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Canada Gazette Notice No. DGRB-010-07

**Consultation on Proposed Conditions of License to Mandate
Roaming and Antenna Tower and Site Sharing and to Prohibit
Exclusive Site Arrangements.**

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COMMENTS

OF

ADR CHAMBERS

February 7, 2008



Re: Canada Gazette Notice No. DGRB-010-07 - Consultation on Proposed Conditions of License to Mandate Roaming and Antenna Tower and Site Sharing and to Prohibit Exclusive Site Arrangements.

The Invitation for Comments

We are writing in response to Industry Canada's invitation for comments on three aspects of the Proposed Conditions of License, specifically:

1. Are the timelines for responding to requests to share and roam, and for submitting agreements that have not been finalized to an arbitrator appropriate? Are there other timelines that should be considered?
2. Specific provisions regarding arbitration may vary from province to province. Would it be useful to adopt a national code such as the ADR Institute of Canada's *National Arbitration Rules* in the default of any specific arbitration agreement? Are there any special provisions which should be made applicable to the arbitrators concerning sharing and roaming?
3. Are there any other license conditions required to facilitate sharing and roaming?

These comments will address the first two questions only.

ADR CHAMBERS -*Who We Are and What We Do*

Originally established in 1995 in Toronto, ADR Chambers is Canada's largest private provider of arbitration, mediation, and other alternative dispute resolution services.

Members of ADR Chambers are located across Canada and include retired Judges of the Appellate and Superior Courts of Canada, senior lawyers and other dispute resolution experts.

Individually, and through specialty panels, Members provide a full range of ADR services across Canada and internationally. ADR Chambers is dedicated to assisting the

legal and business communities, both nationally and internationally, in resolving disputes in an expeditious and cost-effective manner. Further information is available on our website: www.adrchambers.com

1. Are the timelines for responding to requests to share and roam, and for submitting agreements that have not been finalized to an arbitrator appropriate? Are there other timelines that should be considered?

Subject to the comments below with respect to "technical feasibility", the timelines as indicated appear to be appropriate and reasonable. They are long enough to provide the parties with a reasonable timeframe to conduct negotiations in a businesslike manner and not too short that they would create undue hardship for the parties. We recommend, however, that consideration be given to providing the parties with the ability to mutually consent to extend the timelines.

Concerns

The provisions, as drafted, do not appear to contain any specific mechanism actually requiring the Licensee to commence the arbitration process. Rather, they state, "the Licensee must agree to submit the matter to an arbitrator as agreed upon by the parties or in accordance with the provisions of the applicable provincial arbitration legislation." We suggest consideration be given to include a provision for the actual filing of a request to arbitrate at the conclusion of the 90 day period, either directly with an arbitrator of choice or with a national arbitration firm such as **ADR Chambers**. Such a provision might read:

"If the parties have not reached a negotiated agreement within 90 days of the initial request, the Licensee shall refer the matter in dispute to be finally resolved by binding arbitration under the ***ADR Chambers Arbitration Rules***."

If ***ADR Chambers' Arbitration Rules*** or a similar set of national arbitration rules is not specified, we recommend consideration be given to the following matters:

- the number of arbitrators and how they are appointed - three is the preferred default number with the ability of the parties to agree to a single arbitrator;
- the venue of the arbitration;
- the language of the arbitration;

- whether final offer selection is an available option;
- whether any rights of appeal to an appellate arbitral tribunal or to the courts will be allowed; and
- whether the timelines for the convening of the arbitration and the various procedural steps of the arbitration process may need to be extended.

If the question of whether a request is “technically feasible” arises, that issue could also be the subject of an arbitration process and might require its own specific set of timelines.

2.a) Would it be useful to adopt a national code such as the ADR Institute of Canada’s National Arbitration Rules in the default of any specific arbitration agreement?

ADR CHAMBERS –National Panel and National Rules

The consultation process has identified that provisions regarding arbitration may vary from province to province. Consequently, the following question was posed: “Would it be useful to adopt a national code such as the ADR Institute of Canada’s *National Arbitration Rules* in the default of any specific arbitration agreement?”

ADR Chambers supports the adoption of a national set of arbitration rules for the types of disputes contemplated and suggests that the *ADR Chambers Arbitration Rules* be considered for adoption for arbitrations contemplated under “Proposed Conditions of License to Mandate Roaming and Antenna Tower and Site Sharing and to Prohibit Exclusive Site Arrangements.” As there is no national or uniform commercial arbitration act, adopting *ADR Chambers Arbitration Rules* would provide the following benefits:

- a set of *national* arbitration rules, available online at www.adrchambers.com;
- a *national* administered arbitration process that provides users of arbitration services with a consistent, predictable, reliable, timely and well-managed arbitration process;
- a national group of high caliber, respected, trained, experienced, and skilled senior arbitrators, *c.v.* ’s of Members are available online at www.adrchambers.com;

- a national group of retired Judges of the Appellate and Superior Courts who, in addition to being arbitrators and mediators, would be available to conduct private appeals, if contemplated, from arbitration awards;
- a senior group of trained, experienced, and skilled mediators (many of whom are also arbitrators) available for the conduct of mediations, on a consent basis, either during the negotiation phase or as an embedded component of the arbitration process;
- Members are located in all regions of Canada and are willing and available to travel to other locations for the conduct of arbitrations (or mediations);
- ADR Chambers has facilities in Toronto, Canada, where hearings could be held.

2.b) Are there any special provisions which should be made applicable to the arbitrators concerning sharing and roaming?

The document *Policy Framework for the Auction of Spectrum Licenses for Advanced Wireless Services and other Spectrum in the 2 GHz Range*, contemplates that “Roaming arrangements must be offered wherever technically feasible, negotiated expeditiously and in good faith.” It also contemplates that Licensees facilitate the sharing of antenna sites. In particular, it identifies increasing concerns expressed by Canadians about new antenna towers that may impact negatively on property values, create environmental concerns, or reduce enjoyment of property. The document recognizes the potential value for established commercial operators/owners of existing antenna sites, to consider sharing existing infrastructure, on a commercial basis, with any licensee wishing to construct a new tower.

Other considerations include:

- the value of having arbitration decisions publicly available for reference by any person or particular categories of persons or organizations, with the caveat that the decision of one arbitration panel is not binding on any other arbitration panel;
- the value of having a specialized panel or identified team of arbitrators to hear all arbitrations;
- the value of holding arbitration hearings in the location of the one or the other of the parties;

- the value of specifying the language in which the arbitration will be conducted;
- the value of holding all arbitration hearings in one central venue, such as Ottawa.

Making arbitration decisions accessible and available assists in the development of a predictable and consistent set of arbitration outcomes for roaming and antenna tower and site sharing licenses. It also assists in addressing any public policy concerns that may arise through the use of private and confidential arbitration proceedings. The same benefits would accrue if a specialized panel or identified team of highly skilled arbitrators were designated to hear all arbitrations. In addition, the engagement of a specialized panel or identified team of highly skilled arbitrators would provide the industry with neutrals who would be in a position to develop an expertise in the industry, such that future hearing would eventually be more streamlined and efficient. While the decisions would be public, the documents, submissions, and things¹ relied upon by the arbitration panel would not necessarily be made public.

The definition of *technically feasible*, is not defined. If it is interpreted as a condition precedent, it could be used by an existing licensee to prevent new entrants if there is no specification or mechanism described as to who will determine the technical feasibility. Technical feasibility could be determined by Industry Canada, an outside designated expert or panel of experts, or the issue of technical feasibility, could be submitted to a preliminary arbitration panel.

Questions or Further Information

Thank you for the opportunity to provide comments. If you have any questions or require any further information, please contact Kathleen J. Kelly, LL.M., Executive Director, ADR Chambers at 416.362.8555 ext. 1412 or 1.800.856.5154 or

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¹ “things” includes but is not limited to all reports, studies, models, videos, test results, evidence, electronic or digital recordings.