Court of Queen's Bench of Alberta

Citation: Bell Canada Inc v The City of Calgary, 2018 ABQB 865

Date: 20181019
Docket: 1701 03414
Registry: Calgary

Between:

Bell Canada Inc., Rogers Communications Canada Inc., Shaw Communications Inc., and Telus Communications Inc.

Applicants

- and -

The City of Calgary

Respondent

Reasons for Judgment of the Honourable Madam Justice J. A. Antonio

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I. Overview

[1] The Applicants, Bell Canada Inc. and other telecommunications providers operating in Calgary [Bell], seek a declaration that *Bylaw17M2016, Being a Bylaw of The City of Calgary to Regulate The Process For Access and Use Of Municipal Rights-Of-Way* [the Bylaw] is of no force or effect in its application to telecommunications providers [Telecoms]. The City of Calgary [City] opposes.

A. Bell's position

[2] The Bylaw applies to utility providers as defined in its s 3(1):

> i. a for-profit corporate person that supplies electrical, thermal, or other energy services, *telecommunications* services, or oil and natural gas services, and requires access and use of a *service corridor* or a *City Structure* to construct, install, maintain, repair, replace or operate its *equipment*; and
>
> ii. any of the corporate *person*'s (as described in "i" above) employees or contractors of a for-profit corporate *person*. [defined terms are consistently italicized in the Bylaw]

[3] Bell only challenges the application of the Bylaw to telecommunications. Specifically, it challenges the inclusion of the words "telecommunications services" in the above definition.

[4] Bell submits that in purpose and in effect, the Bylaw regulates virtually every aspect of the construction, operation and removal of Telecoms' infrastructure. Directly or by analogy, many courts have already found that such regulation of telecommunications falls exclusively within federal jurisdiction by virtue of s 92(10)(a) of the *Constitution Act, 1867* (UK), 30 & 31 Vict, c 3, reprinted in RSC 1985, Appendix II, No 5 [*Constitution Act*]. Therefore, the Bylaw is *ultra vires* the City and is constitutionally invalid.

[5] Alternatively, if the Bylaw is valid, it is inoperative pursuant to the doctrine of federal paramountcy: it both creates an actual operational conflict with sections 42-44 of the *Telecommunications Act*, SC 1993, c 38 and frustrates the purpose of Parliament's comprehensive and exclusive regime regulating telecommunications in Canada.

[6] In the further alternative, because the Bylaw regulates "the what, where, when, who and how of Telecoms' networks", it "impairs the core of Parliament's exclusive power and must therefore be declared inapplicable as regards the Applicants (and Telecoms generally)": Bell's brief at paras 170, 176.

B. City's position

[7] The City submits that the purpose of the Bylaw is to manage safety, environmental, and other risks arising from utility work and to regulate the City's rights-of-way. The Bylaw is of general application, providing a uniform regulatory regime for all utility providers using rights-of-way. Thus, the subject matter of the Bylaw falls within provincial jurisdiction over local works and undertakings (s 92(10) of the *Constitution Act*), property and civil rights (s 92(13)), and matters of a purely local nature (s 92(16)). Any effect on the federal jurisdiction over telecommunications is incidental and does not render the Bylaw *ultra vires*.

[8] The City also argues that the doctrine of paramountcy does not apply. Under the federal *Telecommunications Act*, the ability of Telecoms to use rights-of-way is subject to municipal consent. The Bylaw establishes a process for obtaining that consent. Its structure aligns with suggested consent agreements published by the Canadian Radio-television and Telecommunications Commission [CRTC], which operates under the authority of the *Telecommunications Act*. Subordinacy clauses in ss 122 and 123 preserve the ultimate decision-making power of the CRTC. Therefore, the Bylaw's municipal consent process does not give rise to operational conflict or frustrate federal purposes.

[9] Finally, the City argues that the Bylaw is not rendered inapplicable to Telecoms by the doctrine of interjurisdictional immunity because it does not affect a previously identified core of federal power over telecommunications, or because the evidence does not establish a significant intrusion on the core of federal power.

II. Determining validity where only a portion of an enactment is challenged

[10] A division of powers analysis begins with a determination of the "pith and substance" of the impugned law. That is, the dominant characteristic or "matter" of the law must be identified. That matter must then be assigned to one or more of the constitutional heads of power. If that head of power has not been granted to the enacting legislator, the law is *prima facie ultra vires*, subject to the operation of any other constitutional doctrine: ***Quebec (AG) v Lacombe***, 2010 SCC 38 at para 19.

[11] Because this application concerns only that portion of the Bylaw governing Telecoms, I apply the framework set out in ***Kitkatla Band v British Columbia (Minister of Small Business, Tourism and Culture)***, 2002 SCC 31 [***Kitkatla***]. The Kitkatla Band challenged only two provisions of a provincial enactment that expressly regulated aboriginal heritage sites, while acknowledging that the remainder of the enactment was *intra vires* the province. The Band argued that the impugned provisions encroached on the core of aboriginal identity, a federal head of jurisdiction, and therefore were either *ultra vires* the province or were inapplicable under the doctrine of interjurisdictional immunity. The province maintained that the provisions were *intra vires* and effective because they formed part of a general regime that did not single out aboriginal heritage sites. The Band asked the Court to determine the pith and substance of the two provisions by focusing only on them, while the province asked it to consider the legislation in its entirety.

[12] At paragraph 58, the Supreme Court stated a three-part test for determining the pith and substance of an impugned portion of an enactment:

> A) Do the impugned provisions intrude into a federal head of power, and if so to what extent?
>
> B) If the impugned provisions intrude into a federal head of power, are they nevertheless part of a valid provincial legislative scheme?
>
> C) If the impugned provisions are part of a valid provincial legislative scheme, are they sufficiently integrated with the scheme?

A. Does the impugned provision of the Bylaw intrude into a federal head of power?

[13] The first step in the ***Kitkatla*** analysis is to determine whether the impugned provisions intrude into a federal head of power. The Supreme Court approached this question by first applying a pith and substance analysis to the impugned provisions, without regard to the remainder of the enactment.

[14] A pith and substance analysis includes consideration of the legislation's purpose and effect. Purpose can be found in the intrinsic content of the legislation itself, as well as extrinsic sources such as records of legislative debates and the circumstances in which the legislation was passed. Effects may include legal results flowing directly from the legislation itself, or practical

effects arising on its application. For instance, in ***Attorney-General for Alberta v Attorney-General for Canada***, [1939] AC 117, the Privy Council struck down a law imposing a tax on banks because the effects of the tax were so severe that the true purpose of the law could only be in relation to banking, not taxation. See also ***Rogers Communication v Châteauguay (City)***, 2016 SCC 23 at para 36 [***Châteauguay***]; ***Kitkatla*** at paras 53-54; ***Global Securities Corp v British Columbia (Securities Commission)***, 2000 SCC 21 at para 23; ***R v Morgentaler***, [1993] 3 SCR 463 at 482-483.

1) Background: The Telecommunications Act's *provisions on municipal consent*

[15] Section 43 of the *Telecommunications Act* provides that a Telecom may enter on and break up any public right-of-way to construct, maintain or operate its transmission lines and may remain there as long as necessary, without unduly interfering with public use of the space: subs (2). Telecoms shall not construct transmission lines "on, over, under or along" public rights-of-way without the municipality's consent: subs (3). Where a Telecom "cannot, on terms acceptable to it, obtain the consent of the municipality", it may ask the CRTC to grant permission on any terms it may determine: subs (4).

[16] To facilitate the municipal consent procedure under s 43(3), the CRTC developed a standard form agreement called the Model Municipal Access Agreement (MAA). The Model MAA provides that Telecoms will be subject to the municipality's regulatory oversight and permitting process, and that if the parties cannot resolve a dispute they will submit it to the CRTC. While the Model MAA provides a starting point for negotiations and municipalities, it is not a binding document.

[17] Under the *Telecommunications Act*, the ultimate power to resolve disputes over municipal consent lies with the CRTC.

2) Extrinsic evidence of the Bylaw's purpose

[18] The record includes affidavits and questioning of senior employees of the applicant Telecoms and City officials, City reports and documents for the Gas, Power and Telecommunications (GPT) Committee, and City Council meeting minutes. This extrinsic evidence paints a detailed picture of the process leading to the enactment of the Bylaw.

[19] Until 2014, the relationship between the applicant Telecoms and the City was governed by a MAA. When it expired, the parties failed to reach a new agreement. The City proposed its own model, which the Telecoms rejected. The Telecoms then asked the CRTC to direct the parties to negotiate in good faith if possible. The CRTC did so in August 2015, but negotiations were never resumed.

[20] Around the same time, the City was considering a Fibre Infrastructure Strategy. According to the Strategy documents, a Report to the GPT Committee dated September 2015, and evidence from Bruna Nardi, Director of Regulatory Affairs for TELUS, the City would build a fibre-optic network within its rights-of-way both for its own use and cost savings and as a fibre-optic provider leasing capacity to others. The City was concerned about securing space for its own network amidst competition from private entities.

[21] The City's Fibre Strategy recommended that the City enact a bylaw similar to the one at issue here. According to one of the City's witnesses, the City's most important objective was to enable it to make decisions on the allocation of relevant rights-of-way. The City was also concerned about competitors forcing multiple installations rather than sharing existing infrastructure, thereby degrading or exhausting rights-of-way.

[22] The City adopted the Fibre Infrastructure Strategy at a City Council Meeting on September 28, 2016.

[23] In a report to the GPT Committee dated November 5, 2015, City administrators advised the Committee and Council that "a negotiated approach no longer favours a fair and sustainable method of managing municipal [rights-of-way]". It recommended that the City manage "this limited asset from a position of authority where access and use can be administered equitably for all users" through the mechanism of a bylaw. Creating a level playing field and an enforcement mechanism were identified as "more important than the pursuit of safety, environmental and other risks that the City has had limited or no success negotiating in recent [Municipal Consent and Access Agreements]". It is evident that City administrators were dissatisfied with the MAA process and its results.

[24] In November 2016, Council received a GPT Report recommending the substance of the Bylaw. Its summary uses language that acknowledges CRTC aims while critiquing the MAA process. It emphasizes the City's "future planning requirements", the desirability of a level playing field, and the need for an enforcement mechanism. The Report notes that the Bylaw "supports Council initiatives including the Fibre Infrastructure Strategy."

[25] The majority of the seven-page November 2016 GPT Report is devoted to telecommunications issues. Social, environmental and economic risks are covered in about half a page. One of the City's witnesses acknowledged that the safety risks relating to telecommunications infrastructure are quite different from those associated with gas or power lines.

[26] On November 23, 2016, Council decided to implement the Strategy's recommendation to bring forward bylaws "that assist in protecting The City's jurisdictional authority on municipal [rights-of-way] and that assist in managing the impacts of [fibre to the premises] in Calgary." Council adopted a recommendation from the GPT Report to draft a bylaw that would address safety, environmental and other risks, set out fees, and establish "other requirements for the installation, maintenance and operation of shallow utility infrastructure by utility providers".

[27] The Bylaw was passed on November 28, 2016 and came into force on January 1, 2018.

3) Intrinsic evidence of the Bylaw's purpose

[28] The first five paragraphs of the Bylaw's preamble cite the sources and scope of municipal jurisdiction, including its ability to control and manage its roads and to charge fees for access to its property. The final two paragraphs read:

> AND WHEREAS, subject to obtaining the consent of the municipality having jurisdiction over roads located in the municipality, a *utility provider* may access municipal rights-of-way for the purpose of constructing, maintaining or operating

> its *equipment* provided the *utility provider* does not unduly interfere with the public's use and enjoyment of the roads.
>
> AND WHEREAS Council has approved the recommendation in [the November 2016 GPT Report] and deems it desirable to pass this *Bylaw* to set out the terms and conditions of consent and processes to be followed by a *utility provider* exercising its ability to access municipal rights-of-way.

[29] The purpose of the Bylaw is stated in s 2:

> (a) to require every *utility provider* proposing to *perform work within service corridors* or within *City Structures* to:
>
> > i. comply with all safety and environmental requirements of *Municipal Legislation* and *Other Legislation*;
> >
> > ii. obtain consent from *The City* for the *work* as required by the *Bylaw*; and
> >
> > iii. obtain the associated permits from *The City*;
>
> (b) to provide *The City* with information on the type and location of equipment situated within the *service corridors* or within *City Structures* so that *The City* can manage its *service corridors* and *City Structures* safely, effectively and efficiently;
>
> (c) to establish a system of permits and fees for administration of the use of *The City*'s *service corridors* and *City Structures* and to enable *The City* to administer such use fairly and equitably for all *utility providers*; and
>
> (d) to compensate *The City* for administrative, technical, inspection and repair costs, damages, or liability arising from *utility providers*' performance of *work within service corridors* or within *City Structures* and to prevent such administrative, technical, *inspection* and repair costs, damages, or liability being transferred to the citizens of *The City*.

[30] "Utility provider" is defined in s 3(1) to include providers of electrical, thermal, energy, telecommunications, or oil and natural gas services. "Work" is defined to include:

> Any installation, removal, construction, maintenance, repair, replacement, operation and *relocation*, or adjustment or alteration of *equipment* that may be performed by a *utility provider within a service corridor* or within a *City Structure*, including the excavation, repair or *restoration* of the *service corridor* or repair and *restoration* of the *City Structure*, as applicable.

[31] Under s 3(1), "telecommunications has the same meaning as stated in section 2 of in the *Telecommunications Act* (Canada)" [emphasis added]. The Bylaw does not define the other captured categories of service.

4) Effects of the Bylaw on Telecoms

[32] The Bylaw "applies to all *utility providers* constructing, installing, maintaining, repairing, replacing or operating *equipment* and performing *work within service corridors* or within *City*

Structures": s 4(1). For purposes of the ***Kitkatla*** analysis, I will focus on the effects of the Bylaw on Telecoms.

[33] The definition of "work" appears above. "Equipment" is defined to include:

i. systems, structures, utilities, and facilities, including telecommunication facilities defined in the *Telecommunications Act* (Canada) [and other utilities' facilities as defined in relevant legislation];

ii. poles, cables, wires, governors, regulators, pipes and/or systems of pipes, ducts, conduits, pedestals, vaults, braces, anchors, anchor rods, amplifiers, connection panels, transformers, valves, or metering equipment fittings, whether or not any of them form part of or are accessory to the systems, structures, utilities and facilities referred to in subsection "i" above; and

iii. *non-compliant equipment* and *abandoned equipment.*

[34] The definitions of "service corridors" and "City Structures" are extensive. The record establishes that the Bylaw captures the majority of locations where telecommunications lines are installed.

[35] The Bylaw grants the City the following powers over the work of Telecoms:

a) to determine the number and location of utility alignments (spaces available for the laying of networks) that Telecoms may use within City rights-of-way (ss 19-20, 24(g), 58);

b) to attach to utility alignment permits "any specific requirements for the performance of the work", including a completion date and dates during which work must be suspended (s 29(a), (b), (c)) and any conditions it finds necessary (s 24(e));

c) to schedule access to service corridors or City structures (s 7);

d) to require that access be coordinated among utility providers and to assume management of such access (s 7, 21-23);

e) for any municipal purpose, to modify a schedule for performance of work in a utility alignment, and to require compliance from the Telecom (s 42);

f) to grant or to refuse an application for an additional utility alignment within a given corridor, and if granted to require the Telecom to install the City's fibre network in the Telecom's utility alignment (s 20);

g) to require permits for and to impose conditions on the installation of "service drops", which are the final links connecting the network to an individual customer (ss 55-57, s 3(1) "*service drop*");

h) to require a Telecom to relocate any of its equipment located within a City right-of-way (s 58), to dictate how the costs of the relocation will be allocated as between the Telecom and the City (ss 62-65), and to order that the relocation will be complete by a given date, failing which fines may be imposed (ss 60-61). See also ss 70-73, 75, and 76 regarding equipment that the City determines a Telecom has abandoned;

i) to restrict the work that a Telecom can do in rights-of-way as a result of an emergency (ss 97, 98);

j) to direct corrections to telecommunications works; if a Telecom fails to make required corrections the City may do so itself at the Telecom's expense (s 95);

k) to issue a stop-work order for a violation of any legislation as defined in the Bylaw, whether or not the violation is related to the work, and to maintain the stop-work order until the violation is rectified to the City's satisfaction (ss 35-38; 3(1) "*Municipal Legislation*" and "*Other Legislation*").

[36] Under s 17(1), applications for utility alignment permits must include "*the utility provider*'s proposed plans and specifications, describing in detail", *inter alia*, the work to be performed, equipment, construction methods and materials. Presumably this information is to be used by the City in deciding whether or not to grant a permit.

[37] The Bylaw contains conventionally punitive enforcement mechanisms such as fines and incarceration. Its priority scheme also creates a back-door punishment. A "priority application" is one submitted by a utility provider that has fully complied with the Bylaw in its current and past dealings: s 3(1). By virtue of s 16, the City may process priority applications before others. Compliance or non-compliance is determined by City officials, with a potential appeal to "the appropriate *Governmental Authority*": s 123. The effect of s 16 is that any non-compliance on a past project may delay a Telecom in obtaining a permit to begin a new project. Since the granting of a utility alignment permit depends on capacity being available in that alignment, continued subordination to other applications may prevent a Telecom from occupying the alignment altogether.

5) Analysis of the Bylaw's pith and substance

[38] According to counsel for the City, the purpose of the Bylaw is twofold:

i. to conform with the federal regulatory scheme by structuring the processes by which the City's consent may be obtained; and

ii. to enhance public safety by regulating access to utility corridors and roadways, or in other words to manage roadways and corridors, not to manage utility providers.

[39] I accept that the latter are purposes of the Bylaw, but they are not its only purposes. I do not accept that the former is a true purpose.

[40] The first several introductory provisions of the Bylaw emphasize proper municipal concerns, and its provisions apply to all utility providers generally. However, the Bylaw also uses language designed to create an appearance of conformity with the scheme of the *Telecommunications Act* in particular. That appearance is belied by the Bylaw's content. For example, s 2(a)(ii) indicates that a purpose of the Bylaw is to "obtain consent from *The City* for the *work* as required by the *Bylaw*". The reference to consent suggests compliance with the *Telecommunications Act*. However, the only activity for which municipal consent is required under the *Telecommunications Act* is the construction of transmission lines on, over or under public places: s 43(3). "Work", as defined in the Bylaw, covers a far greater range of activities.

[41] The Bylaw enables the City to decide whether a Telecom may construct its network in a particular right-of-way, at a particular time, using a particular method or material. It may dictate the timing; impose conditions; identify deficiencies and require their correction or correct them itself; order that work stop or that existing works be relocated. By regulating service drops, which connect individual customers to the utility alignment, the City even has tangential control over those portions of Telecoms' operations that occur on customers' private property.

[42] Similarly, the Bylaw governs activities that extend far beyond safety. This is consistent with extrinsic materials showing that safety concerns relating to telecommunications were of secondary interest to the legislators.

[43] As regards telecommunications in particular, the dominant purpose of the Bylaw is to regulate telecommunications operations by imposing the City's own terms, thereby avoiding the CRTC's negotiation process.

[44] The City suggests that evidence is required to ground any conclusion about the effects of the Bylaw on Telecoms, and that there is no evidence or insufficient evidence of this kind before me. I note that the Bylaw came into force two days before this application was heard. Effects could not have materialized yet.

[45] At this stage of the analysis the question is not whether the Bylaw impedes telecommunications operations, but whether its pith and substance is *ultra vires* the City. In any event, courts may assess constitutional arguments such as these despite the lack of any actual impairment of a Telecom's business: ***Telus Communications Co v City of Toronto***, [2007] 84 OR (3d) 656 (SC) at para 7 [***Telus v Toronto***]. If an actual impairment is not required, then evidence of an impairment is not required. The analysis may proceed on the "potential impact of the laws as written": *ibid* at para 26.

[46] The effect of the Bylaw generally is to comprehensively regulate utility providers' access to and activities in City rights-of-way. The effect of the Bylaw, as it pertains to Telecoms, is as stated in Bell's written submissions at paragraph 89:

> [T]he Bylaw … regulates the what, where, when, who and how regarding the location, construction, maintenance, operation and preservation of Telecoms' networks, as a whole, and thus their design and planning. Moreover, it vests the City with wide authority as to how and when such regulation is to be implemented and enforced.

[47] The City relies on ss 122 and 123 of the Bylaw to suggest that in purpose and effect it remains subordinate to the federal regulatory scheme, because all final decisions rest with the CRTC:

> 122 If there is a conflict between *Other Legislation* and this *Bylaw*, *Other Legislation* prevails.
>
> 123 Any dispute that arises between a *utility provider* and *The City* as a result of a decision made by [City officials] that cannot be resolved to the satisfaction of the *utility provider* and *The City* may be appealed to the appropriate *Governmental Authority*.

[48] "*Other Legislation*" includes the *Telecommunications Act* and "*Governmental Authority*" includes the CRTC and the courts: s 3(1).

[49] Neither section operates automatically to invalidate provisions of the Bylaw or decisions made under it; they depend on decisions by the CRTC or the courts. Until such decisions are made, the Bylaw and the City's decisions remain in force. Therefore, ss 122 and 123 have no bearing on my analysis of its effects. As I will explain in greater detail in my paramountcy analysis, these sections do not conform to the federal regime. They are better understood as manifestations of the drafters' attempt to present an image of conformity.

[50] Telecoms are brought under the application of the Bylaw by the definition of "telecommunications services" in s 3(1). Therefore, the pith and substance of that provision is to supplant the federal scheme and to assume a significant measure of procedural and substantive control over the location, construction, operation, maintenance and preservation of telecommunications.

6) Does the pith and substance of the Bylaw fall under a federal power?

[51] Next, I must decide whether the pith and substance of the Bylaw falls under a federal head of power.

[52] Section 91 of the *Constitution Act* bestows on Parliament exclusive legislative authority over various enumerated subjects, as well as subjects that have been expressly excepted from the subjects assigned to the Provinces. Section 92(10) provides that local works and undertakings are within Provincial authority except, *inter alia*, "Telegraphs, and other Works and Undertaking connecting the Province with any other or others of the Provinces, or extending beyond the Limits of the Province." As technology has evolved, "Telegraph" has been judicially interpreted to include telecommunications: ***Toronto (City)* v *Bell Telephone Co***, [1905] AC 52 at paras 3-4 and 10 [***Toronto v Bell***]; ***Re Regulation & Control of Radio communication in Canada***, [1932] AC 304 at paras 6-8 [***Radio Reference***]; ***Capital Cities Communications Inc v Canadian Radio-Television Commission***, [1978] 2 SCR 141 at 156 [***Capital Cities***]; ***Public Service Board v Dionne***, [1978] 2 SCR 191 at 197 [***Dionne***]; ***Téléphone Guèvremont v Quebec***, [1994] 1 SCR 878 [***Téléphone Guèvremont***]. The Supreme Court has repeatedly affirmed Parliament's exclusive legislative authority over telecommunications undertakings, including works that are entirely situated within a province, since telecommunication depends on the transmission and reception of signals across borders: ***Capital Cities*** at pp 155, 156, 159-162; ***Dionne*** at p 197; ***Alberta Government Telephones v Canadian Radio-television and Telecommunications Commission***, [1989] 2 SCR 225 at 262 [***AGT v CRTC***]; ***Téléphone Guèvremont***.

[53] Parliament's exclusive jurisdiction over telecommunications encompasses the planning, construction, management, location, use and upkeep of telecommunication networks, as well as the decision whether or not to keep them in place: ***AGT v CRTC*** at 257; ***Dionne*** at 196; ***Toronto v Bell*** at para 4; ***Capital Cities*** at 162; ***Re Public Utilities Commission and Victoria Cablevision Ltd***, (1965) 51 DLR (2d) 716 (BCCA) at 10 [***Public Utilities Commission Reference***]. For example:

- The municipality of Châteauguay reserved a plot of land on which it knew Rogers intended to erect a cell tower. Rogers argued that the purpose of the reserve was to prevent it from building the tower. Châteauguay argued that the reserve was merely the means by which it set out to achieve its true purpose: protecting the health of local residents. The Supreme Court

found that the purpose and effect of the reserve were to delay or to prevent the construction of the tower. It held that Châteauguay could not usurp "the federal power to choose where to locate radiocommunication infrastructure": ***Châteauguay*** at paras 40-41, 45-47.

- The antennae, cables and rentals of a television broadcaster were within Parliament's exclusive jurisdiction. Provincial legislation requiring the broadcaster "to furnish adequate service", to provide information, to obey orders, to obtain approval before beginning construction, and "not to abandon a service without permission", gutted the federal undertaking and was *ultra vires* the province: ***Public Utilities Commission Reference*** at para 10.
- A provincial law regulating road clearance could not apply to telephone lines because the height of the lines related directly to the structure of the network. "To recognize such application would be to permit the regulation or control of the construction, operation and maintenance of telephone lines by provincial authorities": ***Mission Paving Services Co v British Columbia Telephone Co***, [1982] 39 BCLR 168 (SC) at para 16.
- A bylaw regulating the siting of telecommunication towers enabled Toronto to control their placement or to refuse or significantly delay permission to establish wireless towers. In considering the doctrine of interjurisdictional immunity, the court concluded that these activities were essential to Telus's telecommunications operation: ***Telus v Toronto*** at paras 9, 28, 30, 31.

[54] The City draws my attention to a passage from ***City of Montréal v Bell Canada***, 1984 CanLII 2907 (QCCA) at para 34: "Powers granted to municipalities are not related to the existence of the [Telecoms'] right of occupation but only to the exercise of this right." The City submits that it therefore has jurisdiction to govern how the Telecoms exercise their right to occupy municipal rights-of-way, and that is what the Bylaw does.

[55] ***City of Montréal v Bell Canada*** assists in determining the content of the federal power over telecommunications, even though the Court expressly declined "to get into a constitutional debate": at para 13. At issue was a claim by Montréal that Bell owed it rent for past use of municipal rights-of-way. Montréal's Charter authorized the city to charge rent for "occupations of the public domain." However, that was not sufficient to override the federal legislation that created Bell and established a consent scheme similar to that now seen in s 43 of the *Telecommunications Act*. At paragraphs 32 and 33, the Court wrote that Bell's authority to occupy the municipal public domain clearly arose from its constitutive Act, and that its right to do so was "not dependent upon municipal authorization; it predominate[d]".

[56] The Quebec Court of Appeal concluded that where Parliament had already provided a right of occupation to Bell, Montréal had no authority to allow or to deny access. The legal consent mentioned in Bell's constitutive legislation was "only a means of insuring the harmonious exercise of [Bell's] sovereign right": at para 36. I have already concluded that the Calgary Bylaw does far more than regulate the Telecoms' right of access to City rights-of-way: it gives the City the ability to deny access and to control most aspects of the physical operation of telecommunications.

7) Conclusion: the impugned provision of the Bylaw intrudes into a federal head of power

[57] The Bylaw's preamble and purpose section assert aims that are properly within provincial jurisdiction and give the appearance of an intent to fit within the federal scheme that governs telecommunications. The extrinsic evidence demonstrates that, in fact, a dominant purpose of the legislators was to create an alternate scheme by which the City could exert greater control over Telecoms. In effect, the Bylaw minutely regulates telecommunications operations in City rights-of-way, allowing the City to determine essential matters such as the siting of networks and the schedule of construction and maintenance. The pith and substance of the Bylaw as it relates to telecommunications is to supplant the federal procedural scheme and to assume a significant measure of regulatory control over the location, construction, operation, maintenance and preservation of telecommunications.

[58] These are matters over which Parliament has exclusive jurisdiction. Therefore the Bylaw intrudes to a significant extent into a federal head of power.

[59] Both parties have referred me to ***Vidéotron c Ville de Gatineau***, 2017 QCCS 3571 [***Vidéotron***]. A notice of appeal from this judgment has been filed and the Quebec Court of Appeal has authorized some interventions: 2017 QCCA 1509, 2018 QCCA 360. Counsel for Bell has advised me that the appeal is scheduled to be heard in November.

[60] I have not relied on ***Vidéotron*** in reaching the above conclusion; there is therefore no need for me to address the parties' arguments about it in any depth. I will note only that the City's efforts to distinguish the case are largely unsustainable in light of my findings on the purpose and effects of the Calgary Bylaw.

B. Is the impugned provision integrated into a valid municipal scheme?

[61] The next step in the ***Kitkatla*** analysis is to determine whether the invalid provision is part of an otherwise valid provincial legislative scheme.

[62] To my knowledge, the Bylaw's application to other utilities has not been challenged. I will assume, without deciding, that the scheme is a valid exercise of provincial power as it pertains to other utility providers.

C. Is the impugned provision sufficiently integrated with the scheme?

[63] The final question in the ***Kitkatla*** analysis is whether the provisions specific to telecommunications providers are "sufficiently integrated" with the municipal scheme that I have assumed to be otherwise valid. As the Supreme Court explained in ***Kirkbi AG v Ritvik Holdings Inc***, 2005 SCC 65 at para 20 [***Kirkbi***]:

> The nature of the relationship between a provision and the statute determines the extent to which the provision is integrated into otherwise valid legislation. If the legislation is valid and the provision is sufficiently integrated within the scheme, it can be upheld by virtue of that relationship: a provision may take on a valid constitutional cast by the context and association in which it is fixed as complementary provision serving to reinforce other admittedly valid provisions

> ([*MacDonald v*] *Vapor Canada* [*Ltd*, [1977] 2 SCR 134] at pp 158-59, *per* Laskin CJ).

[64] To answer this question, I must first determine the degree of integration required, given the depth of intrusion on the federal telecommunications power. In general, if intrusion is minimal, then a "functional relationship" will save the impugned provision. If intrusion is significant, a stricter test is applied: the provision must be "truly necessary" or "integral" to the valid scheme. Keying the standard for “sufficient integration” to the seriousness of the intrusion on federal jurisdiction “ensures that the balance of constitutional powers is maintained and focuses the analysis on the ‘pith and substance’ of the provision.” Once I have determined the requisite level of integration, I must apply that standard to the Bylaw: ***Kirkbi*** at para 32, citing ***General Motors of Canada Ltd v City National Leasing***, [1989] 1 SCR 641.

[65] I have already found that the impugned provision of the Bylaw intrudes significantly on a federal power by purporting to regulate almost every aspect of the physical operation of telecommunications networks – a matter essential to the exercise of the federal jurisdiction. Therefore, I must consider whether the inclusion of telecommunications services is “truly necessary” or “integral” to the Bylaw’s operation.

[66] The “truly necessary” test was discussed in ***Marcoux c St-Charles-de-Bellechasse (Municipalité)***, 2015 QCCS 4353 [***Marcoux***], in the context of a municipal bylaw that prohibited the use of certain kinds of boats on particular lakes, a matter that would ordinarily fall within the federal power over navigation and shipping. The Court reviewed a number of precedents and concluded that constitutional overlap may be permitted where impugned provisions supplement or fill a gap in a comprehensive regulatory scheme that is within the jurisdiction of the enacting body, in order to ensure its effectiveness. In this sense, the enacting body may borrow an element of the power of another level of government to achieve an end ancillary to the *intra vires* scheme. If the enacting body directly assigns itself a power it does not possess, it goes too far: at paras 77, 80, 86.

[67] The Court in ***Marcoux*** found that there was no scheme concerning a defined provincial matter to which the municipality could connect its attempt to regulate navigation. In *obiter*, it went on to assess the integration test if there had been a valid provincial scheme.

[68] When the municipality enacted the bylaw, it was aware that it could obtain federal approval to enact its own rules regarding vessel operation, but it felt that the federal scheme favoured boating and that the federal process was too onerous: paras 89, 96. The municipality’s choice to regulate navigation outside the federal regime was a serious intrusion which, if reproduced on a national scale, “would essentially have the effect of eviscerating the exclusive federal jurisdiction over navigation on lakes”: paras 104, 105. Thus, “necessity” was the appropriate test for integration.

[69] The record revealed that there were other acceptable solutions to the municipality’s concerns. Federal intervention was one of them. Therefore, “the Municipality ha[d] not demonstrated that it was correct to use the exclusive federal jurisdiction over navigation as an ancillary power”: paras 109-114.

[70] I am prepared to assume that the purpose and effect of the Calgary Bylaw, as applied to the other utility providers, is to enhance public safety by managing rights-of-way, and that this is a valid exercise of the City’s delegated legislative authority. I acknowledge that this purpose

would be optimally achieved if the Bylaw applied to all utility providers, including Telecoms. But optimization is not the test, and it does not justify the City's direct attempt to assign itself jurisdiction over a federal matter. The inclusion of Telecoms under the Bylaw is not truly necessary to its scheme or operation. The intrusion on the federal telecommunications power is not merely ancillary to a valid provincial objective or scheme. If reproduced on a national scale, the Bylaw would eviscerate the *Telecommunications Act*. The impugned provision fails the integration test.

[71] By deleting the words "telecommunications services" from the definition of "utility provider" in s 3(1), the intrusion into federal jurisdiction can be cured, and the remainder of the Bylaw can continue to operate. Regulating the other utility providers and managing their right-of-way access will advance the City's stated objectives, which I have assumed to be valid apart from their application to Telecoms. It can therefore be assumed that the City would still have enacted the remainder of the Bylaw: ***Harper v Canada (AG)***, 2004 SCC 33 at para 46.

D. Conclusion: The Bylaw is *ultra vires* the City

[72] In procedure and in substance, the Bylaw regulates the location, construction, operation, maintenance and preservation of telecommunications services, as well as other utility services. Insofar as it regulates Telecoms, it represents a significant intrusion onto a federal head of power. I assume, without deciding, that the Bylaw is valid as it pertains to utilities other than telecommunications. The regulation of Telecoms is not truly necessary to the valid portions of the Bylaw's scheme, and therefore is not sufficiently integrated with it to acquire constitutional validity. Therefore, the provision that brings Telecoms under the Bylaw is *ultra vires* the City.

III. Alternative analyses

[73] In the event I am wrong in this conclusion, I will consider the Applicants' alternate arguments on the doctrines of paramountcy and interjurisdictional immunity.

[74] These doctrines are premised on the independent validity of each law. If I erred in finding the Bylaw *ultra vires*, it must be *intra vires* as a delegated exercise of the provincial authority over property and civil rights in the province (*Constitution Act*, s 92(13)). The City has submitted that the Bylaw could also fall under "all Matters of a merely local or private Nature in the Province" or "Local Works and Undertakings" specifically exempting "Telegraphs, and other Works and Undertakings connecting the Province with any other or others of the Provinces, or extending beyond the Limits of the Province": ss 92(16) and (10) respectively. Given the consistent and venerable line of authority holding that telecommunications are not merely local in nature, and given that the exemption in s 92(10) is what makes telecommunications a matter of federal jurisdiction, I cannot accede to the latter submission even in the alternative. My alternative analyses will proceed on the basis that the Bylaw is a valid exercise of the constitutional power to regulate property and civil rights in the province.

A. Paramountcy

[75] If the Bylaw was properly enacted under a provincial head of power, I must consider whether it is nonetheless rendered inoperative by virtue of the paramountcy doctrine. It is

possible for one subject to fall validly under two heads of power, such that both levels of government may regulate it, but the overlap is untenable if the legislation conflicts. An untenable conflict may be found (a) where there is an operational conflict because it is impossible to comply with both laws, or (b) where compliance with both is possible, but the provincial law frustrates the purpose of the federal law. If the provincial law is valid, its intent is irrelevant; the analysis focuses solely on its operation. The doctrine of paramountcy holds that in the event of a conflict the federal regime prevails, and the provincial law will be declared inoperative to the extent of the conflict: ***Alberta (Attorney General) v Moloney***, 2015 SCC 51, [2015] 3 SCR 327 at paras 17-18, 29.

[76] Having assumed for the alternative analysis that the Bylaw's pith and substance falls within the provincial power to regulate property and civil rights, I turn to the first step in the conflict analysis: is it possible to comply with both the Bylaw and the *Telecommunications Act*?

[77] The operation of s 43 the *Telecommunications Act* has been described above at paragraphs 15-17. The City asserts that the Bylaw structures both the process by which Telecoms may seek the City's consent (consistent with s 43(3) of the *Act*) and the exercise of their rights of access. In particular, it submits that s 123 of the Bylaw provides that disputes between the City and a Telecom that cannot be resolved to mutual satisfaction will be referred to the CRTC (consistent with s 43(4) of the *Act*). In other words, the Bylaw first fills in details that are absent in the *Act* and then mirrors its dispute resolution mechanism, such that there is no conflict.

[78] First, I must observe that subss 43(3) and (4) anticipate that a Telecom will seek the municipality's consent on terms acceptable to the Telecom. The Bylaw conflicts with this expectation by imposing the City's terms unilaterally.

[79] Next, I must observe that the Bylaw's scope is not confined to the construction of transmission lines – the only activity requiring municipal consent under the *Telecommunications Act*. Instead, the Bylaw requires Telecoms to obtain the City's consent any time they must break up a right-of way. Section 43(2) permits them to maintain and to operate their lines without municipal consent, even if they must break the surface to do so.

[80] Similarly, the *Act* permits Telecoms to leave their lines in place as long as necessary, subject to undue interference with public use and enjoyment: s 43(2). The Bylaw empowers the City to require Telecoms to relocate their equipment and installations for any number of unrelated reasons, including the failure to provide as-built drawings by the City's deadline, or where the City concludes that the equipment is no longer in use: Bylaw, ss 54, 67-69, 70-74.

[81] Only in a narrow argumentative sense would it be possible for the Telecoms to comply with the substance of the restrictive Bylaw and the enabling *Act* simultaneously. The result of such compliance would be to strip Telecoms of many of the abilities that Parliament intended them to have. Thus, the Bylaw's "consent" process and its substantive effects on the freedoms and powers of Telecoms are operationally inconsistent with the *Telecommunications Act*.

[82] For the same reasons, the Bylaw's restrictive regime frustrates the purpose of the *Telecommunications Act*, the objectives of which are stated at s 7 to include responsiveness, efficiency, competitiveness, and nationwide accessibility, among others. In short, the purpose of the *Act* is "to encourage and regulate the development of an orderly, reliable, affordable and efficient telecommunications infrastructure for Canada": ***Barrie Public Utilities v Canadian Cable Television Assn***, 2003 SCC 28 at para 38. The entwined substantive and procedural effect

of the Bylaw is to impose wide-ranging regulation under local oversight, thereby impeding the ability of Telecoms to develop national networks in an orderly, reliable and efficient manner.

[83] Here, as at other points in its constitutional analysis, the City has relied on the Bylaw's subordinacy sections.

[84] Section 123 of the Bylaw provides that a dispute over a decision made by the City may be appealed to a competent arbiter, which for Telecoms would be either the CRTC or the courts. The City submits that because the CRTC is the final decision-maker, the Bylaw complies with the scheme of the *Telecommunications Act*.

[85] The *Telecommunications Act* provides that a Telecom and a municipality may agree on terms acceptable to the Telecom or submit the question to the CRTC. In practice, MAAs may be negotiated so that both parties understand in advance the framework within which they may operate. By contrast, the Bylaw makes the City the first-instance decision maker and provides for after-the-fact decision-by-decision appeals to the CRTC. Those decisions may relate to operational matters beyond consent to construct transmission lines. From a Telecom's perspective, it may be unrealistic to wait for an appeal; it may need to comply with a City ruling to achieve an immediate result, and to avoid the risk of being deemed non-compliant and moved to the back of the administrative queue. Section 123 does not alter the Bylaw's reversal of the process established under the *Telecommunications Act*, nor the overbreadth of the Bylaw's regulatory reach. Therefore, it does not cure the Bylaw's operational and purposive conflict with the *Act*.

[86] Section 122 provides that in the event of a conflict between the Bylaw and other legislation, the latter prevails. Practically speaking, this would only result in automatic or advance invalidation if the City were to agree that such a conflict exists. Otherwise, as has happened here, a Telecom must apply to a competent arbiter for a remedy. Where the "other legislation" with which the Bylaw conflicts is federal, s 122 merely acknowledges the doctrine of paramountcy.

[87] I conclude that the Bylaw conflicts with the operation of the *Telecommunications Act* and frustrates its purpose. If the Bylaw is valid provincial legislation, it is nonetheless inoperative as regards telecommunications services by virtue of the doctrine of paramountcy and by virtue of s 122 of the Bylaw itself.

B. Interjurisdictional immunity

[88] In the further alternative, again assuming that the Bylaw is validly enacted under a provincial power, Bell asks me to apply the doctrine of interjurisdictional immunity. I must first determine whether the Bylaw intrudes on the protected core of federal power over telecommunications, and if so, whether the intrusion amounts to a serious or significant intrusion on the core power: ***Châteauguay*** at paras 59 and 70; ***Canadian Western Bank v Alberta***, 2007 SCC 22 at para 48.

[89] The City's primary submission is that the doctrine of interjurisdictional immunity does not apply here. The doctrine can only apply where the alleged core of federal power has been previously established and precisely identified: ***Canadian Western Bank*** at para 77; ***Quebec(AG) v Canadian Owners and Pilot Association***, 2010 SCC 39 at para 36 [***COPA***]; ***Canada Post Corporation v Hamilton***, 2016 ONCA 767 at para 95. Authorities discussing the

federal core of power over telecommunications focus on regulation of the right to access. The Bylaw does not affect right to access, meaning that the existing precedents on the federal core of power over telecommunications do not capture this case.

[90] In the alternative, the City submits that the test for interjurisdictional immunity is not met because the evidence fails to establish a significant intrusion on a core federal power, and that in particular it falls short of establishing the levels of intrusion seen in cases like ***Vidéotron*** and ***Châteauguay***. This submission is answered by my conclusion, above at paragraph 45, that findings on constitutional issues can be made without evidence of tangible effects.

[91] In any event, the City submits that the doctrine of interjurisdictional immunity retains limited application in modern constitutional analysis because it fails to recognize the reality of jurisdictional overlap: ***Canadian Western Bank*** at paras 37-42.

[92] Given findings I have already made, the City's position cannot succeed.

[93] The Bylaw regulates the siting of telecommunications infrastructure. The siting of telecommunications infrastructure has expressly been found to fall within the federal core of power over telecommunications: ***Châteauguay*** at para 63. As I have concluded, the Bylaw goes further and regulates the what, where, when and how of the location, construction, maintenance, operation and preservation of telecommunications networks. The net effect of the cases cited above at paragraph 53 is to establish that all these matters are essential to the exercise of the federal telecommunications power, or in other words are within its protected core.

[94] For all the reasons stated above, I find that the Bylaw intrudes on the protected core of federal power over telecommunications, and that the intrusion amounts to a serious or significant intrusion on the core power.

[95] I recognize that modern constitutional analysis calls for flexible and cooperative federalism, particularly when considering whether an intrusion is serious or significant, or whether it affects a "vital part" of the federal undertaking: ***COPA*** at para 45; ***Telus v Toronto*** at para 12. However, the goal of cooperative federalism cannot be used to "override or modify the division of powers itself", and municipalities cannot be encouraged to systematically intrude on federal jurisdiction by alleging local interests: ***Châteauguay*** at paras 38, 47.

[96] The City may have a legitimate desire to safely and efficiently coordinate work on public rights-of-way, and this may best be accomplished with the cooperation of different levels of government. The *Telecommunications Act* itself provides a vehicle for cooperation between Telecoms and municipalities, but the City chose to abandon that vehicle and to pursue its own ends unilaterally. The City's reliance on cooperative federalism is misplaced.

[97] The doctrine of interjurisdictional immunity operates to render the Bylaw inapplicable to telecommunications services.

IV. Remedy

[98] To the extent that the Bylaw applies to telecommunication services, it is *ultra vires* the City's legislative authority and invalid. The appropriate remedy is to sever the words "telecommunications services" from the definition of "utility provider" in s 3(1) of the Bylaw, and I so order. The remainder of the Bylaw has a different matter and can survive independently: Peter W. Hogg, *Constitutional Law of Canada*, 5th ed (Toronto: Carswell, 2007) at 15-24.

[99] In the alternative, if the Bylaw is inapplicable to telecommunications services by virtue of the doctrine of interjurisdictional immunity, the Bylaw should be read down accordingly. That is, it should henceforth be interpreted as having no application to telecommunications services: *ibid* at 15-28. In the further alternative, if paramountcy applies, the Bylaw is valid but is inoperative to the extent that it regulates telecommunications services: *ibid*.

V. Costs

[100] Bell indicated its intention to seek costs, but I have heard no submissions from either party. Given the professionalism counsel have shown throughout this matter, I suspect they will not need my assistance in settling the terms of the Order or determining costs. If they do, I ask them to notify my office within 30 days of the release of this judgment.

Heard on the 3rd and 4th days of January, 2018.
Dated at the City of Calgary, Alberta this 19th day of October, 2018.

J. A. Antonio
J.C.Q.B.A.

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