Canadian Radio-television and Telecommunications Commission
Conseil de la radiodiffusion et des télécommunications canadiennes

Telecom Decision CRTC 2007-8

Ottawa, 8 February 2007

Rogers Cable Communications Inc. – Part VII application seeking access to highways controlled by the Department of Transportation of the Province of New Brunswick on terms consistent with *Ledcor/Vancouver – Construction, operation and maintenance of transmission lines in Vancouver*, Decision CRTC 2001-23, 25 January 2001

Reference: 8690-R28-200512972

In this Decision, the Commission concludes that it has the jurisdiction to deal with the application filed by Rogers Cable Communications Inc. (Rogers) regarding the fees charged by the Province of New Brunswick (the Province) for use of its highways for the purpose of constructing, maintaining and operating Rogers' transmission lines, as well as related issues. The Commission also concludes that the fees payable by Rogers to the Province are reasonable. Further, the Commission expects that Rogers and the Province will negotiate an agreement regarding the relocation of Rogers' facilities at the request of the Province. Rogers and the Province are to report back to the Commission, within six months of the date of this Decision, on the status of such an agreement.

The dissenting opinions of Commissioners Langford and Cram are attached.

The application

1. Rogers Cable Communications Inc. (Rogers) filed an application dated 11 November 2005, pursuant to sections 42 and 43(4) of the *Telecommunications Act* (the Act) and Part VII of the *CRTC Telecommunications Rules of Procedure*, seeking access to highways controlled by the Department of Transportation of New Brunswick (the DOT) on terms consistent with *Ledcor/Vancouver – Construction, operation and maintenance of transmission lines in Vancouver*, Decision CRTC 2001-23, 25 January 2001 (Decision 2001-23).

2. Specifically, Rogers sought an order from the Commission directing the DOT:

   (i) to permit Rogers to enter on highways controlled by the DOT for the purpose of constructing, operating or maintaining its transmission lines at no charge absent demonstration that such access gives rise to causal costs to the Province; and

   (ii) to negotiate a fair and non-discriminatory division of the costs to Rogers of relocating its transmission facilities on provincial highway rights-of-way (ROW) at the request of the DOT, in accordance with the principles set out in Decision 2001-23.

Process

3. The Province of New Brunswick as the legal entity for the DOT, hereafter referred to as "the Province," filed comments dated 22 December 2005. Rogers filed reply comments dated 16 January 2006.

4. The Province filed further comments dated 3 February 2006[1] regarding Rogers' reply comments. Rogers subsequently filed additional comments dated 10 February 2006.

5. Commission staff issued interrogatories to Rogers, the Province and Aliant Telecom Inc. (now known as Bell Aliant)[2] on 26 April 2006. The Province filed responses to the interrogatories dated 15 May 2006, and Rogers and Bell Aliant filed their respective responses dated 16 May 2006. Rogers and the Province filed supplemental comments dated 8 and 12 June 2006, respectively, regarding the interrogatory responses. Rogers and the Province filed supplemental reply comments dated 14 and 16 June 2006, respectively, regarding the interrogatory responses.

Procedural ruling

6. In its 10 February 2006 submission, Rogers objected to the Province's filing of additional comments on 3 February 2006. In addition, in its 16 June 2006 submission, the Province objected to Rogers' filing of its 14 June 2006 comments. The Commission considers that it is in the public interest to retain on the record of this proceeding all submissions filed and noted above.

Background

7. According to the record of this proceeding, Rogers' transmission lines in New Brunswick, which Rogers acquired from Shaw Communications Inc. in November 2000, are primarily supported by poles owned by Bell Aliant and New Brunswick Power (NB Power). These poles are located in part on highways that are under the jurisdiction of the Province.

8. Some of Rogers' transmission lines are also supported by a small number of poles owned by the City of Edmunston, Saint John Energy and Perth-Andover Electric. Rogers did not know whether or not any of these poles were located on highways controlled by the Province. Rogers also has 37.5 kilometres of transmission lines on highways controlled by the Province that are supported by Rogers-owned poles, which are located on Route 17 between St-Quentin and St-Léonard, New Brunswick.

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1 On 11 February 2006, the Province re-filed its 3 February 2006 comments to include paragraphs 31-34, which had been omitted from the original 3 February 2006 filing.

2 On 7 July 2006, Bell Canada's regional wireline telecommunications operations in Ontario and Quebec were combined with, among other things, the wireline telecommunications operations of Aliant Telecom Inc., Société en commandite Télébec, and NorthernTel, Limited Partnership to form Bell Aliant Regional Communications, Limited Partnership (Bell Aliant).

9. Beginning in 2000, when Rogers started providing services in New Brunswick, Rogers received an annual bill from the Province for highway usage fees in the amount of $170,516.25, inclusive of HST.[3] As of 2 March 2004, the annual bill has been $173,391.25, inclusive of HST. The usage fees were calculated on the basis of 3,424 kilometres of highways in New Brunswick along which Rogers had extended cable.

Relevant statutory provisions

10. Sections 42 and 43 of the Act provide the following:

> 42. (1) Subject to any contrary provision in any Act other than this Act or any special Act, the Commission may, by order, in the exercise of its powers under this Act or any special Act, require or permit any telecommunications facilities to be provided, constructed, installed, altered, moved, operated, used, repaired or maintained or any property to be acquired or any system or method to be adopted, by any person interested in or affected by the order, and at or within such time, subject to such conditions as to compensation or otherwise and under such supervision as the Commission determines to be just and expedient.
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> 42. (2) The Commission may specify by whom, in what proportion and at or within what time the cost of doing anything required or permitted to be done under subsection (1) shall be paid.
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> 43. (1) In this section and section 44, "distribution undertaking" has the same meaning as in subsection 2(1) of the Broadcasting Act.
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> 43. (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.
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> 43. (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.
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> 43. (4) Where a Canadian carrier or distribution undertaking cannot, on terms acceptable to it, obtain the consent of the municipality or other public authority to construct a transmission line, the carrier or distribution undertaking may apply to the Commission for permission to construct it and the Commission may, having due regard to the use and enjoyment of the highway or other public place by others, grant the permission subject to any conditions that the Commission determines.

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[3] HST stands for "harmonized sales tax."

> 43. (5) Where a person who provides services to the public cannot, on terms acceptable to that person, gain access to the supporting structure of a transmission line constructed on a highway or other public place, that person may apply to the Commission for a right of access to the supporting structure for the purpose of providing such services and the Commission may grant the permission subject to any conditions that the Commission determines.

Issues raised in this proceeding

11. The following issues will be addressed in this Decision:

    (i) the Commission's jurisdiction and alternative request to adjourn;

    (ii) highway usage fees payable by Rogers to the Province; and

    (iii) apportionment of costs for relocation of Rogers' facilities at the request of the Province.

In the following section, the Commission has summarized the main arguments of Rogers and the Province.

(i) The Commission's jurisdiction and alternative request to adjourn

Positions of parties

Rogers

12. Rogers sought relief under section 42 and subsection 43(4) of the Act. It submitted that its request for relief fell squarely within the terms of subsection 43(4) since it was both a Canadian carrier and a distribution undertaking. Rogers argued that the access fees that the Province sought to levy for access to provincial highways in New Brunswick and the relocation costs that the Province had imposed on Rogers were not acceptable.

13. Rogers noted that the Commission held in *Part VII Application by Allstream Corp. seeking access to Light Rail Transit (LRT) lands in the City of Edmonton*, Telecom Decision CRTC 2005-36, 17 June 2005 (Decision 2005-36),[4] that its jurisdiction under subsection 43(4) of the Act was not limited to addressing disputes regarding permission to construct new facilities. Rogers submitted that the Commission's jurisdiction under this provision extended, by necessary implication, to disputes regarding ongoing access to existing facilities. Rogers submitted that, in any event, this dispute concerned both existing access as well as any new facilities constructed by Rogers on highways controlled by the Province.

14. Rogers submitted that a provincial regulation could not circumscribe the Commission's authority under section 43 of the Act to adjudicate disputes between a carrier or distribution undertaking and a public authority regarding the terms of access to a highway.

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[4] Decision 2005-36 has since been appealed to the Federal Court of Appeal by the City of Edmonton.

The Province

15. The Province argued that subsection 43(4) of the Act provided a carrier with a narrow remedy: to apply to the Commission for permission to construct a transmission line. It also argued that even if the provision could be read to extend by implication to permission to maintain or operate a transmission line, this language would not be broad enough to give the Commission jurisdiction on the facts of this case.

16. The Province submitted that Rogers did not need its permission to expand or maintain its network on poles owned by Bell Aliant or NB Power and that the Province had no right or ability to refuse consent to construct on the poles of the two owners. The Province also submitted that it wanted Rogers to construct and expand its transmission lines in New Brunswick so that it could provide more and better service to its residents and that it had no incentive to interfere in any way with Rogers' construction, maintenance, or operation of its transmission lines.

17. The Province emphasized, however, that it did not want Rogers to build its system at the expense of taxpayers. In the Province's view, under subsection 43(4) of the Act there must be real evidence that the term being imposed to grant approval to construct, maintain, or operate imposed some kind of unreasonable hardship, was unduly onerous, or constituted wrongful or unreasonable interference with or obstruction of the carrier. The Province submitted that Rogers' application provided no such evidence.

18. In addition, the Province submitted that Rogers was interpreting literally the expression "on terms acceptable to it" from subsection 43(4) of the Act as an entirely subjective test. The Province also submitted that Rogers was unwilling to accept a fee greater than zero unless the fee was to recover a demonstrably causal cost. The Province was of the view that based on this interpretation, every carrier could argue that every fee or charge it faced from a municipal or provincial government was a term of access or construction that was arbitrary and unacceptable to it, and it would follow that unless the public authority were able to demonstrate that the fee or charge was causally related, it would no longer be entitled to receive it.

19. The Province submitted that the Ledcor Appeal Decision[5] upholding the Commission's determinations in Decision 2001-23 was based on the clear understanding that the Commission had determined that the negotiating principles set out in Decision 2001-23 would not be binding on anyone.

20. The Province noted that Rogers had argued that the charges it refused to pay were invalid because they were not authorized by New Brunswick law. The Province submitted that this was a question of the interpretation of provincial law which, in the circumstances of this case, was not within the Commission's jurisdiction to determine.

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5 *Federation of Canadian Municipalities v. AT & T Canada Corp.* (F.C.A.), [2003] 3 F.C. 379, 2002 FCA 500.

21. Finally, the Province argued that section 42 of the Act was an enabling section, not a new and expanded jurisdiction section, and did not provide the Commission with the jurisdiction to deal with Rogers' application. The Province submitted that, instead, section 42 provided a listing of the types of activities to which existing powers to be found in other sections might be applied.

22. The Province submitted that there was also a significant constitutional issue raised by Rogers' application. The Province argued that reasonable fees for the use and occupation of provincial property were entirely within provincial jurisdiction. It also argued that unless a province was (a) demanding a fee that was so unreasonable as to make construction of a transmission line unaffordable or unreasonably onerous, and (b) enforcing this demand with action or threatened action to interfere with the carriers' construction (or "ongoing access"), federal jurisdiction did not arise.

23. The Province submitted that the modest fee charged in this case came nowhere near approaching the unreasonableness threshold and that a simple collection action in a court[6] was not in any way a threat to Rogers' "ongoing access" to anything. The Province argued that Parliament had not given the Commission any regulatory authority to regulate the rates and charges imposed by a provincial government in the same way it regulated the rates and charges of some carriers.

24. The Province submitted that, alternatively, if the Commission did have jurisdiction to deal with this dispute, it should adjourn this application until after the Federal Court of Appeal's decision in the City of Edmonton's appeal of Decision 2005-36. The Province was of the view that the appeal of Decision 2005-36 would resolve many of the same jurisdictional issues as had been raised in this case. The Province noted that the Commission had previously used this reasoning to suspend its consideration of an application and defer its decision in other cases.

25. The Province submitted that Rogers could continue, as at present, to construct, maintain and operate its transmission lines, whether on its own poles or on those of any other person who had constructed a line of poles along the provincial highways. The Province also stated that it would not charge Rogers any interest going forward on non-payment of these statutory charges, pending a decision regarding the appeal of Decision 2005-36.

Rogers' reply comments

26. Rogers submitted that the jurisdiction granted to the Commission by section 43 of the Act made no distinction between terms imposed by contract or otherwise, including provincial or municipal law. It also submitted that the fee the Province was demanding was a term of access. Rogers further submitted that section 43 of the Act provided that a carrier or distribution undertaking that could not gain access to a highway for the purpose of constructing, operating and maintaining its transmission lines on terms acceptable to it might apply to the Commission for permission to access the highway on such terms as the Commission determined. Rogers argued that the fees that the Province had demanded were not acceptable and, therefore, the conditions for invocation of subsection 43(4) of the Act had been satisfied.

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6 In November 2005, the Province initiated a collection action in the New Brunswick Court of Queen's Bench to recover the fees owing by Rogers.

27. Rogers argued that subsection 43(4) of the Act has no carve out for terms of access that might be imposed by provincial law. In Rogers' view, the proper approach is for the Commission to exercise its jurisdiction to establish terms of access, regardless of the mechanism by which a public authority, including a province, seeks to impose such terms. It is the court's role to resolve any operational conflict with a provincial law.

28. Rogers submitted that it was not asking the Commission to determine whether the fees that the Province sought from Rogers were properly imposed pursuant to *Highway Usage Regulation – Highway Act*[7] (Regulation 97-137), or to rule on the constitutionality of Regulation 97-137, or to invalidate or amend Regulation 97-137. Rogers submitted that it was asking the Commission to determine the appropriate charges for Rogers' use of highway ROW controlled by the Province.

29. Rogers submitted that an adjournment of its application would prejudice Rogers.

The Province's additional comments

30. The Province argued that Rogers' submissions regarding paramountcy were inconsistent with the extensive body of case law that established limited circumstances in which the paramountcy doctrine applied. The Province submitted that an operational conflict between the federal and provincial legislation, which must be found to trigger this doctrine, would only exist where the application of the provincial law displaced the legislative purpose of Parliament. In the Province's view, there was no such conflict in this case since there was nothing in the Act that would prohibit Rogers from paying the fees or prohibit a public authority from charging such a fee. Finally, it submitted that even if there was an operational conflict, provincial legislation could affect a federal undertaking so long as it did not impair, sterilize or paralyse it, which was not the case in the current situation.

31. With respect to Rogers' assertion that if all public authorities conducted themselves in the manner proposed by the Province, Rogers would find it impossible to offer efficient and effective communications services, the Province argued that this assertion was speculative, made by Rogers with no supporting evidence.

32. The Province submitted that Rogers had raised a new argument by concluding incorrectly that the requirement to pay the fees was a "term" or "condition" of access, imposed by the Province, for access to a highway for the purposes of constructing, operating or maintaining its transmission lines. The Province argued that the fees were not a condition or term of anything, let alone of "access." It argued that, instead, the fees were simply a legal requirement pursuant to a statute of general application that dealt with the use of provincial highways. The Province noted that although the Minister of Transportation was permitted to refuse the use of highways by Rogers, to order Rogers to remove its lines, or to charge Rogers with an offence for failing to have a valid usage permit, he had not done so.

Rogers' response to the Province's additional comments

33. Rogers argued that the Province seemed to be saying that the Commission could not act because there was no conflict. Rogers argued that taken to its logical conclusion, this would mean that the Commission could never act, yet administrative bodies were required to exercise

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[7] *Highway Usage Regulation – Highway Act*, N.B. Reg. 97-137 (O.C. 97-948).

their statutory jurisdiction. Rogers argued that, in any event, there was no operational conflict between its application and the *Highway Act*[8] and associated *Regulations*. Rogers submitted that the fees were unquestionably a term or condition of use by Rogers of the ROW for the purpose of constructing, maintaining or operating its transmission facilities.

Commission's analysis and determinations

34. The preliminary matter in dispute in this case is the Commission's jurisdiction to intervene with respect to the fees payable by Rogers to the Province for Rogers' use of provincial highways[9] for the purpose of Rogers' transmission lines.[10]

35. The Commission notes that the purpose of the highway usage fee in question, according to the Province, is to attempt to offset the cost of damage and wear and tear to the highways, specifically the roadsides and ditches, resulting from Rogers' use of the highways for its transmission lines. As explained by the Province, the trucks used to install and maintain Rogers' transmission lines are large, heavy vehicles that are parked at the side of the road at each pole. The Province has indicated that these trucks cause significant damage to the roadside and ditches of the highway ROW, which the Province must then restore.

36. The Commission notes that the Province argued that it had not denied Rogers' consent to access its transmission lines, nor had it threatened to remove Rogers' lines for failure to pay the applicable fees. The Commission further notes that the Province submitted that the Minister of Transportation could refuse the use of highways by Rogers or require that Rogers remove its transmission lines if it failed to pay the usage fees.

37. The Commission does not accept the Province's submission that it had not imposed the fee as a condition of access by Rogers to provincial highways for the purpose of constructing, maintaining or operating its transmission lines. While the Commission agrees that the fee in question is not for access to the poles and lines per se, the Commission considers that the fee is for use of provincial highways by Rogers specifically for the purpose of accessing its transmission lines.

38. The Commission notes that without access to the Province's highways, Rogers would be unable to construct, maintain or operate its transmission lines. The Commission also notes that, for this reason, Rogers, as a Canadian carrier and a broadcasting distribution undertaking, has a qualified right pursuant to subsection 43(2) of the Act to enter on any highway (or other public place) for the purpose of constructing, maintaining or operating its transmission lines. In the Commission's view, a fee that is specifically related to Rogers' use of highways for constructing, maintaining or operating its transmission lines relates directly to Rogers' rights under subsection 43(2) of the Act.

39. The Commission considers that the mere fact that the Province has not threatened to remove

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8 *Highway Act, R.S.N.B. 1973, c.H-5 (Highway Act).*

9 Reference herein to highways to which Rogers requires access to construct, operate and maintain its transmission lines includes highway rights-of-way and easements.

10 The Commission notes that it has not been asked to rule, nor will it rule, on the validity or applicability of the *Highway Act* and *Regulation 97-137,* pursuant to which the fees are being charged.

Rogers' transmission lines for failure to pay the fee does not by itself remove a dispute from the scope of subsection 43(4) of the Act. Indeed, if the Province's argument were taken to its extreme, the Province could charge Rogers any fee it wished for access to highways for the purpose of constructing, maintaining and operating its transmission lines, and could preclude Rogers from having any recourse to the Commission simply by not explicitly refusing its consent to access the highway. In the Commission's view, this would be inconsistent with the clear intention of the Act. Furthermore, the Commission considers that the amount of the fee being charged for use of the highway to access transmission lines cannot be determinative of the scope of the Commission's statutory authority under subsection 43(4) of the Act to deal with a dispute regarding the fee. Contrary to the Province's argument, the Commission is of the view that its jurisdiction to resolve disputes pursuant to subsection 43(4) of the Act is not limited – either explicitly or implicitly – to only those situations where the term being imposed to grant approval to construct, maintain or operate transmission lines, imposes some kind of unreasonable hardship or other unreasonable interference with or obstruction of the carrier.

40. Further, as the Commission stated in Decision 2005-36, to accept the argument that an application does not involve questions of construction or access to construct, maintain or operate transmission lines because the public authority has not yet forced the Canadian carrier to remove its transmission lines from the highway could lead to absurd results. That is, it would be absurd to preclude a Canadian carrier or distribution undertaking from seeking a remedy from the Commission until after its transmission lines have been removed and installation of new lines is required.

41. In light of the above, the Commission concludes that the dispute falls within the scope of section 43 of the Act, and subsection 43(4) in particular, as it concerns the use of provincial highways by Rogers for the purpose of constructing transmission lines, as well as maintaining and operating its existing lines, and the applicable terms and conditions of such access which Rogers finds unacceptable.

42. With respect to the dispute regarding terms and conditions of relocation of Rogers' transmission lines at the request of the Province, the Commission notes that the Province has not specifically disputed the Commission's jurisdiction to deal with this issue and has expressed its willingness to enter into a relocation agreement with Rogers. The Commission notes that in Decision 2001-23 it found that it had the jurisdiction to resolve disputes regarding the terms and conditions of relocation, stating at paragraph 136 that it

> …considers that sections 42 to 44 of the Act give it the jurisdiction to impose conditions relating to relocation matters, whether at the time of construction or afterwards. The Commission also notes that its predecessor bodies have generally declined to impose terms and conditions relating to relocation at the time of construction, preferring instead to consider the matter at the time the requirement for relocation arises, having regard to the circumstances then applicable.

43. With respect to its constitutional jurisdiction, the Commission considers that sections 42 and 43, and in particular subsection 43(4), of the Act, and this Decision, relate in pith and substance to telecommunications. The purpose of these statutory provisions is to ensure that a Canadian carrier or distribution undertaking is able to access highways or other public places

in order to construct, maintain or operate its transmission lines and that it has recourse to the Commission in the event of a dispute. Further, both the fee payable by Rogers for access to provincial highways for the purpose of constructing, maintaining or operating its transmission lines, and the terms and conditions regarding relocation of Rogers' lines at the request of the Province, relate to a vital part of the operation of Rogers' undertaking. The Commission therefore concludes that sections 42 and 43, and this Decision, fall within Parliament's exclusive jurisdiction over telecommunications undertakings.

44. Regarding the Province's alternative request that the Commission adjourn this proceeding until after the Federal Court of Appeal renders its decision in the appeal of Decision 2005-36, the Commission notes that only some of the issues may overlap and the facts in that case are substantially different than in the present case. In addition, it may take many months before the Court's decision is released. The Commission further notes Rogers' submissions that it will be prejudiced by an adjournment of this proceeding. The Commission finds that it would not be appropriate to delay its disposition of Rogers' application. Once the Federal Court of Appeal's decision is released, if it bears directly on the Commission's determinations in this case, the Commission can determine what, if any, steps should be taken.

(ii) Highway usage fees payable by Rogers to the Province

Positions of parties

Rogers

45. Rogers noted that in Decision 2001-23 and more recently in Decision 2005-36, the Commission held that fees payable for use of highways should be based on causal or incremental costs. Rogers also noted that consistent with the causal cost principle, the Commission held in Decision 2001-23 that the use by third parties of Ledcor's support structures should not give rise to additional or separate fees. Rogers submitted that while Decision 2001-23 had not established a binding framework, the Commission had consistently recommended that access negotiations ought to be undertaken within its framework.

46. Rogers submitted that there was no indication that its cables that were attached to the support structures located on highways controlled by the Province had caused the Province to incur any costs, let alone annual costs of $170,516.25 or $173,391.25, which were the highway usage fees that the Province sought from Rogers. Rogers noted in this regard that 99 percent of its transmission lines on the Province's controlled highways, as measured by the Province in its invoices for usage fees, were supported by third-parties' poles, including those of Bell Aliant and NB Power.

47. Rogers noted that it had not entered into a usage agreement and had not been required by the Province to obtain a highway usage permit (HUP) for its transmission facilities that were supported by third-party poles. Rogers submitted that it understood, as confirmed by the Province's actions, that these facilities were covered by the HUP issued to the pole owners. Rogers submitted that, in effect, the Province was seeking double payment of the charges payable under Regulation 97-137, by demanding payment from pole owners and from third-party users of support structures.

The Province

48. The Province submitted that if, notwithstanding its arguments, the Commission found that it had the jurisdiction to hear and determine Rogers' application, the Commission should nevertheless dismiss it. The Province argued that there was no basis for overruling the charge, or exempting Rogers from it, on the merits. The Province also argued that for the Commission to impose a requirement for a province to demonstrate causal costs in the doctrinaire manner suggested by Rogers was both unreasonable and unfair.

49. The Province submitted that the charge in question was not irrational, but had as its basis the principle of ROW repair cost recovery, albeit without the precise quantification of a detailed causal costing study. The Province noted that this charge had been applied routinely in New Brunswick for a decade.

50. The Province noted that the trucks used by electric utilities, telecommunications carriers and cable companies to install and maintain their lines along utility poles were large, heavy vehicles, which caused significant indentations to the pavement, paved shoulders, gravel shoulders, gravel, the grassed foreslopes and backslopes, and the ditches of the highway ROW.

51. The Province noted that the greater the number of entities constructing and maintaining their lines along the highways, the greater the number of linear metres of damaged ROW that would have to be repaired at public expense. The Province submitted that this was why the New Brunswick Legislature had chosen to include in its highway legislation a universally applicable charge for all utilities. The Province submitted that if Rogers continued to operate its trucks on provincial ROW as described above, without paying any fees as a contribution to the damage these vehicles imposed on the ROW, the taxpayers of New Brunswick would be subsidizing the shareholders of Rogers.

52. The Province submitted that for it to try to calculate the incremental costs of the increase in ROW maintenance to all the highways in New Brunswick caused by Rogers' vehicles it would have to hire a consulting firm to send numerous consultants to observe a sufficiently large representative sample of Rogers' trucks being used during the construction or maintenance of transmission lines.

53. The Province argued that given the number of kilometres of highway in New Brunswick, the relatively low population density, the high hourly rates charged by accounting firms for such forensic accounting, and the number of years of data required for a reliable sample, the effort to calculate incremental costs would not be justified by the annual revenues that could be obtained from Rogers. The Province submitted that this was especially so given the risk that even after all of this expenditure of time and money, at the end of the exercise, as in a study filed by the City of Vancouver in the proceeding leading to Decision 2001-23, the Commission might still not find the costing methods and data sufficiently persuasive.

54. The Province submitted that if it were to conduct a study similar to the City of Vancouver's, Rogers could argue that the study did not provide sufficient proof that the damage was caused by its vehicles rather than those of Bell Aliant or NB Power, whose trucks also parked at the same poles and caused the same damage in the same places. The Province also submitted that

this was why, to avoid this potentially fatal weakness in the study, it would have to monitor continuously either every vehicle or every pole that was the subject of the study to identify which pole users' truck had caused which damage during the period of study.

55. The Province submitted that Rogers' strict insistence on causal costing under section 43 of the Act was discriminatory against public authorities. The Province also submitted that this position was inconsistent with the Commission's own treatment of the occupation of another's property in cases not involving municipalities or provinces where the Commission determined that property owners should be compensated for the commercial occupancy of their property.[11]

56. The Province submitted that the Commission should discourage, rather than reward, applications such as this one, which was essentially a trivial complaint about an inconsequential charge. The Province submitted that the annual fee of approximately $50.64 per kilometre, on average, for the approximately 3,424 kilometres that Rogers' lines occupied did not seem to be an unreasonable amount for Rogers, like others, to pay for the repairs to an entire kilometre of the ROW due to damage caused by its vehicles and/or for the right to occupy provincial property.

Rogers' reply

57. Rogers submitted that virtually all of its transmission facilities in New Brunswick were attached to third-party poles. Rogers also submitted that absent any costs incurred by the Province to collect highway fees from Rogers, there were no administrative costs to the Province from Rogers' use of third-party poles located on provincially-controlled highway ROW.

58. Rogers submitted that the Province appeared to equate the principle of causal costs with Phase II costing and that it had not requested that the Province engage in a complex Phase II costing exercise.

59. Rogers argued that annual fees in excess of $170,000 may be trivial to the Province, but they were not trivial to a private sector company that operated in a competitive marketplace and had a responsibility to its shareholders to ensure that costs were properly and prudently incurred.

60. Rogers submitted that the facts demonstrated, on a *prima facie* basis, that the fees the Province sought for use of its highways were not based on causal costs. Rogers questioned how the costs associated with repairs caused by its trucks on highways while installing or maintaining transmission lines could vary from $37.50 per kilometre on some highways to $2,500 per kilometre on other highways.

61. Rogers submitted that, contrary to the Province's submissions, the utility pole rates approved by the Commission were based on causal costs and a proportionate share of common costs, and were supported by detailed costing evidence.

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[11] *Provision of telecommunications services to customers in multi-dwelling units*, Telecom Decision CRTC 2003-45, 30 June 2003, at paragraph 160; *Part VII Application – Access to supporting structures of municipal power utilities – CCTA vs MEA et al – Final Decision*, Telecom Decision CRTC 99-13, 28 September 1999, at paragraph 211 (overturned on jurisdictional issues in Barrie Public Utilities v. Canadian Cable Television Association, [2003] 1 S.C.R. 476); and *Co-Location*, Telecom Decision CRTC 97-15, 16 June 1997, at paragraph 63.

Commission's analysis and determination

62. In the Commission's view, the key point of dispute between Rogers and the Province is the appropriateness of using causal costs as the correct measure for determining the rate Rogers should pay to the Province for costs related to its access to the Province's highways for the purpose of constructing, maintaining or operating its transmission lines.

63. The Commission notes that the greater the number of entities constructing and maintaining their lines along the highways, the greater the potential costs of repairing and maintaining those highways. The Commission considers that it is appropriate that Rogers, as a private commercial entity, should pay a fee to mitigate the cost of repair and maintenance to the Province's highways rather than imposing those costs on the provincial taxpayer base.

64. The Commission notes that it has used various methods to determine the amounts property owners should receive as compensation for the occupation of their property, including opportunity costs in multi-dwelling units (MDUs), fair rate of return on utility poles, and embedded costs for co-location floor space. The Commission's determination regarding the appropriate method for determining compensation was made based on the facts of each case, such as the specific type of property and nature of the use of, or access to, that property by the Canadian carrier or distribution undertaking. The Commission considers that the methods used to determine compensation for occupation in MDUs, on utility poles, and in central offices would not be appropriate for determining the appropriate fee to recover the costs for repair and maintenance related to use by Rogers of the Province's highways for the purpose of accessing its transmission lines.

65. As concluded above, the dispute falls within the scope of subsection 43(4) of the Act, as it concerns the use of provincial highways by Rogers for the purpose of constructing transmission lines, as well as maintaining and operating its existing lines, and the applicable terms and conditions of such access. The Commission notes that subsection 43(4) does not provide specific guidance as to the basis upon which any conditions of permission will be granted. The Commission further notes that subsection 42(1) confers, in the exercise of the Commission's powers, the authority upon the Commission to make orders in relation, amongst other things, to the construction, operation, and maintenance of any telecommunications facilities, subject to such conditions as to compensation or otherwise as the Commission determines to be just and expedient. Thus, in accordance with subsection 42(1), with respect to the exercise of its powers under subsection 43(4), the Commission may impose any conditions it determines to be "just and expedient".

66. The Commission accepts the Province's submission that to require it to develop causal costs attributable to Rogers' use of the highways for the purpose of its transmission lines would be very difficult as well as prohibitively costly for the Province in relation to the size of the fees to be collected from Rogers. In addition, the Commission does not consider that the annual fee payable by Rogers is unreasonable when considered in relation to Rogers' revenues in New Brunswick. Moreover, the Commission notes that the fees charged to Rogers apply in a non-discriminatory manner and, therefore, do not disadvantage Rogers vis-à-vis its competitors in similar circumstances.

67. While it considers that fees for use of highways or other public places for the purpose of constructing, maintaining or operating transmission lines should in general be based on causal costs, the Commission considers that, in the circumstances of this case, a requirement to develop a fee for Rogers based on the costs causal to the use by Rogers of provincial highways for the purpose of its transmission lines would be neither practical, nor cost effective, and therefore would not be expedient.

68. In light of the foregoing, the Commission concludes that the fees currently payable by Rogers to the Province for the Province's costs associated with highway usage by Rogers are just and expedient.

(iii) Apportionment of costs for relocation of Rogers' facilities at the request of the Province

Positions of parties

Rogers

69. Rogers requested that the Province negotiate a fair and non-discriminatory division of the costs to Rogers of relocating its transmission facilities on provincial highway ROW at the request of the Province, in accordance with the principles set out in Decision 2001-23.

70. Rogers submitted that the Province had consistently refused to reimburse it for any relocation expenses incurred by Rogers, and had refused to extend to Rogers the treatment that it currently accorded to NB Power and Bell Aliant under the Tri-Agency Agreement.[12] Rogers noted that under that agreement, Bell Aliant and NB Power received reimbursements from the Province whenever they performed relocation work at the request of the Province.

71. In Rogers' view, the terms and conditions reflected in the Province's Tri-Agency Agreement with NB Power and Bell Aliant appeared to be generally consistent with the principles suggested by the Commission in Decision 2001-23 with respect to the allocation of relocation expenses. Rogers submitted that the Province's refusal to reimburse Rogers for relocation costs was not only inconsistent with the principles set out in Decision 2001-23, it also placed Rogers at a competitive disadvantage relative to its main competitor in the province, Bell Aliant.

The Province

72. The Province noted that Rogers had acquired a New Brunswick cable system from an owner who was not a member of the Tri-Agency Agreement with NB Power and Bell Aliant. The Province submitted, however, that in order to maintain competitive neutrality between carriers, it was prepared to treat Rogers as if it were a member of the Tri-Agency Agreement.

73. In its comments dated 3 February 2006, the Province submitted that while the Tri-Agency Agreement provided for sharing relocation costs when the non-routine activities of one party caused the other parties to have to relocate their facilities, the Tri-Agency Agreement was a valid "usage agreement" as contemplated by New Brunswick's *Highway Act*, which provided

[12] The Tri-Agency Agreement, executed by the Province, NB Power and Bell Aliant, set out the terms and conditions for use of ROW in New Brunswick by NB Power and Bell Aliant, including the division of costs between the parties when the Province required NB Power and/or Bell Aliant to relocate facilities located on provincial ROW.

that every usage agreement shall be deemed to contain a term that required the parties to pay any fee established by regulation in relation to any right respecting a highway given to the parties. The Province submitted that Rogers is seeking the same terms regarding relocation without assuming the corresponding obligation to pay usage fees.

74. In an interrogatory response dated 15 May 2006, the Province submitted that it was prepared to enter in a relocation agreement with Rogers as it had with NB Power and Bell Aliant. The Province also submitted that a verbal offer to begin the process of preparing a relocation agreement was made on 1 October 2003 to Rogers, but the information requested from Rogers was never received. The Province further submitted that a written offer of the same was set out in a 22 March 2004 letter.

Rogers' reply

75. Rogers submitted that it appeared that the Province's willingness to extend equal treatment to Rogers was contingent on Rogers paying fees to the Province. Rogers also submitted that the Province had failed to provide any basis for making reimbursement of relocation costs contingent on the payment by Rogers of the highway fees in question. Rogers further submitted that the principles and terms established in the Tri-Agency Agreement were not contingent on the payment of highway usage fees.

Commission's analysis and determination

76. The Commission notes that the Province submitted that it was willing to enter into a relocation agreement with Rogers as it had with Bell Aliant and NB Power and that there was no need for any order from the Commission. The Commission further notes that Rogers considered the terms and conditions of the Tri-Agency Agreement to be generally consistent with the principles in Decision 2001-23 with respect to the allocation of relocation expenses.

77. In light of the foregoing, the Commission considers that no specific order regarding the allocation of relocation costs is required at this time. The parties are to report back to the Commission within six months of the date of this Decision as to whether they have concluded an agreement allocating the rights and obligations of each party, including the obligation to pay the costs, in the event of relocation of Rogers' facilities at the request of the Province. If they have not concluded an agreement by then, the parties are to inform the Commission about the progress of negotiations.

78. The dissenting opinions of Commissioners Langford and Cram are attached.

Secretary General

Dissenting opinion of Commissioner Stuart Langford

I agree with the majority decision with regard to two of the three issues raised in this proceeding, the Commission's jurisdiction and the question of how the costs of relocating Rogers' facilities at the request of the Province of New Brunswick should be allocated between the parties. I disagree, however, with the way the majority has disposed of the third issue, the legitimacy of the highway usage and access fees charged to Rogers and others by the Province.

In a nutshell, what paragraphs 62 to 68 of the majority decision stand for regarding these charges is that though, "fees for the use of highways or other public places … should in general be based on causal costs" (para. 67), when it is difficult to calculate those costs, the party levying them need not do so. It can simply pick figures out of the air, as the Province appears to have done in this case, and on the grounds of expediency expect that the Commission will bless them.

Flying on one wing

In support of this questionable regulatory approach the majority, in paragraph 65, points to sub-section 42(1) of the *Telecommunications Act* (the Act) which gives the Commission in cases such as this the authority to make any order that it, "determines to be just and expedient." The majority decision, as I read it, however, does not constitute such an order. It may be expedient, but on the record of this proceeding I can find no evidence whatsoever that it is just. The word is mentioned in the majority decision, but the concept is never discussed.

Parliament's legislative directive to be **both** just and expedient is clearly an attempt to ensure that in making decisions under section 42 the Commission takes a balanced approach. By overlooking half of Parliament's formula for ensuring balance, the majority is attempting the regulatory equivalent of flying on one wing. Ironically, the *Oxford English Dictionary* includes the following as one definition of expedient: "politic rather than just." It is not an exchange I would recommend.

Sending the wrong message

The majority's decision in paragraph 66 to waive the need for causal costing and to consider ability to pay as an appropriate measure of fairness when it comes to evaluating fee levels is worrisome. It penalizes private sector success, and rewards public sector intransigence. In my view, it sends precisely the wrong message to governments and regulated enterprises alike and establishes no guidelines for causal costing in the future except, perhaps, to indicate that the whole exercise can be avoided.

What will the majority do, I wonder, if some future applicant, complaining about unsubstantiated access and usage fees, instead of being successful like Rogers, is a struggling newcomer to or a failure in the telecommunications or broadcast distribution business? Will the majority declare the "annual fee payable" to be "[un]reasonable when considered in relation … to revenues"? Will we then end up with two sets of access and usage fees, one for successful companies and a second for the not-so-successful? Where will the line be drawn between the two?

The Majority decision invites a Robin Hood approach to assessing user fees. Taken to its logical conclusion it could result in provincial schemes that take from the rich and give to provincial coffers not as directly as the Merry Men of Sherwood Forest once redistributed wealth, but just as

surely. Perhaps a more appropriate analogy would be to the Sheriff of Nottingham rather than Robin of Locksley. Either way, it strikes me as a formula for anything but regulatory fairness.

Arbitrary? Looks that way

Under its regulations, New Brunswick has concocted a range of user and access fees based on two factors, the number of kilometers of roadway along which cables are installed and the classification of the roadway where they are installed. So if, for example, a user strings one kilometer of cable along a "collector" or "local" highway, the annual fee would be $37.50. That same length of cable strung on poles along a "level I" or "level II" highway would result in a $2,500 annual fee, even though buried cable in the same place would result in only a $250 fee. The annual fee for cable along "arterial" roads is $75. Not surprisingly, with no costing data to back them up, Rogers finds these fees arbitrary. So do I.

For example, having searched the record of this proceeding from front to back, I can find no reason for charging ten times as much to gain access to cable on poles as is charged for access to buried cable in exactly the same location. One would think that the necessity to dig up and rebury cables would be far more invasive than effecting a similar repair by climbing a ladder or working from the bucket of a giraffe truck. But that is no more than a guess on my part. With no information supplied by New Brunswick, as to how its various fees were arrived at, all one can do is guess.

In its Answer to Rogers' Application, New Brunswick contends that its usage fees have been specifically calibrated to recover costs: "The purpose of this usage charge is to attempt to offset certain costs imposed by these users" (Answer, para. 15). Yet, it supplies no evidence in support of this contention because, it says, it would be too expensive to compile it: "These costs, although very real, are by their nature incapable of being quantified precisely without incurring inordinate costs to do so" (Answer, para. 15).

Trust us

These "very real costs", according to the province, arise from the damage Rogers' repair trucks do, "to the pavement, paved shoulders, gravel, the grassed foreslopes and backslopes, and the ditches of the highway right-of-way (ROW)" (Answer, para. 16). Rogers' trucks, we are asked to believe, have been causing over $170,000 in annual damage to roads and ROWs since that company purchased its New Brunswick cable operation from Shaw Communications Inc. in November 2000.

That is fully six years ago and yet the Province has not been able to place on the record even one specific example of a Rogers' truck causing damage. General allegations abound in every submission made by the Province, but verifiable evidence of damage (a photograph, an engineer's report or a specific work order) is nowhere to be found. The Province has taken a "trust us" approach to verification. I do not doubt their sincerity but a little verifiable evidence would go a long way towards increasing my comfort levels with the Province's claims.

Excuses, excuses

What New Brunswick's various filings are filled with, besides unsubstantiated allegations, are excuses for inaction. The Province has, "no staff with expertise in causal costing" (Answer, para. 47). The Province would have to hire experts to study, analyze and evaluate Rogers' activities and

the damage they cause, "for several years," to calculate the impact on ROWs of Rogers' trucks (Answer, para. 50). "For the amounts of the charges to carriers involved, the preparation of causal costing studies would be economically irrational" (Answer, para. 54). These excuses appear to satisfy the majority. They leave me hungry for facts.

In its May 15th, 2006 response to a Commission suggestion that perhaps the Province could supply "a sampling" of the sort of damage alleged, New Brunswick supplied nothing more than another list of excuses for inaction. "A sampling programme (sic) would not be a useful exercise… The degradation caused by Rogers' trucks does not occur at an instant in time… it occurs over several years…"

Oh, those wily trucks

Finally, in the same May 15th, 2006 response, New Brunswick trots out a conspiracy theory, the essence of which being that even if the Province initiated a sampling exercise, Rogers would purposefully undermine it: "Rogers trucks would be on their best behaviour to minimize damage if they knew they were being monitored for the purpose of providing a sample on which the cost of the use of the province's poles would be based." I thought the issue was damage to highways and ROWs. Suddenly, we are talking about poles. It makes you wonder.

Take our word for it

Why the majority chooses to reward this type of obstructionist and confusing approach to a serious regulatory proceeding is beyond me. There is in my opinion simply no reason why the Province could not have supplied some factual and analytical basis for its assertions. How difficult would it be, for example, to obtain even one photograph of damage actually done by a Rogers truck? How costly would it be to obtain an assessment by a qualified expert as to how one might logically expect the erosive effects of rain and freeze/thaw cycles to exacerbate initial damage over time?

New Brunswick flatly refused to make even a token costing effort. None exists on the record. The Province did not even file support for its contention, as reflected in its fee structure, that repair costs vary depending on the category of road and whether cables are buried or strung from poles. Stripped to its essential elements, the Province's full case on usage fees is that Rogers' trucks annually account for something in the order of $170,000 in damages to roads and ROWs; take our word for it, and order Rogers to pay. That, along with the fact that Rogers is rich, seems good enough for the majority. It does not convince me.

Stop your whining

Nor can I accept the contention that provable or not – and, therefore, I would add, "just" or not – Rogers should pay up because their application for relief is "trivial and petty" (Answer, page 23). Here are the exact words used: "This is essentially a trivial complaint about an inconsequential charge (in 2004 it amounted to only $173,391.25). This would be a trivial portion of the revenues that Rogers earned in the Province this year… The complaint is merely peevish and petty" (Answer, paras. 85 & 86). That's a little like telling some woman to stop whining about her purse being snatched because she has more money in the bank.

Poor us

Interestingly, though the Province is quick to categorize money coming out of Rogers' revenues as trivial, it takes an opposite view when it comes to its own coffers: "Because municipalities and provinces are seen as having deep pockets, is it really acceptable to require them to forego fees and charges to carriers when others are not expected to forego the same? Is the public purse less worthy of protection than the private one" (Answer, para. 56)? Surely a "just" as well as "expedient" resolution of this proceeding would have concluded that no pocket, private or public, should be picked, and that fairness dictates that payment for actual damages can be recovered but only on some reasonable causal basis.

Name that province

Finally, there arises on the record a question that, all the charges and counter-charges notwithstanding, one would think New Brunswick could have answered. In Rogers' January 16, 2006 Reply, at paragraph 22, the company states that, "no other province has considered it necessary to introduce highway fees to recover provincial costs incurred by the activities described by the Province in its Answer." On February 3, 2006, in an Objection response, the Province took exception to this allegation, calling it "unsupportable and factually incorrect" (para. 27). What New Brunswick did not do is prove Rogers' statement wrong by supplying the name of even one province that does have such a cost recovery system.

Reasonable connections

There is a growing body of law in Canada and elsewhere (Australia and New Zealand, for example) that stands for the proposition that there must be some causal relationship between the amount of fees levied by a government and the services supplied in exchange for them. This need for a reasonable connection between the amount charged and the cost of the service provided was affirmed by the Supreme Court of Canada in *Eurig Estate (Re)*, [1998] 2 S.C.R. 565 and has been adopted in other cases since.

For example, in *Nanaimo Immigrant Settlement Society v. British Columbia*, (2004) 242 D.L.R. (4^{th}) 394, the British Columbia Court of Appeal indicated that for a fee to be a true fee and not merely a taxation scheme in disguise there must be evidence of a serious effort to ensure that the amount collected approximates the cost of the scheme for which it is collected. Fees collected and expenditures made under the scheme need not be identical, but there must be a genuine attempt made to match them.

I have no intention of turning this dissenting opinion into a treatise on the fallout from *Eurig* and the law as it now stands on fees versus taxes, but it is worth noting that these issues are very much before the courts these days. If its performance in this proceeding is indicative of the way New Brunswick might present a defence of its highway access and usage fee scheme before a court of competent jurisdiction in a civil action, I would be very interested indeed to see what the outcome will be.

Conclusion

It may be that the amounts the Province attempts to collect from Rogers each year closely approximate the annual damage done by Rogers' trucks to New Brunswick's highways and rights-of-way. Unfortunately, New Brunswick has provided no evidence upon which I could reasonably come to that conclusion. Accordingly, I would have granted Rogers' application to enter on highways controlled by the Province's Department of Transportation at no charge.

Dissenting opinion of Commissioner Barbara Cram

I agree with the concerns as stated in Commissioner Langford's dissent.