

Date: 20070313

Docket: A-600-05

Citation: 2007 FCA 106

**CORAM: SEXTON J.A.
 EVANS J.A.
 SHARLOW J.A.**

BETWEEN:

CITY OF EDMONTON

Appellant

and

**360NETWORKS CANADA LTD./LONDON CONNECT INC., ALIANT
TELECOM INC., BELL CANADA, CALL-NET ENTERPRISES INC.,
CANADIAN CABLE TELECOMMUNICATIONS ASSOCIATION,
CITY OF CALGARY, CITY OF OTTAWA, CITY OF TORONTO,
CITY OF VANCOUVER, FEDERATION OF CANADIAN
MUNICIPALITIES, FUTUREWAY COMMUNICATIONS INC., MTS
ALLSTREAM INC., (formerly ALLSTREAM CORPORATION),
SASKATCHEWAN TELECOMMUNICATIONS (SASKTEL), and
TELUS COMMUNICATIONS INC.**

Respondents

Heard at Toronto, Ontario, on December 13 and 14, 2006.

Judgment delivered at Ottawa, Ontario, on March 13, 2007.

REASONS FOR JUDGMENT BY:

EVANS J.A.

CONCURRED IN BY:

**SEXTON J.A.
SHARLOW J.A.**

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REASONS FOR JUDGMENT

EVANS J.A.

A. INTRODUCTION

[1] This is an appeal by the City of Edmonton from a decision of the Canadian Radio-television Communications Commission (“CRTC”), dated June 17, 2005 (Telecom Decision 2005-36). In this

decision, the CRTC determined the method for calculating the fee payable to Edmonton by MTS Allstream Inc. (“Allstream”), a telecommunications carrier, for the use of light rail transit (“LRT”) lands to house its fibre optic transmission lines. This appeal raises three questions of principle.

[2] The first is whether a carrier may apply to the CRTC for permission to enter on municipal land for the purpose of constructing, maintaining and operating a transmission line after it has been installed with the consent of the municipality. Edmonton says that no provision of the *Telecommunications Act*, S.C. 1993, c. 38 (“Act”) confers jurisdiction on the CRTC to entertain such an application from a carrier. In contrast, the Act expressly authorizes the CRTC to entertain applications from municipalities seeking redress against the conduct of carriers.

[3] The second question concerns the interpretation of the words “a highway and other public place” in section 43 of the Act. This phrase defines the lands that are subject to carriers’ right of entry for the purpose of constructing, maintaining and operating transmission lines. Edmonton argues that, because of its long legislative history in the Act’s predecessors, the phrase, “other public place”, should be interpreted narrowly to mean places with the essential characteristics of a highway. It says that the CRTC committed an error of law when it adopted a broader approach to defining “public place” and concluded that the inside of buildings owned by a municipality and the walls of LRT tunnels constituted a “public place”.

[4] The third is whether the CRTC abused its discretion to impose conditions on the grant of permission when, relying on the methodology established in *Ledcor/Vancouver – Construction*,

operation and maintenance of transmission lines in Vancouver, Decision CRTC 2001-23 (“*Ledcor*”), it imposed a fee calculated on the basis of the costs caused by the presence of Allstream’s lines on municipal land. Edmonton says that, as the owner of the land, it is entitled to an occupancy rent base on fair market value.

[5] In my opinion, the CRTC committed no reviewable error in reaching its decision. Accordingly, I would dismiss Edmonton’s appeal.

B. FACTUAL BACKGROUND

[6] In 1997, Allstream’s predecessor (which I shall also refer to in these reasons as Allstream) entered into two agreements with Edmonton. First, the Municipal Access Agreement (“MAA”), gave Allstream access to, and the right to enter on and break up, highway rights of way owned by Edmonton, in order to construct, maintain and operate a communications network to serve office buildings along, or adjacent to, the network.

[7] The MAA provided that Allstream would pay a fee of \$20.00 a metre for the use and occupation of highway rights of way in the downtown core. This was the fee that an Edmonton bylaw required carriers to pay. The MAA expired on May 29, 2002.

[8] Second, the LRT Agreement gave Allstream access to LRT lands for similar purposes; it defined the LRT lands as including LRT tunnels, stations, and attached pedways and stairwells. The parties negotiated a fee formula for the LRT lands which took into account both causal costs and an

occupancy rent. Although the bylaw fixing the fee at \$20.00 a metre did not apply to the LRT lands, Edmonton regarded the fee in the LRT Agreement as substantially equivalent to that contained in the bylaw.

[9] Pursuant to the LRT Agreement, Allstream installed approximately 5,000 metres of fibre optic transmission lines, which were housed in metal pipes anchored to the walls of the LRT tunnels, LRT stations and pedways. This represented about 20% of Allstream's network in Edmonton. The Agreement provided that Allstream would remove its facilities on the expiry of the Agreement, that is, March 27, 2002, unless Allstream exercised its option to extend it, with a mechanism for calculating the fees payable to Edmonton.

[10] From Edmonton's point of view, an advantage of the LRT Agreement was that transmission lines could be installed on LRT lands without the disruption to traffic caused when highways are dug up for this purpose. The advantages of the Agreement for Allstream are that access to the LRT tunnels is easy and inexpensive, and the lines are protected from the weather, considerations which make the LRT lands particularly valuable. However, there was no evidence that use of the LRT lands was *necessary* to enable Allstream to serve any of its customers.

[11] In January 2001, just over a year before the LRT Agreement was due to expire, the CRTC issued an important decision in a dispute between the City of Vancouver and Leducor, another telecommunications carrier, respecting the conditions on which it would be granted access to certain street-crossings in Vancouver.

[12] The CRTC determined that the fee payable by Leducor should be limited to any incremental causal costs incurred by Vancouver as a result of the grant of access to Leducor. The CRTC stated in its reasons that, while its decision was based on the particular facts of the case, the causal costs principle would assist municipalities and carriers in negotiating the terms on which municipal consent would be given for carriers to construct, maintain and operate transmission lines on municipal property. This Court dismissed an appeal from the decision: *Federation of Canadian Municipalities v. AT&T Canada Corp.*, 2002 FCA 500, [2003] 3 F.C. 379, leave to appeal to S.C.C. refused, 29635 (September 4, 2003).

[13] In September 2001, Edmonton and Allstream started negotiations for an extension of the agreements. They ultimately agreed all the terms and conditions of a new MAA, consistent with the *Leducor* principles, except for the definition of the lands to be included within it. Edmonton refused to extend the MAA to the LRT lands, on the ground that they were not “a highway or other public place”, and the fees payable for their use were therefore not subject to the jurisdiction of the CRTC or to the causal costs principle applied in *Leducor*.

[14] On June 18, 2002, several months after the initial term of the LRT Agreement had expired, Allstream advised Edmonton that it was not going to exercise its option to renew, on the ground that the fees payable under the renewal clause contravened the causal costs principle in *Leducor*. On the same day, Edmonton passed a resolution extending to LRT lands the bylaw imposing an occupancy fee on carriers who ran transmission lines on City property, and increasing the fee payable.

[15] Despite the expiry and non-renewal of the LRT Agreement, Allstream did not remove its facilities from the LRT lands as required by the Agreement. Edmonton took no steps to enforce this provision, because of the disruptive effect that this would have on Allstream's business and residential customers. Allstream continued to keep its lines in place, and to have access to the LRT lands to operate and maintain its equipment, for which, in the absence of an agreement, it paid no fee.

[16] On June 23, 2003, Edmonton commenced proceedings in the Alberta Court of Queen's Bench to recover the amount which it claimed that Allstream owed for continuing to keep its facilities on, and for having access to, the LRT lands after the LRT Agreement had expired.

[17] On July 9, 2003, Allstream made an application to the CRTC under Part VII of the Act, requesting that it be granted access to the LRT lands for the purpose of constructing, maintaining and operating transmission lines, and for an order imposing conditions on its access in accordance with the causal costs principle established in *Ledcor*.

C. DECISION OF THE CRTC

[18] After fully describing the written submissions made to it by the various parties, the CRTC stated that the issue raised by Allstream was one of ongoing access to the LRT lands. It analysed the parties' arguments as follows.

[19] First, Edmonton argued that sections 42-44 of the Act confer jurisdiction on the CRTC only to determine an application by a carrier to construct transmission lines on municipal property. Since Allstream had already constructed lines pursuant to the LRT Agreement, the CRTC had no jurisdiction over Allstream's application to resolve a dispute over the fee payable for the lines to remain in place and for access to maintain and operate them. Edmonton had not threatened to remove the transmission lines from the LRT lands.

[20] The CRTC rejected this argument, on the ground that such a narrow interpretation of the provisions would lead to "absurd results": at para. 62. It would prevent the CRTC from entertaining an application by a carrier in the absence of any action by the municipality to have the lines removed. However, if a carrier was ordered to remove its lines, it could make an application to the CRTC for permission to reconstruct the very same lines that it had been ordered to remove.

[21] Second, Edmonton submitted that the CRTC had no jurisdiction to grant access and impose conditions, because the LRT lands did not constitute "a highway or other public place" for the purpose of the Act. The CRTC agreed that, since members of the public could not travel in their own vehicles through the LRT tunnels, they were not a "highway". However, it rejected Edmonton's argument that "other public place" should be interpreted *ejusdem generis*, on the grounds that a list of one, "highway", does not establish a *genus*, and that the presence of the word, "other", indicates that Parliament intended "public place" to embrace types of property different from a highway.

[22] In the absence of a statutory definition, the CRTC formulated criteria for determining whether a given property was a “public place” for the purpose of sections 42-44 of the Act: whether the lands were owned by a public body and used for public purposes, and the degree of public access to them. Applying these criteria to the facts, the CRTC concluded that the LRT lands were a “public place”, and that it had jurisdiction to grant Allstream access to them, subject to conditions.

[23] Third, the CRTC held that it would be inappropriate to impose the occupancy fee of \$20.00 a metre proposed by Edmonton on the basis of its land value formula. The CRTC noted that the fee agreed to by the parties in the renegotiated MAA for access to municipal lands, other than the LRT lands, was consistent with the causal costs principle in *Ledcor*, and was significantly less than \$20.00 a metre.

[24] Because Edmonton had already incurred the costs of constructing the tunnels, stations and pedways when it built them for the purpose of the LRT, these costs were not attributable to Allstream’s constructing, maintaining and operating its transmission lines on LRT lands. The CRTC ordered the parties to negotiate a fee structure based on the *Ledcor* causal costs principle, by calculating the future incremental costs to Edmonton of Allstream’s access to the LRT lands for the purpose of constructing, maintaining and operating transmission lines.

D. LEGISLATIVE FRAMEWORK

[25] Sections 42-44 of the *Telecommunications Act* create a qualified right for carriers to enter on public places in order to construct, maintain and operate their transmission lines. These provisions

also confer power on the CRTC to grant carriers permission to construct lines, if they cannot obtain municipal consent on terms acceptable to them, and to resolve complaints by municipalities about carriers.

[26] Subsection 42(1) confers wide powers on the CRTC, “in the exercise of its powers under this Act”. This provision is ancillary to powers conferred on the CRTC by other statutory provisions, rather than the grant of an independent jurisdiction.

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.

42(1) Dans l'exercice des pouvoirs qui lui sont conférés par la présente loi ou une loi spéciale, le Conseil peut, par ordonnance, sauf disposition contraire de toute autre loi ou loi spéciale, enjoindre ou permettre à tout intéressé ou à toute personne touchée par l'ordonnance de procéder, selon les éventuelles modalités de temps, d'indemnisation, de surveillance ou autres qu'il estime justes et indiquées dans les circonstances, à l'une des opérations suivantes : fourniture, construction, modification, mise en place, déplacement, exploitation, usage, réparation ou entretien d'installations de télécommunication, acquisition de biens ou adoption d'un système ou d'une méthode.

[27] Subsection 43(2) authorizes carriers to “enter on and break up any highway or other public place” for the purpose of “constructing, maintaining or operating” their lines, and to “remain there for as long as is necessary for that purpose”.

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

43(2) Sous réserve des paragraphes (3) et (4) et de l'article 44, l'entreprise canadienne et l'entreprise de distribution ont accès à toute voie publique ou tout autre lieu public pour la construction, l'exploitation ou l'entretien de leurs lignes de transmission, et peuvent y procéder à

that purpose, but shall not unduly interfere with the public use and enjoyment of the highway or other public place.

des travaux, notamment de creusage, et y demeurer pour la durée nécessaire à ces fins; elles doivent cependant dans tous les cas veiller à éviter toute entrave abusive à la jouissance des lieux par le public.

[28] The exercise of the rights created by subsection 43(2) is subject to subsections (3) and (4).

Subsection 43(3) provides that no carrier may construct a transmission line “on, over or along a highway or other public place” without the consent of the municipality or other public body with jurisdiction over it.

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.

43(3) Il est interdit à l'entreprise canadienne et à l'entreprise de distribution de construire des lignes de transmission sur une voie publique ou dans tout autre lieu public — ou au-dessus, au-dessous ou aux abords de ceux-ci — sans l'agrément de l'administration municipale ou autre administration publique compétente.

[29] When a carrier cannot obtain a municipality's consent, “on terms acceptable to it”, “to construct a transmission line on a highway or other public place”, it may apply to the CRTC for permission to construct it. The CRTC has an unqualified power to grant the permission “subject to any conditions that the Commission determines”.

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.

43(4) Dans le cas où l'administration leur refuse l'agrément ou leur impose des conditions qui leur sont inacceptables, l'entreprise canadienne ou l'entreprise de distribution peuvent demander au Conseil l'autorisation de construire les lignes projetées; celui-ci peut, compte tenu de la jouissance que d'autres ont des lieux, assortir l'autorisation des conditions qu'il juge indiquées.

[30] Section 44 enables the CRTC, “on application by a municipality or other public authority”, to order carriers to “bury or alter the route of a transmission line, actual or proposed, or “prohibit the construction, maintenance or operation” of such a line, “except as directed by the Commission.”

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

(a) order a Canadian carrier or distribution undertaking, subject to any conditions that the Commission determines, to bury or alter the route of any transmission line situated or proposed to be situated within the jurisdiction of the municipality or public authority; or
(b) prohibit the construction, maintenance or operation by a Canadian carrier or distribution undertaking of any such transmission line except as directed by the Commission.

44. Sur demande d’une administration municipale ou autre administration publique, le Conseil peut :

a) soit obliger, aux conditions qu’il fixe, l’entreprise canadienne ou l’entreprise de distribution à enfouir les lignes de transmission qu’elles ont, ou projettent d’avoir, sur le territoire de l’administration en question ou à en modifier l’emplacement;
b) soit ne leur en permettre la construction, l’exploitation ou l’entretien qu’en exécution de ses instructions.

E. ISSUES AND ANALYSIS

Issue 1: Did the CRTC have legal authority to decide Allstream’s application?

[31] Edmonton says that the dispute between it and Allstream is over the fee to be paid for the transmission lines to remain on the LRT lands and for Allstream’s entry on the lands for the purpose of maintaining and operating the lines. Counsel for Edmonton submitted that the CRTC has jurisdiction to permit a carrier to construct a line on municipal land when it cannot obtain the consent of the municipality on terms acceptable to it, but it does not have jurisdiction to resolve disputes about the post-construction use of municipal land.

[32] The present case, counsel argues, does not involve a dispute about consent to construct a transmission line, because Allstream has already constructed its lines pursuant to the LRT

Agreement. Rather, it is a dispute about the occupancy fee payable for the post-construction use of LRT lands, and must be resolved according to the law of contract by the courts of the province, not the CRTC.

(i) Standard of review

[33] It was not seriously disputed that correctness is the standard of review applicable to the CRTC's decision that it could determine Allstream's application, and grant it permission to use the LRT lands, subject to the payment of a fee. I agree.

[34] The question in dispute is one of statutory interpretation. In *Barrie Public Utilities v. Canadian Cable Television Assn.*, 2003 SCC 28, [2003] 1 S.C.R. 476, it was held that the CRTC's interpretation of the phrase, "supporting structure of a transmission line" in the *Telecommunications Act* was not within the specialized expertise of the CRTC, and was reviewable for correctness. Writing on behalf of the majority of the Court, Gonthier J. chose the correctness standard because the question at issue was one of statutory interpretation, "a purely legal question" (at para. 16), which was "of general importance to the telecommunications and electricity industries" (at para. 18), and did not engage

the CRTC's special expertise in the regulation and supervision of Canadian broadcasting and telecommunications. This is not a question of telecommunications policy, or one which requires an understanding of technical language.

[35] This reasoning is equally applicable to the interpretation of the Act to determine if the CRTC had legal authority to hear and determine Allstream's application. If, as the parties agree, this issue concerns the CRTC's "jurisdiction", that is another reason for concluding that the standard of

review is correctness: *Chieu v. Canada (Minster of Immigration and Citizenship)*, 2002 SCC 3, [2002] 1 S.C.R. 84 at para. 24.

(ii) The statutory scheme

[36] The facts of the case must be kept firmly in mind before the statutory scheme is applied. From March 27, 1997 until March 27, 2002, Allstream entered on the LRT lands for the purpose of constructing, maintaining and operating transmission lines pursuant to the LRT Agreement. The Agreement was not renewed because Allstream refused to agree to Edmonton's claim to an occupancy fee that was much higher than its causal costs.

[37] The absence of any contract with Edmonton appears to have had no adverse effect on Allstream. Its lines remain in place and its employees continue to enter on the LRT lands in order to maintain them. Indeed, Allstream is better off because it is not paying a fee to Edmonton.

[38] True, Allstream is in breach of its contractual obligation to remove its facilities on the expiry and non-renewal of the LRT Agreement. However, Edmonton says that it has no intention enforcing its right, because requiring removal is not practicable. Instead, it has instituted an action in Alberta's Court of Queen's Bench seeking compensation for Allstream's continued use of the LRT lands for its transmission lines without Edmonton's consent.

[39] It is clear that sections 42-44 of the Act do not expressly cover these facts. Subsection 43(2) grants carriers the right to enter on "any highway or other public place for the purpose of

constructing, maintaining and operating its transmission lines”, subject to obtaining municipal consent (subsection 43(3)). However, no municipal consent appears to be necessary to enable a carrier to enter on land for the purpose of maintaining or operating a transmission line, even though Allstream’s application sought, and the CRTC’s decision granted, permission to enter for the purposes of constructing, maintaining and operating transmission lines. Similarly, a municipality may not interfere with a carrier when entering on municipal lands for the purpose of maintaining and operating its lines.

[40] If the carrier cannot obtain municipal consent to construct a line on acceptable terms, it may apply to the CRTC for the necessary permission. In my opinion, “constructing” is not limited to the physical acts of installing or building, but also includes keeping in place what has been constructed. A right simply to construct, without more, would be of no value in ensuring the provision of telecommunications services to the public, since the land owner could remove the lines the day after they were installed. Hence, the qualified statutory right to construct a transmission line includes the right to leave it in place after its installation.

[41] Because it is not necessary for a carrier to enter on lands for the purpose of keeping transmissions lines in place, this is not included in the words “enter on and break up for the purpose of maintaining or operating” lines. Rather, keeping the lines in place is better seen as integral to constructing them.

[42] In the present case, the lines were constructed and have remained in place pursuant to the LRT Agreement granting Allstream the “non exclusive right and licence to use ... LRT lands for the purpose of constructing, maintaining and operating a conduit for fibre optic transmission cables”. On the expiry of the Agreement, the parties were unable to agree terms acceptable to Allstream on which the lines continued to remain on the LRT lands and Allstream had access for the purpose for maintaining and operating them. In my opinion, this can appropriately be described as a dispute about an aspect of Allstream’s qualified right to construct a transmission line, and is therefore within the jurisdiction of the CRTC under subsection 43(4) if the carrier has been unable to obtain the consent of the municipality on terms acceptable to it.

[43] In exercising its jurisdiction under 43(4) with respect to Allstream’s application, the CRTC has broad power under subsection 42(1) to deal with issues inextricably connected with the construction of the transmission lines, including granting permission to enter on LRT lands for the purpose of maintaining and operating them, “subject to such conditions as to compensation or otherwise” ... as it considers “just and expedient”.

[44] Concluding that the CRTC’s jurisdiction under subsection 43(4) includes disputes over matters necessarily incidental to the act of constructing is, in my opinion, fully justified by the modern contextual and purposive approach to statutory interpretation. Whenever possible, statutes should be interpreted in a manner that facilitates the effective implementation of legislative objectives. Thus, writing for the Court, Gonthier J. said in *Bell Canada v. Canada (Canadian Radio-television and Telecommunications Commission)*, [1989] 1 S.C. R. 1722 at 1756:

The powers of any administrative tribunal must of course be stated in its enabling statute but they may also exist by necessary implication from the wording of the Act, its structure and its purpose. Although courts must refrain from unduly broadening the powers of such regulatory authorities through judicial law-making, they must avoid sterilizing these powers through overly technical interpretations of enabling statutes.

[45] The objects of the *Telecommunications Act* include the following:

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| <p>7. It is hereby affirmed that telecommunications performs an essential role in the maintenance of Canada's identity and sovereignty and that the Canadian telecommunications policy has as its objectives</p> <p>(a) to facilitate the orderly development throughout Canada of a telecommunications system that serves to safeguard, enrich and strengthen the social and economic fabric of Canada and its regions;</p> <p>(b) to render reliable and affordable telecommunications services of high quality accessible to Canadians in both urban and rural areas in all regions of Canada;</p> <p>(c) to enhance the efficiency and competitiveness, at the national and international levels, of Canadian telecommunications;</p> <p>...</p> <p>(f) to foster increased reliance on market forces for the provision of telecommunications services and to ensure that regulation, where required, is efficient and effective;</p> <p>...</p> <p>(h) to respond to the economic and social requirements of users of telecommunications services; and</p> <p>...</p> | <p>7. La présente loi affirme le caractère essentiel des télécommunications pour l'identité et la souveraineté canadiennes; la politique canadienne de télécommunication vise à :</p> <p>a) favoriser le développement ordonné des télécommunications partout au Canada en un système qui contribue à sauvegarder, enrichir et renforcer la structure sociale et économique du Canada et de ses régions;</p> <p>b) permettre l'accès aux Canadiens dans toutes les régions — rurales ou urbaines — du Canada à des services de télécommunication sûrs, abordables et de qualité;</p> <p>c) accroître l'efficacité et la compétitivité, sur les plans national et international, des télécommunications canadiennes;</p> <p>[...]</p> <p>f) favoriser le libre jeu du marché en ce qui concerne la fourniture de services de télécommunication et assurer l'efficacité de la réglementation, dans le cas où celle-ci est nécessaire;</p> <p>[...]</p> <p>h) satisfaire les exigences économiques et sociales des usagers des services de télécommunication;</p> <p>[...]</p> |
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[46] The regulation of telecommunications is within exclusive federal legislative authority:

Alberta Government Telephones v. CRTC, [1989] 2 S.C.R. 225 at 256-68 (telephones). In order to

attain the statutory objects, the Act should be interpreted as creating a comprehensive regulatory scheme. In the context of the present dispute, it is relevant that the speed of technological development, and the enhanced reliance on market forces in the provision of telecommunications, have made parties reluctant to enter into long-term arrangements, which were more common in earlier times when the predecessors of what are now sections 42-44 were enacted.

[47] In my opinion, Edmonton's argument that the CRTC has no jurisdiction to resolve disputes, on the application of a carrier, which arise after a transmission line has been constructed, is based on an unduly narrow interpretation of the Act. This is at odds with the administration of the Act in a manner that attains the statutory objects of, among other things, encouraging the orderly development of telecommunications networks in Canada.

[48] First, as the CRTC pointed out in its reasons for decision, it would be absurd to interpret the Act as requiring that Edmonton remove, or threaten to remove, existing transmission lines before Allstream could apply to the CRTC under subsection 43(4) for permission to enter on the LRT lands for the purpose of constructing the lines that had just been removed. In any event, as Edmonton recognized, it could not realistically order the removal of the lines, despite Allstream's contractual obligation to remove them on the expiry of the LRT lands Agreement.

[49] Second, paragraph 44(b) confers jurisdiction on the CRTC, on the application of a municipality or other public authority, to prohibit the construction, maintenance or operation of a transmission line, except as the CRTC may direct. Counsel for Edmonton argued that the broad

words of this provision should be read down so as to limit it to disputes about the *methods* of a carrier's construction, maintenance or operation of lines.

[50] I see no justification for reading in this limitation. Section 44 provides municipalities with a forum in which to seek a broad range of redress for complaints about carriers' construction, maintenance or operation of lines. If Edmonton had chosen to apply under paragraph 44(b), the CRTC would have had jurisdiction to provide a comprehensive solution to its dispute with Allstream, including the basis for the calculation of a fee. To interpret subsection 43(4) as enabling the CRTC to resolve the present dispute on the application of the carrier would thus not empower the CRTC to deal with a subject-matter otherwise outside its authority.

[51] In contrast, Edmonton's interpretation of the statutory scheme would allow municipalities to prevent the CRTC's resolution of such disputes by refusing to avail themselves of the method of redress specifically provided by Parliament in paragraph 44(b) of the Act. Such an approach would fragment the comprehensiveness of the federal regulatory scheme by encouraging resort to the courts, as happened here, and lead to a patchwork approach to telecommunications issues.

[52] Allstream's application under subsection 43(4) claimed that it had been unable to obtain access "for the purpose of constructing, maintaining and operating" transmission lines on LRT lands on terms acceptable to it. The CRTC ordered the parties to negotiate a fee structure, based on causal costs, for Allstream to have access to LRT lands for the purposes of "constructing, maintaining and operating transmission lines": at para. 113. Sections 42-44 should be read as a comprehensive and

exclusive code for regulating carriers' access to public places for the purposes of constructing, maintaining and operating transmission lines.

Issue 2: Do the LRT lands constitute an “other public place” for the purpose of section 43?

[53] Edmonton's contention that the LRT lands are not an “other public place” for the purpose of sections 42-44 was the principal reason for its refusal to extend the renegotiated MAA to the LRT lands. The requirement that the dispute concern a “public place” limits the reach of the jurisdiction of the CRTC under subsection 43(4). The scope of the phrase has important ramifications for other municipalities as well.

(i) Standard of review

[54] This issue, too, involves statutory interpretation, namely, whether “other public place” is limited to a place possessing the essential characteristics of a highway, and the application of that phrase, properly interpreted, to the facts.

[55] It was argued that *Barrie Utilities* is distinguishable, on the ground that a constitutional issue concerning the CRTC's jurisdiction over the power poles of provincially regulated electric power companies may have cast its shadow over the interpretation of the disputed statutory provision. In the present case, however, the interpretation of “other public place” does not raise even a hint of a constitutional question.

[56] In my opinion, in view of the bases of Gonthier J.'s decision in *Barrie Public Utilities* on the standard of review applicable to the CRTC's interpretation of the provisions of the *Telecommunications Act* in issue in that case, this distinction does not warrant the selection of a less probing standard of review in the present case.

[57] Thus, the CRTC will have erred in law if its interpretation of the words "other public place" is not correct. However, the CRTC's application of the statutory phrase to the facts is not reviewable for correctness because it is a question of mixed fact and law, and the Court's appellate jurisdiction over decisions of the CRTC is limited to questions of law and jurisdiction (subsection 64(1)). An unreasonable application of the statutory provision to the facts would constitute an error of law. Since Parliament has provided a right of appeal on questions of law, reasonableness *simpliciter* is the standard appropriate for reviewing the CRTC's application of the statute to the facts.

(ii) Interpretation

[58] The words "any highway and other public place" are not defined in the Act. Edmonton argues that, on the basis of the *ejusdem generis* presumption of statutory interpretation, "public place" should be narrowly construed so as to include only a place with the essential characteristics of a highway, namely, that members of the public have access to it and can travel on it in their own vehicles.

[59] The LRT lands do not have this latter characteristic, since the public can only travel through the tunnels in an LRT vehicle. When pressed for examples of what would constitute a "public

place” on this definition, counsel suggested the roadway in front of a strip mall adjacent to a highway where customers park their cars.

[60] The interpretative problem seems to result from the fact that much of the language of sections 43 and 44 has been borrowed from older legislation, enacted when the transmission lines principally contemplated were telephone or telegraph wires strung on poles along roads, or electricity cables buried under roads. Hence, the corresponding phrase in the *Railway Act*, starting in 1899, was “highway, square or public place”. When used as a third item after “highway” and “square”, the meaning of “public place” may well have been coloured by the presence of these more precise words, and interpreted *ejusdem generis*.

[61] However, the interpretation of the phrase “other public place” should be informed more by its contemporary setting in the present *Telecommunications Act*, than by its historical antecedents. Thus, the removal of “square” from the current Act seems to me to broaden the meaning of “other public place”. When a more general word or phrase follows a single word, the *ejusdem generis* presumption of statutory interpretation is of little assistance. A list of one does not normally establish a single *genus*: *Ferguson v. MacLean*, [1930] 2 S.C.R. 630 at 653.

[62] Although counsel could not point to any statutory purpose that would support limiting “other public place” to a “highway-like” place, they noted that a significant contextual consideration was that the statutory provisions deal with the grant of permission for carriers to “enter on and break up” a highway or other public place. They argued that these words were not apposite for describing

access to buildings, such as the LRT tunnels, stations and pedways: in these contexts, “enter in” would be more apt than “enter on”, and “break up” would be largely irrelevant.

[63] The words “enter on and break up” are time-honoured and are derived from earlier legislation governing rights of access for regulated carriers. The verbs “enter”, “break up” and “open” have appeared in the *Railway Act* since 1899. Their retention in the current legislative scheme should not be taken as an indication that Parliament intended the words “other public place” to have a narrower meaning than that indicated by their ordinary usage and the objects of the current Act.

[64] Sections 42-44 of the Act appear to have been drafted, in part at least, by “cut and paste”. The history of statutory language should not determine the meaning of words or phrases when used in a relatively new Act if this would thwart the effective administration of the legislation. As already noted, the objects of the *Telecommunications Act* include encouraging the efficient and orderly development of communications networks by providing a regulatory framework which is responsive to advances in telecommunications technology and to the introduction of a competitive business environment and market forces.

[65] Counsel supporting Edmonton’s position could suggest no reason, consistent with the current legislative scheme, for reading down “other public place” to mean places that members of the public can access and travel on in their own vehicles. However, it was argued that the CRTC’s

interpretation was so broad as to make “highway” redundant, and there is a presumption that Parliament intends each word in s statute to have a function.

[66] In my opinion, no interpretation provides a perfect fit with sections 42-44, and the phrases that they contain, in large part because they have been transplanted in modified form from earlier legislation. Nonetheless, I am satisfied that a broader interpretation of “other public place” is a better fit with the text, context and purposes of the current Act than that advanced by Edmonton. In short, the phrase is not narrowly confined to “highway-like” places.

[67] The CRTC did not purport to provide a succinct, dictionary definition of the phrase. Rather, it identified criteria for determining whether a particular location was an “other public place” for the purpose of the Act. These include: ownership of the land, the purpose for which it is used, and the degree of access to it. In my opinion, this multi-factored approach embodies the correct approach to the interpretation of “other public place” in the Act, by enabling the CRTC to be attentive to the facts of individual cases, as well as to the current statutory objects of the present regulatory scheme.

(iii) Application

[68] Applying these criteria to the facts, the CRTC noted that the LRT lands were owned by Edmonton, a public body, and were used for the public purpose of providing transportation to paying passengers. Further, the public has relatively broad access to the lands in question for the purpose of travelling on the vehicles operated by the LRT.

[69] In my view, on the basis of these criteria, the CRTC's conclusion that the LRT lands constitute a "public place" is not unreasonable and hence is not erroneous in law.

Issue 3: Did the CRTC err in law by limiting the fee payable by Allstream for the use of LRT lands to Edmonton's causal costs?

(i) Standard of review

[70] The CRTC has power under subsection 43(4) to impose conditions when a carrier cannot obtain municipal consent on terms acceptable to it:

... 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.

... [le Conseil] peut, compte tenu de la jouissance que d'autres ont des lieux, assortir l'autorisation des conditions qu'il juge indiquées.

[71] The CRTC has greater expertise than the Court in designing the conditions, including the setting of fees, to which permission will be subject. This, together with the breadth of the statutory discretion conferred, indicates that a deferential standard is appropriate when the Court is reviewing decision made under subsection 43(4). However, the presence of a limited right of appeal, and the fact that the decision, while discretionary, is more adjudicative than polycentric, suggests that Parliament did not intend the most deferential standard of review to apply.

[72] Hence, the CRTC will have erred in law if its exercise of discretion under subsection 43(4) does not satisfy the reasonableness *simpliciter* standard: *semble, Federation of Canadian Municipalities v. AT&T Canada Corp. supra* at para. 30.

[73] In *Allstream Corp. v. Bell Canada*, 2005 FCA 247, 338 N.R. 177 at para. 31, this Court applied the more deferential standard of patent unreasonableness to the CRTC's exercise of discretion in approving tariffs submitted by Bell for the provision of fibre optical services to customers. That case is distinguishable from ours, however, on the ground that rate-setting decisions are more polycentric, and of broader application, than adjudicative. In any event, nothing turns on which unreasonableness standard applies to the CRTC's exercise of discretion in this case.

(ii) Was the imposition of a costs-based occupancy fee unreasonable?

[74] In view of the breadth of the CRTC's discretion under subsection 43(4) and the deferential standard of review appropriate to its exercise, the appellant faces a formidable task to establish that the CRTC committed a reviewable error.

[75] Counsel developed two principal lines of attack on this aspect of the CRTC's decision. The essence of the first was that it was fundamentally unfair that Allstream and its customers should be granted the use of the LRT lands for what was likely to be a very small sum, because the LRT tunnels and stations had already been built for the transit system.

[76] The argument was that Parliament could not possibly have intended the CRTC to permit a carrier to interfere with the property rights of a municipality without paying proper compensation. In my view, however, when considered in the context of the regulatory scheme established by the Act, this argument falls short of demonstrating that the CRTC's decision was unreasonable.

[77] First, whatever the abstract “fairness” of this decision may be, it is not the function of the Court to substitute its view of the merits for that of the CRTC. In this context, “fairness” is a subjective and judicially unmanageable standard. Nonetheless, I would note that Edmonton agreed to a fee schedule based on causal costs when it renegotiated the MAA respecting municipal lands, other than the LRT lands.

[78] Second, by granting to carriers a conditional right to enter on and break up a highway or other public place for the purpose of constructing, maintaining or operating transmission lines, subsection 43(2) of the Act explicitly limits the property rights of municipalities and other public authorities in order to ensure the provision to the public of telecommunications services.

[79] Section 46 of the Act provides a discrete process for enabling a carrier to expropriate land or an interest in land for the purpose of constructing transmission lines, including the payment of fair market value for the land expropriated. It was not argued that the CRTC’s decision in this case was an expropriation of an interest in Edmonton’s land.

[80] Third, while the CRTC’s decision was undoubtedly beneficial to Allstream, the benefit was not at the expense of the taxpayers of Edmonton, in the sense that Allstream was required to compensate Edmonton for any costs attributable to Allstream’s constructing, maintaining or operating the transmission lines on the LRT lands.

[81] Indeed, the creation of a state-of-the-art, competitively priced telecommunications network to serve downtown Edmonton is likely to produce indirect benefits for the City and its residents through, for example, an increase in municipal revenues and employment opportunities, as a result of the retention, expansion and attraction of businesses.

[82] The second line of attack on the decision focused on the CRTC's use of its earlier decision in *Ledcor*, where the CRTC first promulgated "causal costs" as the basis on which a carrier was to pay for access. In particular, it was argued, the CRTC has elevated causal costs to the status of a general principle, despite the warning of this Court in *Federation of Canadian Municipalities v. AT&T Canada Corp.*, *supra* at para. 21, that the principles elaborated by the CRTC in *Ledcor* were not binding on anyone.

[83] In my view, however, Edmonton has not established that, in the present case, the CRTC unlawfully fettered the exercise of its discretion, or ignored factors that it was obliged to consider, when it ordered that the fee payable to Allstream be based on causal costs.

[84] First, the CRTC rejected as "inappropriate *in the circumstances of this case*" (my emphasis), Edmonton's proposal of a \$20.00 a metre occupancy fee based on its land value formula. This was because the fee to which Edmonton had agreed with respect to the non-LRT lands in the renegotiated MAA was substantially lower than the \$20.00 a metre which Edmonton said was based on land value: para. 107. Edmonton did not suggest any other figure.

[85] Second, the CRTC found that, if it imposed the occupancy fee proposed by Edmonton, it would put Allstream at a competitive disadvantage *vis-à-vis* other carriers, because it would be the only carrier paying substantially more than causal costs for access. It is a policy of the Act to foster increased reliance on market forces in the supply of telecommunications services: para. 7(f). A decision not to impose on Allstream a higher fee than that paid by its competitors would seem consistent with this policy.

[86] Third, the CRTC rejected Edmonton's suggestion that a fair market value should be determined by an auction of the rights to use the LRT lands for transmission lines, on the ground that, while there were potential bidders, Edmonton was the only seller, since no equivalent sources of supply were available: para. 110.

[87] Fourth, the CRTC did not prescribe the particular methodology to be used for the calculation of causal costs. It was prepared to leave it to the parties to agree on the appropriate methodology and to intervene only if they could not agree: paras. 104-5 of its reasons.

[88] In summary, I am not persuaded that, on the facts of this case, the CRTC's conclusion that the fees should be based on causal costs was vitiated by any error that can be said to make its decision unreasonable. This is not to say that, when the appropriate evidence is led, the CRTC is precluded from including in the calculation of causal costs a portion of the costs of the ongoing maintenance of the municipal property being used by a carrier for its transmission line.

F. CONCLUSION

[89] For these reasons, I would dismiss the appeal with costs.

“John M. Evans”

J.A.

“I agree.

J. Edgar Sexton J.A.”

“I agree.

K. Sharlow J.A.”

FEDERAL COURT OF APPEAL

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CONCURRED IN BY: SEXTON J.A. AND SHARLOW J.A.

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