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Mr. Robert Malcolmson
Senior Vice President, Regulatory Affairs
BCE Inc.
160 Elgin Street, Suite 1900
Ottawa, Ontario
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Dear Mr. Malcolmson:

Re: Legal Treatment of Spectrum Licences Recorded in the Name of Inukshuk Wireless Partnership

I. INTRODUCTION AND EXECUTIVE SUMMARY

1. On June 6, 2018, Innovation, Science and Economic Development Canada (“ISED”) issued a consultation document entitled *Consultation on Revisions to the 3500 MHz Band to Accommodate Flexible Use and Preliminary Consultation on Changes to the 3800 MHz Band* (the “**Consultation**”). As part of the Consultation, ISED has indicated that it is seeking to provide an opportunity for additional licensees to deploy 5G services in the 3500 MHz band by requiring incumbent licensees to return a portion of their spectrum holdings and is considering options for establishing future spectrum allocations to incumbents.
2. As part of Bell Canada’s consideration of the potential impact of the Consultation, you have asked us to provide:
 - (a) an overview of the treatment of partnerships and partnership property generally under Canadian partnership law and its application to the Inukshuk Wireless Partnership (the “**Partnership**”) and the Licences (as defined below);
 - (b) an overview of the historical treatment of partnerships and licences by ISED and the Canadian Radio-television and Telecommunications Commission (the “**CRTC**”) and its application to the Partnership and the Licences;
 - (c) examples of any Canadian regulators and statutes that treat partnerships in a manner similar to the treatment afforded by the CRTC and any other considerations that may be relevant to the treatment of the Partnership and the Licences; and
 - (d) our view on the legal treatment ISED should apply to the Licences in the determination of any spectrum reductions and future spectrum allocations proposed in the Consultation that would result in treatment of the Licences in a manner consistent with general principles of Canadian partnership law, the historical treatment by ISED, the CRTC and other Canadian regulators and statutes and certain other relevant considerations.

3. Among other things, our analysis considered the following relevant facts:
 - (a) The Partnership is a general partnership governed by the laws of the Province of Ontario and an amended and restated partnership agreement made as of December 31, 2012 (the “**Partnership Agreement**”).
 - (b) The current partners of the Partnership are Bell Canada (“**Bell**”) and Rogers Communications Inc. (“**Rogers**”, and together with Bell, the “**Partners**”).
 - (c) Presently, Bell and Rogers own a 50.72% and 49.28% interest in the Partnership, respectively, and each Partner holds a 50% voting interest in the Partnership.
 - (d) The 3.5 GHz (i.e., 3500 MHz) spectrum licences described in Schedule “B” to the Partnership Agreement were contributed by the Partners to, and are currently recorded in the name of, the Partnership (collectively, the “**Licences**”).

4. For the reasons set out in this letter, it is our view that:
 - (a) Under well-established general principles of Canadian partnership law, the Partnership is not a distinct legal entity capable of owning property such as the Licences. Instead, each Partner holds an undivided proportional ownership interest in the Partnership’s property, including the Licences, corresponding to such Partner’s percentage interest in the Partnership.
 - (b) While the Licences granted by ISED are recorded in the name of the Partnership, ISED has previously: (i) acknowledged that spectrum licences recorded in the name of the Partnership are currently controlled by the Partners; and (ii) looked through the Partnership and treated the licences as being held by the Partners, being Bell and Rogers. This treatment is consistent with the general principles of partnership law.
 - (c) In its implementation of the options proposed in the Consultation, ISED should treat the Licences in a manner consistent with general principles of Canadian partnership law and ISED’s historical treatment of the Licences. To apply this treatment, ISED should determine any reduction of existing spectrum or future spectrum allocation on a Licence-by-Licence basis, calculated for each Partner based on its undivided proportional interest in each Licence corresponding to such Partner’s percentage ownership interest in the Partnership. See paragraph 11(c) below for a sample calculation of a spectrum reduction.
 - (d) The proposed treatment is most consistent with the treatment of: (i) partnership property under general principles of partnership law; (ii) partnerships and licences by ISED, the CRTC, other Canadian regulators and pursuant to various statutes; (iii) each Partner’s interest in the Licences under certain provisions of the Partnership Agreement; and (iv) Bell’s interest in the Partnership for financial statement purposes under Canadian generally accepted accounting principles.

II. TREATMENT OF THE PARTNERSHIP AND THE LICENCES UNDER PARTNERSHIP LAW

A. Partnership Law Principles

5. It is well established in Canadian law that a partnership is not a distinct legal entity from its partners, but rather is the result of a relationship between the partners carrying on business with a view to profit.¹ An important legal consequence of this principle identified by Canadian courts is that a partnership is not capable of owning property independently of its partners, but rather the “partnership property is owned by the partners in a form of co-ownership whereby each partner owns a share of a property which is proportionate to that partner’s share of the partnership”.²
6. The *Partnerships Act* (Ontario) provides that:
 - (a) every partner is an agent of the firm (i.e., the partnership) and of the other partners for the purpose of the business of the partnership, and the acts of every partner who does any act for carrying on in the usual way business of the kind carried on by the firm of which he or she is a member, bind the firm and the other partners;³
 - (b) every partner in a firm is liable jointly with the other partners for all debts and obligations of the firm incurred while the person is a partner;⁴ and
 - (c) property brought into the partnership, or acquired by the partnership on account of the firm, is deemed to be “partnership property”. Under the *Partnerships Act* (Ontario), the result of property becoming partnership property is that such property must be held and applied by the partners exclusively for the purposes of the partnership and in accordance with the partnership agreement.⁵
7. When property is contributed to a partnership, it becomes “partnership property” and each partner retains an undivided proportional, proprietary interest in such property corresponding to

¹ See, for example, *Thorne v. New Brunswick Workmen’s Compensation Board* (1962), 33 D.L.R. (2d) 167 (N.B.C.A), aff’d [1962] S.C.R. viii; *Molson Brewery B.C. Ltd. v. R.*, 2001 CarswellNat 63, 2001 CarswellNat 5165, [2001] F.C.J. No. 87, 103 A.C.W.S. (3d) 323, 199 F.T.R. 210, 2001 G.T.C. 3502 (“Molson”), *Cattermole Timber v. British Columbia (Minister of Forests)* (1994), 92 B.C.L.R. (2d) 382 (B.C.S.C.), aff’d (1995) 2 B.C.L.R. (3d) 108 (B.C.C.A.); *Kucor Construction & Developments & Associates v. The Canada Life Assurance Co.* (1998), 41 O.R. (3d) 577, 167 D.L.R. (4th) 272 (Ont.C.A.), *Seven Mile Dam Contractors v. R. In Right of British Columbia*, 1980 CarswellBC 350, [1980] B.C.J. No. 1063, 116 D.L.R. (3d) 398, 25 B.C.L.R. 183; Alison R. Manzer, *A Practical Guide to Canadian Partnership Law* (Toronto: Canada Law Book, 2017) at paras. 1.240, 4.770, 4.830 and 4.870 (“Manzer”); and J. Anthony VanDuzer, *The Law of Partnerships and Corporations*, 3d ed. (Toronto: Irwin Law, 2009) at p. 31.

² *Molson supra* note 1 at para. 12.

³ R.S.O. 1990, c. P.5, s. 6.

⁴ R.S.O. 1990, c. P.5, s. 10.

⁵ R.S.O. 1990, c. P.5, s. 21(1).

such partner's percentage interest in the partnership.⁶ This results from the partnership not being a legal entity capable of owning property.

8. In two cases with respect to the Partnership, the Ontario Superior Court of Justice has recognized spectrum licences (such as the Licences) as property.⁷
9. Canadian courts have recognized the proposition that each partner has a property interest in the specific assets of the partnership, and a sale of a partnership asset is a sale by the partners of their individual interests in the specific asset.⁸

B. Application to the Partnership and the Licences

10. The following legal consequences flow from the principles described above:
 - (a) the Partnership cannot contract independently of the Partners;
 - (b) the Licences, as property contributed to and used in the Partnership's business, constitute "partnership property" under the *Partnerships Act* (Ontario); and
 - (c) the Licences are owned by the Partners on a proportionate and undivided basis, corresponding to their percentage interest in the Partnership. While the Licences are recorded in the name of the Partnership, the Partnership is not an entity capable of owning the Licences.
11. In its implementation of the options proposed in the Consultation, in our view, ISED should treat the Licences in a manner consistent with well-established general principles of Canadian partnership law by applying the following principles in the determination of any reduction of existing spectrum:
 - (a) The Partnership is not a distinct legal entity and is not capable of owning property, such as the Licences.
 - (b) Each Partner holds an ownership interest in the Licences based on its percentage interest (on an undivided basis) in the Partnership.
 - (c) In the same way that Canadian courts have taken the view that a sale of a partnership asset is a sale by the partners of their individual interests in the specific asset, ISED's determination of any reduction should be completed on a Licence-by-Licence basis, calculated based on each Partner's proportionate interest in the particular Licence

⁶ See, for example, Manzer *supra* note 1 at paras. 4820, 4850 and 4870.

⁷ *UBS Wireless Services, Inc. v. Inukshuk Wireless Partnership*, [2008] O.J. No. 1704 (Ont. S.C.J.), at para. 60 and *Inukshuk Wireless Partnership v. NextWave Holdco LLC et al*, 2013 ONSC 5631, at para. 43.

⁸ *Seven Mile Dam Contractors v. R. In Right of British Columbia*, 1980 CarswellBC 350, [1980] B.C.J. No. 1063, 116 D.L.R. (3d) 398, 25 B.C.L.R. 183, at para. 9.

corresponding to its percentage ownership interest in the Partnership.

For example, ISED's calculation for an existing 150 MHz Licence recorded in the name of the Partnership would be as follows (assuming the implementation of Option 2 as described at paragraph 47 of the Consultation and a 50.72% and 49.28% ownership interest split between Bell and Rogers, respectively): Bell would be ascribed an ownership interest in 76.08 MHz of spectrum under the Licence (150 MHz * 50.72% ownership interest) and Rogers would be ascribed an ownership interest in 73.92 MHz of spectrum under the Licence (150 MHz * 49.28% ownership interest), and each Partner's ascribed ownership interest would be subject to a spectrum reduction for that Licence resulting in each Partner being licensed at 50 MHz for that Licence going forward.

III. TREATMENT OF PARTNERSHIPS AND THE LICENCES BY ISED AND THE CRTC

A. ISED Treatment

12. Spectrum licences are issued by ISED in accordance with the *Radiocommunication Act*⁹ and the *Radiocommunication Regulations*.¹⁰ The *Radiocommunication Regulations* provide that a partnership is eligible to be issued spectrum licences as a radiocommunication service provider, if "each partner... is eligible to be issued a radio licence".¹¹
13. While the Licences granted by ISED are recorded in the name of the Partnership, ISED has previously: (i) acknowledged that spectrum licences recorded in the name of the Partnership are currently controlled by the Partners; and (ii) looked through the Partnership and treated the licences as being held by Bell and Rogers. Examples of this treatment by ISED include the following:
 - (a) In two decisions dated January 15, 2015 approving joint applications made by the Partnership with each of Bell and Rogers to transfer spectrum licences from the Partnership to Bell and Rogers, ISED noted in each decision that "... Inukshuk is a partnership between Bell [Rogers] and Rogers Communications Partnership [Bell Mobility Inc.], with each owning a 50% partnership interest. As the Licences would continue to be controlled by Bell [Rogers] post-transfer, the transfer will not result in any change in spectrum concentration."¹²
 - (b) In a February 27, 2014 decision denying the transfer of spectrum licences held by NextWave to the Partnership, ISED noted that if the application were approved, "Bell

⁹ R.S.C., 1985, c. R-2.

¹⁰ SOR/96-484.

¹¹ *Radiocommunication Regulations*, at ss. 9(1)(c) and 10(2)(b), respectively.

¹² ISED, Licence Transfer Decision: [Transfer of Spectrum Licences Held by Inukshuk Wireless Partnership \(Inukshuk\) to Bell Mobility Inc. \(Bell\)](#), January 15, 2015. ISED, Licence Transfer Decision: [Transfer of Spectrum Licences Held by Inukshuk Wireless Partnership \(Inukshuk\) to Rogers Communications Partnership \(Rogers\)](#), January 15, 2015

and Rogers, through Inukshuk, would increase their combined WCS spectrum holdings from 29 percent to 77 percent.”¹³ Therefore, ISED looked through the Partnership and considered the proposed spectrum licences as being held directly by the individual Partners.

B. CRTC Treatment

14. The CRTC has consistently taken the position that because partnerships are not legal entities, it licenses each individual partner in the partnership.
15. The CRTC’s ownership records for partnerships consistently state that “Licences for undertakings held and operated by a partnership are issued to all partners carrying on business in the manner set out in the partnership agreement”.¹⁴
16. Where an applicant is a partnership, the CRTC considers the application as filed by all partners, carrying on business under the partnership name.¹⁵
17. In determining whether the Canadian ownership and control requirements are met, the CRTC has indicated that “[b]ecause a partnership is not a legal entity, it is the Commission’s practice to look at each of the partners individually to ensure that each is “Canadian” and that the proposed structure will comply with the [*Direction to the CRTC (Ineligibility of Non-Canadians)*] at all times.”¹⁶
18. With respect to the partners’ interests in the partnership’s assets, the CRTC has previously held that “[a] partnership is not, under Canadian law, a legal entity distinct from its partners. Each partner has a proportional proprietary interest in the partnership’s assets. Equally, the partners remain personally responsible for the debts of the partnership.”¹⁷

C. Application to the Partnership and the Licences

19. The treatment of partnerships and licences by ISED and the CRTC is consistent with the general principles of Canadian partnership law described above.
20. In our view, ISED’s treatment of the Partnership and the Licences in connection with the Consultation should be consistent with its historical treatment of the Partnership and the

¹³ ISED, Transfer Decision: [Transfer of Spectrum Licences Held by 4253311 Canada Inc. \(NextWave\) to Inukshuk Wireless Partnership \(Inukshuk\)](#), February 27, 2014.

¹⁴ See for example the CRTC’s Ownership Charts for: [Allarco Entertainment Limited Partnership](#), [Bell ExpressVu Limited Partnership](#), [Bell Media Radio](#), [Blue Ant Television General Partnership](#), [Corus Television Limited Partnership](#), [Harvard Broadcasting](#), [Jim Pattison Ltd.](#)

¹⁵ CRTC, [Open Part 1 Licence Renewal Applications](#).

¹⁶ Broadcasting Decision CRTC 2006-566: [Standard Radio Inc., on behalf of a limited partnership to be established \(SR Limited Partnership\) - Intra-corporate reorganization - Acquisition of assets](#), 29 September 2006, at para. 8.

¹⁷ Telecom Circular CRTC 2004-3: [Treatment of partnerships for the purpose of telecommunications fees](#), 7 April 2004.

Licences in various decisions and correspondence with the Partners and with the CRTC's treatment of partnerships and licences.

21. Consistent treatment as between ISED and CRTC is supported by the complementary nature of the legislation enforced by each regulator, as indicated in the following:
- (a) As recently noted by ISED and Canadian Heritage in the Terms of Reference of the panel tasked with the Broadcasting and Telecommunications Legislative Review (issued the day before the Consultation), the *Radiocommunication Act* “constitutes an integral part of the same legislative framework [as the *Broadcasting Act* and the *Telecommunications Act*], and is constructed in a manner that takes the objectives of the *Telecommunications Act* as its own. These three Acts are complementary and form the main legislative framework for communications.”¹⁸
 - (b) Courts have also held that “[t]he *Broadcasting Act* and the *Radiocommunication Act* must be seen as operating together as part of a single regulatory scheme.”¹⁹
 - (c) Prior to the relaxation of the Canadian ownership and control rules applicable to telecommunication common carriers in 2012, the *Radiocommunication Regulations* incorporated by reference the *Canadian Telecommunications Common Carrier Ownership and Control Regulations*²⁰ in order to determine whether a prospective radiocommunication carrier qualified as “Canadian”.²¹

IV. TREATMENT OF PARTNERSHIPS BY OTHER CANADIAN REGULATORS AND STATUTES

22. There are a number of other Canadian regulators and statutes that treat partnerships in a manner similar to the treatment afforded by the CRTC. For example:
- (a) Partnerships are not included as “persons” who may be licensed under the *Energy Board Act* (Ontario)²².
 - (b) Partnerships are not included as “persons” who may apply for a sewage works operator’s licence in Ontario.²³

¹⁸ Broadcasting and Telecommunications Legislative Review, [Terms of Reference](#), June 5, 2018, at Section II – A Joint Review.

¹⁹ *Bell ExpressVu Limited Partnership v. Rex*, 2002 SCC 42, at para. 46. and *Reference re Broadcasting Regulatory Policy CRTC 2010-167 and Broadcasting Order CRTC 2010-168*, 2012 SCC 68, [2012] 3 S.C.R. 489, at para. 34.

²⁰ SOR/94-667.

²¹ Industry Canada, Spectrum Management and Telecommunications Client Procedures Circular CPC-2-0-15, Issue 2: [Canadian Ownership and Control](#), August 2007, rescinded April 2014.

²² 1998, S.O. 1998.

²³ See *Ontario Water Resources Act*, RSO 1990, c. O.40 and O.Reg. 129/04 Licensing of Sewage Works Operators.

- (c) The land title offices or registries in various provinces of Canada do not allow partnerships to register an interest in land in their own name.²⁴ A legal commentator has indicated that this recognizes that land remains owned by the partners, albeit in a percentage interest as partnership property.²⁵
- (d) In *Personal Property Security Act* jurisdictions, in order to register security against a general partnership in the name of the partnership, the partnership must be registered. If the partnership is not registered in those jurisdictions, then security must be taken from, and registration completed against, the individual partners of the partnership.
- (e) In Alberta, partnerships are not permitted to apply or obtain licences to commence to drill a well or undertake any operations preparatory or incidental to the drilling of a well or continue any drilling operations, any producing operations or any injecting operations.²⁶
- (f) In the Northwest Territories and Nunavut, partnerships are not permitted to acquire mineral claims or mining leases in their names.²⁷

V. ADDITIONAL SUPPORTING CONSIDERATIONS

23. Certain provisions of the Partnership Agreement support the proposition that the Licences recorded in the name of the Partnership should be treated as being held by Bell and Rogers on the basis of their respective ownership interests in the Partnership for the purposes of assessing spectrum concentration and/or calculating spectrum reductions and future allocations. The provisions of the Partnership Agreement are particularly relevant as the agreement was filed with ISED and forms part of the record upon which ISED issued and renewed the Licences. For example:

- (a) On dissolution, the Partnership Agreement provides a process for allocating the Licences to the Partners and makes clear that, unless otherwise agreed by the Partners, the allocation is on a 50/50 basis.²⁸
- (b) The Partnership Agreement expressly provides for automatic dissolution of the Partnership 18 months after ISED's issuance of a band plan for the 3.5 GHz spectrum. Upon such dissolution, the Licences will be transferred to the appropriate Partner (subject to ISED's approval).²⁹ Therefore, it would be an inefficient use of

²⁴ For instance, see *Land Titles Act*, R.S.O. 1990, c. L.5, s. 67.

²⁵ Manzer, *supra* note 1 at para. 4810.

²⁶ *Oil and Gas Conservation Act*, RSA 2000, c.O-6, s. 20.

²⁷ *Northwest Territories Mining Regulations* - SOR/2014-68, s. 3(1)(b) and *Nunavut Mining Regulations* - SOR/2014-69, s.3(1)(b)

²⁸ Partnership Agreement, Article 7 and Schedule "G".

²⁹ Partnership Agreement, ss. 7.1(c) and (d).

public resources for ISED to determine the reduction and future allocation of spectrum based on the Partnership, since the Partners intend to dissolve the Partnership shortly after the band plan is issued and the Partnership may not be in existence at the time of such reduction or future allocation.

24. In addition, we understand from Bell that, consistent with the treatment of the Partnership described in this letter, Bell's 50.72% interest in the Partnership is consolidated into BCE Inc.'s financial statements in accordance with Canadian generally accepted accounting principles.

VI. CONCLUSION

25. All of the foregoing is consistent with each Partner holding an undivided proportional ownership interest in the Licences as partnership property that corresponds to such Partner's percentage interest in the Partnership under general principles of Canadian partnership law.
26. It is also consistent with ISED's previous treatment of the Licences held in the name of the Partnership, whereby ISED has (a) acknowledged that spectrum licences recorded in the name of the Partnership are currently controlled by the Partners; and (b) looked through the Partnership and treated the licences as being held by the individual Partners, Bell and Rogers.
27. Accordingly, in its implementation of the options proposed in the Consultation, in our view, ISED should treat the Licences in a manner consistent with general principles of Canadian partnership law and ISED's historical treatment of the Licences by determining any reduction of existing spectrum or future spectrum allocation on a Licence-by-Licence basis, calculated for each Partner based on its undivided proportional interest in each Licence that corresponds to such Partner's percentage ownership interest in the Partnership in the manner set out above.

We trust this responds to your enquiries.

Yours very truly,



GOODMANS LLP