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Federation of Canadian Municipalities

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Dealing with Telecom Companies: Protecting Municipal Rights-of-Way

A HANDBOOK FOR MUNICIPAL OFFICIALS

Prepared by:

Federation of Canadian Municipalities

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Table of Contents

Message from the FCM President.....4

Introduction5

The Telecom Environment – Then and Now.....6

The Legal Battles – Overview and Implications.....8

Protecting Your Rights – Working with Telecoms10

Moving Forward – Unresolved Issues.....13

Conclusion.....14

Annexes15

 A. Key Legal Cases – Detailed Summaries16

 B. Calculating Recoverable Costs22

 C. Calculating Loading Factors – List of Components.....26

 D. Drafting Your MAA – Checklist for Municipalities.....30

Additional tools and resources available at www.fcm.ca.

Message from the FCM President

Roads are among the most basic elements of our public infrastructure. They connect us to our neighbours, jobs, schools and businesses. A good local street network is one of the building blocks of our economy and quality of life.

But our local streets and roads and other municipally owned public spaces are under siege, with multiplying potholes the most visible signs of the damage. Age plus the demands of growing communities and the challenge of a changing climate are straining municipal infrastructure and services.

As a municipal leader, you know that municipalities are struggling to deal with this growing problem. Unfortunately, we are hamstrung by the \$123-billion municipal infrastructure deficit, the product of a flawed fiscal system that has shifted too many responsibilities to the municipal property tax base.

Now another factor that is pushing local infrastructure—and our property tax payers—to the breaking point has been documented: telecommunications companies that dig up municipal streets and roads to install and upgrade equipment without having to pay the full cost of ongoing repairs.

This contributes to the declining condition of local roads and other rights-of-way and is, in effect, a subsidy by local property tax payers to for-profit telecommunications companies.

The rules for installing telecommunications equipment below municipal rights-of-way are set by outdated federal legislation and a Canadian Radio-television and Telecommunications Commission (CRTC) that is not equipped to understand the fiscal and infrastructure challenges facing municipalities. Together, these factors have severely undermined the ability of local governments to manage public roads in the public interest.

Municipal governments are in danger of losing both their ability to control their own rights-of-way and their ability to recover the full costs they incur as a result of these private projects. This handbook provides all FCM members with a resource that presents the best information currently available, and suggests concrete steps which can be taken to ensure that increased activity in the telecommunications sector does not translate in added costs to municipalities and your taxpayers.

Sincerely,

Jean Perrault
Mayor of Sherbrooke
President of FCM

Introduction

In 1993, the current federal *Telecommunications Act*¹ was adopted. The goal: to usher in an era of deregulation and free-market competition for the Canadian telecommunications industry. The days of regional monopolies, which had been the standard for nearly a century, would soon disappear. Consumers and businesses would be able to choose from a variety of new services, new providers and new technologies to meet their telecommunications needs.

From many perspectives, this change in policy represented a great step forward for the country. However, as a rapidly growing number of municipalities soon found out, the new environment created by deregulation would also lead to a complete upheaval in relations between local authorities and telecommunications corporations.

Instead of dealing with a long-term partner, municipalities were now negotiating with dozens of emerging corporations. Instead of the relative predictability of the single-provider environment, municipalities were struggling to respond to companies which were in heated competition with each other, demanding quick approvals, installing new infrastructure at great speeds and quickly clogging up public rights-of-way.

Not surprisingly, the dramatic increase in demands for right-of-way space resulted in increased costs (inspections, repairs, shortened roadway lifespan, workaround costs, etc.) as well as physical and logistical dilemmas for local governments. Trying to safeguard the interests of the municipalities and their taxpayers, while responding to new industry demands, became a delicate balancing act which inevitably led to friction between local officials and the industry.

When the new, market-driven telecommunications corporations were unable to get their way, they began using a provision of the *Telecommunications Act* which was relatively unknown until that time. This provision allows telecoms to appeal to the CRTC (the Canadian Radio-television and Telecommunications Commission) to obtain access to municipal rights-of-way. Unexpectedly, the CRTC began to take on an active role adjudicating disputes and setting the conditions of access to municipal property. This development was also new to municipal officials. The Commission, mainly designed to regulate the telecommunications and broadcasting industries, was an unfamiliar forum in which to argue the merits of a municipality's position.

Because of uncertainty and litigation surrounding cost recovery, municipalities ended up *de facto* subsidizing for-profit telecommunications corporations. According to the most recent FCM survey,² the resulting cost to municipalities for the 2002 to 2007 period was close to \$107 million per year, for a six-year total in the \$646 million range. Furthermore, beyond the financial burden, municipalities' control over the management of their rights-of-way and other public property began eroding, thereby raising significant safety concerns.

The FCM Handbook

Over the last decade, individual municipalities across the country, large and small, along with FCM have been investing time, energy and resources to safeguard legitimate municipal interests in the midst of this new environment. At FCM, the Technical Committee on Telecommunications and Rights-of-Way has been spearheading national efforts, promoting information-sharing, assisting individual members in their legal battles against telecommunications corporations and attempting to raise the political and public profile of this issue.

After 10 years of discussions, litigation and negotiations, some best practices and guiding principles are emerging. While there are still a number of areas where FCM will continue to play an active role to defend the interests of its members, enough experience has been gained to make it worthwhile to compile the relevant information in order to enable municipalities to systematically protect some of their most basic rights.

The purpose of this handbook is therefore to provide all FCM members with the best information currently available, as well as suggest concrete steps which can be taken to ensure that increased activity in the telecommunications sector does not translate into added costs to municipalities and their taxpayers.

The handbook provides:

- information on the current environment;
- an overview of the leading legal cases and their effects;
- practical advice on how to best protect municipal interests and maximize cost-recovery; and
- a summary of issues of interest to members which are still outstanding.

¹ S.C. 1993, ch. 38

² FCM, Highway Robbery: How Federal Telecom Rules Cost Taxpayers and Damage Public Roads, June 2008

The Telecom Environment – Then and Now

Deregulation

When telegraph and telephone services first appeared in Canada, corporations operating in this industry were heavily regulated by the federal government. In fact, corporations were only permitted to engage in very specific activities, each new activity requiring legislative authorization.

In this context, in 1899 Parliament adopted an amendment to the *Railway Act*. Telegraph and telephone companies, which until then were only allowed to operate within railway corridors, were granted the authority to “break up and open any highway, square or other public place”.³ The intention was to provide telecommunications companies access to new markets by allowing them to extend their networks into towns and cities. The 1899 amendment stated clearly that, in order to do this, telecommunications companies had to obtain municipal approval.

In 1903, a dispute-resolution clause was included in the Act. Historically, it was seldom used since Canadian municipalities and the small number of telephone companies maintained a healthy co-existence in the use and occupancy of municipal property. This is where matters stood for generations, until the federal government’s decision to deregulate the industry in the 1990s.

When the 1993 *Telecommunications Act* was drafted, it provided a new direction for telecommunications in Canada, including much greater reliance on free-market competition. These new policies were turned into brand new legislative provisions. However, for other aspects of the act, old provisions were simply lifted from existing legislation, including Section 43. The entire Canadian telecommunications landscape was about to undergo a revolution, but the Victorian-era provisions were left as the sole guide to managing the relationship between municipalities and telecommunications corporations.

Under the pressures of a fiercely competitive market, and in the hands of the CRTC—a highly-specialized administrative tribunal essentially designed to regulate the telecommunications and broadcasting industries—Section 43 was about to morph into something for which it was never intended: limiting municipal property rights in order to facilitate profit-making by private business ventures.

³ There was a notable exception: the Bell Telephone Company of Canada operated under a separate statute and the provisions of the *Railway Act* did not apply to it until 1906. Until then, Bell did not require municipal approval to install its infrastructure within municipal rights-of-way.

The *Telecommunications Act*

The significant legal battles of the last decade have centred on the interpretation and the application of Subsections 43(2), (3) and (4) of the *Telecommunications Act*. The provisions read as follows:

Definition

43. (1) In this section and section 44, “distribution undertaking” has the same meaning as in subsection 2(1) of the *Broadcasting Act*.

Entry on public property

(2) Subject to subsections (3) and (4) and section 44, a Canadian carrier or distribution undertaking may enter on and break up any highway or other public place for the purpose of constructing, maintaining or operating its transmission lines and may remain there for as long as is necessary for that purpose, but shall not unduly interfere with the public use and enjoyment of the highway or other public place.

Consent of municipality

(3) No Canadian carrier or distribution undertaking shall construct a transmission line on, over, under or along a highway or other public place without the consent of the municipality or other public authority having jurisdiction over the highway or other public place.

Application by carrier

(4) Where a Canadian carrier or distribution undertaking cannot, on terms acceptable to it, obtain the consent of the municipality or other public authority to construct a transmission line, the carrier or distribution undertaking may apply to the Commission for permission to construct it and the Commission may, having due regard to the use and enjoyment of the highway or other public place by others, grant the permission subject to any conditions that the Commission determines.

Applications by municipalities and other authorities

44. On application by a municipality or other public authority, the Commission may

(a) order a Canadian carrier or distribution undertaking, subject to any conditions that the Commission determines, to bury or alter the route of any transmission line situated or proposed to be situated within the jurisdiction of the municipality or public authority; or

(b) prohibit the construction, maintenance or operation by a Canadian carrier or distribution undertaking of any such transmission line except as directed by the Commission.

Subsections 43(2) and (3) are essentially the 1899 provisions. As indicated above, when subsection (2) was enacted, it allowed carriers to extend their networks into communities. **However, as it is now interpreted by the CRTC and, so far, by the courts, this permission has become a “power to enter.” In short, the provision is now being treated as a right granted to telecommunications corporations to use highways and other public places in order to install their infrastructure.** This right is limited by a single caveat set out at the end of the provision (“shall not unduly interfere”). Unfortunately, in the legal challenges mounted until now, this condition has not been given much weight.

Access to municipal property has always been conditional on obtaining municipal approval and this principle is restated in subsection (3) of the new act. Not surprisingly however, problems can arise when a carrier is unhappy with the terms of the approval. Prior to deregulation, an understanding between municipalities and the various local telecommunications monopolies had developed over several decades.

However, aggressive new players quickly began challenging long-standing practices in order to minimize their costs. Leducor Industries Limited (Leducor) was one of the first to blow the dust off subsection (4) and appeal directly to the CRTC to argue for more favourable terms for infrastructure it was installing in Vancouver. In its landmark decision in the Leducor case (discussed in greater detail below), the CRTC set out a detailed set of conditions for access to certain street crossings in Vancouver which have subsequently been enshrined by the telecommunications industry as “principles” to be applied to any situation where access to municipal property is desired.

The CRTC

The CRTC’s decision in the Leducor case sent shock waves through the municipal world. The CRTC has always regulated telecommunications corporations. From frequency spectrum to bandwidth management, from Canadian content rules to media ownership concentration, the CRTC has tackled some of the most visible and technically complex issues in the country. Given the technical knowledge and expertise required to fulfill its core mandate, many present and past CRTC members have been drawn from various parts of the Canadian telecommunications industry: executives, lawyers, engineers, financiers, etc.

However, in the deregulated environment, this industry forum was now dictating terms to municipalities, essentially telling them how to manage their property. Despite numerous court challenges, it appears that until there are changes to the *Telecommunications Act* itself, municipalities will have to accept that the CRTC and the federal government may exercise some jurisdiction in these matters.

Every municipality should become familiar with the CRTC’s principles and procedures in order to protect its interests as best as possible, including using section 44 of the act when necessary. This handbook’s purpose is to assist members in this task.

Collectively, through FCM, a dialogue has been established with the CRTC in order to increase awareness of municipal realities, foresee future issues, and reduce the need for costly litigation. Furthermore, the nomination of a former city councillor to the CRTC has been a welcome addition to that forum.

The Legal Battles – Overview and Implications

This section provides summaries in chronological order, of the legal cases which, over time, have begun to create a comprehensive picture of what municipalities can expect in a competitive telecommunications environment. Of particular importance is the most recent decision mentioned, *MTSA v. Vancouver*, in which the CRTC provided clear guidance and supported many of Vancouver's claims. (For more complete summaries of these cases, please see Annex A.)

Ledcor v. Vancouver (2001)

Ledcor is the case which opened Pandora's box. It was the first significant decision by the CRTC on access to municipal property in the deregulated telecom environment. Not only did it determine the conditions under which Ledcor could have access to 18 street crossings in a railway corridor, it also confirmed the CRTC's jurisdiction in such cases. Furthermore, the CRTC tried to use this opportunity to set out general principles to guide municipalities and telecommunications companies in their dealings.

Vancouver appealed the Commission's ruling. The city challenged the CRTC's jurisdiction to adjudicate the dispute, the CRTC's ability to set out generally applicable principles and last, the actual conditions of access set out by the CRTC. The Federal Court of Appeal ruled that this was only a very limited squabble which the CRTC had the authority to adjudicate. Given the limited characterization of the issue by the Federal Court of Appeal, it is not surprising that Leave to Appeal to the Supreme Court was denied.

However, there was an inescapable reality emerging: the "Ledcor principles" were here to stay. Over the coming years, several battles were fought over the interpretation of these principles, including the expression "causal costs." It is worth noting that while Vancouver was allowed to recover some costs, the CRTC rejected its claim for compensation for the use of the property by Ledcor.

Allstream v. Edmonton – The LRT Tunnels (2005)

The case opposing the City of Edmonton to Allstream Corp. brought the unpredictability of the deregulated telecommunications environment to new heights for municipalities.

Allstream and Edmonton had entered into an agreement granting Allstream access to the city's LRT tunnels to install certain facilities. The agreement, which included occupancy fees, expired in 2002. By the terms of the agreement, Allstream had to choose between renewing for another five years at stated terms or remove its equipment. Instead, Allstream appealed to the CRTC to obtain more favourable terms.

The CRTC ruled it had jurisdiction since the tunnels were a "public place" and set out criteria to establish what constitutes a public place under the *Telecommunications Act*. It then set out Allstream's conditions of access in accordance with the Ledcor principles. This involved, notably, the elimination of occupancy fees. The Commission's decision was confirmed on appeal by the Federal Court of Appeal. Leave to Appeal to the Supreme Court was sought, with financial support from FCM, but the request was denied.

Toronto v. MTS Allstream and Calgary v. MTS Allstream (2005)

In both these cases, MTS Allstream (MTSA) had inherited MAAs entered into by other corporations which it acquired. Unhappy with the terms of those agreements, MTSA applied to the CRTC for modifications to the conditions of access set out in these contracts.

While, at the end of the day the CRTC did find that the MAAs had been freely entered into by MTS Allstream's predecessors, and were therefore binding, the Commission did indicate that it reserved the right to review the conditions under which agreements are negotiated to ensure that telecommunications companies are not subject to duress or coercion which would call into question the validity of the agreement.

Shaw v. Maple Ridge (2007)

In 2005, Shaw Cablesystems Limited attempted to install telecommunications infrastructure within the District of Maple Ridge (British Columbia). Maple Ridge denied permission until both parties could negotiate a comprehensive MAA. The parties negotiated during two years without coming to an agreement. Shaw applied to the CRTC to obtain access. The Commission granted access and set out the terms based on the Ledcor principles and included additional provisions, some of which were favourable to Maple Ridge.

In its ruling, the CRTC did not hide its frustration with the fact that the parties had been unable to come to an agreement after such lengthy negotiations. In a rather bold statement, the Commission indicated that it "has consistently identified access to municipal rights-of-way as a barrier to entry and to local competition." A comment of this type certainly did little to reassure municipalities that their concerns were being understood.

Baie-Comeau v. TELUS Communications Company (2008)

In order to undertake the reconstruction of a major artery, including sewer and water main replacements, Baie-Comeau asked TELUS to relocate its infrastructure (mainly ducts, lines and vaults) located directly above the municipal services. TELUS' equipment had been installed when the City had originally dug the trench, some 40 years previous. There was

disagreement on the appropriate cost-sharing formula for the relocation. As is the case in most municipalities, there is no Municipal Access Agreement in place in Baie-Comeau.

In its first decision of this kind, the CRTC defined “relocation costs” and established a cost-sharing formula for existing telecommunications infrastructure not covered by an MAA. The formula is essentially an amortization table based on the useful life of the assets. While this represented a financial victory for Baie-Comeau, the practical application of the decision in contexts where complex infrastructure is located underground is questionable.

Wheatland County v. Shaw Cablesystems Limited (2008)

Wheatland County (Alberta) had been negotiating a comprehensive MAA with Shaw. The parties had agreed on all aspects of the MAA with one exception. Wheatland wanted Shaw to register with Alberta One-Call, the provincial utility notification service. Shaw steadfastly refused and appealed to the CRTC.

Citing its “goal of reducing regulation,” the CRTC refused to impose One-Call membership as a condition of the MAA. The Commission also modified a number of provisions on which there had been agreement. Wheatland is appealing the ruling to the Federal Court of Appeal, challenging the CRTC’s jurisdiction over issues which are solely matters of public safety and roadway management. A date has not yet been set for the hearing.

MTS Allstream v. Vancouver (2009)

The City of Vancouver and MTS Allstream Inc. (MTSA) had spent the better part of five years negotiating a comprehensive, long-term MAA, but negotiations had broken down. MTSA applied to the CRTC to set out the conditions under which it could gain access to rights-of-way and other municipal property and infrastructure.

Vancouver spent a tremendous amount of time preparing for this hearing and, in the end, won its case on several points. The CRTC used this opportunity to clarify the application of several principles set out in the Leducor case. Furthermore, the Commission refused to extend the application of the MAA to all public places, essentially agreeing with Vancouver that properties other than rights-of-way should be treated on a case-by-case basis. In short, this decision helped, to some extent, to correct the power imbalance between municipalities and telecommunications companies.

Protecting Your Rights – Working with Telecoms

The vast majority of municipalities in Canada have not yet entered into any kind of Municipal Access Agreement with the telecommunications companies operating on their territory. While, in some cases, telecoms seek formal approval on an ad hoc basis, in other communities they install their equipment without even notifying local authorities.

If a municipality has not yet put in place a process by which telecoms must first obtain approval before undertaking work within the municipality, it means that every time a telecom breaks open a right-of-way, it transfers costs to municipal taxpayers. In a competitive, free-market environment, there is no reason for municipalities to be subsidizing the telecommunications industry. Furthermore, if a municipality is not being consulted on the design and location of the infrastructure, the risk of accidental damage and service disruption to telecommunications infrastructure increases, endangering public safety.

This section of the handbook provides you with practical, “nuts and bolts” suggestions on how to go about protecting the integrity of your municipality’s property and ensuring that the all possible costs are recovered.

1. Inventory of Telecoms Occupying ROW

An important first step is to compile, to the extent possible, a complete inventory of:

- telecommunications companies operating within your municipality, and
- the physical location of each of their assets.

As trivial as this may seem, you might get some surprises. A significant number of new players have appeared since deregulation and several other companies have been bought out or have merged. Determining the list of who your legal partners will be might not be entirely straightforward. In addition to going through your own records, external sources such as provincial one-call services can be of assistance. Contacting neighbouring municipalities to compare notes could also prove useful, as could consulting other utilities, such as the local hydro company, who often share infrastructure. In the case of incumbent companies providing service within a municipality for decades prior to deregulation, it may be very difficult to obtain accurate records of old infrastructure as the company itself may not have diligently maintained such records.

2. Informing Council

Once you have a good idea of the situation on the ground, informing elected officials is crucial. Depending on the rules of procedure in your municipality, council approval might be required to embark on negotiations with the

telecommunications companies in your area. Even if approval is not required, it is probably wiser to advise council before setting the wheels in motion in order to equip local politicians with the information they need should they be lobbied by telecom representatives.

Indeed, experience has shown that some telecoms will react negatively when municipalities try to exercise what rights they do have and will attempt to influence the decision at the political level. The threat of not deploying new, state-of-the-art technologies in your municipality if causal costs are to be recovered can sway some decision-makers.

It is important that all those involved on the municipal side, staff and elected officials alike, understand the change which has occurred since deregulation. Gone are the days of the more symbiotic relationship between a municipality and “the telephone company.” New players in the telecommunications industry often have very targeted services and clientele in mind. Why should the community as a whole bear the costs created to serve a small number of customers? There is no longer any rationale for municipalities to give competing, for-profit companies a free ride at the expense of their taxpayers.

In addition, if telecommunications equipment is being installed without your knowledge, or without proper notification as to the exact location of these assets, the risk of accidental damage by municipal crews and private contractors becomes significant. The financial cost of disrupting service can quickly add up, not to mention the potential danger to the public at large if essential communications services are accidentally cut. Proper roadway management becomes impossible if your municipality is unable to create complete records of the uses others are making of its property.

3. Choosing the Right Tool – Negotiating a Municipal Access Agreement (MAA) or Adopting an Access Bylaw

Municipalities essentially have two distinct means at their disposal to safeguard their interests. They can negotiate individual Municipal Access Agreements with each telecommunications company or they can exercise their legislative authority and adopt a bylaw regulating access to municipal property. A growing number of municipalities, which have been dealing with this issue for some time, are using a combination of both methods. In coming to your own decision on how to approach the matter, it is important to keep the following factors in mind.

Adopting a Bylaw

Although the CRTC in a number of decisions has stated that telecommunications companies must abide by provisions of all municipal bylaws, if such a bylaw were to impose conditions of access on a telecommunications company that run counter to the CRTC’s opinions, what would happen? Does the CRTC have the authority to overturn local bylaws, an action which is

normally only within the purview of the court? If the Commission does have powers of this type, how far do they extend? These are fundamental questions for which there is no clear answer at this point.

The reality is that only a handful of municipalities have enacted bylaws to regulate access to municipal property. As a result, despite the significant amount of litigation on telecommunications matters, the validity of a municipal bylaw has never been tested in this context. It remains to be seen whether the CRTC actually has the authority to overrule local legislation, especially if it deals with issues not directly related to the provision of telecommunications services.

Some municipal lawyers are of the view that the CRTC does not have the authority to declare bylaws of general application which have an incidental effect invalid even though telecommunications are a “federal undertaking,” thereby triggering specific constitutional rules relating to federal supremacy. If, on the other hand, the Commission does have that power, many would argue that it only extends to municipal actions which would substantially impair a company’s essential activities as a federal undertaking. This would arguably leave room for municipalities to legislate matters of safety and roadway management that do not have direct cost implications on telecoms.

For the moment, the issue is purely theoretical, but it is likely only a matter of time before the broader constitutional question of the extent of the CRTC’s jurisdiction ends up before the courts. In the meantime, municipalities should consider this in deciding whether to adopt a bylaw and which provisions to include in their municipal access bylaw.

Negotiating a Municipal Access Agreement

Negotiating your first MAA with a telecommunications company might not be as straightforward an exercise as one might think. Some companies take a very aggressive stance in negotiations. Furthermore, it is not rare to negotiate for a number of years before coming to an agreement. However, this should not deter municipalities from embarking on this process. In fact, as best practices become clearer and more widespread, this undertaking should become considerably simpler in the near future.

While the guiding principles set out by the CRTC and the suggestions contained in this Handbook can be of great help in preparing your negotiating position, these are only guides. You should not hesitate in including any terms which might reflect unique local conditions. Even if you end up in litigation before the CRTC, the Commission has an obligation to treat each dispute individually and rule on each case based on its own merits. If you have well-documented reasons for requesting a specific provision in your MAA, there is no reason not to insist on its inclusion.

One of the central elements to any MAA (or access bylaw, for that matter) is cost recovery. Keeping the taxpayer whole while telecommunications companies deploy their networks has presented a significant challenge. While not perfect, best practices on this front are evolving. The proper application of the Ledcor principles, along with the most recent clarifications provided in the Vancouver/MTSA case, will help to mitigate the cost to municipalities.

Although this classification is not set in stone, recoverable costs are generally grouped in four categories:

1. plan review and inspection costs;
2. pavement degradation costs;
3. lost productivity costs;
4. relocation costs.

To these categories, loading factors and inflation adjustments are added.

For complete information on cost recovery, please consult Annex B. Annex C provides the elements included in the loading factors.

This handbook also provides a checklist of topics which should be addressed in a MAA or bylaw. You will find the MAA Checklist at Annex D.

4. Resolving Disputes

In an attempt to reduce the length and cost of litigation, in January 2009 the CRTC launched a new dispute-resolution process.⁴ The process is aimed at resolving disputes related to a single issue or, in exceptional cases, to several closely related issues. The process can be used if negotiations of a new MAA bog down or to interpret a provision of an existing MAA provision if its application has led to a disagreement. In order to access the process, the following conditions must be met:

- the dispute is bilateral (or affects only a small number of parties);
- the parties have been unable to resolve the dispute by alternative methods;
- the dispute is in relation to the telecommunications system and deals primarily with the interpretation or application of an existing Commission decision, policy or regulation; and
- resolution of the dispute does not require a new policy or change to an existing policy.

The first step of the process regardless of the type of dispute is mediation assisted by CRTC staff. The Assisted Mediation process is entirely confidential and the outcome of the mediation cannot be used in the context of a future hearing unless all parties agree.

⁴ Broadcasting and Telecom Information Bulletin CRTC 2009-38 – *Practices and procedures for staff-assisted mediation, final offer arbitration, and expedited hearings.*

If the issue at play is purely monetary, Final Offer Arbitration is the second step. In short, both parties put an offer on the table and a panel of the CRTC chooses between the two. The decision is final and binding.

If the issue at play is not purely financial in nature, either party can request an Expedited Hearing. The timelines for this process are much shorter than for regular hearings and allow the rapid resolution of an issue. The CRTC used this method in the Baie-Comeau case as construction work had already begun and a quick resolution was required.

5. Litigation

In the event of a deadlock, applying to the CRTC remains an option. If you look closely at the *Telecommunications Act* and compare section 43 (application by carrier) and section 44 (applications by municipalities), you will notice that there are differences in the wording. Telecommunications companies can turn to the CRTC in order to obtain permission to construct their lines, whereas municipalities can apply to request that a telecom bury or alter the route of its lines, or to prohibit construction except as directed by the Commission.

In reality, however, this distinction should not be given too much weight. The wording is broad enough that the CRTC will entertain applications from either party if negotiations are unsuccessful.

Anyone wishing to challenge a decision of the CRTC made under either section 43 or 44 must apply for Leave to Appeal to the Federal Court of Appeal. The applicable timelines are set out in section 64 of the *Telecommunications Act*. Given the national significance of this issue, FCM would ask to be informed when litigation is undertaken on an issue which has not yet been dealt with in previous cases.

Strength in Numbers

In many cases, the disputes between individual municipalities and telecommunications companies have taken on the air of battles between David and Goliath, with Goliath coming out on top in many cases. The reality is that even large municipalities have had difficulties in protecting their interests in telecom cases. For smaller communities, the challenges have been even greater given the inequality in resources available to a small town compared to those of a national or multinational telecommunications company.

Information sharing has become key in making sure that municipalities are recovering everything they can to keep their taxpayers whole. Being aware of the agreements struck with other municipalities in your area, in your province and nationally is essential to strengthening your bargaining power.

Some municipalities have decided to create negotiation groups or clusters. In Quebec, for example, where there are practically no MAAs currently in place, the 12 largest municipalities have joined forces. Under the auspices of the *Union des municipalités du Québec*, they created a working group mandated with preparing a model MAA to be used by the members of this group as a starting position in their negotiations with telecommunications companies. Furthermore, they have created an active information-sharing network in order to keep each other apprised of discussions unfolding in their area. The aim is clear: to collectively obtain the best terms possible for their constituents.

FCM is also helping municipalities share best practices through this handbook and a library of model MAAs and bylaws posted on its website. Members are invited to share with others the terms and conditions they have set out for telecommunications companies in their area. Furthermore, FCM asks that members keep it informed of significant developments, especially if litigation in which you are involved might raise issues which have not been dealt with in previous cases.

Moving Forward – Unresolved Issues

There are a number of other issues related to telecommunications for which best practices have not yet fully emerged. Nonetheless, members should be aware of them so that they can keep informed of new developments on these fronts.

Aerial Installations

With the deregulation of the telecommunications industry, telecom networks have not only multiplied underground, there are also a number of new players using existing utility poles. In many cases, the poles themselves belong to local or provincial utilities and telecommunications companies have made arrangements to use them for their own purposes.

The issue which is now arising as a result relates to the relocation or replacement of utility poles when roadwork is undertaken. In the past, co-ordinating the work was fairly simple because of the small number of parties involved. Now, more and more municipalities are reporting significant delays because of the number of different network owners using the poles and the need to relocate these installations. In many cases, for example, where new poles were put in place, municipalities had to wait several weeks or months for all telecom companies to move their wires to the new poles. During this time, the old poles cannot be removed, delaying completion of the roadwork. These delays obviously create additional costs and disruptions, despite the fact that the relocation itself is a minor undertaking.

For the time being, there is no clear direction with respect to how municipalities can be compensated for these extra costs. Where the opportunity presents itself, municipalities might consider incorporating additional agreement provisions which require that pole replacement and removal of old poles be done within an agreed-upon timeframe (e.g., an old pole to be removed within six months of placing the new pole).

It is worth noting that there is currently a case before the CRTC between Shaw and the British Columbia Ministry of Transportation on a similar situation. A decision is expected later in 2009.

WiFi and Emerging Technologies

There have been reports of increased activity on this front, including a growing number of requests from U.S. companies. In essence, the issue involves the installation of a wireless Internet network on a large scale. The transmission devices for these networks are typically installed on traffic light posts, public lighting fixtures, utility poles, etc.

Practices vary greatly. Some communities have refused them altogether while others have entered into exclusivity agreements with certain carriers in order to provide public wireless access in large sections of their community. It should be noted, however, that there is little guidance yet from the CRTC on such matters. The issue of competition in such cases could be problematic. Having five different networks running under the street is one thing. Having five different transmission devices affixed to a traffic light is a whole other matter. Should a municipality be in the position to require a municipal access agreement from a company engaged in such activities, it may consider including requirements for compliance with local consultation protocols and other regulations.

Transmission Antennae (television, cellular telephone service, etc.)

Unlike other telecommunications assets, transmission antennae are not under the jurisdiction of the CRTC. Instead, they are governed by Industry Canada. The most frequently occurring issue on this front is the location of towers for cellular telephone service. There is limited case law on this point, but it generally has not been favourable to municipalities. For example, Telus Communications Inc. recently successfully challenged the application of the City of Toronto's site plan control bylaws to telecommunications structures. Despite the fact that the only elements the municipality was trying to control were mitigating measures (e.g., landscaping, etc.), the court felt that even a potential municipal veto was sufficient to render the bylaw inapplicable to these structures. In doing so, the court noted that lack of municipal approval could potentially affect the actual location of the antennae. One can likely expect more litigation on this front in the coming years until the jurisdictional issue has been clearly resolved by either a provincial Court of Appeal or the Supreme Court.

Conclusion

The effects on municipalities of the deregulation of the telecommunications industry have yet to be completely understood. There are a number of significant issues which will likely only be resolved by the courts. As a result, this first handbook will continue to evolve as the knowledge base grows.

Nonetheless, municipalities across Canada, big and small, must begin to exercise their rights and test the limits of their jurisdiction. By sharing information and working together, communities will ensure that they are as well positioned as possible to ensure they recover the costs which can be attributed to telecommunications companies and that any risks to public safety are mitigated. As it has for the last number of years, FCM and the Technical Committee on Telecommunications and Rights-of-Way will continue to play a key role in supporting the work of municipalities.

ANNEXES

A. Key Legal Cases – Detailed Summaries

B. Calculating Recoverable Costs

C. Calculating Loading Factors – List of Components

D. Drafting Your MAA – Checklist for Municipalities

ANNEX A: Key Legal Cases – Detailed Summaries

This section provides a summary of the landmark cases on this issue. For each case, the **context** portion describes the events leading up to the litigation as well as the issues at stake, while the portion on the **decision** summarizes the lessons which be taken from the case. Where applicable, an additional portion has been added to deal with **appeals** to higher courts.

Understanding these principles is helpful in developing your strategy on how best to manage your own relationship with telecoms.

Ledcor v. Vancouver

The Context

In 1997, Ledcor Industries Limited (Ledcor) began construction of a fibre optic network. Negotiations on the terms under which Vancouver would grant access to Ledcor through a railway corridor that crossed 18 intersections began in October of that year.

By March 1999, the parties had not yet come to an agreement, although Ledcor had continued to build its network without municipal approval. That is when Ledcor decided to file an application with the CRTC under section 43 to obtain access, stating that it found the conditions requested by Vancouver to be unacceptable.

Although, technically, this case was only about the conditions of access to 18 intersections in Vancouver, the CRTC indicated that “it expected that the principles developed in the proceeding may inform the Commission’s consideration of any disputes that may arise elsewhere”.⁵ As a result, the CRTC invited all interested parties to comment on the following issues:

- the CRTC’s jurisdiction in light of sections 42 to 44 of the *Telecommunications Act*;
- the appropriate conditions of access in this case, including monetary compensation;
- the appropriate form of any monetary compensation (costing methodology); and
- whether the terms imposed by the CRTC in this case should also apply to other access agreements in Vancouver not in dispute.⁶

FCM was among the long list of parties (which included several municipalities and telecoms) that made submissions to the CRTC in what was clearly going to be a precedent-setting case.

⁵ Ledcor/Vancouver – Decision CRTC 2001-23, par. 9. (Ledcor Decision). Note that the full versions of all CRTC decisions are available on the Commission’s web site at www.crtc.gc.ca.

⁶ Ledcor Decision, par. 10.

The Decision

On the issue of its jurisdiction, the CRTC ruled that since telecommunications networks are “federal undertakings,” their regulation falls exclusively within the authority of the federal government and that any effects on municipal rights are incidental. The determination, where necessary, of the terms and conditions of use of municipal property was considered by the CRTC to be part of this exclusively federal telecommunications activity. Furthermore, the CRTC was of the view that the *Telecommunications Act* conferred broad powers on the Commission. Essentially, the CRTC felt it was free to impose any conditions it saw fit with respect to access to municipal property, as long as it had “due regard to the use and enjoyment” of the property by others, as stipulated in the act.

With respect to conditions of access and monetary compensation for Vancouver, the CRTC indicated that although it was stopping short of recommending a model or standard Municipal Access Agreement (or MAA) to serve as a starting point for discussions between municipalities and telecoms, it explicitly anticipated that the principles established in this case would assist in future negotiations between telecoms and municipalities. The generally applicable principles set out in the Ledcor case include the following.

- a) **Joint Planning** – Where feasible, a **Public Utility Coordinating Committee** should be established in order to facilitate information sharing and long-term planning with a view to reducing costs and disruptions. It is appropriate for telecoms to contribute to the costs of such committees where they are established.
- b) **Causal Costs** – Vancouver should recover the “**causal costs**” associated with the construction, maintenance and operation of telecommunications infrastructure located on its property. “Causal costs” are defined as “**prospective**” (i.e., forward-looking, which excludes “sunk” costs) and “**incremental**” (costs that change as a result of the project under consideration). Therefore, all **direct variable common costs**, such as plan approval and inspection costs, can be recovered as causal costs.
- c) **Fixed Common Costs** – These costs are associated with running a municipality (e.g., overhead charges for city hall) and are covered by tax revenue. Therefore, contributions to fixed common costs should not be recovered through charges to telecoms.
- d) **Indirect Variable Common Costs** – These costs can be recovered as they are attributable to the project under consideration and are causal costs (e.g., added clerical workload for existing staff). These are appropriately recovered through the application of a percentage increase to all direct costs. This percentage is referred to as a “**loading factor**.”

- e) **Additional Variable Common Costs** – Some causal costs are small and the process to determine them accurately would be disproportionately difficult or complex. Therefore, an **additional loading factor** was added to the plan approval and inspection costs.
- f) **Occupancy Fees** – The CRTC **rejected** the imposition of occupancy fees for the land used by telecoms. The Commission indicated that the market value approach suggested by Vancouver to calculate these fees was inappropriate as a public highway does not have “value” (i.e., the amount a willing buyer would pay a willing seller) in the same way that other types of property may have.
- g) **Relocation Costs** – On the issue of allocating the cost of future relocations of telecommunications equipment (should Vancouver require the equipment to be moved), the CRTC declined to prescribe a prospective method. Instead, it indicated that, should the situation arise, the parties should negotiate a cost-sharing arrangement and, in the absence of agreement, a new application to the CRTC could be filed. Nonetheless, the Commission indicated that the following factors should be taken into account when allocating relocation costs:
- who has requested the relocation (municipality, telecom or third party);
 - the reasons for the relocation (safety, aesthetics, service improvements, etc.); and
 - how much time has passed since the original construction of the telecom’s assets.
- h) **Term of Agreement** – The CRTC was of the view that it was reasonable to set a fixed expiry date for the agreement since circumstances may evolve and require modifications to the conditions of access to municipal property.
- i) **Liability, Indemnity and Insurance** – The CRTC did not prescribe any specific terms. It is up to the parties to allocate risk and liability among themselves. If they are unable to come to an agreement, provincial principles of liability (e.g., negligence) would apply.
- j) **Applicable Law** – It is the CRTC’s view that access agreements should be governed by the laws of the province in which the municipality is located, as well as the laws of Canada when applicable.

After setting out these principles, the CRTC proceeded to apply them to the circumstances involving Leducor. (Details on cost recovery are provided in the “Protecting Your Rights” section of this handbook.) In short, Vancouver was not permitted to recover anything above “causal costs,” and even some of those were disputed. This meant that any bargaining power which the City might have had in order to obtain compensation for providing the use of its land to a for-profit corporation had been taken away.

The Appeal

The CRTC’s decision was appealed to the Federal Court of Appeal.⁷ The appeal essentially challenged the CRTC’s jurisdiction to adjudicate the dispute between Leducor and Vancouver, the future impact of the decision on municipalities generally and last, the conditions of access as set out by the CRTC.

In a relatively short ruling, the Federal Court of Appeal agreed with the CRTC’s reasoning and conclusions with respect to its authority to hear such cases and set conditions of access. On the issue of the future impact of the decision, the Court felt that this was only a ruling in a very specific dispute binding only on the parties with respect to the particular locations involved. It underlined the fact that the CRTC was not proposing to adopt a model access agreement and refused to review or sanction the principles set forth in Leducor. With respect to the specific conditions, the Court found no errors in law and noted that, with respect to occupancy fees, the CRTC had only rejected the methodology proposed by Vancouver, not the principle itself.

Leave to Appeal to the Supreme Court of Canada was sought but not granted. Given the fact that the Federal Court of Appeal had so narrowly characterized the CRTC’s decision, this is not surprising. However, it left municipalities in a quandary. The CRTC was now free to set conditions at it saw fit and continue applying its “principles.” More significantly, the Leducor decision had greatly affected the bargaining power of municipalities and their ability to protect their taxpayers’ interests. Furthermore, it had effectively negated the value of rights-of-way.

Edmonton’s LRT Tunnels

The Context

The case opposing the City of Edmonton to Allstream Corp.⁸ brought the unpredictability of the deregulated telecommunications environment to new heights for municipalities.

In 1997, Edmonton and Allstream had signed an access agreement to allow Allstream to install cables inside the City’s Light Rail Transit (LRT) tunnels. Under the terms of the agreement, Allstream paid fees to occupy the space and agreed that, on the expiry of the agreement in 2002, it would remove its facilities unless it exercised its option to extend the agreement, with a formula provided to calculate the ongoing fees payable to Edmonton.

In 2001, after the publication of the Leducor decision, negotiations began between Edmonton and Allstream. Allstream insisted on using the Leducor principles to negotiate a new agreement for the LRT tunnels. Edmonton rejected this approach and in June 2002, several months after the

⁷ Federation of Canadian Municipalities v. AT & T Canada Corp. (C.A.) [2003] 3 F.C. 379

⁸ Telecom Decision CRTC 2005-36

agreement expired, Allstream advised Edmonton that it would not exercise its option to renew, stating that the occupancy fees in the agreement were contrary to the Leducor principles.

In June 2003, Edmonton commenced legal proceedings in the Court of Queen's Bench to recover amounts owed to it as a result of the continued use by Allstream of the LRT tunnels. Two weeks later, Allstream applied to the CRTC to obtain new conditions of access.

The Decision

Although there were a number of technical legal issues at play, at the heart of the litigation was whether the LRT tunnels could be defined as "other public places" for the purposes of the *Telecommunications Act*, thereby giving the CRTC the authority to set out conditions of access. The CRTC established three criteria to help define the expression "public place":

1. public ownership of the land in question;
2. the nature of the public purpose;
3. the degree of access to the land allowed by members of the general public.

Applying these criteria to the LRT tunnel network, the CRTC had no difficulty in ruling that these tunnels constituted a "public place" for which the Commission could rightfully set conditions of access. In particular, it should be noted that even though passage by the public in the tunnels could only occur by the traveling public within the LRT train, this was sufficient to satisfy the test established by the CRTC for a "public place."

When the time came to set the conditions, every argument raised by Edmonton to justify recovering occupancy fees for the space was rejected by the CRTC. The Commission was of the view that there was no market for this space, that public auctions were not a proper way to determine value, that the tunnels had already been built and paid for by taxpayers, so there was no need to require Allstream to contribute to these costs, etc. Edmonton could only recover causal costs flowing from Allstream's presence. In this case, very few costs directly attributable to the presence of Allstream's network could actually be demonstrated and recovered.

The Appeal

Edmonton appealed to the Federal Court of Appeal.⁹ However, the Court endorsed the criteria used by the CRTC to define a "public place" it confirmed its conclusion that the LRT tunnels were public places and last, found no error in law in the CRTC's refusal to set occupancy costs as a condition of access. The initial contract which had been entered into by Allstream with Edmonton had expired and Allstream was free to seek to vary the renewal terms through negotiation or application to the CRTC. (Note: This is in contrast with the Toronto and

Calgary cases below where Allstream was not allowed to reopen existing MAAs through an application to the CRTC.)

The only bright spot was that the Court indicated that the CRTC had to consider each case on its own merits and could not, as a rule, refuse to grant occupancy costs. While it is true that the CRTC has not stated that, in principle, occupancy costs cannot be recovered, it must be noted that it has rejected every methodology put before it to calculate such costs. Therefore, after the attempts by Vancouver and Edmonton, it was difficult to envisage a methodology which would convince the CRTC to allow municipalities to recover occupancy costs.

Leave to Appeal to the Supreme Court of Canada was sought by Edmonton, with financial support from FCM. However, leave was denied and, as is generally the case, no reasons were provided for the denial.

Toronto & Calgary v. MTS Allstream¹⁰

The Context

These two cases concerned an attempt by MTS Allstream to have the CRTC reopen and adjust two previous agreements which were entered into by Allstream (or its predecessor companies) prior to the decision in *Leducor v. Vancouver*. Allstream argued that it should now, in the interests of "competitive equity", be permitted to apply to the CRTC to adjust the terms of these agreements to render them consistent with the Leducor "principles," mainly the requirement that no licence fees be payable with respect to the occupation of city streets.

The CRTC, after consideration of the issue in a Public Notice Proceeding, determined¹¹ that the fact of a signed agreement was not conclusive proof that the parties had negotiated an agreement on terms satisfactory to the company. Instead, the CRTC decided that it would entertain requests to review the circumstances under which an agreement had been entered into to determine if it was indeed a legally enforceable agreement under the principles of contract law or was the result of economic duress, coercion, inequality of bargaining power, etc.

The Decisions

The CRTC concluded, after reviewing the facts of both cases, that both the Toronto and Calgary agreements were legally binding agreements. Those decisions were upheld by the Federal Court of Appeal and Allstream's application for leave to appeal to the Supreme Court of Canada was dismissed.

Municipalities should therefore be cognizant of any strategy by a telecom company to obtain approvals in the short term in circumstances which may allow them to later claim duress or coercion and seek to have a written agreement set aside by the CRTC. It is hoped that this handbook will allow municipalities to take firm but reasonable and legally defensible negotiating positions in light of the reality that negotiations may be subject to CRTC scrutiny after the fact.

⁹ Edmonton (City) v. 360Networks Canada Ltd.

¹⁰ CRTC Decisions 2005-46; 2005-47

¹¹ CRTC Decision 2003-82

Maple Ridge

The Context

In 2005, Shaw Cablesystems Limited attempted to install telecommunications infrastructure within the District of Maple Ridge (British Columbia). Maple Ridge denied permission until both parties could negotiate a comprehensive MAA. Both parties agreed to negotiate based on the principles set out in the Ledcor decision and using the MAA developed by the City of Richmond as a starting point. Negotiations began in April 2005 but had not yet produced an agreement by early 2007. As a result, Shaw applied to the CRTC in March of that year in order to obtain conditions of access to rights-of-way within Maple Ridge.

The Decision

In its ruling,¹² the CRTC did not hide its impatience with Maple Ridge and with what the Commission clearly considered an unreasonable delay in reaching an agreement with Shaw. The CRTC went as far as stating that it “has consistently identified access to municipal rights-of-way as a barrier to entry and to local competition.”¹³ A comment of this type certainly did little to reassure municipalities that their concerns were being understood.

In its most detailed decision yet, the CRTC went through every disputed provision of the agreement and chose the wording to be used. Several of the CRTC’s preferences were predictable and, in many instances actually ended up favouring Maple Ridge. The key points are outlined in detail in the “Protecting Your Rights” section of this handbook. They include a formula to determine cost-sharing arrangements for future relocations, annual indexation of the fees paid by Shaw and a greater level of accountability on behalf of Shaw in plan preparation and reporting of emergency situations.

Baie-Comeau v. TELUS Communications Company¹⁴

The Context

The facts in Baie-Comeau (Quebec) are about as straightforward as they come. The City was undertaking the reconstruction of a major artery, including sewer and water main replacements. TELUS had infrastructure (mainly ducts, lines and vaults) located directly above the municipal services which had been installed when the City had originally dug the trench. The City had to act since its infrastructure was over 40 years old and was beginning to fail. Both parties had agreed on the technical aspects of the matter (the new location for the telecommunications infrastructure). However, there was strong

disagreement on the appropriate cost-sharing formula for the relocation. As is the case in most municipalities, there is no Municipal Access Agreement in place in Baie-Comeau.

As far as Baie-Comeau was concerned, TELUS’ predecessor had knowingly decided to save money by installing its equipment in the same trench as the municipal services (the cost savings would have been significant since the trench is in bedrock). It must therefore have known that the day would come when the City would require access. Under these circumstances, the City should not have to compensate TELUS.

TELUS, on the other hand, was of the view that since Baie-Comeau was causing its facilities to be relocated, it should have to cover a portion of the costs. TELUS was willing to pay for the purchase of new assets, but argued that the City should cover labour and construction equipment costs to remove the existing assets and install the new ones, as well as the residual value of the existing assets.

The Decision

In its first decision of this kind, the CRTC stated that the methodology to allocate the costs should be “predictable and just for both parties.” It then proceeded to define **relocation costs**: the costs to purchase the new assets, and the labour and equipment costs to remove the existing assets and to install the new ones.

To establish the cost-sharing formula, the CRTC stated that it had taken into account the factors set out in Ledcor. It also stated that it accepted Baie-Comeau’s contention that the work it was undertaking was necessary.

In the end, the CRTC simply decided to base the proportions payable by each party on the remaining useful life of each category of assets. For example, the bulk of the assets were ducts and cables which were 43 years old. Those assets had a useful life of 40 years.¹⁵ Therefore, as they had no remaining useful life, the entire cost was to be borne by TELUS. The relocation of another piece of equipment installed only one year prior to the relocation, which had a useful life of 18 years, had to be covered mainly (17/18 or 94.4 per cent) by Baie-Comeau.

It is worth noting that this cost-sharing formula is very different from the ones found in the Maple Ridge MAA and the most recent decision in Vancouver v. Allstream (below). It is the CRTC’s position that the Baie-Comeau formula only applies to assets which pre-date a Municipal Access Agreement and are not subject to the terms of any subsequent agreement between the parties.

¹² Telecom Decision CRTC 2007-100

¹³ Ibid, paragraph 24

¹⁴ Telecom Decision CRTC 2008-91

¹⁵ The useful life of each category of assets was determined using tables found in Telecom Decision 2008-14. Although that decision is unrelated to municipal cases, the data is deemed by the CRTC to reflect the appropriate duration of asset lives.

Wheatland County v. Shaw Cablesystems Limited

The Context

Wheatland County (Alberta) is a prime example of the need to consider important public safety issues associated with right-of-way management. Wheatland County has a population of approximately 9000, and manages over 3000 km of roads within its boundaries. When Wheatland and Shaw negotiated a comprehensive MAA, the only issue where they could not agree was Wheatland's request that Shaw register with Alberta One-Call.

Alberta One-Call is a non-profit organization which has been providing a utility notification service to the public, digging contractors and its members since 1984. Enquiries with respect to buried utilities are made through Alberta One-Call who then forwards requests to all parties having assets in the vicinity so they can locate them appropriately before digging begins. Shaw opposed this requirement insisting that the public use its own DigShaw line to make enquiries.

From Wheatland's perspective, this is a significant public safety issue. The advantage of the one-call system is that it greatly reduces the risk of accidental damage and service disruptions since all member utilities are advised automatically. If a person who is planning to do work in a given location has to call each utility individually, there is a much greater risk that this person will forget to call someone who has assets in the area simply by being unaware of their presence.

In November 2007, Shaw filed an application to the CRTC to settle the dispute. However, Shaw used the opportunity to also challenge a number of other provisions of the MAA to which it had already agreed.

The Decision

In its decision,¹⁶ in addition to ruling on the One-Call dispute, the CRTC allowed Shaw to reopen the parts of the MAA which had been agreed upon. Several of the new provisions dictated by the Commission favoured Shaw, including forcing Wheatland County to bear a greater share of future relocation costs.

With respect to the One-Call issue, the CRTC ruled that it saw no reason to force Shaw to become a member of the provincial organization. In fact, the CRTC simply left it up to the parties to come to an agreement, effectively allowing Shaw to veto Wheatland's request. The Commission indicated that imposing this requirement "would be inconsistent with the Commission's goal of reducing regulation," a comment which seems to make little sense given the nature of the provision requested and has no clear basis in law.

¹⁶ Telecom Decision CRTC 2008-45

¹⁷ Telecom Decision CRTC 2009-150

The Appeal

Not surprisingly, Wheatland County has appealed the decision to the Federal Court of Appeal. The case is significant as Wheatland is challenging the CRTC's jurisdiction over issues which are solely matters of safety and roadway management and are therefore not related to telecommunications or cost recovery. Whether the Commission's jurisdiction truly extends beyond conditions of access and into actual roadway management issues is a fundamental question.

As a fall-back argument Wheatland invokes the passage in the *Telecommunications Act* which states that the CRTC shall have "due regard to the use and enjoyment of the highway or other public place by others". The safety of the digging public and the prevention of accidental damage to infrastructure are, in the County's arguments, elements which the CRTC must take into account as part of the use others make of the highway. As a result, having regard to the use by others, membership in Alberta One-Call should be imposed.

FCM has been instrumental in obtaining contributions from other affected parties in the construction and utilities industries to help finance the appeal. A hearing date has not yet been scheduled for this appeal.

MTS Allstream v. Vancouver

The Context

The City of Vancouver and MTS Allstream Inc. (MTSA) spent the better part of five years negotiating a comprehensive, long-term MAA. Although there was agreement between the parties on a number of issues, negotiations eventually broke down and MTSA applied to the CRTC to set out the conditions under which it could gain access to rights-of-way and other municipal property and infrastructure.

Vancouver challenged the CRTC's jurisdiction to impose the terms of a long-term city-wide MAA (as opposed to engage in site specific dispute resolution). Other points of contention were:

- the inclusion of "other public places" in the city-wide MAA;
- the cost impacts of the MAA;
- the relationship between the City's street access bylaw and the MAA; and
- the costing methodology for various elements of the agreement.

The Decision

As could be expected, the CRTC found¹⁷ that it had jurisdiction over the matter and proceeded to rule on the contentious elements of the MAA.

Both parties agreed that the MAA should apply to streets, lanes, highways and other service corridors, including bridges and viaducts. However, Vancouver resisted applying the city-wide MAA to all “other public places.” Applying general rules to very different properties with unique characteristics was not desirable from the City’s perspective. In the end, the CRTC agreed and indicated that “other public places” should be dealt with on an individual basis, as the need arose.

One of MTSA’s concerns was that Vancouver was in the midst of adopting a new street access by-law and that it could use the by-law to unilaterally amend provisions of the MAA. Vancouver responded that its by-law would only apply to situations where there was no MAA in place. With this in mind, the CRTC essentially side-stepped the issue, but made an interesting remark:

“consistent with its previous statements, telecommunications companies must comply with all laws, including municipal bylaws and building permit processes to the extent that such compliance does not change the terms and conditions of any MAA between the parties.”¹⁸

The reality is that, until now, despite the significant amount of litigation on telecommunications matters, the effects of a municipal bylaw have never been tested in this context. It remains to be seen whether the CRTC actually has the authority to overrule local legislation, especially if it deals with issues not directly related to the provision of telecommunications services. With respect to the cost-recovery methodology and other technical matters at play, thanks to tremendous preparation by Vancouver, the City was able to convince the CRTC that its position on several issues was reasonable and well-founded. These topics are discussed further in the “Protecting Your Rights” section of this handbook.

The true effect of this most recent CRTC decision has been to clarify several principles first set out in the Ledcor case and, to some extent, to correct the power imbalance between municipalities and telecommunications companies.

¹⁸ Ibid., at par. 51

ANNEX B: Calculating Recoverable Costs

It is important to remember that the CRTC will allow municipalities to recover all demonstrable “causal costs,” that is to say costs attributable to a telecommunications company’s project as long as they are **prospective** and **incremental**. The examples listed below are meant to assist municipalities but they might not all be applicable in each set of circumstances. By the same token, other costs, which are not listed, could legitimately be recovered, depending on the context and the evidence available to support the municipality’s claim.

Recognized Cost Categories

1. Plan Review and Inspection Costs

Generally speaking, these fees are meant to allow municipalities to recover the costs directly attributable to plan approval and on-the-ground inspections which can be complex and time-consuming. Included in these fees are elements such as:

- determining the optimal alignment and routing
- avoiding conflicts with other utilities
- safeguarding for future requirements
- oversight of construction
- ensuring compliance with soil compaction standards
- oversight of reinstatement work
- ensuring compliance with timelines and traffic plans to minimize disruption to the public
- ensuring compatibility and coordination with the municipality’s long-term construction workplans

Base approval fees –The standard has come to begin with a base fee calculation which distinguishes between smaller, relatively simple projects, and larger, more complex undertakings. In both Vancouver decisions, the threshold was set at 20 metres. A base fee was determined for projects of 20 metres or less and another, higher for projects in excess of 20 metres. In Ledcor, the base fees were \$230 and \$760 respectively. In MTSA, the base fees were set at \$500 and \$1,500 for each type of application.

Per-metre approval fees – These fees are added to the base approval fees and are meant to reflect the cost differential associated with the varying complexity of each project. In Ledcor, the per-metre fee was set at \$6 while it was \$10 in the MTSA case. Therefore, under the most-recent decision, approval for a project of 15 metres in length would trigger a fee of \$650 (15m x \$10 + \$500). The approval fee for a project of 65 metres in length would be \$2,150 (65m x \$10 + \$1,500).

Inspection Fee – The City is entitled to recover the cost of overseeing the actual construction work and ensuring compliance with the approved plans as well as the municipality’s reinstatement standards. In the MTSA case, the fee was set at \$65 per day, per city block.

2. Pavement Degradation Costs

An asphalt or concrete pavement is an engineered structure that works by flexing and transmitting traffic loads to a wide area of the pavement’s substructure. Once this structure is cut, its ability to flex and distribute loads is destroyed. Water will inevitably seep into the cut, even if properly repaired, leading to cracks, potholes, and the need to replace the pavement earlier than would have otherwise been the case.

Pavement Restoration Costs – Where the telecommunications company does not perform the work itself to the reasonable satisfaction of the city, municipalities can recover the cost of pavement restoration. It is appropriate to rely on a standard rate schedule for pavement restoration (a “per square metre” charge, for example) provided that the schedule reflects the causal costs of restoration and is applied on a routine and non-discriminatory basis to all parties performing construction in the street. In other words, a distinct schedule for telecoms would likely be rejected by the CRTC.

Increased Repair Costs – The initial repair to a road cut, even if done to the municipality’s standard, falls short of compensating for the long-term costs associated with the loss of integrity of the pavement surface. Municipal maintenance crews will be called upon to effect repairs on an ongoing basis (crack sealing, slot grinding, pothole and skin patching, etc.). These costs can be recovered but the CRTC has indicated that recovery must be in the form of an upfront fee. In the MTSA case, the CRTC combined the repairs to the costs associated with the shortened lifespan of the pavement. (See “Pavement Degradation Costs” below.)

Pavement Degradation Costs – In the MTSA case, the CRTC agreed that the imposition of a one-time Pavement Degradation Fee was appropriate to compensate for both the increased maintenance costs and the shortened lifespan of the road surface. Although Vancouver had prepared a very detailed study to support its proposed fee structure, the CRTC relied mainly on a fee structure imposed in another setting. The fee structure in the MTSA case takes into account the age of the pavement in question and includes a 20 per cent loading factor:

Pavement Age	Pavement Degradation Fee (cost per square metre)
0 to 5 years	\$50.00
6 to 10 years	\$40.00
11 to 15 years	\$30.00
16 to 20 years	\$20.00
over 20 years	\$10.00

3. Lost Productivity Compensation

The construction and presence of telecommunications assets can have a significant impact on the orderly operation of many municipal services. Lost Productivity Compensation is meant to allow municipalities to mitigate these effects. It is important to note that, under the lost productivity heading, some elements are true “costs” to the municipality while others are more accurately characterized as lost revenues. The distinction is important as the CRTC treats these two categories differently. Furthermore, the CRTC establishes a distinction between the effects of new works and the effects due to the presence of existing telecommunications assets.

In the MTSA decision, the CRTC indicated that there are two methods by which Lost Productivity Compensation can be recovered in the case of **new works** undertaken by a telecommunications company.

1. **Direct Invoicing** – If lost productivity elements (either costs or lost revenues) can be isolated and accurately calculated and attributed to a telecommunications project, the municipality can invoice these items directly to the company. The CRTC indicated that such invoices should include the following information:
 - a description of the costs being recovered;
 - the location of the alignment of the new work;
 - a description of the City work, including the affected sewage lines, conduits, ducts, pipes, or any other utilities located in the trench;
 - an explanation of the nature of the interference caused by the telecom;
 - an itemized breakdown of the City’s additional costs
 - the methodology and data sources used by the City to determine the various elements; and
 - the methodology and data sources used by the City to determine the amount of these costs.
2. **Loading Factor** – If accurate calculations are not administratively cumbersome, a loading factor can be added to plan review and inspection fees. (See “Loading Factors” below.)

Traffic Signage Costs – Costs to clear parking in construction zones (to hood parking meters and post related signage) are causal costs which can be recovered through invoicing. Like all “cost” items, it is subject to the addition of the appropriate loading factor.

Lost Revenues – The CRTC recognizes that telecommunications projects can have an impact on some municipal revenue streams. In the Ledcor decision, it stated the principle that recovery of lost revenues must be limited to the net revenues lost, not simply the gross income. In the MTSA case, two specific examples are examined:

1. **Lost Parking Meter Revenue** – The CRTC acknowledged that removing parking meters from operation to accommodate a construction project would create causal costs to a municipality in the form of lost revenue. In the Ledcor case, Vancouver had presented gross revenue data and this approach was rejected by the CRTC. In the MTSA case, Vancouver came prepared with an “occupancy rate” which combined both parking meter and parking ticket revenues.
2. **Lost Parking Ticket Revenue** – While the CRTC did not reject the notion of recovering this loss, it was not convinced that the City had presented a proper accounting of the loss since, in the Commission’s mind, a reduction of parking meters in one location could, in fact, translate into an increase in parking fines in the vicinity. For this reason, it did not allow Vancouver to recover under this heading.

Transit Delays – While the CRTC agrees that there are cost implications on public transit service when construction work is undertaken, determining the amount accurately can be difficult and disproportionately time consuming. Therefore, these causal can be included in a “loading factor”. (See “Loading Factors” on page 24.)

Site-specific Costs – Depending on the location of the work, or particular conditions in a given municipality, additional causal costs can occur. For example, in the Ledcor case, Vancouver claimed compensation for the drainage of the telecommunications company’s underground vaults. In Vancouver, the City had to pay the regional government a volumetric charge for draining rain water. Since water accumulation in Ledcor’s vaults was drained directly into the City’s sewer network, Vancouver was permitted to calculate this volume and pass the cost on to Ledcor. (Note that, when simply transferring costs of this nature, the CRTC did not apply an additional loading factor.)

Workaround Costs – When telecommunications companies build their underground duct facilities, they typically do so as quickly and as inexpensively as possible, particularly in a competitive environment. In practical terms, this means that the ducts are placed as shallow as possible to minimize excavation costs and construction time. These ducts, often made of inexpensive and flimsy materials are therefore located above municipal water and sewer infrastructure. “Working around” existing telecommunications assets in order to prevent damage when undertaking a large excavation project can become a significant challenge, adding time and costs to the provision of basic public services.

The recent MTSA case provides guidance on how to recover workaround costs. Simply put, it involves using the Commission’s approach to the recovery of other lost productivity costs. Workaround costs can therefore be recovered through specific and detailed invoicing, including the application of the appropriate loading factor.

4. Relocation and Rehabilitation Costs

Prospective Relocation Costs – In the MTSA case, the CRTC indicated that the Relocation Costs for City-initiated requirements to relocate should include all physical costs (labour, materials and equipment) as well as depreciation, betterment and salvage costs. The CRTC was also of the view that any relocation occurring in the first three years should be borne by the City but that MTSA should finishing recovering its investment within a 10-year timeframe. The following scale was therefore established:

Year	Percentage of Cost Borne by the City
1	100
2	100
3	100
4	90
5	80
6	65
7	50
8	35
9	20
10	10
11	0

It is important to note that this scale only applies to relocations due to the need to repair, replace or upgrade municipal infrastructure and other, bona fide, municipal projects. The cost of relocations requested by the City purely for beautification or similar purposes will be entirely borne by the City.

It is also worth noting that other municipalities have negotiated different sliding scales, some as short as seven years, some extending to 12 years.

Retrospective Relocation Costs – Typically, MAAs will only deal with telecommunications assets which have been installed after the date of the agreement. However, parties should include provisions, in their agreement, to cover existing assets. A scale similar to the one set out for Prospective Relocation Costs could be used. In the absence of an agreement, the useful-life principles set out in the Baie-Comeau case are currently the best guides.

Please note that, in some cases, provincial legislation may have an impact. In Ontario, for example, municipalities have also chosen to include references to the 50/50 split of costs for “labour and labour-saving devices” as set out in the Ontario *Public Service Works on Highways Act* with respect to the relocation of plant installed prior to the date of the agreement for any bona fide municipal purpose.

Rehabilitation Costs – During the course of a public works project, telecommunications assets can sometimes be damaged because of the age of the asset itself or its poor quality. When a municipality reconstructs a road, it may be faced with significant costs and time delays while telecoms

rebuild or upgrade their assets to modern standards, even though this work is not truly required in order for the project to proceed. These costs should be recovered unless the telecommunications company takes responsibility for the work.

5. Loading Factors and Inflation

As illustrated by the diversity of elements which can be subject to cost recovery listed above, all significant additional costs related to the construction or the presence of telecommunications assets can be recovered through specific fees if they can be adequately itemized and calculated. However, there are several cost and lost productivity elements which are much more difficult to quantify, even though their recovery is entirely appropriate and justified. The loading factors were created for this very purpose. They allow the recovery of a number of smaller cost elements through the application of a percentage increase to individual fees.

Loading Factor for Miscellaneous Causal Costs – Indirect and variable common costs which can appropriately be characterized as “causal” but which are difficult to quantify can be recovered globally through this loading factor. Examples of such costs include everything from the time spent by the Branch Manager on telecommunications issues to the additional workload created for clerical staff, IT personnel, etc. Essentially, all types of additional or incremental costs incurred by the municipality can be recovered. (Please see Annex C for the elements Vancouver included as part of its loading factor in the MTSA case.)

Therefore, for the sake of administrative expediency, all these costs are rolled into a single, comprehensive loading factor or surcharge. This percentage multiplier is applied to the fees. In the MTSA case, the loading factor was set at 20 per cent. This reflects the City’s cost structure at the time, it is consistent with its approach with other utilities and the elements included in the loading factor are not recovered through any of the specific fees. In the example given above, the approval fee for the 15-metre project would therefore come to a total of \$780 ($\650×1.2).

The CRTC has agreed that the loading factor should be applied to **all cost-related fees**. This means that every cost-recovery item should be augmented by the set percentage when invoiced. For example, if Vancouver crews have to be used to reinstate something damaged by a telecommunications company, the total cost billed to the telecom would include the direct cost as well as the 20 per cent loading factor. It is important to note that this loading factor cannot be added to the recovery of lost revenue since these items do not have an inherent “cost” component. It has become the practice, in fact, to indicate the loading factor in the MAA, but to set out the various fees inclusive of the additional loading.

Loading Factor for Lost Productivity – Where the loss of revenue streams and some increased costs cannot be accurately attributed to a project and calculated, a municipality

can still recover these funds through an additional loading factor to be added to the approval fees. In Ledor, the loading factor for lost productivity was set at 15 per cent to be applied to the approval fees only and covered lost parking meter revenue, transit operating delays and lost productivity for other City operations. In the MTSA case, Vancouver gave up this 15 per cent loading factor for lost productivity because it convinced the CRTC to use a specific formula for lost parking meter revenues.

Inflation and Other Cost Increases – In negotiating a long-term MAA, it is appropriate to include automatic increases to all set fees based on the annual Consumer Price Index (CPI) in your municipality or region. The CRTC has also indicated that even if an agreement is for a very long period (e.g., 15 years), it is appropriate to include periodic reviews of all fees (e.g., every five years) in order to appropriately apply any specific increases above the CPI. If parties cannot agree on new fee structures, they can, of course, apply to the CRTC for a ruling.

Rejected Cost Categories

In the various cases to date, some cost recovery items have been refused by the CRTC. They include the following.

- **Occupancy Costs** – So far, the CRTC has rejected every calculation method proposed, without going as far as rejecting the principle of recovering costs for the value of the land occupied by telecoms. Because of this approach, there has been no decision by the CRTC on the principle of recovering occupancy costs. This has effectively prevented challenges to the CRTC's position in Court. This issue, from FCM's perspective, is still outstanding, especially when one considers that telecoms that own ducts located within rights-of-ways charge rent to other telecoms who request to use their ducts. It is frustrating, to say the least, to force taxpayers to provide their land free of charge to profit-making businesses who then turn around and rent that space to others.
- **Negotiation Costs** – The CRTC has refused to compensate municipalities for the time spent on negotiating MAAs with telecoms. Despite the fact that, in some cases, these negotiations do require significant resources, the CRTC is of the view that allowing municipalities to recover would reduce their incentive to come to an agreement in a timely fashion. However, the on-going management of an active MAA is something which will be included in the loading factor.
- **Public Delays** – Although delays caused to public transit can be recovered, inconveniences to the traveling public cannot as these are not costs to the municipality itself.
- **Fixed Costs** – None of the municipality's general overhead costs can be charged to a telecommunications project. Only incremental costs can be included.

- **Sunk Cost** – Costs already incurred by a municipality cannot be charged to a telecommunications project. An example of this was the refusal by the CRTC to allow Edmonton to recover part of the value of the LRT tunnels through fees to the telecommunications company. The CRTC was of the view that a) the tunnels were already built, therefore these costs were not recoverable and b) the municipality would have built the tunnels anyway. None of this work was attributable to the telecom's presence.

ANNEX C: Calculating Loading Factors

City of Vancouver

Patsy Scheer
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Our file: 05-0377

February 7, 2008

BY EPASS

Canadian Radio-television and
Telecommunications Commission
Les Terrasses de la Chaudiere
Central Building
1 Promenade du Portage
Gatineau, Quebec J8X 4B1

**Attention: Mr. Robert A. Morin
Secretary General**

Dear Mr. Morin:

**Re: MTS Allstream Inc. v City of Vancouver (File 8690-M59-200707721)
Further Response to Interrogatories**

Pursuant to the letter from Commission staff dated January 29, 2008, the City of Vancouver (the "City") provides the following further response to the interrogatories of MTS Allstream Inc. ("MTSA") directed to the City.

MTS Allstream (City of Vancouver) 13Nov07- 23(b), (e)

QUESTION

IN DECISION CRTC 2001-23, THE COMMISSION DENIED THE CITY'S PROPOSAL TO INCLUDE A MARK-UP FOR THE RECOVERY OF FIXED COMMON COSTS, STATING, AMONG OTHER THINGS, THAT "(T)HE COMMISSION CONSIDERS IT APPROPRIATE THAT VANCOUVER RECOVER THE CAUSAL COSTS IT INCURS WHEN CARRIERS CONSTRUCT, MAINTAIN AND OPERATE TRANSMISSION LINES IN MUNICIPAL RIGHTS-OF-WAY."

AT PARAGRAPHS 139 TO 141 OF ITS ANSWER, THE CITY INDICATED THAT IT PROPOSED TO USE A 20% LOADING TO RECOVER INDIRECT AND VARIABLE COMMON COSTS. AT PARAGRAPH 56 OF ATTACHMENT 15 TO THE CITY'S ANSWER, THE CITY PROPOSES THAT THE 20% LOADING WILL APPLY TO "ALL DIRECT COSTS INCURRED BY THE CITY INCLUDING, BUT NOT LIMITED TO PLAN REVIEW FEES, INSPECTION FEES, PAVEMENT DEGRADATION FEES AND COSTS RELATING TO PERMANENT RESTORATION IF THE CITY DOES THIS WORK." IT WAS ALSO INDICATED THAT "(I)F THE CITY DOES ANY OTHER WORK. . . USING ITS OWN FORCES, THE CALCULATION OF THE CITY'S COSTS SHALL INCLUDE A 20% LOADING FACTOR."

- b) IDENTIFY ALL SPECIFIC COST ELEMENTS INCLUDED IN THE CALCULATION OF THE 20% MARK-UP.
- e) PROVIDE THE RATIONALE FOR CITY'S VIEW THAT EACH OF THE COST ELEMENTS INCLUDED IN THE 20% LOADING IS CAUSAL TO THE CONSTRUCTION, MAINTENANCE AND OPERATION OF TRANSMISSION LINES IN MUNICIPAL RIGHTS-OF-WAY.

ANSWER

b) and e)

In Decision CRTC 2001-23 *Ledcor/Vancouver – Construction, operation and maintenance of transmission lines in Vancouver*, the City sought to recover indirect costs, variable common costs and fixed common costs by applying a 62% loading factor to its direct costs. The Commission rejected the City's claim for fixed common costs but decided (at paragraph 63) that the City could apply a 29.6% loading on direct costs to recover indirect and variable common costs.

Question (b) asks for the identification of all specific cost elements included in the calculation of the 20% mark-up or loading the City seeks in this proceeding. In its submission to the Commission dated 28 September 2007 in Telecom Public Notice CRTC 2007 – 4 *Review of certain Phase II costing issues*, MTSA said the following under the heading “Variable Common Cost (VCC) Definition” (in the context of costs causal to telecommunications service and demand for service):

“It is clear from the above that VCC are intended to include only costs that are causal either to demand or to the service but for which i) the precise causal link or drive between the specific VCC element and an individual service may not be immediately obvious and has not been established ii) the establishment of the specific causal link and the development of related data sources and explicit costing methods are likely to be complex or time-consuming, and iii) the effort required to establish explicit costing methods is not warranted given the typically modest magnitude of any given VCC inclusion.”
[emphasis added]

The 20% loading proposed by the City in this proceeding includes variable common costs (“VCC”). Given the nature of VCC as articulated by MTSA above, the list of cost components set out below is not exhaustive and does not include all cost components that might properly be considered to be VCC. However, although the list is not exhaustive, each cost component on it is causal in relation to the construction, maintenance and operation of telecommunications transmission lines or other facilities in City streets or rights-of-way. The cost components on the list below are not included in any fees or charges proposed by the City.¹⁹

- Technical support, administrative support, office space, furniture, computers, etc. for Utilities Branch Permit Group staff who deal directly with applications made by telecommunications carriers for the construction, maintenance and operation of their facilities.

Note that these staff members do not do work on City utilities. Also note that the fees and charges proposed by the City (such as plan review and inspection fees) do not include these cost components.

- Work done by the Branch Manager of the Utilities Branch Permit Group dealing directly with issues arising from specific construction or maintenance work done by, and requests made by, telecommunications carriers (e.g., reviewing and responding to requests for relaxations of the City’s Utility Design and Construction standards; responding to requests for changes to location, size and appearance of above-ground cabinets or underground vaults; etc.).

Note that the fees and charges proposed by the City (such as the plan review fee) do not include this cost component.

- Technical maintenance and management of the City’s GIS system relating directly to design, construction and maintenance activities of telecommunications carriers, i.e., managing the specific layers of the GIS system that display third party utility information.

Note that the fees and charges proposed by the City do not include this cost component.

- Technical support (e.g., materials lab, consultants, etc.) to review and respond to requests from telecommunications carriers that relate to new technology or construction techniques. For instance, carriers may ask for changes in relation to the City’s standard construction requirements such as backfilling, use of unshrinkable fill, expedited surface repair, shoring, trench depth, etc. or raise issues with respect to new technology such as surface inlay.
- Work done by the Traffic Management Branch directly dealing with construction and maintenance activities of telecommunications carriers. For instance, staff must review and comment on traffic management plans prepared by carriers and deal with issues such as determining appropriate hours of construction.

Note that cost components relating to the Traffic Management Branch are not included in any of the fees or charges proposed by the City (such as plan review fees).

Work done by the Traffic Management Branch directly dealing with construction and maintenance activities of telecommunications carriers to liaise with the Transit Authority regarding impacts on bus routes, disruption of trolley service, relocation of bus stops, disruption to access for persons with disabilities, etc.

As noted above, cost components relating to the Traffic Management Branch are not included in any of the fees or charges proposed by the City (such as plan review fees).

¹⁹ This is the case whether or not this is expressly stated below in relation to the specific items listed.

Work done to receive, investigate and respond to questions and concerns from the public and other outside utilities concerning construction and maintenance work done by telecommunications carriers during the course of the work. For example, staff must receive and respond to calls and complaints relating to disruption of traffic and pedestrian flow, the behaviour of construction personnel, claims with respect to third party damage to telecommunications facilities or damage caused by carriers, noise complaints, etc.

Note that this cost component does not include work done by the Utilities Branch Permit Group staff.

Technical investigation of problems arising as a direct result of construction and maintenance work done by telecommunications carriers after completion of the work. For example, this includes problems such as settlement of telecommunications trenches, potholes, etc. arising directly from the work done by carriers in City streets and rights-of-way.

Note that this cost component is not included in any fees or charges proposed by the City (such as the fee relating to pavement degradation). It is also not included in inspection fees which are limited to the period of time when carrier construction or maintenance work is ongoing.

Speciality expertise (e.g., from planners, urban designers, noise technicians, etc.) required to evaluate specific construction work or facilities proposed by telecommunications carriers (e.g., issues relating to size, nature or location of above ground facilities; noise generated by cooling fans in cabinets; servicing new developments; aesthetic issues relating to bridge attachments or other above-ground facilities, etc.).

Costs incurred to do “emergency” repairs (e.g., pothole filling or repairing other localized settlement) caused by faulty materials or workmanship in the course of construction or maintenance work done by telecommunications carriers.

Note that these costs are not factored into the fee proposed by the City for pavement degradation which assumes that all repairs are properly done using proper materials. Therefore, costs relating to “emergency” repairs caused by problems such as inadequate compaction of backfill, asphalt not meeting specifications, etc. are not factored into the pavement degradation fee.

Time spent working with telecommunications carriers with respect to issues and complaints in relation to their facilities (e.g., graffiti removal from cabinets, etc.).

Note that this cost component is not included in any of the fees or charges proposed by the City.

- Work to positively locate telecommunications lines and other facilities in the field when the City does work in its streets and rights-of-way.

Note that this is not covered by the City’s proposal to bill carriers for lost productivity. The City must positively locate facilities whenever the City does work near telecommunications facilities. Lost productivity costs would only be claimed in unusual circumstances when those costs are sufficiently large to justify the time and expense to calculate the costs and bill the carrier.

- Observation and monitoring of temporary pavement repair (after completion of the temporary repair but before the City does the permanent pavement repair).

Temporary pavement repairs are done by carriers. Carriers are responsible for maintenance of temporary repairs within 30 days of construction, but the City must monitor the repair and request additional maintenance, if required. This is not included in the City’s proposed inspection fees, which only cover the time when the temporary repair work is ongoing (assuming the City does the permanent pavement repair).

- Technical observation and monitoring of permanent pavement repairs undertaken by carriers (especially during the warranty period) to ensure adequate performance of the work done by the carrier.

Note, again, that this is not included in the City’s proposed inspection fee.

- Ongoing technical observation and monitoring of pavement cut repairs to evaluate pavement degradation fees and to obtain the documentation necessary to propose changes to the fee, if appropriate?

Work by Superintendents in the City's Engineering Department directly relating to construction and maintenance work done by telecommunications carriers in City streets and rights-of-way. For instance, this work would include scheduling City crews relating to carrier construction work, making arrangements for provision of equipment and materials, oversight such as documentation of work, etc.

Note that this cost component is not included in any fees or charges proposed by the City (such as fees for pavement degradation). The fees proposed by the City only reflect work done by City employees up to the working foreman level.

- Clerical work with respect to work done by City forces directly relating to construction and maintenance work of telecommunications carriers in City streets and rights-of-way (exclusive of initial cut repairs). This would include work such as recording data associated with labour, materials and equipment; ordering and billing in relation to materials; etc.

Note that this cost component is not included in any fees or charges proposed by the City (such as pavement degradation fees).

Yours truly,
CITY OF VANCOUVER
Per:

Patsy J. Scheer
cc Teresa Griffin-Muir, Vice President, Regulatory Affairs, MTS Allstream Inc. (By e-mail)

ANNEX D – Drafting Your MAA – Checklist for Municipalities

As indicated in this handbook, in order to set the conditions under which telecommunications companies may have access to rights-of-way and other municipal property, municipalities can choose to legislate these conditions by enacting a bylaw, or to negotiate a Municipal Access Agreement (MAA) with each telecom operating within their boundaries.

While intended to assist in the preparation of MAAs, this checklist can, of course, be used as a basis for drafting the provisions of a bylaw. Of course, both tools can also be used in a co-ordinated manner with a bylaw setting out default conditions in the absence of an agreement, for example.

In addition to the obvious elements of the MAA which would be found in most contracts (identification of the parties, date of the agreement, signatures, confidentiality provisions, notice provisions, severability of individual clauses, successors to the parties, dispute-resolution mechanisms, etc.), the following provisions are now commonly found in MAAs. Please note that the headings and contents are solely to indicate topics which, according to collective experience, should be covered by a comprehensive MAA.

Recitals – These provisions, which often begin with “Whereas...”, are not typically interpreted as binding on the parties, but are rather used to set out background information which will assist in the interpretation of the MAA itself.

Recitals can include information on the status of the parties, the purpose for which the MAA has been entered into, the general intent of the agreement (e.g., recognition of the requirement to obtain municipal approval, the need to access property without creating undue interference, keeping the municipality whole from a financial point of view) and the overall obligations of the parties.

Scope of Municipal Consent – The purpose of the agreement is to grant access to municipal property subject to the provisions of the MAA. The text should therefore specify the types of property which fall within the agreement (e.g., rights-of-way, bridges viaducts). In addition, it is preferable to indicate that the consent is not exclusive as other telecom operators are likely to also request access over time.

Conditions of Authorization – The MAA should set out, in detail, the permit process for new works or maintenance projects requiring excavation. This process can include:

- different categories of permits, depending on the nature of the work to be done;
- the type and nature of engineering plans to be filed;
- any other information required for proper right-of-way management (construction timelines, traffic flow

contingencies, etc.), including an open-ended stipulation in the form “such other information as the municipality may reasonably require.”

This section should also include a general prohibition against excavation or other types of entry onto municipal property unless the telecom has complied with all aspects of the permit process and the MAA generally.

Conduct of Work – Most MAAs include provisions specifying the manner in which the work, authorized by a permit, is to be undertaken. This can include stipulations as to:

- the supervision of the work;
- revisions to project timelines;
- inspections;
- removal of surplus material;
- minimizing disruptions to other users of the space.

Completion of Work and As-built Drawings – Once the work is completed, the municipality might require corrections or might have to undertake work itself in order, for example, to restore the area. Compensation to the municipality should be provided in such cases. Furthermore, telecoms should be required to file as-built plans within a specified timeframe (e.g., two months), failing which the municipality should not be held responsible for damage to the telecommunications equipment caused by its own projects.

Emergency Access – The regular conditions of access are typically waived in cases where the telecom must undertake emergency repair work. However, these provisions often include requirements for written notice with respect to the location, the scope of the work, and the reasons for the emergency. Notice is given, whenever possible, prior to undertaking the repairs. Many MAAs include provisions stipulating that if the number of emergency repairs exceed a set number, both parties will meet to establish a plan to reduce the number of emergencies. The goal is obviously to prevent too much work being undertaken under the guise of emergency repairs.

Routine Maintenance – Routine maintenance work which does not require excavation or breaching a roadway surface is sometimes excluded for the requirement to obtain a permit. However, requirements such as notice to the municipality are often imposed when maintenance work involves replacing above-surface equipment with larger pieces (e.g., switching consoles) or when the work requires the obstruction of an intersection. Some MAAs also include specific requirements for large-scale maintenance work (e.g., projects greater than 500 meters in length with a right-of-way).

General Conditions Applicable to Work by Telecoms – MAAs typically set out conditions applicable to all work carried out by the telecom, regardless of whether it involves the installation of new equipment, maintenance or emergency repairs. These conditions can include:

- conformity to all applicable statutes, bylaws and regulation (federal, provincial and municipal);
- completion of the work to the satisfaction of the municipality;
- conformity to sound engineering practices;
- specifications with respect to ductwork to be used (e.g., concrete casing);
- roadway restoration specifications (standards and authority of municipality to undertake such work at the telecom's expense if unsatisfactory);
- municipal authority to order the work to cease if a danger is identified.

Representations with Respect to State of Condition of Property –

It is important to stipulate that the municipality has made no representations with respect to the state or condition of the property covered by the MAA. Determining the suitability of any area used by a telecom should be entirely the telecom's responsibility.

Equipment Locates – The provision, to the municipality, of equipment locates in a timely fashion can be helpful, as well as mandatory registration with provincial authorities, where applicable.

Exchange of Emergency Contacts – Both parties should exchange and update lists of contacts.

Relocation of Equipment – It is highly recommended to include provisions which deal with scenarios where there is the need to relocate telecommunications infrastructure as a result of a project undertaken by the municipality or by a third party. These provisions do vary and are typically complex. (Please consult MAA examples found on the FCM website for more details.) Typically, these provisions deal with:

- notice requirements (by the municipality);
- allocation of costs (in accordance with the CRTC decisions or other mutually agreed upon terms);
- whether these provisions apply retroactively to all infrastructure already in place or only prospectively to equipment installed after the date of the agreement – best practices suggest that the predictability of including all infrastructure is preferable.

Insurance and Liability – Parties should apportion risk of losses resulting from the work undertaken by either party, as well as by the presence of the telecommunications infrastructure, as part of the MAA. Otherwise, provincial liability principles (tort law) will apply. These provisions often include specific insurance requirements.

Term of the Agreement – It is commonplace to see MAAs signed for an initial five-year term with one or two optional five-year renewal periods. Because negotiating a MAA can be time-consuming, shorter terms do not make it worthwhile to undertake the negotiations exercise.

Termination Provisions – The parties should determine what happens in the event the agreement is terminated. These provisions should deal with the continued presence or removal of equipment (especially unused pieces), unfinished remedial work, etc.

Remedies in Case of Default – MAAs now usually include various scenarios under which the telecom is deemed to be in default, along with the municipality's remedies in such cases. Defaults may include events such as arrears in payments or the failure to relocate equipment. (For more details, please consult the MAA examples found on the FCM website.)

Fees and Payments – Of obvious importance is the determination of the various fees to be charged. Many MAAs simply include a general requirement to pay fees in accordance with a Schedule attached to the agreement. This allows for the establishment of very detailed fee structures, in accordance with the "causal cost" recovery principles set out by the CRTC, including lost productivity, CPI increases and loading factors.

Security Deposits – It is common to require a telecom to provide a municipality with a Letter of Credit or other similar security prior to the commencement of excavation work. The amount should be enough to completely restore the area affected in case of default by the telecom.

Utility Co-ordination Committees – The MAA can be used to obtain a firm commitment, on the part of the telecom, to participate in local utility coordination committees and to fund part of their operation.

Third Party Provisions – As telecoms often rent out their own equipment to other parties, it is advisable to include a provision which compels the telecom to include certain provisions in its third-party agreements which protect the municipality's interests.

Environmental Responsibility – The MAA should provide that the municipality is not responsible for environmental hazards created by a telecom or its equipment.

Abandoned Equipment – The MAA should provide a notification requirement when a telecom abandons equipment. In such cases, it is advisable to include provisions which allow the municipality to compel the telecom to remove its equipment in order to prevent accidents and unnecessary costs.

Taxes and Utilities – Any costs related to taxes and utilities applicable to the telecom should remain the telecommunication provider's responsibility.

Occupational Health and Safety – For greater certainty, many MAAs include specific provisions relating to the telecom provider's obligations in the area.