Telecommunications and rights-of-way

A handbook for municipalities

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FCM FEDERATION OF CANADIAN MUNICIPALITIES FÉDÉRATION CANADIENNE DES MUNICIPALITÉS

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This handbook has been developed for FCM's municipal members. Information contained within the handbook reflects FCM's best understanding and is believed to be accurate at the time of preparation. The material contained in this document is for informational purposes only and is not intended to provide legal advice and should not be relied upon in that regard. Municipalities are encouraged to seek professional legal advice specific to the realities of each municipality. FCM accepts no responsibility for damages, if any, suffered by any party as a result of decisions made or actions based on this document.

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CONTENTS

Message from the FCM President

Municipalities actively support widespread access to telecommunications services, which helps drive Canada's prosperity through community development. For the last 25 years, FCM has also spearheaded a collective municipal response to changes brought about by the federal decision to open the telecommunications industry to market competition.

The challenge of managing municipal rights-of-way and keeping local taxpayers whole when working with carriers is not new. In fact, it was the very reason for the creation of FCM by its original members back in 1901. However, with the arrival of numerous new carriers, all vying for access to congested rights-of-way space, this work took on renewed urgency in 1993.

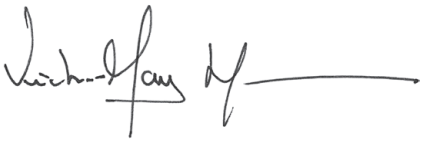
Thanks to the contributions of countless municipal staff and elected officials to FCM's Technical Committee on Telecommunications and Rights-of-Way—and with financial resources provided by members through the Legal Defense Fund that allowed FCM to intervene directly in a number of key legal cases—FCM played an important role in advancing municipal interests in this changing landscape.

Our collective efforts have resulted in a workable framework to manage relationships between municipalities and the telecommunications industry. While each relationship with a carrier is unique and should reflect local conditions, this revised edition of the Handbook provides FCM members with a thorough overview of the information they need and the concrete steps they can take to effectively safeguard their interests.

I wish to thank all those who have contributed to this undertaking over the last 25 years and to those who continue to do so. I also wish to

thank members for their financial contributions to the Legal Defense Fund, as well as members of the Legal Advisory Committee who play an objective oversight role in the management of the Fund. Without the Fund it would not be possible to bring the municipal perspective to the CRTC and the Courts.

As the telecommunications market continues to evolve and as new technologies and services emerge, FCM will continue to advocate for the interests of municipalities and the residents we serve.



Vicki-May Hamm
Mayor, City of Magog, Québec
President, FCM

Introduction

In 1993, the current version of the *Telecommunications Act*[1] came into force. The goal of the revamped Act was to introduce free-market competition in the Canadian telecommunications industry. Consumers and businesses would be able to choose from a variety of new services, new carriers and new technologies to meet their telecommunications needs.

For municipalities, the change had immediate and profound repercussions. Regional monopolies, the norm for nearly a century, would soon disappear. Instead of dealing with a single long-term partner, municipalities began struggling to respond to any number of new industry players, each demanding quick approvals in order to deploy their networks and begin making money. Installation of new infrastructure occurred at great speeds, often without municipal permits or plan approvals, increasing congestion in public rights-of-way and, at times, creating unexpected hazards in spaces that were already greatly used.

The dramatic increase in demand for right-of-way space resulted in increased costs (inspections, repairs, shortened roadway lifespan, workaround costs, other causal costs flowing from these new demands, 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 and public desire for these new services, became a delicate balancing act.

As local governments gradually adapted to this new environment, and tried to develop best practices, there were inevitable frictions with carriers. These led to a number of pivotal legal disputes. These legal decisions, combined with the collective experience of the last 25 years, have shaped the framework

1 Statutes of Canada, 1993, ch. 38

within which municipalities and carriers can best work together on issues of rights-of-way management.

Two key decisions handed down in 2016—one from the CRTC, and one from the Supreme Court of Canada—brought further clarity and certainty to a municipality's ability to negotiate the terms of access to municipal rights-of-way and influence the location of telecommunications infrastructure. At the time of writing, other cases are making their way through the Courts but, with the collective knowledge gained since the Handbook was first published, the time was right to provide FCM members with this updated edition.

The FCM Technical Committee on Telecommunications and Rights-of-Way

Since deregulation, 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, collective efforts on behalf of the municipal sector have been spearheaded by the Technical Committee on Telecommunications and Rights-of-Way.

With over 50 members—including engineers, infrastructure management experts and municipal lawyers—representing municipalities of all sizes from across the country, the Technical Committee has led national efforts by promoting information-sharing, fostering the development of best practices, assisting individual members in their legal battles against carriers, and raising the political and public profile of this issue. Without their invaluable contributions, the progress achieved over the last 25 years would not have been possible.

The FCM Legal Defense Fund

In 1997, FCM established a Legal Defense Fund to cover the legal costs of defending municipal jurisdiction over rights-of-way management. Since then, the scope of the Fund has evolved and is now a critical tool in advancing the national legal interests of municipalities in a broad range of cases that have implications for the municipal sector.

The Fund, which covers legal costs incurred by FCM in its role as intervener in active litigation files, has been instrumental in setting important legal precedents on key local issues. It is also used by FCM to obtain proactive legal opinions on emerging policy files of concern to local governments. The Fund is supported by FCM members on a voluntary basis.

Since its inception, the Fund has allowed FCM to bring the voice of the municipal sector to numerous cases. FCM was the Appellant to the Federal Court of Appeal in the landmark *Ledcor* case that established the principle that municipalities have the right to recover all incremental costs related to telecommunications activity on their land. FCM also intervened in early cases such as the Edmonton LRT tunnels as well as recent precedent-setting cases: next-generation access agreements (CRTC decision in *Hamilton v. Bell*), the applicability of general ROW bylaws to federal undertakings (Court of Appeal for Ontario in *Hamilton v. Canada Post*) and the use of bylaws to grant "consent" under the *Telecommunications Act*. (At the time of writing, this last matter is ongoing before the CRTC as well as the Courts of Alberta and Quebec, with FCM supporting the cities of Calgary and Gatineau.)

Further information on the Legal Defense Fund, can be found at FCM.ca

The FCM Handbook

After 25 years of discussions, litigation and negotiations, a number of best practices and guiding principles have emerged. There are still some grey zones left where FCM will continue to play an active role, but enough experience has been gained to make it worthwhile to provide a comprehensive update on how

municipalities can best protect the interest of their residents when setting terms of access to their property.

The purpose of this 2nd edition of the Handbook is to provide legal and public works staff of FCM members who work on rights-of-way and telecommunications issues with the most complete information currently available. The Handbook also suggests practical ways of developing the best working relationship possible with the telecommunications industry. Ultimately, the goal is to ensure that, while new services are being deployed locally, the presence of telecommunications infrastructure in rights-of-way does not translate into added costs or risks to municipalities and taxpayers.

The two-part structure of the Handbook is straightforward. **Part 1 is the body of the document**. It provides all the essential information any municipal official should know to effectively manage relationships with carriers. Part 1 is divided into five chapters:

- **Chapter 1: What you can and cannot do: Understanding the legal framework:** Grasping what the law says you can and cannot do to protect your municipality's interests is key to achieving the best outcome possible. Understanding the law also allows you to minimize the risks of getting caught up in costly litigation.
- **Chapter 2: Managing your relationship with carriers: Key considerations:** This chapter provides practical, concrete advice on how to engage with carriers.
- **Chapter 3: Negotiating your MAA: Checklist for municipal officials:** A comprehensive list of matters that you should consider including as part of your *ad hoc* permitting process or in your comprehensive access agreements with carriers.
- **Chapter 4: Where the dollar hits the road: Calculating recoverable cost items:** Whether you opt for entering into a comprehensive MAA or to simply issue *ad hoc* permits, the presence of carriers should not generate costs to your municipality. Understanding how the CRTC implements the "cost-neutrality" principle will ensure you keep your taxpayers whole.
- **Chapter 5: Responding to common implementation issues:** Once you agree on how telecommunications infrastructure will be deployed, you will likely run into issues on the ground. This chapter provides a list of common problems and advice on how to deal with them.

Part 2 of the Handbook provides you with a number of supplementary, detailed resources on specific aspects of managing relationships with the telecommunications industry. Part 2 is divided into five annexes:

- **Annex 1:** Glossary of key technical terms
- **Annex 2:** Calculating loading factors: Technical response from the CRTC
- **Annex 3:** Detailed summaries of key legal cases
- **Annex 4:** Antenna tower siting: ISED procedure and FCM-CWTA protocol template
- **Annex 5:** The model MAA and other access agreement examples

Chapter 1

What you can and cannot do: Understanding the legal framework

Broadly speaking, the business of telecommunications falls under federal jurisdiction but many of the "nuts-and-bolts" considerations relating to the physical installation of telecommunications infrastructure come under the authority of municipalities. This overlap in jurisdiction has been at the centre of several legal disputes over the years. As a result, the dividing line between what municipalities can and cannot do has become clearer.

Depending on your municipality's circumstances, you might decide to deal with the occasional request from a carrier through ad hoc or individual permits, attaching specific conditions to the permit. Alternatively, if you receive a number of requests, you might decide to negotiate long-term, comprehensive Municipal Access Agreements (MAAs) with carriers. Either way, it is important to understand a few basic notions about how the legal framework surrounding telecommunications operates. This will allow you to effectively protect your municipality's interests and reduce the risks of litigation.

Radiocommunications vs. telecommunications

As a preliminary note, municipal officials must keep in mind that although most of us consider telecommunications and radiocommunications as a single service—often provided by the same company—they are treated quite differently by the federal government. For example, cellular telephone services are considered "radiocommunications" while telephones using land lines, internet communications, fibre optics, cable, etc. are considered "telecommunications". From a practical perspective, the first step in responding to requests you might receive from the industry depends on this distinction.

Radiocommunications are governed by the *Radiocommunications* Act and the statute is applied by Innovation, Science and Economic Development Canada (ISED, formerly known as Industry Canada). The department's jurisdiction includes the placement of transmission antennas for various consumer and commercial applications such as cellular telephone services. The placement of transmission antennas is subject to the approval of ISED Canada and the approval process is set out in *Antenna Tower Siting* Procedure. (For more information on the Procedure, see Annex 4.)

The industry's desire to expand their wireless networks by the deployment of antennas (small cells and other infrastructure to deliver LTE, 4G, or the upcoming 5G networks) coupled with the public's desire for these new services means that the expansion of wireless networks is something that most municipalities will have to deal with at some point. However, because the legal framework for radiocommunications

Antenna siting: Triple role of municipalities

Municipal involvement in the deployment of radiocommunication antennas typically occurs in one of three ways:

a) **Municipality as property owner (or custodian)**: As a rule, carriers must obtain the consent of the property owner in order to place an antenna. Carriers do not have expropriation powers (the Minister can theoretically expropriate but there are no recent examples of this taking place). Therefore, if a carrier wishes to install an antenna on municipal property or infrastructure, it cannot proceed without municipal consent. In negotiating consent, a municipality should feel free to impose any reasonable conditions to safeguard its interests. Like other private property owners, municipalities typically receive rent from carriers for any antennas installed on their property.

b) **Municipality as land use planning authority:** In 2014, FCM was successful in advocating for regulatory amendments to the federal government's Antenna Siting Procedure that previously exempted certain antennas (notably towers under 15 metres in height) from public consultation requirements. While there is no statutory requirement to obtain municipal approval or planning consent, the updated federal procedure requires consultation with the municipality and the public on all commercial tower installations, regardless of height, and encourages active involvement of municipalities in the tower siting process (with limited exceptions). Innovation, Science and Economic Development Canada (ISED) retains the ultimate authority to approve or deny antenna siting application.

   In addition, FCM negotiated a comprehensive Antenna System Siting Protocol Template with the Canadian Wireless Telecommunications Association (CWTA). This template can be used to enter into agreements to complement the federal Procedure and reflect local considerations.

   More information on the Procedure and the Protocol Template is set out in Annex 4: Antenna Tower Siting: ISED procedure and FCM CWTA protocol template.

c) **Municipality as building code enforcement authority:** If a carrier wishes to attach a transmission antenna to an existing, privately owned building or structure, municipalities should feel free to require a Building Permit Application. The rationale for this requirement is the same as for any other change to an existing structure and FCM is of the view that this approach is constitutionally sound.

is quite different from the rules that apply to telecommunications, wireless issues are not typically addressed in MAAs. The installation of wireless infrastructure is typically authorized separately, and differently, than the wireline connections municipalities have dealt with in MAAs. In the context of radiocommunications, the measures you take will depend on which hat your municipality is wearing in the context of the specific application: whether as property owner, as land-use planning authority or as the entity responsible for the application of the local building code.

Furthermore, while "occupancy fees" (or rent) for access to municipal infrastructure is not permitted in the context of telecommunications (much more on this point later in the Handbook), ISED has indicated that municipalities can charge fees for the attachment of antennas to municipal infrastructure (such as lampposts, traffic signals, etc). However, there are some limitations. For example, in Ontario, the Ontario Energy Board imposes certain restrictions. Municipalities are therefore encouraged, before setting any fees to access or use municipal property, to confirm if there are any restrictions in this realm in their province.

Telecommunications: Essentially, everything other than transmission antennas is governed by the *Telecommunications Act* and the statute is applied by the Canadian Radio-television and Telecommunications Commission (CRTC). The key distinction in the case of telecommunications is that there is **an explicit statutory requirement to obtain municipal consent** under the Act. Municipalities can—and should—set the terms of this consent in such a way as to protect the long-term interests of their taxpayers and residents. Setting these terms involves understanding and respecting the following legal parameters.

The Constitution

According to the Constitution, telecommunications are under the jurisdiction of the federal government. In its landmark decision in the *Châteauguay* case,[2] the Supreme Court of Canada confirmed that this is an area of exclusive federal jurisdiction—in contrast with areas where federal and local regulations can coexist (e.g. to regulate the use of pesticides on private property). This characterization as an exclusive federal power limits a municipality's constitutional right to intervene directly in this area. That said, despite what some carriers might claim, **this does not eliminate municipal jurisdiction altogether**. From a **purely constitutional perspective**, here are the "do's and don't's"

The "don'ts"

Municipalities cannot use their legislative powers (adopt bylaws, establish procedures, etc.) to specifically or directly regulate telecommunications matters. A municipal bylaw can have incidental or indirect effects on telecommunications but cannot have, as a goal, to regulate this field of activity. Such direct actions will be deemed unconstitutional or *ultra vires* (outside municipal jurisdiction). Putting an inoffensive name on the bylaw is not enough to protect it. The Court will look at what it views as the **true objective** of the municipality's actions in order to determine whether or not these actions are constitutionally valid. In legal terminology, this is called the "pith and substance" test and represents the first step in any constitutional analysis.

Municipalities cannot incidentally or indirectly affect telecommunications undertakings in such a way as to interfere with core aspects of their operations. Once a bylaw (or other municipal action) has passed the "pith and substance" test, the analysis moves to the

2 Although the *Châteauguay* decision pertains to the siting of an antenna under the *Radiocommunications Act*, the Supreme Court made it clear that the decision **applies equally to telecommunications**. For a more thorough overview of the *Châteauguay* case and other Court and CRTC decisions that have shaped the legal landscape for municipalities, please consult Annex 3 to this Handbook.

effects of the bylaw. In areas of exclusive federal jurisdiction, even a valid bylaw (such as the one in the *Canada Post* case above) is constrained by constitutional law: a valid bylaw cannot "impair" essential operational aspects of a carrier's business. It is up to the Courts to determine what constitutes a "core aspect" of a carrier's business and whether it is "impaired" by the local regulation.

The extreme example would be a valid rights-of-way bylaw which completely prohibits the installation of telephone wires above all roadways. While the bylaw, in pith and substance, is valid *per se*, its effect could be considered as impairing an element that is essential to the carrier's business. In other words, forcing all wires to be systematically buried would likely be considered

"Pith and substance" – Concrete examples

1. **In *Châteauguay***, the municipality argued that its attempt to influence the location of a cellular telephone antenna was justified under its land use and general welfare powers. However, the Supreme Court ruled that the true objective, or the "pith and substance" of the expropriations, was not to regulate land use nor to protect the public. The Court characterized the City's real objective as an attempt to dictate the location of Rogers' transmission antenna, a matter which is exclusively under federal jurisdiction. As a result, the expropriation measures were invalid from the outset because they were *ultra vires* or outside the City's constitutional powers.

2. **In the *Canada Post v. Hamilton* decision**, the Court of Appeal for Ontario examined a Hamilton bylaw that purported to regulate the placement of all equipment within the City's road allowances. The bylaw required a permit for the installation of any equipment, including community mailboxes. Canada Post argued that Hamilton's objective the pith and substance of its bylaw was to regulate the placement of mailboxes and that, as a result, the bylaw was *ultra vires*. Hamilton argued that it was simply exercising its legitimate authority over rights of way. The Court sided with the City in this case. It concluded that the central objective of the City's bylaw was indeed to regulate and manage road allowances. Any effect on Canada Post was incidental to this valid objective and was no different than the effects on any other occupant of the road allowance. As a result, the bylaw was "in pith and substance" within the City's jurisdiction.

(Note: Hamilton ultimately lost its appeal because its bylaw – though valid – was in conflict with a federal regulation granting Canada Post the last word in locating mailboxes.)

cost-prohibitive for the carrier, which would constitute an "impairment" of a "core" aspect of its business and of the federal jurisdiction. This impairment is what renders the bylaw inoperative or inapplicable in this example.

However, it is important to remember that "impairment" means more than simply "affecting" the carrier. An inconvenience is not an impairment. So, while a general prohibition against overhead wires likely goes too far, a site-specific requirement to bury a wire, which certainly "affects" the carrier's business, likely does not create a constitutionally problematic "impairment". The municipality therefore enjoys some logistical leeway for site-specific issues.

The "do's"

The limitations described above are certainly significant but there is still enough constitutional room left for municipalities to protect their interests.

Municipalities **can adopt bylaws** (or policies, procedures, etc.) that affect telecommunications, as long as such bylaws meet all three of these criteria:

1. The bylaw is intended and actually operates as a bylaw **of general application**—e.g. a typical rights-of-way management bylaw that covers all users of the right-of-way in a similar way.
2. The bylaw **only** has **incidental or indirect** impacts on telecommunications matters. It is acceptable to impose parameters on carriers as long as these effects do not target carriers and are similar in nature and impact as those imposed on other entities that are subject to the bylaw.
3. The bylaw does not **"impair the core of the federal power"**. As mentioned above, *impairment* is a much higher bar than simply affecting or inconveniencing a carrier. A core aspect is something fundamental to the carrier's operations.

If these criteria are respected, a general bylaw that has an effect on carriers **is likely constitutionally valid**.

The *Châteauguay* decision settled this issue for the foreseeable future and the framework above describes the entire legal context with respect to *radiocommunications* (transmission antennas).

However, as far as *telecommunications* (the entire communications field except antennas) are concerned, it is essential to keep in mind that the constitutional framework is **only part** of the story. As set out below, these constitutional limitations are explicitly tempered by the federal *Telecommunications Act* which recognizes the necessary municipal role in managing infrastructure that, for the most part, is located within rights-of-way. In recognizing the municipal role, the *Telecommunications Act* prohibits carriers from deploying or maintaining their networks without **municipal "consent"** (a requirement which does not exist with respect to transmission antennas under the *Radiocommunications Act*).

The *Telecommunications Act*

Although, constitutionally, carriers enjoy a privileged position which makes them immune to *direct* attempts at local regulation, general municipal rules do still apply to federal undertakings within the limits explained above.

More importantly, Parliament has expressly limited this immunity by enacting the provisions of the *Telecommunications Act* set out below. Under the Act, carriers can only access municipal property **with the consent** of the municipality. Furthermore, the presence of carriers cannot "unduly interfere" with other users. It is these explicit statutory limitations that allow municipalities to dictate reasonable terms of access to their rights-of-way.

The most widely used way of granting consent and setting the terms of access to municipal rights-of-way is through the negotiation of a

mutually-acceptable comprehensive Municipal Access Agreement (or MAA). This Handbook focuses on this approach (see the **checklist** in Chapter 3).

Theoretically, however, consent and terms of access can also take the form of a bylaw. Only a handful of municipalities have opted for this approach and, in some cases the carriers have reacted by challenging the bylaws in Court. At the time of publication, cases involving Calgary (AB) and Gatineau (QC) are proceeding through the courts so the judicial response to this approach is still unknown but is being developed. (For a more detailed discussion on this approach, see the **Adopting a bylaw** section in Chapter 2.)

For municipal officials, these are the key sections of the *Telecommunications Act* that provide for a municipal right to refuse access to rights-of-way until terms of access have been agreed to by both parties:

> 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 CRTC for permission to construct it and the CRTC 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 CRTC determines.
>
> Applications by municipalities and other authorities
>
> 44. On application by a municipality or other public authority, the CRTC may
>
> (a) order a Canadian carrier or distribution undertaking, subject to any conditions that the CRTC 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 CRTC.

In practical terms, a number of CRTC and Court decisions[3] have interpreted these provisions. As an initial observation, it is worth noting that three types of municipal property have been treated differently by the CRTC and the Courts:

- **Titled municipal lands** (parks, community centres, city hall, etc.): There are very few specific decisions dealing with properties of this type but, typically, they are dealt with on an individual basis, taking into account the unique characteristics of each location.

3 See Annex 3 – Key Legal Cases – Detailed Summaries for a more complete overview of these decisions.

- **Other public places:** The Courts have given a fairly broad interpretation to this concept (e.g. the LRT tunnels in Edmonton were deemed to be "other public places" because the public circulated in them) but the CRTC and the Courts have systematically refused to apply general rights-of-way conditions of access to these spaces or to include them in general MAAs, again because of their unique nature.
- **Rights-of-way:** Access to rights-of-way is usually granted through blanket approvals, most often through a negotiated MAA. These specific conditions of access have been at the heart of most of the litigation since the deregulation of the carrier industry.

With respect to rights-of-way—but not the other types of property—the provisions of the Act have been read as establishing the following general framework:

- Carriers have the right to enter upon and remain on municipal land to build, maintain and operate their networks. As a result, municipalities cannot outright prevent the deployment of telecommunications infrastructure on their property. Such a prohibition would also be unconstitutional (it would impair the core of the federal power). However, this right is not absolute. It is subject to the two important conditions mentioned above:
- The activities surrounding the construction, operation and maintenance of a network on municipal property, including the right to occupy municipal land, cannot cause "undue interference" with the use and enjoyment of the space by others. Because it is set out in the Act, the CRTC itself is bound by this limitation. This provision can be used, for example, to justify site-specific mitigation measures or changes during plan approvals to prevent conflicts with other rights-of-way users.
- Construction, maintenance and operation of carrier infrastructure cannot take place without **prior** municipal consent.

The reality is that no matter how carefully a municipality tries to follow the legal framework set out above, there is always a chance that a dispute will arise. We now turn to how telecommunications disputes—which usually arise because of disagreements on the conditions of access set out by the municipality—are typically resolved.

The role of the CRTC

While avoiding litigation is certainly preferable, there will almost inevitably be disagreements on the conditions of access you will propose to a carrier, whether for an *ad hoc* permit or as part of a comprehensive MAA. It is common practice to turn to private dispute-resolution mechanisms as a first step. Indeed, many MAAs include such provisions, such as non-binding mediation or private arbitration, as initial steps to resolve a disagreement. (See more on this point in the **Resolving disputes** section of Chapter 2.)

If these processes do not lead to a successful conclusion, the formal body that has the mandate to adjudicate disputes with respect to the terms of access to municipal property (regardless of the property type) is the CRTC. Private dispute resolution alternatives cannot legally displace the CRTC's ultimate authority in this regard. Carriers and municipalities are therefore always free to proceed to the CRTC if they wish.

The grounds on which to file an Application to the CRTC are worded slightly differently for carriers and municipalities. Technically:

- carriers can apply to the CRTC when they are unable to reach an agreement with a municipality on the terms of access; and,
- municipalities can apply to the CRTC to prohibit the activities of a carrier who has not yet obtained municipal consent or to direct the planning of a specific transmission line.

In reality, however, the process followed by the CRTC is much the same regardless of which side files an Application. It is therefore useful to understand key aspects of the CRTC as it relates to rights-of-way management.

The CRTC is the federal entity mandated by Parliament with overseeing most aspects of telecommunications in Canada. From frequency spectrum to bandwidth management, from Canadian content rules to media ownership concentration, including internet and cell phone rates, the CRTC tackles some of the most visible and technically complex issues in the country. Given the technical knowledge and expertise required to fulfill its core mandate, most CRTC members have been drawn from various parts of the Canadian telecommunications industry: executives, lawyers, engineers, financiers, etc.

Although the Application process relating to rights-of-way access had been part of the statutory framework for decades prior to deregulation in 1993, disputes of this type had rarely—if ever—been brought to the CRTC during the era of regional monopolies. The one-on-one relationships between carriers and municipalities had been relatively simple to manage and, for the most part, these issues were not on the CRTC's radar when deregulation hit.
With the sudden flood of access disputes resulting from market competition, the CRTC faced a steep learning curve. In light of the CRTC's mandate and composition, the realities of the municipal sector were not well known to the CRTC. Early CRTC decisions felt biased in favour of the industry, with municipal stakeholders struggling to get their message across. The municipal sector responded in two ways:

- **The collective response:** Through the work of the FCM Technical Committee, and thanks to the resources provided by the FCM Legal Defense Fund, a number of sector-wide initiatives were undertaken. A dialogue was established with the CRTC in order to increase awareness of municipal realities, foresee future issues, and reduce the need for costly litigation. These multi-party discussions, as well as the later nomination of a former city councillor to the CRTC, all helped increase institutional awareness. FCM also intervened directly in a number of important legal cases. Over time, these efforts led to what is generally perceived as a greater understanding of legitimate municipal preoccupations and more balanced decisions with respect to the conditions of access to municipal rights-of-way.
- **The individual responses:** The second factor that allowed the CRTC to gain a better perspective is the quality of the arguments and evidence presented by individual municipalities appearing before the CRTC. By preparing strong, reliable data on various issues, individual municipalities were able to demonstrate the legitimacy of their arguments and positions, with each case building on the previous ones.

The result of these efforts has been a greater understanding, by the CRTC, of municipal realities. By and large, more recent CRTC decisions regarding the terms of access to municipal property have tended to be more balanced and reflective of legitimate municipal concerns.

Chapter 2

Managing your relationship with carriers: Key considerations

Choosing how to manage your relationship with carriers will depend on a number of local conditions and a few key considerations. Should you set out to negotiate a full-blown MAA? Or is an *ad hoc* permit process sufficient? Do you have the staff resources on hand to process applications or should additional resources be brought in? Should Council be involved? Can you set out certain basic requirements in a general bylaw?

While there is no standard answer to the questions above, collective experience over the last 25 years has shown that simply allowing carriers to install their equipment without notifying or consulting local authorities should not be the default approach.

If a municipality has not yet put in place any process by which carriers must first obtain approval before undertaking work within the municipality, experience has repeatedly demonstrated that every time a carrier breaks open a right-of-way, it invariably transfers costs to municipal taxpayers. Furthermore, if a municipality is not being consulted on the design and location of telecommunications infrastructure on public property, the risk of unexpectedly coming across carrier infrastructure when undertaking municipal works is dramatically increased. Poor practices of this type can obviously endanger the safety of workers on site and, if carrier services are disrupted, it can have an impact on businesses as well as public safety generally if emergency telecommunications are compromised. Unapproved works by carriers also has negative impacts on other users of the rights-of-way.

As you ponder how best to manage the presence of carrier infrastructure within your rights-of-way, here are some basic points to consider.

Creating an inventory of carriers 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 self-evident as this may seem, you might get some surprises. A number of new players have appeared since deregulation and several companies have been bought out or have merged over the years. Determining the list of who your current 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 their infrastructure (underground conduits, poles, etc.) with the carriers

In the case of incumbent companies who provided services within a municipality for decades prior to deregulation, it may be very difficult to obtain accurate records of old infrastructure. Experience has shown that these companies themselves have not always diligently maintained precise and reliable records. Even if horizontal alignments have been recorded, it is very rare for the carriers to have vertical alignments (depth or elevation) data available.

Informing council

Once you have a good idea of the situation on the ground, informing your 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. You will want to equip local politicians with the information they need should they be lobbied by carrier representatives—something which is almost inevitable.

Indeed, experience has shown that some carriers will react negatively when municipalities try to exercise their rights and will attempt to influence the decision at the political level. For example, a carrier might threaten to stop deploying new, state-of-the-art technology in your municipality if Council attempts to recover causal costs. Such tactics can sway some decision-makers. Consulting with other municipalities can help you debunk such threats.

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 fact, the application of a "user-pay" principle for the industry has been repeatedly endorsed by the CRTC and municipalities should not be afraid to hold their ground in order to protect the integrity of local taxpayers.

As indicated above, the other key argument for a minimal level of supervision by the municipality is that if telecommunications equipment is 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. There are also impacts to other users providing essential services such as water, gas, and sewer services. The financial cost of disrupting any of these services 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.

Negotiating a municipal access agreement (MAA)

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 uncommon to negotiate for a number of years before coming to an agreement. However, this should not deter municipalities from embarking on this process.

CRTC decisions now create a fairly clear framework for a number of key elements of any MAA. Unfortunately, this has not entirely stopped certain local representatives from pushing back, even on items that are well settled. Therefore, knowledge is definitely power in this context—hence this Handbook.

The guiding principles set out by the CRTC are reflected in the **MAA checklist** in Chapter 3 and these constitute a good starting point. It might also be useful to look through the Model MAA at Annex 5. The Model MAA was the result of a CRTC-sponsored process whereby carriers and the FCM set out common issues that can be treated in your own MAA. All of these suggestions contained in this Handbook reflect common practices and are certainly of great help in preparing your negotiating position but remember that these are only guides.

You should not hesitate in including any terms which might reflect unique local conditions. This is particularly true if, as you come to renew existing MAAs, your local experience dictates the need for additional provisions to safeguard your municipality's interest.

One of the central elements to any MAA is cost recovery. Keeping the taxpayer whole while telecommunications companies deploy their networks has presented a significant challenge.

Litigation tips

Even if you deploy best efforts and show good faith in negotiating with a carrier, you might end up in litigation before the CRTC either because the carrier files an Application or because you conclude, at your end, that the negotiations are deadlocked. If you need to prepare to litigate before the CRTC, here are a few things to keep in mind:

- The CRTC has an obligation to treat each dispute individually and rule on each case based on its own unique merits.
- Past case law can be used as a guide but will not supplant context specific determinations if you have supporting evidence.
- If you have well documented reasons for requesting a specific provision in your MAA, there is no reason not to insist on its inclusion.
- The Model MAA is only a resource document a fact that has been explicitly stated by the CRTC. It is not a default set of access conditions and there is no need to justify departing from its terms.
- The Handbook provides a good starting point to understand the law and how to argue for key conditions of access.
- FCM's Legal Defense Fund can potentially be of assistance if the dispute raises questions that affect the municipal sector more broadly. More information can be found at: **https://fcm.ca/en/about-fcm/membership/legal-defense-fund**

For more information, see the section on **Resolving disputes** below.

While not perfect, direction from the CRTC and best practices provide a reasonable degree of protection. Although this classification is not set in stone, **recoverable costs** are generally grouped in five categories:

1. plan review and inspection costs;
2. pavement degradation costs;
3. lost productivity costs;
4. relocation costs;
5. removal of abandoned equipment.

To these cost categories, **loading factors** and **inflation adjustments** are added—all of these elements are explored in detail in Chapter 4.

In addition to cost-recovery, **key elements of a typical MAA** include:

- provisions on the scope of the agreement (items covered or excluded—often referred to as the definition of "work" subject to the terms of the agreement),
- design approval process and requirements,
- performance requirements,
- insurance and liability provisions, and
- mechanisms to address non-compliance.

Key CRTC decisions: A quick overview

Three CRTC Decisions set out the framework for an effective cost recovery. While more details are provided in Chapter 4 and Annex 3, here is a very short summary to set out the context.

Ledcor v. Vancouver

This decision established the cost neutrality principle for municipalities and its key components. All incremental costs associated with a carrier's work or presence in the right of way can be recovered by municipality. However, the CRTC rejected the imposition of occupancy fees (rent) for public space.

MTS Allstream v. Edmonton

The *Telecommunications Act* gives the CRTC jurisdiction to set the terms of access to "highways and other public places". This decision was the first to interpret the phrase "other public places". This case also clarifies that cost neutrality allows municipalities to recover prospective, incremental costs from carriers, not the sunk costs of existing infrastructure.

Hamilton v. Bell

The CRTC approved a "next generation MAA" that includes compliance and penalty provisions. The CRTC also confirmed various cost recovery principles challenged by carrier. The decision also confirms that the conditions of access apply to all operations by the carrier (installation, maintenance, occupancy, etc.), not simply to the initial construction work.

The proper application of the Ledcor principles, along with the more recent clarifications provided in the MTSA and Hamilton/Bell cases incorporated into the **MAA checklist** found in Chapter 3 will help to mitigate costs for municipalities.

Adopting an access bylaw

As indicated earlier, municipalities have the theoretical ability to set terms of access to rights-of-way through the adoption of a bylaw. By way of reminder, this ability stems from the provisions of the *Telecommunications Act* in which Parliament constrained the relative constitutional immunity of carriers by explicitly requiring them to obtain **prior municipal consent** before accessing municipal land. Although this consent is usually given through a MAA, there is nothing in the Act preventing municipalities from setting out the terms of access—or granting consent—in a bylaw. In fact, the CRTC has expressly stated, in a number of decisions, that telecommunications companies must respect the provisions of all municipal bylaws.

Why can this option be attractive? Municipalities who have historically relied on the MAA route to set out the terms of their consent have grown frustrated with the protracted negotiation process which often ends up in litigation anyway. Even renewing long-standing agreements has proven challenging for some municipalities. Adopting a bylaw that sets out the terms under which a carrier can obtain the statutory municipal consent required to construct infrastructure and occupy municipal rights-of-way certainly provides a much quicker way to establish a working framework for all carriers that operate within a municipality.

Some municipalities have therefore opted to adopt a general bylaw setting out default terms of access in the absence of a bilateral MAA. Edmonton and Toronto have been relying on bylaws to set out the terms of access for some time and this approach has gone fairly smoothly. However, recent efforts by the City of Gatineau (in 2013) and as well as Calgary (in 2017) have been met with swift and angry responses by carriers.

Carriers immediately challenged the Gatineau bylaw in Quebec Superior Court arguing that it was unconstitutional. This legal challenge, started before the *Châteauguay* case was decided, was on hold for a number of years as Gatineau tried to negotiate a satisfactory MAA. Four years of negotiations did not produce an agreement and the matter was referred to the CRTC by Gatineau for resolution. At their end, the carriers reactivated the court challenge. Gatineau's bylaw was ruled to be unconstitutional at first instance and, at the time of writing, the matter is proceeding to the Quebec Court of Appeal at the request of the Attorney-General of Quebec. FCM has been granted Leave to Intervene and has filed a factum with the Quebec Court of Appeal on behalf of the municipal sector.

As far as the Calgary case is concerned, it was heard by the Court of Queen's Bench and a decision is pending. It is quite possible that the matter will be appealed by the losing side, regardless of the outcome.

Another grey zone is the role of the CRTC in resolving disputes in the presence of a municipal bylaw. Does the CRTC have the authority to overrule local legislation? The *Telecommunications Act* gives the CRTC the authority to set the terms of access where there is a disagreement but, from a legal perspective, deciding the validity of bylaw provisions has normally been the purview of the Courts.

These are fundamental questions for which there is no clear answer at this point but clarity will likely be achieved in the coming years as the legal disputes make their way through the Courts. In the meantime, municipalities should inform themselves as to the latest developments in deciding whether to adopt a bylaw and which provisions to include in their municipal access bylaw. FCM will be updating its website regularly with new developments by publishing addendums to this Handbook. Members of the Technical Committee are also a valuable resource for officials who wish to connect with colleagues with experience in this area.

Resolving disputes

Data, evidence and information sharing

For any CRTC litigation, a **key lesson** has emerged from the past 25 years of work: members have everything to gain by investing in **comprehensive and reliable data** gathering abilities. History clearly shows that compiling clear and convincing evidence (photos, permit aging data, compliance reports, etc.) is essential to supporting an argument for your desired conditions of access to local rights-of-way. The CRTC does not undertake its own research and relies heavily on the quality of the information a municipality can provide.

Furthermore, while disputes between individual municipalities and telecommunication companies can often feel like a battle between David and Goliath, experience has shown that information sharing can contribute greatly to protecting the interests of the municipal sector. In this light, FCM asks that you keep it informed of significant developments, especially if your municipality finds itself involved in litigation. FCM, and individual members of the Technical Committee can be a great resource to develop an effective strategy. Your situation may provide examples for other FCM member municipalities as well.

Private dispute resolution

Most municipalities who have put in place comprehensive access agreements have included private mediation or arbitration as an initial means of resolving disputes. There is no reason why this approach cannot be included in an *ad hoc* permit as well.

These private processes are typically much quicker, less formal and cheaper than turning to the formal processes offered by the CRTC. As such, they are an attractive option. However, it is important to note that the *Telecommunications Act* does not allow parties to exclude the jurisdiction of the CRTC (and of the Courts on appeal). Therefore, while practical, these tools can never close the door on the formal route as the ultimate recourse for either party.

Staff-assisted mediation

The first step of the "official" process, regardless of the type of dispute, is typically to go through a mediation assisted by CRTC staff. The Staff-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. (Details at: https://crtc.gc.ca/eng/industr/rddr/mediation.htm)

Short dispute-resolution process

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 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—negotiation, private mediation, CRTC-assisted mediation;
- 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.

4 Broadcasting and Carrier Information Bulletin CRTC 2009-38 – *Practices and procedures for staff-assisted mediation, final offer arbitration, and expedited hearings*. Link: https://crtc.gc.ca/eng/archive/2009/2009-38.htm

Full application to CRTC

i) Written proceedings

In the event of a deadlock relating to more complex issues, particularly if you are negotiating a MAA, either party can file an Application with the CRTC. For municipalities, this means applying under section 44 of the *Telecommunications Act* to request, for example, that a carrier "bury or alter the route" of its lines or "to prohibit construction" except as directed by the CRTC.

The CRTC does not have a very formal code of procedure. The Application will typically be in the form of a letter, accompanied by the arguments for the municipality's position, supported by a strong evidentiary record. Parties are allowed to respond to each other's submissions. It is not uncommon for the CRTC, after receiving initial submissions from all parties, to send out questionnaires seeking clarifications on various points.

At this stage of the proceedings, written interventions from other stakeholders are typically possible. If your municipality decides to file an Application—or finds itself facing an Application by a carrier—we strongly recommend notifying FCM. Individual members of the Rights-of-Way Technical Committee, as well as FCM itself, can provide suggestions and, if it is helpful, seek to intervene directly in the proceedings.

ii) Hearings

Any party can request a full hearing before the CRTC but the decision as to whether or not to hold a public hearing is entirely discretionary.

If the issue at play is not purely financial in nature but is limited in scope, either party can request an Expedited Hearing. The timelines for this process are much shorter than for regular hearings and allow the relatively 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 on a specific issue. Here again, the CRTC's decision is discretionary.

iii) Technical interpretations

A final option is requesting a staff-level interpretation of certain technical aspects. This can be a relatively quick and simple way of obtaining clarity on a term or a provision of a MAA. These interpretations are non-binding and, depending on the outcome, parties can choose to escalate the matter by filing an Application.

Appealing a CRTC decision

i) Internal appeal

Once the CRTC has communicated its decision, it is possible to file an internal appeal of the decision, in whole or in part, pursuant to section 62 of the Act. This internal appeal is called an *Application to Review and Vary* a decision.

In Telecom Information Bulletin 2011-214, the CRTC outlined the criteria it would use to assess review and vary applications. Specifically, the CRTC stated that applicants must demonstrate that there is substantial doubt as to the correctness of the original decision, for example due to (i) an error in law or in fact, (ii) a fundamental change in circumstances or facts since the decision, (iii) a failure to consider a basic principle which had been raised in the original proceeding, or (iv) a new principle which has arisen as a result of the decision.

If these criteria are met, an Application can be filed with the CRTC asking it to take a second look at any issue raised in the initial Application.

ii) Judicial appeal

Anyone wishing to challenge a decision of the CRTC made under either section 43 or 44 in court must apply for Leave to Appeal to the Federal Court of Appeal (FCA). The applicable timelines are set out in section 64 of the *Telecommunications Act*. Granting Leave is

discretionary, the decision of the FCA is final, and reasons for a refusal are not typically provided.

As a reminder, experience has shown that the chances of success on appeal are greater when a municipality can count on the support of the municipal sector and FCM. Prior to launching an appeal, we recommend you contact FCM or a member of the Technical Committee and that you review the information on the Legal Defense Fund (LDF) to see whether your case could receive support from the LDF. Information on the LDF can be found here: https://www.fcm.ca/home/membership/legal-defense-fund.htm

Chapter 3

Negotiating your MAA: Checklist for municipal officials

In order to set the conditions under which telecommunications companies may have access to rights-of-way (and, possibly, other municipal property), the most widespread approach is to negotiate a Municipal Access Agreement (MAA) with each carrier operating within your boundaries.

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. In addition, a Model MAA was developed under the auspices of the CRTC. This resource document can also give you a starting point for your reflection.[5] However, please note that the Model MAA left many provisions open because of a lack of consensus. These are likely the key issues where your own MAA will require the most attention during your negotiations with the carriers. The suggestions in this Handbook will be of assistance in developing your position. Keep in mind that the recent CRTC decision in Hamilton/Bell (incorporated in the checklist below) confirmed that the Model MAA is only a resource document.[6] This decision also provided guidance on many of the issues that had been left as outstanding during the Model MAA process.

Recitals: These provisions, which often begin with "Whereas…", are not typically interpreted as binding on the parties, but are instead 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 or the general intent of the agreement and can include:

- acknowledgment that municipal consent is required to access rights-of-way,
- recognition that access to rights-of-way must be undertaken without creating undue interference to all other users,
- recognition that it is the role of the municipality to reconcile competing demands on rights-of-way,
- the need to keep the municipality whole—no transfer of costs or risk as a result of carrier operations, and
- the overall obligations of the parties.

5 The Model MAA was developed through a CRTC Interconnection Steering Committee (CISC) process. This approach brought together FCM Technical Committee and industry representatives under the auspices of the CRTC. The full document is reproduced at Annex 5 of this Guide.

6 See CRTC Decision 2016-51 at para. 10.

Definitions and scope of municipal consent: The purpose of the agreement is to grant access to municipal rights-of-way (and perhaps certain other municipal properties if you so choose) subject to the provisions of the MAA. The text should therefore specify or define key aspects from the outset:

- the types of property which fall within the agreement (e.g. rights-of-way, bridges, viaducts);
- the type of work or activities subject to the agreement (e.g. installation, removal, construction, maintenance, repair, replacement, relocation, operation, adjustment or other alteration of carrier equipment);
- the fact that the agreement binds not only the carrier but also its agents, contractors, successors, etc.;
- a way of distinguishing between regular or normal activities from emergency activities as, typically, permit requirements are modified when unexpected emergency repairs are required.

In addition, it is preferable to indicate that the consent or agreement is not exclusive in any way as other carrier 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; it is common practice to exclude from permit requirements routine maintenance work by the carrier as long as the work does not involve excavation or physical disruptions to the right-of-way;
- the type and nature of engineering plans to be filed;
- any other information required for proper right-of-way management (construction timelines, contingencies for traffic flow, pedestrian access and parking, 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 carrier has complied with all aspects of the permit process and the MAA generally. Being able to withhold a permit in case of severe non-compliance can be a helpful tool.

Many MAAs refer to the fact that, for technical or planning reasons, the municipality can reasonably withhold permission or reject an application. Such an acknowledgment is often accompanied by a commitment to make good

Definition of "work"

Even though this matter has been treated explicitly by the CRTC, some carriers continue to try to limit the scope of MAAs by arguing that it can only apply to the initial construction of telecommunications infrastructure – not to its repair or ongoing presence in the rights of way. This is not the case.

As an example, here is the wording in the Hamilton Bell MAA approved by the CRTC that captures all aspects of the carrier's operations:

"Work" means, but is not limited to, any installation, removal, construction, maintenance, repair, replacement, relocation, operation, adjustment or other alteration of the Equipment performed by the Company, or on its behalf, within a Highway, including the excavation, repair and restoration of the Highways

faith efforts to propose alternatives when an application is rejected.

Scope of authorization: Although this might not be strictly necessary, it is common practice to include provisions that indicate that authorization under the MAA and the use or occupancy of municipal property does not create any registerable or opposable interests in the property. This is true of any entitlement to the rights-of-way by the telecommunication company, as well as any entitlement of the carrier's equipment by the municipality.

General conditions applicable to work by carriers: MAAs typically set out conditions applicable to all work carried out by the telecom, regardless of whether it involves the installation of new equipment, routine 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), and
- the municipality's ability to issue a stop-work order in certain circumstances (danger to the public, danger to workers, municipal need to access the site, etc.).

Conditions applicable to construction work and permits: Most MAAs include provisions specifying the manner in which the work is to be undertaken when it is subject to a permit application. This can include stipulations as to:

- the supervision of the work by the carrier or the municipality,
- the process to apply for revisions to project timelines,
- inspections by the municipality or its agents,
- safeguards in the public interest (e.g. signage and way-finding, protection of tree root systems, removal or concealment of graffiti, etc.),
- removal of surplus material, and
- ways of minimizing disruptions to other users of the space.

Municipalities should feel free to require high performance standards from the carriers including requiring professional sign-off on drawings, the level of detail required on plans, etc. Reference to industry or engineering standards can also be helpful.

Completion of work and as-built drawings: Once the work is completed, it is common practice to set out a number of additional requirements:

- notification that the work is complete,
- the municipality's ability to require corrections or to undertake work itself in order, for example, to restore the area if this has not been done to the municipality's standards or satisfaction—in keeping with the cost-neutrality principle, compensation to the municipality should be provided in such cases, and
- filing of as-built plans within a specified timeframe (e.g. two months) with any number of technical specifications (format, data shown on plans, etc.).

Cost-recovery: fees and payments provisions: Of obvious importance is the determination of the various fees to be charged for the permit application process and other work undertaken by carriers. 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.

For a complete review of typical cost-recovery provisions, please see Chapter 4: Where the dollar hits the road: Calculating recoverable cost items.

Emergency access: The regular conditions of access are typically waived in cases where the carrier 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 or as soon as reasonably possible. 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 without adequate planning control by the municipality.

Routine maintenance: Routine maintenance work which does not require excavation or breaching a roadway surface is sometimes excluded from 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. cabinets or pedestals) 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).

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 which a carrier proposes to use 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 a need to relocate telecommunications infrastructure as a result of a project undertaken by the municipality or by a third party.

Bill S-229

Bill S 229 is a private bill initiated in the Senate. It would create a federal underground infrastructure notification system that would require, among other things, operators of underground infrastructure that is federally regulated or that is located on federal land to register the infrastructure with a notification centre. Anyone undertaking excavation work could contact the centre for a locate request and the owner of the infrastructure would have to mark the relevant location on the ground.

At the time of writing, Bill S 229 has passed 3rd and final reading in the Senate. It was read the first time in the House of Commons in May 2017, and confirmed in October 2017 by the Speaker of the House that it could proceed through the consideration process of the House. At the time of writing, the bill had not progressed any further and its fate is far from certain.

Relocation is the most contentious issue due to the impact associated with the high costs to either the municipality or the telecom. It is highly recommended that readers familiarize themselves with the provisions described below, and the chronological order of events relating to the development of MAAs across Canada by reading through Annex 3. Many carriers still attempt to negotiate relocation cost provisions based on older, outdated CRTC decisions.

These provisions do vary and are often complex. The provisions typically deal with:

- notice requirements (by the municipality);
- allocation of costs between the carrier and the municipality (typically a sliding scale over a number of years, in accordance with the CRTC decisions or other mutually agreed upon terms);
- whether or not these provisions apply retroactively to all infrastructure already in place at the time of concluding the MAA or only prospectively to equipment installed after the date of the agreement—experience suggests that the predictability of including all infrastructure is preferable.

Performance-related provisions: As most carriers now call upon any number of contractors to perform their work, the quality of the work can vary tremendously, as can the responsiveness to deficiencies. In that light, experience has shown that setting out various scenarios under which the carrier is deemed to be in default, along with the municipality's remedies in such cases, is advisable. Defaults may include events such as arrears in payments or the failure to relocate equipment.

Setting out the consequences or remedies in cases of default is equally important. These can include:

- performing remedial work and invoicing the telecom,
- suspending the processing of permits until deficiencies are addressed,
- securing a standing letter of credit which can be used by the municipality to cover costs, and
- imposing financial penalties for delays, etc. On this point, in the Hamilton-Bell MAA, the CRTC stated that it would be inappropriate for a municipality to levy fines as these would constitute a type of bonus revenue beyond causal costs. However, the CRTC did acknowledge that some remedy for non-compliance was justified and, instead, used a letter of credit mechanism, creating a funding source that the municipality can access to undertake remedial work itself, but at the expense of the carrier.

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 for the carrier (e.g. vehicle insurance, blasting, etc.), and cross-indemnification.

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 often do not make it worthwhile to undertake the negotiations exercise.

Termination provisions: The parties should determine under which conditions the agreement can be terminated (e.g. insolvency, sale of the carrier, etc.) and what happens in

the event the agreement is terminated. These provisions should deal with the continued presence or removal of equipment (especially unused or abandoned pieces), unfinished remedial work, etc.

Security deposits: It is common to require a carrier 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. (see "Performance Related Provisions" above)

Utility coordination 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 carriers often rent out their own equipment to other parties, it is advisable to include a provision which compels the carrier to include certain provisions in its third-party agreements in order to protect the municipality's interests. In the absence of such provisions, the CRTC decision in Shaw v. British Columbia (2009-452) is helpful in that the CRTC refused to compensate the carrier that occupied the right-of-way without the owner's consent. (See Annex 3 for more details on this case.)

Environmental responsibility: The MAA should provide that the municipality is not responsible for environmental hazards created by a carrier or its equipment.

Abandoned equipment: The MAA should provide a notification requirement when a carrier abandons equipment. In such cases, it is advisable to include provisions which allow the municipality to compel the carrier to remove its equipment in order to prevent accidents and unnecessary costs. Some MAA's include a provision for the carrier to "make safe" abandoned equipment that the municipality allows to remain until future work allows for the removal of the equipment without impacting the roadway and/or other users.

Taxes and utilities: Any costs related to taxes and utilities applicable to the carrier should remain the telecommunication carrier's responsibility.

Occupational health and safety: For greater certainty, many MAAs include specific provisions relating to the carrier's obligations in the area, in accordance with a municipality's practices and provincial legislation.

Chapter 4

Where the dollar hits the road: Calculating recoverable costs

From the moment a carrier cracks open a right-of-way, a municipality begins to incur costs: the road structure will degrade faster than it would have otherwise, someone will have to inspect the work to make sure that the municipality is not at risk of liability, other users of the right-of-way might be affected, the municipality might lose parking revenue, etc. And once a carrier installs infrastructure, managing conflicts with other underground infrastructure can involve substantial "workaround" costs. For example, if telephone cables have to be supported while municipal crews access a watermain underneath it, the cost of the project might increase substantially.

While up-to-date telecommunications services are essential to any community, there is no escaping the fact that the more carriers operate in your municipality, the more costs will arise. Keeping municipal taxpayers whole is an essential function for any ad hoc permitting process or comprehensive MAA—and no aspect of the municipal-carrier relationship has been more litigated than cost recovery.

To protect your taxpayers, it is important to remember that the CRTC's central principle is **"cost-neutrality."** In other words, the presence of telecommunications infrastructure in public spaces should **not** transfer costs to local taxpayers. Therefore, the CRTC will allow municipalities to recover **all demonstrable "causal costs,"** that is to say costs attributable to a telecommunications company's project and presence as long as these costs are **prospective** (e.g. sunk costs relating to existing municipal infrastructure cannot be recovered) and **incremental** (e.g. fixed costs which form part of core municipal operations—such as running City Hall that cannot be logically attributed or apportioned to a carrier, cannot be recovered).

Recoverable causal costs include **all incremental costs**, including "workaround costs" that are generated by the **ongoing presence** of telecommunications infrastructure and any need to accommodate this presence each time municipal access is required. Carriers have argued that workaround costs should only apply to the initial construction of their infrastructure, a restrictive approach which has been clearly rejected by the CRTC.

The cost-recovery formula

Through key decisions such as *Ledcor*, *MTSA*, and *Hamilton*, the CRTC has given detailed direction on how to operationalize the cost-neutrality principle. The basic formula can be summarized as follows:

Directly billable fees, costs and lost revenues

Fees are the amounts charged for municipal processes such as permit applications, plan review, site/field inspections, etc. associated with a request by a carrier to undertake work.

Costs can arise in a number of ways:

- when a carrier decides to undertake construction work, triggering a permit process (permit application, plan review, inspection, remediation, etc),
- damage to the integrity of a roadway structure, shortening its lifespan,
- when the presence of telecommunications infrastructure adds complexity to a municipal project,
- when telecommunications infrastructure needs to be relocated as part of a municipal project, etc.

Similarly, construction by a carrier can cause **revenue losses** such as diminished parking meter income or a reduction in parking tickets issued in the affected area.

If these cost elements and lost revenues can be isolated, accurately calculated, and attributed to a telecommunications project, the municipality can **invoice these items directly to the carrier**. The CRTC indicated that such invoices should generally include the following information:

- a description of the costs being recovered;
- the location of the alignment of the infrastructure;
- 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 carrier;
- 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.

The specific costs and lost revenues items explicitly recognized by the CRTC are explored in greater details in the following pages of this chapter.

Loading factors

Even though additional costs (and lost revenues) related to the construction or the presence of telecommunications assets can be recovered through direct invoicing when these can be adequately itemized and calculated, there are several cost elements which are more difficult to quantify. The **loading factors** were created for this very purpose. They allow a municipality to recover a number of **smaller cost elements** through the **application of a percentage** increase to individual fees. In past

decisions, the CRTC has referred to **two distinct loading factors**.

- **Loading factor for miscellaneous causal costs:** There are any number of indirect and variable common costs which can appropriately be characterized as "causal" but which are difficult to quantify. These can be recovered globally through this first 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 to manage telecommunications projects can be recovered. (Please see Annex 2**: Calculating loading factors** for the elements Vancouver included as part of its loading factor in the MTSA case.) For the sake of administrative expediency, all these costs—which are not recovered otherwise through direct billing—are rolled into a single, comprehensive loading factor or **surcharge**. This **percentage multiplier** is applied to the items that are billed directly such as permit fees to determine the **total amount** payable by a carrier.

  To be clear, the CRTC has stated that the loading factor should be applied to **all cost-related charges**. This means that every cost-recovery item that is billed directly to a carrier can and should be augmented by the set percentage when invoiced. For example, the loading factor was set at 20 per cent in the MTSA case. This reflects the City's cost structure at the time and was consistent with its approach with other utilities. Therefore, a permit approval fee for a 15-metre project set at $650 would be subject to the loading factor, and the total amount actually charged to the carrier would come to $780 ($650 x 1.2). Another illustration would be the case where municipal crews have to be dispatched to reinstate something damaged by a carrier during its project. The cost can legitimately be billed directly to the carrier, and the total cost invoiced would include the direct cost of the crew plus 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.

- **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 a **second** loading factor to be **added to the permit approval fees**. In Ledcor, the loading factor for lost productivity was set at 15 per cent to be applied to the permit 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 was able to convince the CRTC to use a specific formula for lost parking meter revenues instead.

It has become common practice, in fact, not to expressly indicate the loading factor in the MAA as additional cost items, but to set out the various fees inclusive of the additional loading. In other words, the various fees set out in the MAA cover the actual, direct cost to the municipality plus the loading factor for smaller cost items.

Inflation and other cost increases

In negotiating a long-term, multi-year Municipal Access Agreement, it is recommended that year-over-year increases to the various fees—such as permitting fees, inspection fees,

etc.—be incorporated through reference to the local inflation or "consumer price index" increases. Local CPI is publicly available from Statistics Canada. For items such as pavement degradation costs and other construction-related costs, using the *Non-Residential Building Construction Price Index* will typically offer better long-term financial protection to the municipality as these costs often increase ag a greater rate than the general CPI.

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 during the life of the agreement (e.g., every five years) in order to appropriately apply any specific cost increases—above the CPI—that may occur (e.g. higher salaries, etc.). If parties cannot agree on new fee structures, they can, of course, apply to the CRTC for a ruling.

Recognized cost categories

The cost categories listed below are taken from past CRTC decisions and are generally found in most MAAs. These categories will allow you to populate the **cost-recovery formula** and make it reflect the reality in your municipality. The categories 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. The numbers provided in the illustrations are only examples. Real data from your municipality should be the factual standard used in setting the amounts to properly keep you whole. Real data will have to be provided to the CRTC should a disagreement on the fees arise.

Plan review and inspection costs

Generally speaking, these fees are meant to allow municipalities to recover the costs directly attributable to plan approval and site or field 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 and restoration work by municipal officials,
- ensuring compliance with trench restoration standards,
- ensuring compliance with timelines and traffic plans to minimize disruption to the public, and
- ensuring compatibility and coordination with the municipality's long-term construction workplans.

Base approval fees: It is commonplace to begin with a base fee calculation which distinguishes between smaller, relatively simple projects, and larger, more complex undertakings. For example, a base fee can be 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 $1500 for each type of application.

Per-metre approval fees: Per-metre fees are then 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 ($500 + (15m x $10)). The approval fee for a project of 65 metres in length would be $2,150 ($1,500 + ($65m x $10)).

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.

Pavement degradation costs

A road structure 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 compromized. Water will inevitably seep into the cut, even if properly repaired, leading to cracks, potholes, and the need to replace the roadway structure earlier than would have otherwise been the case. The effect of carrier road cuts on the lifespan of pavement is recognized by the CRTC and is recoverable.

Pavement restoration costs: Where the carrier does not perform the work to the reasonable satisfaction of the municipality, it 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 carriers would likely be rejected by the CRTC and might well be unconstitutional.

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—as opposed to later invoicing. 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 25 years	$20.00
over 25 years	$10.00

Note that this is only an illustration. Each municipality should feel free to base these recoverable fees on its own studies or methodology. In some cases, partnering with neighbouring municipalities might be helpful in order to share any costs associated with the development of these fees.

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. We remind you that this distinction is important as the CRTC treats these two categories differently with respect to the application of loading factors.

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 .

Transit delays: While the CRTC agrees that there are costs implications on public transit service when construction work is undertaken, determining the amount accurately can be difficult and disproportionately time consuming. Therefore, these causal costs are more frequently included in a "lost productivity loading factor".

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. Vancouver 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 allowed to calculate this volume and pass the cost on to Ledcor.

Workaround costs: Recognizing that telecommunications companies seek to minimize the expense of excavation and construction work when constructing their underground duct facilities, these ducts—typically consisting of PVC or other less rigid materials—are often located just 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 due to the need to support the telecom's infrastructure. It is now well established that workaround costs are to be 100% borne by the carrier. As indicated in the ***cost-recovery formula*** section of this chapter, these costs can be recovered through specific invoicing with the application 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 the gross income. In the MTSA case, two specific examples are examined:

- **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.
- **Lost parking ticket revenue:** While the CRTC did not reject the notion of recovering this loss in past decisions, it was not easily convinced that the City had presented a proper accounting of the loss. In the CRTC'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, for example, to recover under this heading.

Relocation and rehabilitation costs

Prospective relocation costs: 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 has indicated that the following factors should be taken into account when allocating relocation costs:

- who has requested the relocation (municipality, carrier 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 carrier's assets.

Over time, the CRTC has clarified that a sliding scale to apportion the costs between the parties is the preferred method to be used. The duration of the sliding scale has varied from case to case. In MTSA, the CRTC felt that carriers should finishing recovering its investment within a 10-year timeframe and the sliding scale was designed accordingly:

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

However, in the most recent Hamilton/Bell case, a 16-year timeline was established to reach the 0 mark for the municipality. It is too early to tell, at this point in time, whether this is the CRTC's preferred timeframe.

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 aesthetic purposes are typically placed on the city. However, defining what constitutes a purely aesthetic project remains a challenge as practically all projects include an aesthetic element.

Retrospective relocation costs: Typically, MAAs will only deal with telecommunications assets installed **after** the date of the first agreement. However, parties should also include provisions, in their agreement, to cover existing assets. A scale similar to the one set out for Prospective Relocation Costs could be used.[7]

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 carriers rebuild or upgrade their assets to modern standards, even though this work is not truly required in order for the project to proceed. The cost of these delays should be recovered from the carriers.

Abandoned rquipment costs: In applying its central cost-neutrality principle, the CRTC has endorsed the notion that costs associated with the presence and removal of abandoned equipment should be 100% borne by the carrier. This should be specified in the MAA, particularly with respect to providing for successor obligations when one carrier takes over the assets of another.

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 carriers. Although this issue might

7 Please note that, in Ontario, municipalities should consider the impact of the *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.

still arguably be considered as "outstanding", especially when one considers that carriers that own ducts located within rights-of-ways charge rent to other carriers who request to use their ducts, it is likely a lost cause.

Negotiation costs: The CRTC has refused to compensate municipalities for the time spent on negotiating MAAs with carriers. Despite the fact that, in some cases, these negotiations do require significant resources, the CRTC is of the view that allowing municipalities to recover these costs would reduce their incentive to come to an agreement in a timely fashion. However, as explained at the beginning of this chapter, once the agreement is in place, the on-going management of an active MAA is something which will typically be reflected 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 costs: 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 therefore attributable to the telecom's presence.

Chapter 5

Responding to common implementation issues

Reaching an agreement with the carriers is only part of your work. Experience has shown that there can be significant differences between what the carriers commit to and what actually takes place on the ground. This section provides you with some of the most common implementation issues you might encounter, as well as suggestions on ways to deal with these matters if they arise.

Common implementation issues

Site condition and temporary repairs or measures

Carriers—or more typically their sub-contractors—do not always leave an active site in optimal condition and, at times, the temporary measures put in place are problematic for a number of reasons, such as:

- trip hazards in or around the work area,
- improperly secured open excavations,
- undue impacts on access to area, pedestrian or vehicular traffic, and
- lack of final or permanent remediation long after a permit is issued.

Response times to municipal requests to address these issues can be quite long, creating ongoing frustration for the public.

Temporary drop lines

In order to respond quickly to a customer, carriers will, at times, install temporary overhead wires (through trees, attached to municipal light posts, etc.) prior to applying for a permit. Temporary lines will also be used during construction in order to maintain service while underground work takes place.

These lines are often attached to municipal light standards, traffic lights, trees and even private property without authorization. In addition, the lines are often at heights that can create hazards for some vehicles. Members of the public tend to react strongly to these installations and getting a carrier to respond to their complaints in a timely fashion can be challenging.

Poor quality of restoration or remedial work

Making sure that, once the carrier contractor leaves, the site is properly remediated can also be an issue. This will include things such as settlement, poor quality of the paving work and inadequate or neglected landscaping. As work generally occurs during the warmer months, soil is prone to further settling as time goes on. In addition, new landscaping is particularly vulnerable to the heat and dry conditions. However, carrier contractors will often abandon the new landscaping to its fate once they are done. Watering and replacement—if watering was not done—can often fall onto the municipality as public complaints will be inevitable.

Multiplication of pedestals and cabinets

Carriers will rarely share their installations with other carriers. In addition, a single carrier will often choose to install two cabinets at the same location for different services (i.e. copper line with fibre optic line pedestals). Municipalities do not have the ability to force the carriers to co-locate their pedestals, nor for requiring carrier facilities of one company to be combined, although the technology exists to do so. Managing the growth of these "pedestal farms" can be challenging and they are often viewed by the public as eyesores and nuisances.

Lack of response to maintenance requests

Pedestals and cabinets are often poorly maintained and are particularly vulnerable to vandalism. Some pedestals remain total wide open, rusted, and unrepaired for months, even when the company has been notified. Identifying which cabinet belongs to which carrier can be challenging as these installations are not always tagged or labeled. Carriers know what belongs to them but a municipal inspector might not be able to make that determination. This slows down the communication process and the time needed to address maintenance concerns.

Relocation delays

Getting carriers to relocate their equipment in a timely manner can be challenging. When a project includes the transfer of overhead wires from an existing set of poles to a new one for example, it is not rare to encounter long delays—even up to three years in some cases. The impacts on municipal projects can be significant.

Adjustment to manholes

Changes in the depth of manholes and underground vaults is a recurring issue in many places. As ground settles or as a municipality resurfaces the roadway or modifies the paving in other ways, the vertical location of manholes in relation to the roadway surface can become problematic. Getting timely responses to requests to address such issues can be difficult as these matters are not seen as priorities by carriers.

Improperly located installations

Whether above or below grade, telecommunications equipment might not be installed where it is supposed to be according to the permit or to as-built drawings submitted by the carrier or contractor. This can lead to conflicts with other utilities below grade and with municipal operations (such as snow plowing) above grade.

Solutions to address implementation issues

The suggestions below can help address a number of the issues listed above. Your own experience, and the relationship you will build with local representatives of the carriers, will help you assess how best to tackle the issues that emerge within your jurisdiction.

Building safeguards into your MAA and using them

Giving yourself the legal tools you need to keep the carriers to their word is the essential first step. Try to foresee potential issues in your own municipality and build safeguards for your municipality into the agreement. Use the ideas in this Handbook, consult with Technical Committee members and read through existing MAAs. Do not be shy about applying your MAA and technical requirements strictly.

As your experience develops, you might consider developing specific guidelines for things such as pedestal location, drop-line heights, etc. These guidelines can be developed with the industry and added to your MAA.

Utility coordination processes

Whether on an *ad hoc* basis or through a more permanent committee structure, meetings with local carrier representatives are a helpful

way to build relationships, reinforce public and municipal expectations as well as develop effective communication and response mechanisms. This is particularly helpful in building accountability into large-scale projects that require equipment relocation. It can also help in reducing clutter in the rights-of-way by combining installations.

Quantifying and recovering causal costs

Putting in place a simple mechanism to allow you to allocate costs to various projects or open permits is a helpful tool to keep your municipal taxpayers whole and to provide an incentive to carriers to respect the terms of the MAA. Municipalities should not be shy in quantifying and assigning costs in order to recover them from the industry, particularly when equipment relocation derails timelines for large projects.

Active inspection and enforcement

It might appear trite to say this but increasing the frequency of inspections at active permit sites is an effective way of identifying and addressing issues quickly and before they become a nuisance or a hazard to the public. Remember that these inspections are valid incremental causal costs that should be assigned to each permit and billed to the carriers.

Requiring installation identification

Making sure that all equipment is tagged or labelled so the proper carrier can be contacted quickly is a simple way to save time and money.

Keeping records

You will likely have to actively supervise any permits issued to carriers. The industry's heavy reliance on sub-contractors means that the quality of the work and of the management of the project site can vary considerably from one location to the next. Keeping accurate and complete records of communications and measures taken to respond to public complaints and to ensure compliance with the conditions of the permit will allow you to build a case for relief should you have to go to the CRTC. Reliable data will also allow you to exercize your rights under your MAA—assuming you included penalty provisions for non-compliance by the carrier.

Annexes

ANNEX 1

Glossary of key technical terms

The Handbook uses broadly-accepted terminology that has developed over the years of negotiation and litigation between municipalities and carriers. This section of the Handbook provides the meaning of key words and expressions for readers who are not familiar with them.

Causal costs: This term, established by the CRTC, serves as the foundation for cost-recovery by municipalities. In order to avoid placing a burden on local taxpayers, the CRTC has repeatedly stated that municipalities can legitimately recover all incremental costs that result from—or are "caused" by—the construction and ongoing presence of telecommunications infrastructure on municipal lands.

CPI increases: In multi-year Municipal Access Agreements (see definition below), it is recommended that year-over-year increases in the various fees—such as permitting fees, inspection fees, etc.—be incorporated through reference to the local inflation or "consumer price index" increases. Local CPI is publicly available from Statistics Canada. For items such as pavement degradation costs and other construction-related costs, using the *Non-Residential Construction Price Index* will typically offer better long-term financial protection to the municipality as these costs often increase at a greater rate than the general CPI.

CRTC (Canadian Radio-television and Telecommunications Commission): This federal body has a broad mandate under the *Telecommunications Act* to regulate all aspects of telecommunications. For our purposes, the CRTC plays a key role in adjudicating disputes between municipalities and carriers on the specific terms under which the carriers can access municipal property.

Ledcor principles: This expression refers to the central cost-recovery approach—including the fundamental *cost-neutrality principle* and various cost-recoverable items—set out by the CRTC in the *Ledcor* decision. In a nutshell, any incremental cost generated by the presence of a carrier in a municipal right-of-way can be recovered. Cost-recovery is fully canvassed in Chapter 4 and the CRTC decision itself is discussed in detail in Annex 3: Detailed summaries of key legal cases.

Model MAA: Under the auspices of the CRTC, FCM and industry representatives spent over a year establishing the framework for a *Model Municipal Access Agreement*. This Model MAA, approved by the CRTC, *is only intended as a non-binding resource document*—something which has been explicitly reiterated by the CRTC. Along with other samples available by contacting FCM (see Annex 5 for more information), the Model MAA can give you ideas on how to structure your own MAA but the CRTC document should not be considered as a starting point or a default position in negotiations with carriers, despite their possible representations to the contrary. You will also notice that the Model MAA contains a number of unresolved issues where the municipal sector and the industry was unable to agree. These are likely the key issues where your own MAA will require attention and where the suggestions in this Handbook will be of assistance.

Municipal access agreement: In order to enter upon and use municipal land (rights-of-way or any other property) for their purposes, carriers must obtain municipal "consent" under the *Telecommunications Act*. Entering into a Municipal Access Agreement with individual carriers is the most common way to grant "consent". Colloquially referred to as a MAA, these agreements between carriers and a municipality set out the conditions under which the carrier can obtain access to municipal rights-of-way. In other words, a MAA reflects the terms under which a municipality gives "consent". They do not typically provide blanket access to other municipal lands. This Handbook provides detailed advice on creating a MAA.

ANNEX 2

Calculating Loading Factors: Technical Response from the CRTC

City of Vancouver

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

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 CRTC 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 CRTC dated 28 September 2007 in Carrier 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.[8]

- 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.

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

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).

  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

ANNEX 3

Detailed summaries of key legal cases

This Annex provides a detailed summary of the landmark cases that have helped shape the environment within which municipal-carrier relationships operate. This section of the Handbook is intended to empower you with greater knowledge should you face a difficult industry partner, as well as the exact references should you wish to read the actual CRTC or Court decisions; these are all available on their respective websites by clicking on the links embedded in this Annex. The cases summarized in this Annex are:

- **Ledcor v. Vancouver** (CRTC Telecom Decision 2001-23) (link to full CRTC decision) (link to Federal Court of Appeal decision)
- **MTS Allstream v. Edmonton – Edmonton's LRT Tunnels** (CRTC Telecom Decision 2005-36) (link to full CRTC decision) (link to Federal Court of Appeal decision)
- **Toronto v. MTS Allstream** and **Calgary v. MTS Allstream** (CRTC Carrier Decisions 2005-46 and 2005-47) (links to the full Decision 2005-46 and Decision 2005-47)
- **Maple Ridge v. Shaw Cablesystems Limited** (CRTC Telecom Decision 2007-100) (link to full CRTC decision)
- **Baie-Comeau v. TELUS Communications Company** (CRTC Telecom Decision 2008-91) (link to full CRTC decision)
- **Wheatland County v. Shaw Cablesystems Limited** (CRTC Telecom Decision 2008-45) (link to full CRTC decision) (link to Federal Court of Appeal decision)
- **MTS Allstream v. Vancouver** (CRTC Telecom Regulatory Policy 2009-150) (link to full CRTC decision)
- **Shaw Cablesystems Limited v. British Columbia (Ministry of Transportation and Infrastructure)** (CRTC Telecom Decision 2009-462) (link to full CRTC decision)
- **Hamilton v. Bell** (CRTC Telecom Decision 2016-51) (link to full CRTC decision)
- **Rogers Communications Inc. v. Châteauguay (City)** (2016 SCC 23) (link to full Supreme Court of Canada decision)
- **Canada Post Corporation v. Hamilton (City)** (2016 ONCA 767) (link to full Ontario Court of Appeal decision)

For each case, the **significance** portion describes briefly why the decision is relevant (if and how it can be used in your work), the **dispute** describes the events leading up to the litigation as well as the issues at stake, while 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.

Ledcor v. Vancouver (CRTC Telecom Decision 2001-23) (link to full CRTC decision) (link to Federal Court of Appeal decision)

FCM actively participated in this dispute as an intervener.

Significance

Establishment of cost-neutrality principle for municipalities and its key components. Rejection of occupancy fees (rent) for public space.

In this landmark decision, the CRTC set out, for the first time, a number of principles to govern terms of access to municipal ROWs by carriers. The "*Ledcor Principles*", as they are now commonly referred to, have been refined in later decisions (covered in this Annex) but remain to this day as the foundations upon which to build MAAs. Central to the CRTC's approach is the notion of cost-neutrality for municipalities—the notion that carriers should cover all incremental costs created by their operations. However, Vancouver's request for occupancy fees—or rent—for the space was denied.

Dispute

In 1997, Ledcor Industries Limited (Ledcor) began construction of a fibre optic network in Vancouver. Negotiations on the terms of access to 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. Ledcor filed an application with the CRTC to obtain access.

Although, technically, this case was only about the conditions of access to the 18 intersections in question, the CRTC indicated that "*it expected that the principles developed in the proceeding may inform the CRTC's consideration of any disputes that may arise elsewhere*".[9] 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 to the municipality;
- 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 municipal access agreements in Vancouver not in dispute.[10]

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

9 Ledcor Decision at par. 9
10 Ledcor Decision at par. 10

Decision

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 only incidental and justified. The determination, where necessary, of the terms and conditions of use of municipal property was treated, by the CRTC, as part of the exclusive federal jurisdiction. Furthermore, the CRTC ruled that the *Telecommunications Act* gave it broad powers. 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.

Conditions of access – With respect to conditions of access and monetary compensation for Vancouver, the CRTC indicated that it was stopping short of recommending a standard MAA to serve as a starting point for discussions between municipalities and carriers. However, it explicitly anticipated that the principles established in this case would assist in future negotiations. The original set of "*Ledcor Principles*" set out how cost-neutrality is to be achieved. The lengthy guidance provided by the CRTC on these points is incorporated into the relevant portions of this Handbook.

Appeal

The CRTC's decision was appealed to the Federal Court of Appeal.[11] The appeal essentially challenged the CRTC's jurisdiction to adjudicate the dispute between Ledcor and Vancouver, in particular with respect to establishing generally applicable principles, and the specific 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 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 Ledcor. Despite this pronouncement by the Federal Court of Appeal, the "*Ledcor Principles*" are now widely referred to and applied by the CRTC.

With respect to the specific conditions, the Court found no errors in law and noted that, with respect to the denial of occupancy fees, the CRTC had only rejected the methodology proposed by Vancouver, not the principle itself. In practical terms, however, later attempts to recover occupancy fees have all been rejected.

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.

11 The exact citation is Federation of Canadian Municipalities v. AT & T Canada Corp. (C.A.) [2003] 3 F.C. 379

MTS Allstream v. Edmonton – Edmonton's LRT Tunnels

(CRTC Telecom Decision 2005-36) (link to full CRTC decision)
(link to Federal Court of Appeal decision)

FCM actively participated in this dispute as an intervener.

Significance

Definition of "other public places", clarification of cost-recovery principles (exclusion of sunk costs).

The *Telecommunications Act* gives the CRTC jurisdiction to set the terms of access to "highways and other public places". This decision was the first to interpret the phrase "other public places". The CRTC applied the "*Ledcor Principles*" to modify significant conditions of access upon renewal of an existing MAA, including by denying the ability to charge occupancy fees for the space.

This case also clarifies that cost-neutrality allows municipalities to recover prospective, incremental costs, not the sunk costs of existing infrastructure.

Dispute

In 1997, Edmonton and Allstream entered into 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, including the formula to calculate the ongoing fees payable to Edmonton.

After the publication of the Ledcor decision, Allstream insisted on using the Ledcor principles to negotiate a renewal agreement for the LRT tunnels. Edmonton rejected this approach and insisted on the continued application of the previous agreement. In June 2002, several months after the agreement had 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 Ledcor 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 seek new conditions of access.

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 jurisdiction 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 ruled that the tunnels constituted a "public place" for which the CRTC could rightfully set conditions of access. Even though public access to the tunnels could only occur by the traveling public within a LRT train, this was sufficient to satisfy the test established by the CRTC.

When the time came to set the conditions of access, every argument raised by Edmonton to justify recovering occupancy fees was rejected by the CRTC. The CRTC 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. In keeping with the "Ledcor Principles", Edmonton could only recover causal costs flowing from Allstream's presence. In this case, with very few costs directly attributable to the presence of Allstream's network very little could be recovered.

Appeal

Edmonton appealed to the Federal Court of Appeal.[12] The Court endorsed the criteria used by the CRTC to define a "public place", confirmed the conclusion that the LRT tunnels were public places and found no error in law in the CRTC's refusal to set occupancy fees as a condition of access. As the initial contract between Allstream and Edmonton had expired, Allstream was free to seek new terms by applying to the CRTC.

The Court did indicate that the CRTC had to consider each case on its own merits and could not, as a rule, refuse to grant occupancy costs. While the CRTC has never actually stated, in principle, that occupancy costs cannot be recovered, it has rejected every methodology put before it to calculate such 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.

12 Edmonton (City) v. 360Networks Canada Ltd. 2007 FCA 106

Toronto v. MTS Allstream and **Calgary v. MTS Allstream**
(CRTC Telecom Decisions 2005-46 and 2005-47)
(links to full Decision 2005-46 and Decision 2005-47)

FCM actively participated in this dispute as an intervener.

Significance

Two attempts by the carrier to renegotiate valid MAAs (rejected by CRTC) that underscore the importance of negotiating in good faith.

MTS Allstream attempted to reopen two existing MAAs in order to obtain better terms of access in light of the Ledcor decision, including removing the requirement to pay occupancy fees. The CRTC used the opportunity to indicate that it would examine the conditions under which a MAA was negotiated to ensure that it was not the result of duress or other forms of coercion. The MAAs were upheld in both these cases.

Subsequent decisions have supported municipalities that have taken firm but reasonable and factually defensible negotiating positions. Retroactive scrutiny and claims of duress are therefore not likely to be a significant risk if the record shows that negotiations are carried out in good faith and based on verifiable data.

Dispute

These two cases concerned an attempt by MTS Allstream to have the CRTC reopen and adjust two agreements entered into by Allstream (or its predecessor companies) prior to the decision in *Ledcor 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 make them consistent with the Ledcor principles, mainly by removing the requirement to pay licence fees to occupy municipal ROWs.

The CRTC ruled that the existence of a signed agreement was not conclusive proof that the parties had negotiated an agreement on terms satisfactory to the company. The CRTC decided that it would entertain requests to review the circumstances under which an agreement had been entered into in order 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.

Decision

The CRTC concluded, on the evidence, that both MAAs were legally binding. Those decisions were upheld by the Federal Court of Appeal in a one-page decision and Allstream's application for leave to appeal to the Supreme Court of Canada was dismissed.

Maple Ridge v. Shaw Cablesystems Limited
(CRTC Telecom Decision 2007-100) (link to full CRTC decision)

Significance

Further clarification of cost-neutrality methodology. First illustration of the CRTC's line-by-line approach to reviewing MAAs.

For the first time, the CRTC actually examined competing wording put forward by both parties for every provision of a proposed MAA and hand-picked clauses to create a MAA. This process has been repeated in other subsequent cases. Given this recurring approach, it has become crucial for municipalities to rely on accurate and comprehensive data to support the specific provisions they put forward.

This case also illustrates how, at this point in time, municipalities were still very much perceived as obstacles in the deployment of new telecommunications technology. It is safe to say that the CRTC's perspective on this point has evolved, to the benefit of the municipal sector, but genuine attempts to conclude negotiations in a timely fashion are to a municipality's advantage. This case is also a further example of the application of the cost-neutrality principle set out in Ledcor, mostly to the municipality's benefit.

Dispute

In 2005, Shaw 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 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. Shaw applied to the CRTC in March of that year to obtain conditions of access to ROWs within Maple Ridge.

Decision

In its ruling, the CRTC did not hide its impatience with Maple Ridge and with what the CRTC 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.*"

In its most detailed decision yet, the CRTC went through every disputed provision of the agreement and chose the specific wording to be used. The CRTC's preferences predictably aligned with the Ledcor principles but, despite its criticism of Maple Ridge, the provisions mainly ended up favouring the municipality. The cost-recovery elements of this decision are incorporated into the relevant sections of this Handbook.

Baie-Comeau v. TELUS Communications Company

(CRTC Telecom Decision 2008-91) (link to full CRTC decision)

FCM did not actively participate in this dispute but attended the hearing as an observer.

Significance

Case often used by carriers to argue for a more favourable relocation cost calculation. Case explicitly limited to the particular circumstances by the CRTC—not to be used as a model.

Who bears the cost of moving carrier equipment when the relocation is requested by the municipality for *bona fide* technical reasons is an important element of any MAA. For many years, the best practice had been to use a 5 to 10-year sliding scale which saw the municipal share gradually diminish to zero over the period.

This decision initially seemed to undermine the sliding scale approach by using a much less favourable and more complicated "useful life" amortization scheme. In fact, certain carriers systematically advocated for the "Baie-Comeau model" to obtain more advantageous terms in MAAs. Thankfully, in the recent *Hamilton v. Bell* decision (see below), this controversy has been put to rest and Baie-Comeau is clearly limited to its own particular set of facts and is not to be used as a guide for MAAs.

Of ongoing use for municipalities is the definition of "relocation costs" set out by the CRTC in this case.

Dispute

Baie-Comeau (Quebec) was undertaking the reconstruction of a major artery, including the replacement of old sewer and water mains which had begun to fail. TELUS had infrastructure (mainly ducts, lines and vaults) located directly above the municipal services. These had been installed when the City originally dug the trench in bedrock. Both parties had agreed on the technical aspects of the project but there was strong disagreement on the appropriate cost-sharing formula for the relocation. As is the case in many municipalities, there was no MAA in place in Baie-Comeau.

Baie-Comeau argued that TELUS' predecessor had knowingly decided to save money by installing its equipment in the same trench as the municipal services. 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 for the forced relocation.

TELUS was of the view that since Baie-Comeau was causing the relocation, it should 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 compensate TELUS for the residual value of the existing assets.

Decision

In its first and only decision of this kind, the CRTC began by stating 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.[13] 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.

Wheatland County v. Shaw Cablesystems Limited

(CRTC Telecom Decision 2008-45) (link to full CRTC decision) (link to Federal Court of Appeal decision)

Significance

Refusal, by the CRTC, to impose mandatory participation in a provincial locate system on a carrier. No other cases on this issue since then.

NOTE: As indicated in Chapter 3, the reader should enquire as to the status of Bill S-229 that aims to create a federal underground infrastructure notification system.

Wheatland County (Alberta) wanted to include mandatory participation by Shaw in the provincial Alberta One-Call service as part of its MAA requirements. 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. The CRTC declined to add this requirement and reopened a number of other provisions. A challenge, in the Federal Court of Appeal, to the CRTC's right to dictate matters that are not telecommunications issues as part of settling conditions of access was unsuccessful.

Dispute

When Wheatland County 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.

13 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.

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. 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. Shaw opposed this requirement insisting that the public use its own DigShaw line to make enquiries.

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.

Decision

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 CRTC favoured Shaw, including forcing Wheatland County to bear a greater share of future relocation costs.

With respect to the One-Call issue, the CRTC saw no reason to force Shaw to become a member of the provincial organization. In fact, the CRTC did not rule on the matter and simply left it up to the parties to come to an agreement, effectively allowing Shaw to veto Wheatland's request. The CRTC indicated that imposing this requirement "would be inconsistent with the CRTC'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.

Appeal

Wheatland County, with the support of FCM, appealed the decision to the Federal Court of Appeal, challenging the CRTC's jurisdiction over issues which are solely matters of safety and roadway management and are therefore not related to telecommunications.

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.

In its decision, the Federal Court of Appeal[14] confirmed the CRTC's jurisdiction to set all conditions of access to municipal rights-of-way and found that the decision not to impose participation in Alberta One-Call was reasonable in light of the evidence provided.

14 Wheatland County v. Shaw Cablesystems Limited, 2009 FCA 291

MTS Allstream v. Vancouver

(CRTC Telecom Regulatory Policy 2009-150) (link to full CRTC decision)

Significance

"Other public places" should not be treated as rights-of-way for access purposes. Many cost-recovery elements decided in favour of Vancouver. Clarification of loading factors and invoicing methodology to recover causal costs.

This is another seminal decision which reviews how the principle of cost-neutrality is to be applied in practical terms, rejects the automatic inclusion of "other public places" in the general conditions of access in the MAA, and speaks to the relationship between a general streets bylaw and a MAA. In many ways, this decision marks a turning point in achieving a better balance between municipal and industry interests. This progress was possible thanks to Vancouver's strong evidence and data and illustrates the fact that, with thorough preparation, it has become easier to demonstrate the legitimacy of a municipality's position. These useful elements of this decision are incorporated throughout the relevant sections of this Handbook.

Dispute

The City of Vancouver and MTS Allstream Inc. spent five years negotiating a comprehensive MAA. Although there was agreement between the parties on a number of issues, negotiations broke down and MTSA applied to the CRTC to set the conditions of access to rights-of-way as well as 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.

Decision

The CRTC found that it had broad 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 citywide MAA to "other public places." Applying general rules to different properties with unique characteristics was not desirable from the City's perspective. 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 bylaw and that it could use the bylaw to unilaterally amend provisions of the MAA. Vancouver responded that its bylaw 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."*

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.

Shaw Cablesystems Limited v. British Columbia (Ministry of Transportation and Infrastructure)

(CRTC Telecom Decision 2009-462) (link to full CRTC decision)

Significance

Carrier must bear the cost of relocating third-party infrastructure installed on its utility poles without the consent of the right-of-way owner.

Although it does not involve a municipality, this case is the only CRTC decision dealing specifically with the allocation of relocation costs for equipment installed by a third party on the poles of an authorized occupant of the right-of-way. The outcome is helpful in determining a municipality's position in similar circumstances: when a carrier with whom you have a MAA allows another person to "piggy-back" on its infrastructure (poles, pipes, conduits, etc.) without your consent and your relocation request generates costs for this third party. In short, municipalities are likely not liable for these costs.

Dispute

Shaw installed its cables on the poles of another utility along a provincial highway. When the province decided to widen the highway, and require the relocation of the poles and the cables they supported, Shaw refused to pay for the cost of relocating its infrastructure. The province invoiced Shaw for the cost of moving their wires to the new poles. The carrier paid but appealed to the CRTC, asking the CRTC to direct the Ministry to reimburse the amounts paid.

Decision

Interestingly, the CRTC ruled that since Shaw had not sought the consent of the province to install its equipment within the right-of-way, the "statutory precondition for the exercise of the CRTC's authority" had not been met. The CRTC concluded that Shaw's application did not engage the CRTC's jurisdiction and it denied Shaw's request directing the Ministry to refund the amounts paid to the province.

Hamilton v. Bell (CRTC Telecom Decision 2016-51) (link to full CRTC decision)

FCM actively participated in this dispute as an intervener.

Significance

Approval of "next generation MAA" by CRTC including compliance and penalty provisions. Confirmation of various cost-recovery principles challenged by carrier.

This decision marks the next step in the evolution of MAAs generally. During negotiations for the renewal of its long-standing MAA with Bell, Hamilton put forward a number of new provisions intended to deal with a long history of deficiencies and non-compliance by Bell and its contractors. Hamilton had accumulated a thorough record illustrating its rationale for the more stringent provisions and was able to have these "2nd-generation" provisions included (e.g. more onerous on-site supervision requirements; a comprehensive penalty mechanism for recurring deficiencies and incidents of non-compliance).

In addition, this case confirms or clarifies a number of cost-neutrality provisions as well as the fact that conditions of access apply to all carrier operations (installation, maintenance, occupancy, etc.), not simply to the initial construction work. These important elements are incorporated throughout the relevant portions of the Handbook.

Dispute

After a long history of non-compliance and recurring deficiencies by Bell, Hamilton attempted to include a number of more stringent provisions as it negotiated a renewal MAA with the telecom. Bell resisted these new provisions and attempted to revisit a number of fundamental cost-neutrality elements (workaround costs, relocation costs, abandoned equipment provisions) that, since Ledcor and MTS Allstream, had been considered by the municipal sector as settled law.

Bell went as far as to argue that the MAA could only set out conditions for the initial construction or installation of equipment but could not dictate conditions for later operations (maintenance, etc.).

Decision

After a considered analysis of the arguments—even the ones that seem to reopen settled issues—the CRTC reaffirmed the cost-neutrality approach and the application of MAAs to all carrier operations over time. In short, Hamilton was able to convince the CRTC of the rationale for all its requests and was successful on practically every point it put forward.

One of the few negative surprises was the fact that the CRTC imposed a much longer sliding scale to apportion relocation costs—moving to a 17-year timeframe before the municipality is entirely free of any relocation cost obligations. It is unclear if this longer timeframe will become the CRTC's preferred range as opposed to the shorter 7 to 10 year scales that are more commonplace.

Rogers Communications Inc. v. Châteauguay (City)

(2016 SCC 23) (link to full Supreme Court of Canada decision)

FCM actively participated in this dispute as an intervener.

Significance

Confirmation that telecommunications and radiocommunications are within the federal government's exclusive constitutional jurisdiction. Establishes constitutional framework within which municipalities must operate in these fields.

The dividing line between the federal jurisdiction over telecommunications and municipal authority has been one of the significant questions lurking in the background ever since deregulation began in 1993

In this 2016 decision, the Supreme Court of Canada provided fairly clear guidance on this matter. Although the Court severely restricted a municipality's outright constitutional ability to intervene in telecommunication matters, it did not close the door altogether. Furthermore, as set out in this Handbook, the conclusion on the limited constitutional ability does not negate the statutory rights set out in the *Telecommunications Act*.

Because of their central role in carrier operations, the key principles flowing from this case are set out in Chapter 1: Understanding the legal framework.

Context

Rogers applied to the federal government to install a cellular telephone within Châteauguay. As part of the consultation requirements for transmission antenna siting, Rogers consulted with the municipality.

Initially, Châteauguay consented to the application and issued a building permit. Federal authorities also issued the required permit. After strong public reaction, Châteauguay began discussions with Rogers in order to find a more acceptable location. Rogers maintained its preference for location A (which it had secured through a lease) but agreed that location B (preferred by the City) was technically acceptable and would be satisfactory if it could be made accessible quickly.

Châteauguay undertook expropriation proceedings at location B in order to make the land available to Rogers. The owner objected—as did Rogers, somewhat ironically. Rogers invoked the delay to proceed with the installation at location A. The City then proceeded to file a Notice of Reserve (akin to an expropriation) on location A. Rogers argued that the City did not have the constitutional authority to influence the location of a transmission antenna.

Decision

The Supreme Court of Canada agreed with Rogers' submissions. The Court ruled that radiocommunications, as well as telecommunications, were exclusively under federal jurisdiction. Significantly, the Court then characterized Châteauguay's interventions as measures truly intended to influence the location of the antenna (a federal matter) as opposed to land use or general welfare measures (a local matter). This characterization meant that the municipality's actions constituted an inappropriate foray into an area of exclusive federal jurisdiction and, as a result, these efforts were *ultra vires*—outside the municipality's constitutional jurisdiction.

Canada Post Corporation v. Hamilton (City) (2016 ONCA 767) (link to full Ontario Court of Appeal decision)

FCM actively participated in this dispute as an intervener.

Significance

Example of how municipalities can adopt bylaws that affect—even single out—federal undertakings as long as the object of the bylaw is a legitimate municipal purpose. This case also illustrates the notion of "conflict" between a local and federal rule, giving rise to the application of federal paramountcy.

This case is the first to deal with the applicability of municipal bylaws to federal undertakings in the wake of the *Châteauguay* decision above.

In this 2016 decision, the Ontario Court of Appeal provided a good illustration of the balancing act that courts must undertake between municipal and federal regulations. As long as a bylaw is enacted based on a proper municipal objective, the bylaw will be valid and applicable even if it singles out a federal undertaking.

Context

In light of the proposed large-scale deployment of community mailboxes (CMBs) by Canada Post (to replace door-to-door mail delivery), Hamilton decided to specifically extend the application of its general rights-of-way bylaw to include CMBs. Thousands of CMBs were slated to be installed in Hamilton and the initial wave had already created some conflicts with other ROW users.

Hamilton therefore instituted a number of measures to properly manage these new installations: a four-month moratorium on new CMBs, a $200 permit fee for each CMB, and the requirement to pay the first 500 permits upfront ($100,000) to allow the City to hire staff required to process the permit applications. The bylaw also contemplated the development of specific CMB guidelines with Canada Post during the moratorium period.

Decision

The Ontario Court of Appeal agreed with Hamilton's contention that the bylaw was validly adopted for municipal purposes. Even though the bylaw did affect—and single out—Canada Post (a federal undertaking), the "pith and substance" was a valid municipal purpose, namely managing the ROW.

Hamilton lost the Appeal on the final element of the constitutional test. The existence of a federal regulation indicating that the location of mailboxes was up to the federal Postmaster meant that the two rules—the ROW bylaw and the federal regulation—were in conflict. Two people could not have the final word on the location of CMBs. As a result, the federal regulation overrode Hamilton's bylaw.

Despite the loss on this final point, the rest of the decision provided broad recognition of a legitimate municipal role in regulating federal undertakings as long as the true objective was clearly municipal.

ANNEX 4

Antenna tower siting: ISED procedure and FCM-CWTA protocol template

The federal department of Innovation, Science and Economic Development (ISED) requires formal consultation with municipalities in their role as land-use planning authorities for most new antenna tower installations. The Procedure does provide for certain exceptions—installations for which no consultation is required—such as:

- certain modifications to existing antenna systems,
- non-tower antenna systems such as antennas attached to buildings, water towers, lamp posts, etc. (although municipalities can require building permit applications to ensure the continued integrity of structures when antennas are added), and
- temporary antenna systems.

The following excerpts from the ISED website provide you with an overview of the municipality's role. For the complete Procedure, including the exceptions set out by ISED, please consult the ISED website directly at:

http://www.ic.gc.ca/eic/site/smt-gst.nsf/eng/sf08777.html

> *Proponents must always contact the applicable land-use authorities to determine the local consultation requirements and to discuss local preferences regarding antenna system siting and/or design, unless their proposal falls within the exclusion criteria outlined in Section 6. If the land-use authority has designated an official to deal with antenna systems, then proponents are to engage the authority through that person. If not, proponents must submit their plans directly to the council, elected local official or executive. The 120-day consultation period commences only once proponents have formally submitted, in writing, all plans required by the land-use authority, and does not include preliminary discussions with land-use authority representatives.*
>
> *Proponents must follow the land-use consultation process for the siting of antenna systems, established by the land-use authority, where one exists. In the event that a land-use authority's existing process has no public consultation requirement, proponents must then fulfill the public consultation requirements contained in Industry Canada's Default Public Consultation Process (see Section 4.2).*
>
> *Industry Canada believes that any concerns or suggestions expressed by land-use authorities are important elements to be considered by proponents regarding proposals to install, or make changes to, antenna systems. As part of their community planning processes, land-use authorities should facilitate the implementation of local radiocommunication services by establishing consultation processes for the siting of antenna systems.*
>
> *Unless the proposal meets the exclusion criteria outlined in Section 6, proponents must consult with the local land-use authority(ies) on any proposed antenna system prior to any construction. The aim of this consultation is to:*

- *discuss site options;*
- *ensure that local processes related to antenna systems are respected;*
- *address reasonable and relevant concerns (see Section 4.2) from both the land-use authority and the community they represent; and*
- *obtain land-use authority concurrence in writing.*

Land-use authorities are encouraged to establish reasonable, relevant, and predictable consultation processes specific to antenna systems that consider such things as:

- *the designation of suitable contacts or responsible officials;*
- *proposal submission requirements;*
- *public consultation;*
- *documentation of the concurrence process; and*
- *the establishment of milestones to ensure consultation process completion within **120 days**.*

Where they have specific concerns regarding a proposed antenna system, land-use authorities are expected to discuss reasonable alternatives and/or mitigation measures with proponents.

As a complement to the official Procedure, FCM and the Canadian Wireless Telecommunications Association (CWTA) jointly developed an **Antenna system siting protocol template**. The Protocol provides municipalities with a tool to develop customized protocols for the siting of antenna systems within their municipality. As the template was developed jointly by the FCM and the CWTA, and is consistent with ISED rules on Antenna System consultations, its use should result in consistent and predictable Antenna System siting protocols.

The template encourages the development of local protocol guidelines that fully express a municipality's location and design preferences. It is desirable for protocols to highlight local knowledge and expertise by suggesting preferred sites in all zoning designations and community development plans, including in residential areas, as well as design and screening preferences. Additionally, all examples of local customization provided in the Template's Appendix are endorsed by the wireless industry as being reasonable and practical components of an antenna siting protocol. Some of these examples are better suited to urban, suburban or rural municipalities, but they serve as 'best practices' and should be considered by municipalities as they examine options for developing their own local protocols. Municipalities can simply remove all items from the template that are not relevant to its policies and preferences before finalizing its protocol.

The full Antenna System Siting Protocol Template can be found here:

https://fcm.ca/Documents/reports/FCM/Antenna_System_Siting_Protocol_Template_EN.pdf

More FCM information on antenna siting can also be found on fcm.ca.

ANNEX 5

The model MAA and other access agreement examples

The model MAA

To help you draft your own Municipal Access Agreement (or the conditions of an ad hoc permit if that is the process you choose to follow), you will find the **Model MAA** that was the result of a CRTC-sponsored negotiation process between the municipal sector and the telecommunications industry.

As you will note in the document, there are several areas—listed as **non-consensus items**—where it was not possible to reach a general agreement on best practices or approaches. It is therefore up to individual municipalities to determine what is required to protect their interests.

Although stated in the Handbook, it is worth repeating that the Model MAA is non-binding resource document. The Model MAA does **not constitute** a default set of provisions. There is no need to justify departing from these provisions if you have reasonable grounds to support your own position on fees and other conditions.

Other MAA examples

FCM will gladly provide you with actual MAAs from municipalities that are members of the Technical Committee upon request. These municipalities have developed a rich experience over the years and their comprehensive agreements can illustrate concretely the type of provisions that you might want to add to your own document. For reasons of confidentiality, these are not posted on the FCM website but will be emailed to you upon request.

MUNICIPAL ACCESS AGREEMENT

BETWEEN

THE MUNICIPALITY

AND

THE COMPANY

This model Municipal Access Agreement (MAA) is intended to be a non-binding resource document for use by municipalities and carriers when negotiating their own MAAs.

CRTC Decisions on Municipal Access

Ledcor/Vancouver – Construction, operation and maintenance of transmission lines in Vancouver, Decision CRTC 2001-23, 25 January 2001 (the "**Ledcor Decision**")

Part VII application by MTSA Corp. seeking access to Light Rail Transit (LRT) lands in the City of Edmonton, Telecom Decision CRTC 2005-36, 17 June 2005 (the "**Allstream - Edmonton Decision**")

Shaw Cablesystems Limited's request for access to highways and other public places within the District of Maple Ridge on terms and conditions in accordance with Decision 2001-23, Telecom Decision CRTC 2007-100, 25 October 2007 (the "**Shaw - Maple Ridge Decision**")

Shaw Cablesystems Limited's request for access to highways and other public places in the County of Wheatland, Alberta, Telecom Decision CRTC 2008-45, 30 May 2008 (the "**Shaw - Wheatland Decision**")

Application by the City of Baie-Comeau regarding the costs to relocate TELUS Communications Company's telecommunications facilities, Telecom Decision CRTC 2008-91, 19 September 2008 (the "Telus - Baie-Comeau Decision")

MTSA Inc. – Application regarding a Municipal Access Agreement with the City of Vancouver, Telecom Regulatory Policy CRTC 2009-150, 19 March 2009 (the "**Allstream – Vancouver Decision**")

Bell Aliant Regional Communications, Limited Partnership and Bell Canada – Application regarding access to municipal property in the City of Thunder Bay, Telecom Decision CRTC 2010-806, 29 October 2010 (the "**Bell – Thunder Bay Decision**")

TABLE OF CONTENTS

MUNICIPAL ACCESS AGREEMENT

This Municipal Access Agreement shall be effective as of the _____ day of _____, 20___ (the **"Effective Date"**).

B E T W E E N:

[NAME OF MUNICIPALITY]
(the **"Municipality"**)

- and -

[NAME OF COMPANY]
(the **"Company"**)

(each, a **"Party"** and, collectively, the **"Parties"**)

RECITALS

WHEREAS the Company is a "telecommunications common carrier" as defined in the *Telecommunications Act*, S.C. 1993, c.38 (**"Telecom Act"**) or "distribution undertaking" as defined in the *Broadcasting Act*, S.C. 1991, c.11 (collectively, a **"Carrier"**) and is subject to the jurisdiction of the Canadian Radio-television and Telecommunications Commission (the **"CRTC"**);

AND WHEREAS, in order to operate as a Carrier, the Company requires to construct, maintain and operate its Equipment in, on, over, under, across or along (**"Within"**) the highways, streets, road allowances, lanes, bridges or viaducts which are under the jurisdiction of the Municipality (collectively, **"Rights-of-Way"** or **"ROWs"**)[15] or other public places[16] as agreed to by the Parties;

AND WHEREAS, pursuant to section 43 of the Telecom Act, the Company requires the Municipality's consent to construct its Equipment Within the ROWs and the Municipality is willing to grant the Company a non-exclusive right to access and use the ROWs; provided that such use will not unduly interfere with the public use and enjoyment of the ROWs, nor any rights or privileges previously conferred or conferred after the Effective Date by the Municipality on Third Parties to use or access the ROWs;[17]

AND WHEREAS the Parties have agreed that it would be mutually beneficial to outline the terms and conditions pursuant to which the Municipality hereby provides its consent;

NOW THEREFORE in consideration of the mutual terms, conditions and covenants contained herein, the Parties agree and covenant with each other as follows:

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15 Rights-of-way can also be referred to as streets, highways, road allowances and alignments.
16 For a discussion of "other public places", see the Allstream - Edmonton Decision and the Allstream – Vancouver Decision.
17 Sections 43 and 44 of the Telecom Act set out the Company's and Municipality's basic statutory rights.

1. DEFINITIONS AND INTERPRETATION

1.1. Definitions.

(a) **"Affiliate"** means:

i. in the case of the Company, "affiliate" as defined in the *Canada Business Corporations* Act that is also a Carrier.

ii. in the case of the Municipality, a local board, agency or commission of the Municipality or a corporation which is partially or solely owned by, and is controlled by, the Municipality, and which has as a primary purpose, the management and maintenance of the ROWs.

(b) **"Emergency"** means an unforeseen situation where immediate action must be taken to preserve the environment, public health, safety or an essential service of either of the Parties.

(c) **"Hazardous Substance"** means any harmful substance including, without limitation, electromagnetic or other radiation, contaminants, pollutants, dangerous substances, dangerous goods and toxic substances, as defined, judicially interpreted or identified in any applicable law (including the common law).

(d) **"Equipment"** means the transmission and distribution facilities owned by the Company and its Affiliates, comprising fibre optic, coaxial or other nature or form of cables, pipes, conduits, poles, ducts, manholes, handholds and ancillary structures and equipment located Within the ROWs.

(e) **"Municipal Consent"** means the written consent of the Municipality, with or without conditions, to allow the Company to perform Work Within the ROWs that requires the excavation or breaking up of the ROWs (as more fully described in **Schedule B**).

(f) **"Municipal Engineer"** means the [●] of the Municipality or the individual designated by him or her.

(g) **"Municipality's Costs"** means the reasonable and verifiable costs and expenses of the Municipality, including the cost of labour and materials, plus a reasonable overhead charge of [●][18].

(h) **"Permit"** means a Municipal Consent or a Road Occupancy Permit or both.

18 Municipality's Costs are incurred in respect of activities the Municipality performs on behalf of the Company.

(i) **"Road Occupancy Permit"** means a Permit issued by the Municipality authorizing the Company to conduct Work that includes any activity that involves a deployment of its workforce, vehicles and other equipment in the ROWs when performing the Work (as more fully described in **Schedule B**).[19]

(j) **"Service Drop"** means a cable that, by its design, capacity and relationship to other cables of the Company, can be reasonably considered to be for the sole purpose of connecting backbone of the Equipment to not more than one individual customer or building point of presence or property.

(k) **"Third Party"** means any person that is not a party to this Agreement nor an Affiliate of either Party, and includes any person that attaches its facilities in, on or to the Equipment under an agreement with the Company.

(l) **"Work"** means, but is not limited to, any installation, removal, construction, maintenance, repair, replacement, relocation, operation, adjustment or other alteration of the Equipment performed by the Company Within the ROWs, including the excavation, repair and restoration of the ROWs.

1.2. **Recitals and Schedules.** The beginning part of this Agreement entitled "Recitals" and the following schedules are annexed to this Agreement and are hereby incorporated by reference into this Agreement and form part hereof:

Schedule A – Fees and Charges Payable by the Company
Schedule B – Permits Required by the Municipality
Schedule C – Relocation Costs

2. USE OF ROWs

2.1. **Consent to use ROWs.** The Municipality hereby consents to the Company's use of the ROWs for the purpose of performing its Work, subject to the terms and conditions of this Agreement and in accordance with all applicable municipal by-laws, rules, policies, standards and guidelines (**"Municipal Guidelines"**) pertaining to the Equipment and the use of the ROWs.

2.2. **Proviso.** Notwithstanding **Section 2.1** and any other provisions of this Agreement, to the extent that any of the Municipal Guidelines are inconsistent with the terms of this Agreement, the Company shall not be required to comply with such Municipal Guidelines.

2.3. **Scope of municipal consent.** The Company shall not, in the exercise of its rights under this Agreement, unduly interfere with the public use and enjoyment of the ROWs.

19 Not every municipality uses Road Occupancy Permits or similar type permits.

2.4. **No ownership rights.** The Parties acknowledge and agree that:

(a) the use of the ROWs under this Agreement shall not create nor vest in the Company any ownership or property rights in the ROWs; and

(b) the placement of the Equipment Within the ROWs shall not create or vest in the Municipality any ownership or property rights to the Equipment.

2.5. **Condition of ROWs.** The Municipality makes no representations or warranties as to the state of repair of the ROWs or the suitability or fitness of the ROWs for any business, activity or purpose whatsoever, and the Company hereby agrees to accept the ROWs on an "as is" basis.

3. PERMITS TO CONDUCT WORK

3.1. **Where Permits required.**

(a) Subject to **Section 3.2,** Work Within the ROWs by the Company is subject to the authorization requirements of the Municipality as set out in **Schedule B**.[20]

(b) For each Permit required above, the Company shall submit to the Municipality a completed application, in a form specified by the Municipality and including the applicable fee set out in **Schedule A.**[21]

(c) Subject to **Section 3.5,** the Municipality will issue the applicable Permits within ● days of receiving a complete Application, or such other time as agreed to by the Parties having regard to the complexity of the Work covered by the Application and the volume of Permit Applications before the Municipality at that time.

3.2. **No Permits for routine Work.**[22] Notwithstanding **Section 3.1,** the Company may, with advance notice as required by the Municipality's traffic management policies, but without first obtaining a Permit:

(a) utilize existing ducts or similar structures of the Equipment;

(b) carry out routine maintenance and field testing to its Equipment; and

(c) install and repair Service Drops;

provided that in no case shall the Company break up or otherwise disturb the physical surface of the ROW without the Municipality's prior written consent.

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20 Alternatively, the Municipality may want to refer to its permit by-law.
21 The Municipality may want to refer to its fees by-law instead.
22 This provision may be used if the Parties do not want to use Schedule B.

3.3. **Expiry of Permit.** In the event that the Company has not commenced construction of the approved Work associated with a particular Permit within [●] of the date of issuance of the Permit, and has not sought and received an extension to the Permit from the Municipality, which extension shall not be unreasonably withheld, the Permit shall be null and void. In such circumstances, any fees paid by the Company in respect of the expired Permit shall not be refunded and the Company must obtain a new Permit for the Work.

3.4. **Submission of plans.** Unless otherwise agreed to by the Municipality, the Company shall, prior to undertaking any Work that requires a Municipal Consent, submit the following to the Municipal Engineer:

(a) construction plans of the proposed Work, showing the locations of the proposed and existing Equipment and other facilities, and specifying the boundaries of the area within the Municipality within which the Work is proposed to take place; and

(b) all other relevant plans, drawings and other information as may be normally required by the Municipal Engineer from time to time for the purposes of issuing Permits.

3.5. **Refusal to issue Permits.** In case of conflict with any *bona fide* municipal purpose, including reasons of public safety and health, conflicts with existing infrastructure, proposed road construction, or the proper functioning of public services, all as identified in writing to the Company by the Municipality, the Municipality may request amendments to the plans referred to in **Section 3.4** or may choose to refuse to issue a Permit in accordance with **Section 3.1.**

3.6. **Temporary Connections.**

COMMENTARY

The Municipality may want to address the issue of temporary connections or Service Drops, including clauses that require that:

- wires and cables cross ROWs with adequate vertical clearance and do not lie on the ground;
- the temporary connection be removed within a reasonable time (e.g., the next construction season);
- the Company remedy any conditions deemed unsafe by the Municipality within a certain time; and
- the Company not cause any aerial trespass of adjacent or nearby properties.

3.7. **Restoration of the Company's service during Emergencies.** Notwithstanding **Section 3.1,** in the event of an Emergency, the Company shall be permitted, provided that the Company gives notice to the Municipality as soon as reasonably practicable, to perform such remedial Work as is reasonably necessary to restore its services without complying with **Section 3.1;** provided that the Company does comply with **Section 3.1** within five (5) business days of completing the Work.

3.8. **Temporary changes by Municipality.** Notwithstanding any other provision in this Agreement, the Municipality reserves the right to set, adjust or change the approved schedule of Work by the Company for the purpose of coordinating or managing any major events or activities, including the restriction of any Work during those restricted time periods; provided however, that any such adjustment or change shall be conducted so as minimize interruption to the Company's operations. The Municipality shall use its commercially reasonable efforts to provide to the Company forty-eight (48) hours advance written notice of any change to the approved schedule of Work, except that, in the case of any Emergency, the Municipality shall provide such advance notice as is reasonably possible in the circumstances.

3.9. **Security.**

> COMMENTARY
>
> This Article sets out the circumstances in which a security deposit may be required of the Company.

4. MANNER OF WORK

4.1. **Compliance with Applicable Laws, etc.** All Work shall be conducted and completed to the satisfaction of the Municipality and in accordance with:

(a) the applicable laws (and, in particular, all laws and codes relating to occupational health and safety);

(b) the Municipal Guidelines;

(c) this Agreement; and

(d) the applicable Permits issued under **Section 3.1.**

4.2. **Stoppage of Work.** The Municipality may order the stoppage of the Work for any *bona fide* municipal purpose or cause relating to public health and safety or any circumstances beyond its control. In such circumstances, the Municipality shall provide the Company with a verbal order and reasons to stop the Work and the Company shall cease the Work immediately. Within two (2) business days of the verbal order, the Municipality shall provide the Company with a written stop work order with reasons. When the reasons for the Work stoppage have been resolved, the Municipality shall advise the Company immediately that it can commence the Work.

4.3. **Coordination of Work.** The Company shall use its reasonable efforts to minimize the necessity for road cuts, construction and the placement of new Equipment Within the ROW by coordinating its Work and sharing the use of support structures with other existing and new occupants of the ROWs.

4.4. **Utility co-ordination committee.** The Company shall participate in a utility co-ordination committee established by the Municipality and contribute to its equitable share of the reasonable costs of the operation and administration of the committee as approved by such committee.

4.5. **Emergency contact personnel.** The Company and the Municipality shall provide to each other a list of 24-hour emergency contact personnel, available at all times, including contact particulars, and shall ensure that the list is kept current.

4.6. **Emergency work by Municipality.** In the event of an Emergency, the Municipality shall as soon as reasonably practicable contact the Company and, as circumstances permit, allow the Company a reasonable opportunity to remove, relocate, protect or otherwise deal with the Equipment, having regard to the nature of the Emergency. Notwithstanding the foregoing, the Municipality may take all such measures it deems necessary to address the Emergency and otherwise re-establish a safe environment, and the Company shall pay the Municipality's Costs that are directly attributable to the Work or the presence of the Equipment in the ROWs.

4.7. **"As-built" drawings.** Where required by the Municipality, the Company shall, no later than [● days] after completion of any Work provide the Municipal Engineer with accurate "as-built" drawings, prepared in accordance with such standards as may be required by the Municipal Engineer, sufficient to accurately establish the plan, profile and dimensions of the Equipment installed Within the ROWs. Such drawings shall only be used for the purposes of facilitating the Municipal Engineer's conduct of planning and issuance of Work permits. The "as-constructed" drawings must be protected through reasonable measures and must not be shared beyond those who require it for the purposes described above, nor must they be used for any other purpose or combined with other information.

4.8. **Where Equipment is located incorrectly.** Where the location of any portion of the Equipment in a ROW is located outside a distance of [●] horizontally (centre-line to centre-line) from the location approved in the Permit or as shown on the as-built drawings (as accepted by the Municipality) and, as a result, the Municipality is unable to install its facilities Within the affected ROWs in the manner it expected based on the Permit or as-built drawings (the **"Conflict"**), the following shall apply:

NON-CONSENSUS – To be negotiated

4.9. **Agents and Sub-contractors.** Each Party agrees to work with the other Party directly to resolve any issues arising from any the acts, omissions or performance of its agents and sub-contractors.

5. REMEDIAL WORK

5.1. **General.** Following the completion of any Work, the Company shall leave the ROW in a neat, clean, and safe condition and free from nuisance, all to the satisfaction of the Municipality. Subject to **Section 5.5,** where the Company is required to break or otherwise disturb the surface of a ROW to perform its Work, it shall repair and restore the surface of the ROW to substantially the same condition it was in before the Work was undertaken, all in accordance with the Municipal Guidelines and to the satisfaction of the Municipal Engineer.

5.2. **Permanent Road Restoration.** If the Company has excavated, broken up or otherwise disturbed the surface of a ROW, the requirements for the Company completing the road restoration work will vary depending on if and when pavement has been recently repaved or overlaid, as follows:

(a) if pavement has been repaved or overlaid during the five-year period immediately prior to the date of issuance of the Permit, then the Municipality may require that the Company grind and overlay the full lane width of pavement in the ROW;

(b) if pavement has been repaved or overlaid during the two-year period immediately prior to the date of issuance, then the Municipality may require that the Company grind and overlay the full width of the pavement in the ROW;

(c) in either **subsections (a)** or **(b)** above, if Third Parties, including the Municipality as a carrier of services to the public, has excavated, broken up or otherwise disturbed the pavement to be ground and overlaid, the costs of that grind and overlay will be apportioned between the Company and the Third Parties on the basis of the area of their respective cuts;

(d) the Municipality will not require grind and overlay under **subsections (a)** or **(b)** above for road restoration work involving:

i. service connections to buildings where no other reasonable means of providing service exists and the Company had no requirement to provide service before the new pavement was placed;

ii. Emergencies; and

iii. other situations deemed by the Municipal Engineer to be in the public interest; and

(e) if the Municipality has required the Company to grind and overlay under either **subsections (a)** or **(b)** above, the Company will have no obligation to pay Pavement Degradation fees under **Schedule A** in relation to that pavement.

5.3. **Temporary repair.** Where weather limitations or other external conditions beyond the control of the Company do not permit it to complete a final repair to the ROW within the expected period of time, the Company may complete a temporary repair to the ROW; provided that, subject to **Section 5.5,** the Company replaces the temporary repair with a final repair within a reasonable period of time. All repairs to the ROW by the Company shall be performed in accordance with the Municipal Guidelines and to the satisfaction of the Municipality.

If a temporary repair gives rise to an unsafe condition, then this shall be deemed to constitute an Emergency and the provisions of **Section 4.6** shall apply.

5.4. **Warranty for repairs.** The Company warrants its temporary repair, to the satisfaction of the Municipality until such time as the final repair is completed by the Company, or, where the Municipality is performing the final repair, for a period of two (2) years or until such time as the final repair is completed by the Municipality, whichever is earlier. The Company shall warrant its final repairs for a period of two (2) years from the date of their completion.

5.5. **Repairs completed by Municipality.** Where:

(a) the Company fails to complete a temporary repair to the satisfaction of the Municipality within [●] of being notified in writing by the Municipality, or such other period as may be agreed to by the Parties[23]; or

(b) the Company and the Municipality agree that the Municipality should perform the repair,

then the Municipality may effect such work necessary to perform the repair and the Company shall pay the Municipality's Costs of performing the repair.

23 This time period may be negotiated between the parties. A common time period used is 72 hours.

6. LOCATING FACILITIES IN ROWs

6.1. **Locates.**[24] The Company agrees that, throughout the Term it shall, at its own cost, record and maintain adequate records of the locations of its Equipment. Each Party shall, at its own cost and at the request of the other Party (or its contractors or authorized agents), physically locate its respective facilities by marking the ROW using paint, staking or other suitable identification method (**"Locates"**), under the following circumstances:

(a) in the event of an Emergency, within two hours of receiving the request or as soon as practicably possible, following which the requesting Party will ensure that it has a representative on site (or alternatively, provide a contact number for its representative) to ensure that the area for the Locates is properly identified; and

(b) in all other circumstances, within a time reasonably agreed upon by the Parties.

6.2. **Provision of Mark-ups.** The Parties agree to respond within [●] days to any request from the other Party for a mark-up of municipal infrastructure or Equipment design drawings showing the location of any portion of the municipal infrastructure or Equipment, as the case may be, located within the portion of the ROWs shown on the plans (the **"Mark-ups"**), and shall provide such accurate and detailed information as may be reasonably required by the requesting Party.[25]

6.3. **Inaccurate Locates.** Where the Company's Locates do not accurately correspond with either the Mark-ups or physical location of the Equipment, and as a result, the Municipality is unable to install its facilities Within the affected ROWs in the manner it expected based on the Locates provided by the Company (the **"Error"**), the following shall apply:

NON-CONSENSUS – To be negotiated

7. RELOCATION OF PLANT

7.1. **General.** Where the Municipality requires and requests the Company to relocate its Equipment for bona fide municipal purposes, the Municipality shall notify the Company in writing and, subject to **Section 7.3,** the Company shall, within ● days thereafter or such other time as agreed to by the Parties having regard to the schedules of the Parties and the nature of the relocation required, perform the relocation and any other required and associated Work.

24 This section may need to be amended to reflect procedures for providing locates that have been established by provincial legislation.
25 Parties to negotiate time (15 days is suggested).

7.2. **Municipality's efforts.** The Municipality will make good faith efforts to provide alternative routes for the Equipment affected by the relocation to ensure uninterrupted service to the Company's customers. Once the Company has provided the Municipality with all information the Municipality requires to enable it to process a Permit application, the Municipality shall provide, on a timely basis, all Permits required to allow the Company to relocate the Equipment.

7.3. **Reimbursement by Municipality for the Company's Relocation Costs.** The Municipality shall reimburse the Company for all or part of its reasonable and verifiable costs of completing a relocation requested by the Municipality (the **"Relocation Costs"**) based upon the principles, methodologies and procedures set out in **Schedule C**.

8. FEES AND OTHER CHARGES

8.1. **General.** The Company covenants and agrees to pay to the Municipality the fees, charges and Municipality's Costs in accordance with this Agreement, including the fees and charges set out in **Schedule A**.[26]

8.2. **Invoices.** Unless expressly provided elsewhere in this Agreement, where there are any payments to be made under this Agreement, the Party requesting payment shall first send a written invoice to the other Party, setting out in detail all amounts owing, including any applicable provincial and federal taxes and interest payable on prior overdue invoices, and the payment terms. The Parties agree that all payments shall be made in full by no later than [●] days after the date of the invoice was received.[27]

8.3. **Payment of taxes.** The Company shall pay, and shall expressly indemnify and hold the Municipality harmless from, all taxes lawfully imposed now or in the future by the Municipality or all taxes, rates, duties, levies or fees lawfully imposed now or in future by any regional, provincial, federal, parliamentary or other governmental body, corporate authority, agency or commission (including, without limitation, school boards and utility commissions) but excluding the Municipality, that are attributable to the Company's use of the ROW.

9. TERM AND TERMINATION

9.1. **Initial term and renewal.** This Agreement shall have an initial term of ● years commencing on the Effective Date and shall be [renewed automatically for successive ● year terms][28] unless:

26 The Municipality may want to refer to its fees by-law instead.
27 The payment terms will be negotiated between the parties.
28 The parties may negotiate the renewal terms.

(a) this Agreement is terminated by either Party in accordance with this Agreement;

(b) a Party delivers initial notice of non-renewal to the other Party at least ● days prior to the expiration of the then current term; or

(c) this Agreement is replaced by a New Agreement (as defined below) between the Parties.

9.2. **Termination by either Party.** Either Party may terminate this Agreement without further obligation to the other Party, upon providing at least twenty-four (24) hours' notice in the event of a material breach of this Agreement by the other Party after notice thereof and failure of the other Party to remedy or cure the breach within thirty (30) days of receipt of the notice. If, however, in the view of the non-breaching Party, it is not possible to remedy or cure the breach within such thirty (30) day period, then the breaching Party shall commence to remedy or cure the breach within such thirty (30) day period and shall complete the remedy or cure within the time period stipulated in writing by the non-breaching Party.

9.3. **Termination by Municipality.** The Municipality may terminate this Agreement by providing the Company with at least twenty-four (24) hours' written notice in the event that:

(a) the Company becomes insolvent, makes an assignment for the benefit of its creditors, has a liquidator, receiver or trustee in bankruptcy appointed for it or becomes voluntarily subject as a debtor to the provisions of the *Companies' Creditors Arrangement Act* or the *Bankruptcy and Insolvency Act*;

(b) the Company assigns or transfers this Agreement or any part thereof other than in accordance with **Section 16.7**; or

(c) the Company ceases to be eligible to operate as a Carrier.

9.4. **Obligations and rights upon termination or expiry of Agreement.** Notwithstanding any other provision of this Agreement, if this Agreement is terminated (other than in accordance with **Sections 9.2** and **9.3**) or expires without renewal, then, subject to the Company's rights to use the ROWs pursuant to the Telecom Act and, unless the Company advises the Municipality in writing that it no longer requires the use of the Equipment:

(a) the terms and conditions of this Agreement shall remain in full force and effect until a new municipal access agreement (a **"New Agreement"**) is executed by the Parties; and

(b) the Parties shall enter into meaningful and good faith negotiations to execute a New Agreement and, if, after six (6) months following the expiry of this Agreement, the Parties are unable to execute a New Agreement, then either Party may apply to the CRTC to establish the terms and conditions of the New Agreement.

9.5. **Removing abandoned Equipment.** Where the Company advises the Municipality in writing that it no longer requires the use of any Equipment, the Company shall, at the Municipality's request and within a reasonable period of time as agreed to by the Parties, act as follows at the Company's sole cost and expense:

(a) Remove the abandoned Equipment that is above ground;

(b) Subject to (c) immediately below, make safe any underground vaults, manholes and any other underground structures that are not occupied or used by a Third Party, (collectively **"Abandoned Underground Structures"**);

(c) Where, in the reasonable opinion of the Municipal Engineer, the Abandoned Underground Structures will interfere with any municipally-approved project that will require excavation or otherwise disturb the portions of the ROWs in which the Abandoned Underground Structures are located, then the Company shall, at or about the time the excavation of such portions of the ROWs for said project commences, remove the Abandoned Underground Structures therein.

Upon removal of the abandoned Equipment or upon the removal or making safe of Underground Structures, the Company shall repair any damage resulting from such removal or making safe and restore the affected ROWs to the condition in which they existed prior to the removal or making safe. If the Company fails to remove such Equipment and restore the ROWs within the time specified above and to the satisfaction of the Municipal Engineer, the Municipality may complete such removal and restoration and the Company shall pay the associated Municipality's Costs.

9.6. **Continuing obligations.** Notwithstanding the expiry or earlier termination of this Agreement, each Party shall continue to be liable to the other Party for all payments due and obligations incurred hereunder prior to the date of such expiry or termination.

10. INSURANCE

COMMENTARY
This Article sets out the insurance required of the Company and will depend on the individual requirements of the Parties.

11. LIABILITY AND INDEMNIFICATION

11.1. **Definitions.** For the purposes of this **Article 11**, the following definitions shall apply:

(a) **"Municipality"** means the Municipality and its elected and appointed officials, officers, employees, contractors, agents, successors and assigns;

(b) **"Company"** means the Company and its directors, officers, employees, contractors, agents, successors and assigns;

(c) **"Claims"** means any and all claims, actions, causes of action, complaints, demands, suits or proceedings of any nature or kind;

(d) **"Losses"** means, in respect of any matter, all losses, damages, liabilities, deficiencies, Costs and expenses; and

(e) **"Costs"** means those costs (including, without limitation, all legal and other professional fees and disbursements, interest, liquidated damages and amounts paid in settlement, whether from a third party or otherwise) awarded in accordance with the order of a court of competent jurisdiction, the order of a board, tribunal or arbitrator or costs negotiated in the settlement of a claim or action.

11.2. **No liability, Municipality.** Except for Claims or Losses arising, in whole or in part, from the negligence or wilful misconduct of the Municipality, the Municipality shall not:

(a) be responsible, either directly or indirectly, for any damage to the Equipment howsoever caused; and

(b) be liable to the Company for any Losses whatsoever suffered or incurred by the Company, on account of any actions or omissions of the Municipality under this Agreement.

11.3. **No liability, both Parties.** Notwithstanding anything else in this Agreement, neither Party shall be liable to any person in any way for special, incidental, indirect, consequential, exemplary or punitive damages, including damages for pure economic loss or for failure to realize expected profits, howsoever caused or contributed to, in connection with this Agreement and the performance or non-performance of its obligations hereunder.

11.4. **Indemnification by the Company.**

NON-CONSENSUS – To be negotiated

11.5. **Indemnification by Municipality.**

NON-CONSENSUS – To be negotiated

12. ENVIRONMENTAL LIABILITY

12.1. **Municipality not responsible.** The Municipality is not responsible, either directly or indirectly, for any damage to the natural environment or property, including any nuisance, trespass, negligence, or injury to any person, howsoever caused, arising from the presence, deposit, escape, discharge, leak, spill or release of any Hazardous Substance in connection with the Company's occupation or use of the ROWs, unless such damage was caused directly or indirectly by the negligence or wilful misconduct of the Municipality or those for which it is responsible in law.

12.2. **Company to assume environmental liabilities.** The Company agrees to assume all environmental liabilities, claims, fines, penalties, obligations, costs or expenses whatsoever relating to its use of the ROWs, including, without limitation, any liability for the clean-up, removal or remediation of any Hazardous Substance on or under the ROWs that result from:

(a) the occupation, operations or activities of the Company, its contractors, agents or employees or by any person with the express or implied consent of the Company Within the ROWs; or

(b) any Equipment brought or placed Within the ROWs by the Company, its contractors, agents or employees or by any person with the express or implied consent of the Company;

unless such damage was caused directly or indirectly in whole or in part by the negligence or wilful misconduct on the part of the Municipality or those for which it is responsible in law.

13. FORCE MAJEURE

Except for the Parties' obligations to make payments to each other under this Agreement, neither Party shall be liable for a delay in its performance or its failure to perform hereunder due to causes beyond its reasonable control, including, but not limited to, acts of God, fire, flood, or other catastrophes; government, legal or statutory restrictions on forms of commercial activity; or order of any civil or military authority; national emergencies, insurrections, riots or wars or strikes, lock-outs or work stoppages (**"Force Majeure"**). In the event of any one or more of the foregoing occurrences, notice shall be given by the Party unable to perform to the other Party and the Party unable to perform shall be permitted to delay its performance for so long as the occurrence continues. Should the suspension of obligations due to Force Majeure exceed two (2) months, either Party may terminate this Agreement without liability upon delivery of notice to the other Party.

14. DISPUTE RESOLUTION

14.1. **General.** The Parties hereby acknowledge and agree that:

(a) this Agreement has been entered into voluntarily by the Parties with the intention that is shall be final and binding on the Parties until it is terminated or expires in accordance with its terms;

(b) it is the intention of the Parties that all Disputes (as defined in **Section 14.2**) be resolved in a fair, efficient, and timely manner without incurring undue expense and, wherever possible, without the intervention of the CRTC; and

(c) the CRTC shall be requested by the Parties to consider and provide a decision only with respect to those matters which form the basis of the original Dispute as set out in the Dispute Notice issued under this **Article 14**.

14.2. **Resolution of Disputes.** The Parties will attempt to resolve any dispute, controversy, claim or alleged breach arising out of or in connection with this Agreement (**"Dispute"**) promptly through discussions at the operational level. In the event a resolution is not achieved, the disputing Party shall provide the other Party with written notice of the Dispute and the Parties shall attempt to resolve such Dispute between senior officers who have the authority to settle the Dispute. All negotiations conducted by such officers shall be confidential and shall be treated as compromise and settlement negotiations. If the Parties fail to resolve the Dispute within thirty (30) days of the non-disputing Party's receipt of written notice, either Party may initiate legal proceedings and/or submit the Dispute to the CRTC for resolution.

14.3. **Continued performance.** Except where clearly prevented by the nature of the Dispute, the Municipality and the Company agree to continue performing their respective obligations under this Agreement while a Dispute is subject to the terms of this **Article 14**.

15. NOTICES

15.1. **Method of Notice.** Any notice required may be sufficiently given by personal delivery or, if other than the delivery of an original document, by facsimile transmission to either Party at the following addresses:

If to the Municipality:	With a copy to:
If to the Company	With a copy to:

15.2. **Delivery of notice.** Any notice given pursuant to **Section 15.1** shall be deemed to have been received on the date on which it was delivered in person, or, if transmitted by facsimile during the regular business hours of the Party receiving the notice, on the date it was transmitted, or, if transmitted by facsimile outside regular business hours of the Party receiving the notice, on the next regular business day of the Party receiving the notice; provided, however, that either Party may change its address and/or facsimile number for purposes of receipt of any such communication by giving ten (10) days' prior written notice of such change to the other Party in the manner described above.

15.3. **Alternative Method of Notice.**

> COMMENTARY
> This Section sets out alternate methods of notice that the Parties may negotiate.

16. GENERAL

16.1. **Entire agreement.** This Agreement, together with the Schedules attached hereto, constitutes the complete and exclusive statement of the understandings between the Parties with respect to the rights and obligations hereunder and supersedes all proposals and prior agreements, oral or written, between the Parties.

16.2. **Gender and number.** In this Agreement, words importing the singular include the plural and vice versa, words importing gender, include all genders.

16.3. **Sections and headings.** The division of this Agreement into articles, sections and subsections and the insertion of headings are for convenience of reference only and do not affect the interpretation of this Agreement. Unless otherwise indicated, references in this Agreement to an article, section, subsection or schedule are to the specified article, section or subsection of or schedule to this Agreement.

16.4. **Statutory references.** A reference to a statute includes all regulations and rules made pursuant to the statute and, unless otherwise specified, the provisions of any statute or regulation which amends, supplements or supersedes the statute or the regulation.

16.5. **Including.** Where the word "including" or "includes" is used in this Agreement it means "including (or includes) without limitation as to the generality of the foregoing".

16.6. **Currency.** Unless otherwise indicated, references in this Agreement to money amounts are to the lawful currency of Canada.

16.7. **Assignment.** This Agreement may not be assigned, in whole or in part, without the prior written consent of the other Party. Notwithstanding the foregoing, either Party shall have the right to assign this Agreement to an Affiliate without the consent of the other Party, provided that: i) it is not in material breach of this Agreement; ii) it has given prompt written notice to the other Party; iii) any assignee agrees to be bound by the terms and conditions of this Agreement; and iv) the assignee is not in direct competition with the other Party, in which case, prior written consent would be required.

16.8. **Parties to act reasonably.** Each Party shall at all times act reasonably in the performance of its obligations and the exercise of its rights and discretion under this Agreement.

16.9. **Amendments.** Except as expressly provided in this Agreement, no modification of or amendment to this Agreement shall be effective unless agreed to in writing by the Municipality and the Company.

16.10. **Survival.** The terms and conditions contained in this Agreement that by their sense and context are intended to survive the performance thereof by the Parties hereto shall so survive the completion of performance, the expiration and termination of this Agreement, including, without limitation, provisions with respect to indemnification and the making of any and all payments due hereunder.

16.11. **Governing law.** This Agreement shall be governed by the laws of the Province of [●] and all federal laws of Canada applicable therein.

16.12. **Waiver.** Failure by either Party to exercise any of its rights, powers or remedies hereunder or its delay to do so shall not constitute a waiver of those rights, powers or remedies. The single or partial exercise of a right, power or remedy shall not prevent its subsequent exercise or the exercise of any other right, power or remedy.

16.13. **Severability.** If any provision of this Agreement is determined by a court of competent jurisdiction to be invalid or unenforceable in whole or in part, such invalidity or unenforceability shall attach only to such provision and everything else in this Agreement shall continue in full force and effect

16.14. **Inurement.** This Agreement is and shall be binding upon and inure to the benefit of the Parties hereto and their respective legal representatives, successors, and permitted assigns, and may not be changed or modified except in writing, duly signed by the Parties hereto.

16.15. **Equitable Relief.** Either Party may, in addition to any other remedies it may have at law or equity, seek equitable relief, including without limitation, injunctive relief, and specific performance to enforce its rights or the other party's obligations under this Agreement.

IN WITNESS WHEREOF the Parties hereto have executed this Agreement by their duly authorized representatives.

MUNICIPALITY

Authorized Signatory, [name & title]

Authorized Signatory, [name & title]

COMPANY

Authorized Signatory, [name & title]

Authorized Signatory, [name & title]

SCHEDULE A
FEES AND CHARGES PAYABLE BY THE COMPANY

Definition of Causal Costs

NON-CONSENSUS – To be negotiated

Determination of Causal Costs

COMMENTARY
The discussion below provides a high level description of the methodology established by the CRTC to calculate causal costs based on generally accepted economic principles. This methodology was first described in CRTC Telecom Decision CRTC 79-16, *Inquiry into Telecommunications Carriers' Costing and Accounting Procedures – Phase II: Information Requirements for New Service Tariff Filings* (28 August 1979). However, as discussed below, the parties may mutually agree to negotiate how causal costs may be determined and/or applied through fees and other charges.

"Causal costs" are prospective (*i.e.*, forward-looking, in that "sunk" costs are not included) and incremental (*i.e.*, only costs that change as a result of the project are considered). Such causal costs are determined through an economic study specifying a Reference Plan and an Alternative Plan.

The Reference Plan consists of expected activities if a right of way is not granted to the carrier in question. In most cases, the Reference Plan will reflect normal operation of the street, regular maintenance with no (additional) right of way, etc. Occasionally, however, some repair activity may already be planned, e.g. repair of cracks in the pavement. In such cases, the planned activities should be reflected in the Reference Plan.

Similarly, the Alternative Plan should be elaborated by listing all costs associated with the construction of the transmission line by a specific carrier. The Alternative Plan should be as specific as possible, giving the location and length of the right of way and the timing of construction.

The resulting costs (expressed as present values) should be added up for each of the Alternative Plan and the Reference Plan. The difference between the total for the Alternative Plan and the Reference Plan is the present value of the costs of the project (*i.e.*, the causal costs).

Municipalities and carriers have the flexibility to negotiate the fee structure for the recovery of these costs. For example, they could be recovered in one lump sum payment, or a series of payments, fees or charges or some combination, as long as the payment scheme chosen by the municipality generates revenues whose present value equals the present value of costs.

In practice, carriers and municipalities often agree on certain fees/charges as a proxy for the municipality's causal costs, rather than requiring the municipality to conduct a cost study which may be complex and time consuming. Through the many cases that have been considered by the CRTC and agreements that have been concluded freely between municipalities and carriers, there are a number of fee structures that have been accepted as a means of recuperating a municipality's causal costs.

In this Schedule are listed fees that have been used in agreements in Canada between carriers and larger cities or municipalities. While the quantum of the fees are not listed here as they would differ from municipality to municipality and potentially carrier to carrier, Municipalities and Carriers may wish to familiarize themselves with sample agreements and satisfy themselves that, within a reasonable range and considering inflation and other factors, these fees will adequately reflect the local context.

Recovery of Causal Costs

The following constitutes various fees or charges that have been applied in the past by municipalities. The examples of fees listed below are meant to assist negotiations between municipalities and carriers, but the examples might not all be applicable and there may be others that apply. Such fees may include:

1. Permit application fees;
2. Inspection fees;
3. Lost productivity or workaround costs;
4. Pavement degradation costs; and
5. Lost parking meter revenue and associated costs

To which may be added a loading factor and adjustments for inflation.

1. Permit Application and Permit Change Fees

This fee can be used to allow municipalities to recover their costs that are directly attributable to the review and approval of the carriers' construction projects. The type of work involved is reviewing alignments and providing optimal routing; planning space for future utility work; providing input to traffic plans; processing and filing design and as-built drawings, etc.[29]

The fee can be simplified to differentiate short projects from long projects recognizing differences in the degree of effort required to review, to provide feedback as necessary and to approve final drawings.

29 For further discussion, see paras. 66-72 of the Ledcor Decision and paras. 59-66 of the Allstream-Vancouver Decision.

Requests for changes to permits (including extensions) can give rise to additional fees. These fees allow municipalities to recover their costs that are directly attributable to the review and approval of the permit change requests.

2. Inspection Fees

The general principle is that the Municipality should be 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. This may be considered as a separate fee or, for convenience, included in the permit application fee.[30]

3. Lost Productivity or "Work Around" Costs

If significant lost productivity costs can be isolated and accurately calculated and attributed to a telecommunications installation, the Municipality can invoice these items directly to the Company.[31]

The CRTC has indicated that such invoices should include the following information:

- a description of the costs being recovered;
- the location of the telecommunications equipment and the municipal work being done;
- a description of the municipal work being done;
- an explanation of the nature of the interference of the telecommunications facility;
- an itemized breakdown of the Municipality's additional costs; and
- the methodology and data sources used to determine the costs.

4. Pavement Degradation Costs

These fees reflect the fact that once pavement has been cut, the strength and longevity of the pavement cannot be restored. The cut edges lead to cracks and ultimately potholes and other defects that require ongoing maintenance and premature replacement. The fee reflects that ongoing maintenance and loss of pavement life. [32]

5. Lost Parking Meter Revenue and Associated Costs

This fee captures lost revenue due to parking meters rendered unusable during construction. The fee should reflect actual measured or estimated average occupancy rates of the meters. The fee can also include the costs of signage required to take the meters out of service. [33]

30 For further discussion, see paras. 66-72 of the Ledcor Decision and paras. 59-66 of the Allstream-Vancouver Decision.
31 For further discussion, see paras. 89-92 of the Ledcor Decision and paras. 82-89 of the Allstream-Vancouver Decision.
32 For further discussion, see paras. 67-73 of the Allstream-Vancouver Decision.
33 For further discussion, see paras. 74-79 of the Ledcor Decision and paras. 90-100 of the Allstream-Vancouver Decision.

Further Areas to be Addressed

(a) *Loading Factor* - It has been recognized that there are miscellaneous indirect and variable common costs that are difficult to quantify. Any such costs that are not quantified directly can be recovered by a loading factor that is applied to all of a municipality's cost-based fees and charges. Alternatively, the municipality may want to charge a flat annual administrative fee.

(b) *Adjustment to Fees* - This section provides for the adjustment of fees based on CPI or whatever other basis is considered appropriate by the parties.

(c) *Renegotiation of Fees* - This section can provide a mechanism to renegotiate fees periodically; perhaps every 5 years in order to better reflect changes in legislation, CRTC decisions, municipal bylaws, changes in knowledge or installation techniques.[34]

34 For further discussion, see para. 47 of the Ledcor Decision.

SCHEDULE B
PERMITS REQUIRED BY THE MUNICIPALITY[35]

WORK ACTIVITY	MC[36]	ROP[37]	Notification only[38]	No Permit or Notification[39]
Any installation of Plant that requires Excavation[40] in the ROW, including: — the installation of buried Plant crossing a road; — the installation of new Above-ground Equipment[41]; — the relocation of buried Plant or Above-ground Equipment; — the replacement of existing Above-ground Equipment with equipment that is significantly larger; and — the installation of buried Service Drops that cross a road or a break a hard surface of the ROW.	X	X		
The installation of aerial Plant (excluding aerial Service Drops)		X		
Tree trimming on ROWs		X		
The replacement of existing Above-ground Equipment without adding more Plant or significantly increasing its size (pole replacements excluded)			X	
The installation of buried Service Drops that do not cross a road or break the hard surface of a ROW			X	
Pulling cable through existing underground duct			X	
The installation of or repair to aerial Service Drops				X
The maintenance, testing and repair of Plant where there is minimal physical disturbance or changes to the ROW				X
Any other Work activity agreed to by the Municipality				X

35 This is a sample of how permits may be administered by the Municipality. The actual requirements will vary with each municipality.
36 "MC" means Municipal Consent.
37 "ROP" means Road Occupancy Permit.
38 Depending on the nature of the Work, the type of ROW or the Municipality's Traffic Management Policy, the Municipality may require an ROP or other type of consent.
39 Subject to its Traffic Management Policy, the Municipality may require notification or an ROP.
40 "Excavation" means the breaching or breaking up of the hard surface of the ROW, and includes activities such as day-lighting, test pitting, digging pits and directional boring but excludes hand-digging.
41 "Above-ground Equipment" means, in all cases above, any structure located on the surface of the ROW used to house or support the Plant, and includes cabinets, pedestals, poles and lamp poles but excludes aerial Plant.

SCHEDULE C
RELOCATION COSTS

COMMENTARY[42]

The CRTC, in adjudicating disputes between carriers and municipalities has recognized that, in general carriers are entitled to the recovery of all or a portion of their relocation costs caused by the construction or activities of the municipality. The CRTC has not prescribed a single mechanism governing the allocation of relocation costs. It has stated, however, that the parties should negotiate a suitable allocation taking into account the following factors:

(a) who has requested the relocation, *i.e.*, the municipality, the carrier, or a third party;

(b) the reason for the requested relocation (*e.g.*, safety reasons, aesthetic reasons, to better serve customers); and

(c) when the request is made *vis-à-vis* the original date of construction (*e.g.*, whether the request is made a considerable length of time after the original construction, or very shortly after that time).

1. Reimbursement for Relocation Costs

NON-CONSENSUS – To be negotiated

2. Equipment affected by Municipality's Capital Works Plan. Prior to the issuance of a Permit, the Municipality will advise the Company in writing whether the Company's proposed location for new Equipment will be affected by the Municipality's [●]-year capital works plan (the **"Capital Works Plan"**).[43] If the Municipality advises that the new Equipment will be so affected and the Company, despite being advised of such, requests the Municipality to issue the Permit, then the Municipality may issue a conditional Permit stating that, if the Municipality requires, pursuant to any project identified in the Capital Works Plan as of the date of approval, the Company to relocate the Equipment within [●] years of the date of the Permit, the Company will be required to relocate the Equipment at its own cost, notwithstanding Section 1.

3. Beautification.

NON-CONSENSUS – To be negotiated

42 For further discussion, see paras. 130-138 of the Ledcor Decision and paras.74-81 of the Allstream-Vancouver Decision.
43 The duration of the Municipality's capital works program may vary.

4. **Municipality not responsible for Third Party Relocation Costs.**

Unless otherwise agreed to between the Municipality and the Third Party, in no event shall the Municipality be responsible under this Agreement for:

(a) the costs of the Company to relocate Equipment at the request of a Third Party; or

(b) the costs or relocating the facilities of a Third Party installed on or in the Equipment.

5. **Company not responsible for Third Party Relocation Costs.**
Unless otherwise agreed to between the Company and the Third Party, in no event shall the Company be responsible under this Agreement for:

(a) the costs of the Company to relocate Equipment at the request of a Third Party [**NON-CONSENSUS – To be negotiated**]; or

(b) the costs of relocating the facilities of a Third Party [**NON-CONSENSUS – To be negotiated**] installed on or in the Equipment.

6. **Where Equipment is located incorrectly**. Where the location of any portion of the Equipment in a ROW is located outside a distance of [●] horizontally (centre-line to centre-line) from the location approved in the Permit or as shown on the as-built drawings (as accepted by the Municipality), then the Municipality shall not be responsible for the costs of relocating such Equipment or portion thereof. Notwithstanding the foregoing, in circumstances where records of the approved location of the Equipment are non-existent or unavailable, or where the conditions of the applicable ROW have changed materially from what was described in the Permit, the Parties agree to act reasonably when sharing or allocating the associated Relocation Costs.

7. **Maintenance Cover adjustments.**

NON-CONSENSUS – To be negotiated

8. **Equipment Upgrades**. Unless otherwise agreed to by the Parties, Relocation Costs shall not include the installation of any Equipment by the Company for the purpose of providing an up-graded service, which shall be at the sole cost of the Company. The Parties agree that the Relocation Costs to be allocated between the parties shall be based on the use of the same approximate quantity, quality and type of Equipment and manner of construction for the new installation as was used for the original, subject to any adjustments required due to:

   (a) technological change or industry construction methods;

   (b) the need for an installation of greater length or other modifications due to, for example, space constraints or the presence of third party equipment; or

   (c) the undergrounding of aerial Equipment where required as part of the relocation where cost sharing is permitted under this Agreement.

9. **Relocation performed by Municipality**. If the Company fails to complete the relocation in accordance with **Section 7.1** of the Agreement, the Municipality may, at its option, upon reasonable final notice to the Company, complete such relocation and the Company shall pay the Municipality's Costs of the relocation.

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