

Federal Court
of Appeal



CANADA

Cour d'appel
fédérale

Date: 20091013

Docket: A-544-08

Citation: 2009 FCA 291

**CORAM: EVANS J.A.
LAYDEN-STEVENSON J.A.
TRUDEL J.A.**

BETWEEN:

WHEATLAND COUNTY

Appellant

and

SHAW CABLESYSTEMS LIMITED

Respondent

Heard at Edmonton, Alberta, on October 6, 2009.

Judgment delivered at Ottawa, Ontario, on October 13, 2009.

REASONS FOR JUDGMENT BY:

EVANS J.A.

CONCURRED IN BY:

LAYDEN-STEVENSON J.A.
TRUDEL J.A.

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REASONS FOR JUDGMENT

EVANS J.A.

A. INTRODUCTION

[1] This is an appeal under subsection 64(1) of the *Telecommunications Act*, S.C. 1993, c. 38 (“Act”), by Wheatland County (“Wheatland”), an Alberta municipality, from a decision of the Canadian Radio-television and Telecommunications Commission (“CRTC”), Telecom Decision CRTC 2008-45.

[2] In that decision, the CRTC granted Shaw Cablesystems Limited (“Shaw”), a Canadian carrier and distribution undertaking, permission to construct transmission lines on highways and other public places in Wheatland, subject to specified conditions.

[3] The parties had previously attempted to negotiate the terms of a Municipal Access Agreement (“MAA”), under which Shaw would extend cable and telecommunications services to a new subdivision in Wheatland. While they agreed on many provisions of an MAA, Shaw would not agree to Wheatland’s demand that it become a member of the Alberta One-Call Corporation (“Alberta One-Call”), a not-for-profit organization established in 1984 to notify its members (mainly the operators of buried facilities) of those intending to disturb the ground. Shaw insisted on using its in-house notification program and locate service, DIGSHAW, which, it said, would provide at least as good a service as Alberta One-Call, and at substantially less cost.

[4] Having failed to obtain a negotiated consent with Wheatland on terms acceptable to it, Shaw applied to the CRTC for permission to construct its transmission line on Wheatland property. The CRTC granted the application and did not require that the MAA oblige Shaw to take out membership in Alberta One-Call, unless the parties agreed otherwise. Wheatland was granted leave to appeal to this Court on August 27, 2008.

[5] At the hearing of the appeal, counsel restricted his argument to a single question: does the CRTC have jurisdiction under subsection 43(4) of the Act to impose a condition respecting

membership in Alberta One-Call, a matter that relates to road safety and management, and not to the construction of a telecommunications transmission line?

[6] Subsection 43(4) provides as follows.

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.

[7] I do not propose to deal with the other issues that Wheatland raised in its memorandum of fact and law because counsel said he was not arguing them. Suffice it to say that, having examined those issues when preparing for the hearing, I doubt whether any has merit.

[8] Despite the vigorous arguments of counsel, it is my opinion that the CRTC did not err in law or jurisdiction when it decided to adjudicate the Alberta One-Call issue and selected Shaw's version of the relevant provision of the MAA, which designated DIGSHAW as the notification service provider. Consequently, I would dismiss the appeal.

B. FACTUAL BACKGROUND

[9] On April 30, 2007, Shaw submitted a request to Wheatland for permission to install a fibre optics line on a highway right of way and on other public property in Wheatland. In a letter dated May 17, 2007, Wheatland informed Shaw that it approved its application, on the condition that Shaw became a member of Alberta One-Call, and entered into an appropriate work agreement with Wheatland for the project.

[10] Alberta One-Call is a single point of contact for more than 650 operators of buried facilities in Alberta, including major telecommunications carriers. Its purpose is to prevent damage to buried facilities by those intending to dig. It advertises widely, informing potential diggers of the importance of “call before you dig”. When Alberta One-Call receives a notification or locate request from a potential digger, it disseminates the request to its members with facilities in the area where the requester proposes to dig.

[11] Shaw signed Wheatland’s original work agreement, but removed the Alberta One-Call condition, substituting its own locate program, DIGSHAW, which it established in 2003. Shaw said that DIGSHAW would cost it much less than membership in Alberta One-Call and would provide at least the same level of benefits to both parties. The parties’ attempt to negotiate the terms of an MAA did not succeed, largely, it would seem, because of this issue.

[12] On August 21, 2007, Wheatland County Council passed Bylaw 2007-83, which set out standard terms and conditions for the installation of support structures and transmission facilities in

Wheatland. The Bylaw included a standard “Rights-of-Way Access and Work Agreement”, which stipulated that all companies must agree to register as members of Alberta One-Call and to maintain their membership in good standing. The Bylaw demanded the execution of a general MAA governing access to all rights of way in Wheatland. This MAA was intended to serve as a model agreement and to save carriers from having to negotiate the terms of consent from scratch. However, Wheatland’s general MAA did not preclude a carrier from negotiating its own terms.

[13] When notified of the Bylaw and the model MAA, Shaw advised Wheatland that it did not agree with many of the terms in Wheatland’s MAA, including some that had been contained in the original work agreement to which it had agreed. In a letter dated September 20, 2007, Shaw proposed that, because of the rapid development of the housing development to which it intended to provide telecommunications services, Wheatland should execute a work agreement so that Shaw could start to install its facilities on the highway right of way on an interim basis. Meanwhile, the parties would attempt to negotiate a mutually acceptable MAA to supersede the work agreement. Wheatland rejected this proposal on October 1, 2007.

[14] After further unsuccessful negotiations, principally on the Alberta One-Call issue, Shaw filed an Application under Part VII of the Act (“Application”) with the CRTC on November 19, 2007, requesting permission pursuant to subsection 43(4) of the Act to obtain access to highways and other public places in Wheatland in order to construct, operate and maintain its transmission lines. In its Application, Shaw objected to Wheatland’s requirement that it become a member of

Alberta One-Call, as well as to other terms and conditions in the MAA, some of which had previously been agreed by the parties.

[15] On December 19, 2007, Wheatland replied to Shaw's Application, arguing that the only outstanding issue between them was that of membership in Alberta One-Call, and requesting the CRTC to dismiss the rest of the Application in order to allow the parties to negotiate further on the terms of an MAA. A number of interveners, including Alberta One-Call, also filed submissions in December in response to Shaw's Application.

[16] On February 22, 2008, CRTC staff suspended consideration of Shaw's Application in order to give the parties a further opportunity to negotiate the disputed terms of Wheatland's consent. The parties expressed a willingness to negotiate, but were unable to schedule a meeting until April 7, 2008. However, during this period they corresponded about their differences.

[17] On April 9, 2008, the parties filed reports with the CRTC outlining the terms of consent that still remained in dispute, and identifying disputed issues. They filed reply comments on April 11, 2008, in which each party identified further areas of dispute and submitted a draft MAA reflecting its position on the issues.

[18] On April 21, 2008, Alberta One-Call submitted a letter to the CRTC responding to written submissions by Shaw to both Wheatland and the CRTC between February and April 2008. The letter addressed the nature and scope of Alberta One-Call's services, but did not expressly identify

any evidence or argument that it had not already adduced in its original response to Shaw's Application.

[19] CRTC staff refused to accept the letter from Alberta One-Call into the record, on the ground that it was "out of process". In a decision dated May 14, 2008, the CRTC stated that the letter would not form part of the record, noting that Alberta One-Call had had ample opportunity to reply to the information in Shaw's Application of November 19, 2007, and that it had in fact responded in the comments that it had filed on December 18, 2007.

[20] The CRTC issued its decision on Shaw's Application on May 30, 2008.

C. TELECOM DECISION CRTC 2008-45

[21] The CRTC decided to exercise its power under subsection 43(4) of the Act to grant Shaw permission to construct transmission lines in Wheatland, on the grounds that the parties had failed to reach an agreement on the terms of the consent, even though they had had a reasonable opportunity to negotiate, and the date for the start of occupancy of the new development had passed. The CRTC also noted that the exercise of its power was subject to the Policy Direction of the Governor in Council (P.C. 2006-1534), dated December 14, 2006.

[22] In determining the terms and conditions on which it would grant permission to Shaw to construct a transmission line on Wheatland's property, the CRTC stated that it would incorporate into the MAA those provisions in the draft MAAs submitted by each party that were identical. The

CRTC set out eighteen items on which the MAAs submitted by the parties differed, and gave short reasons for either selecting one version or, when it found neither satisfactory, preferring its own wording.

[23] The CRTC addressed separately what had been the major stumbling block to a negotiated MAA: the Alberta One-Call issue. First, it summarized the principal advantages that Wheatland claimed for Alberta One-Call over DIGSHAW. Second, it referred to an earlier decision (Telecom Decision 2004-17), in which it had refused to impose mandatory locate processes and procedures, on the ground that this would be contrary to the CRTC's policy of reducing regulation where appropriate, especially for non-dominant carriers and small incumbent local exchange carriers. Third, it declined to require that Shaw become a member of Alberta One-Call as a condition of the MAA, unless the parties agreed to it. Noting that if membership in Alberta One-Call were beneficial to all parties, they could enter into further negotiations and amend the MAA to reflect their agreement. However, on the basis of the record before it, the CRTC concluded that there was no evidence that DIGSHAW was less efficient and reliable than Alberta One-Call.

[24] As a result, the CRTC selected article 11 of Shaw's MAA which provides as follows:

The Company agrees that throughout the Term it shall, at its own costs, ensure that all of its cable lines are recorded and maintained through its locate system DIGSHAW and shall continue to participate in forums dedicated to promote and educate both the public and private sectors in the prevention of injuries to persons and damage to properties and to promote safe working environments for all stakeholders in the digging community.

D. LEGISLATIVE FRAMEWORK

[25] While only subsection 43(4) of the *Telecommunications Act* is immediately relevant to this appeal, other provisions in the Act provide important context. Sections 43-44 create a comprehensive code governing carriers' access to highways and other public places for the purpose of constructing, using, and operating transmission lines.

[26] Section 7 sets out the statutory objectives, of which the following are particularly pertinent in this appeal.

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

(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;

(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;

(c) to enhance the efficiency and competitiveness, at the national and international levels, of Canadian telecommunications;

...

(f) to foster increased reliance on market forces for the provision of telecommunications services and to

7. La présente loi affirme le caractère essentiel des télécommunications pour l'identité et la souveraineté canadiennes; la politique canadienne de télécommunication vise à :

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;

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;

c) accroître l'efficacité et la compétitivité, sur les plans national et international, des télécommunications canadiennes;

[...]

f) favoriser le libre jeu du marché en ce qui concerne la fourniture de services de télécommunication et assurer l'efficacité de la

ensure that regulation, where required, is efficient and effective;

réglementation, dans le cas où celle-ci est nécessaire;

...

[...]

(h) to respond to the economic and social requirements of users of telecommunications services; and

h) satisfaire les exigences économiques et sociales des usagers des services de télécommunication;

[27] Subsection 42(1) sets out the broad powers of the CRTC to grant permission for, among other things, the construction, installation, operation and maintenance of transmission lines, and to impose such conditions as the Commission determines to be just and expedient.

42. (1) Subject to any contrary provision in any Act other than this Act ... the Commission may, by order, in the exercise of its powers under this Act ... permit any telecommunications facilities to be ..., constructed, installed, ... operated, .. or maintained ... 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, ... 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 : ... construction, ... mise en place, ... usage, ... ou entretien d'installations de télécommunication, acquisition de biens ou adoption d'un système ou d'une méthode.

[28] Subsection 43(2) creates a statutory right for Canadian carriers and distribution undertakings to enter on and to break up highways and other public places for the purpose of constructing, maintaining and operating their transmission lines. However, that right is qualified by subsection 43(3), which provides that it may not be exercised without the consent of the relevant municipality or other public authority.

43.(2) Subject to subsections (3) and (4) and section 44, a Canadian carrier or distribution undertaking may enter on and

43.(2) Sous réserve des paragraphes (3) et (4) et de l'article 44, l'entreprise canadienne et l'entreprise de distribution

break up any highway or other public place for the purpose of constructing, maintaining or operating its transmission lines and may remain there for as long as is necessary for that purpose, but shall not unduly interfere with the public use and enjoyment of the highway or other public place.

(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.

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 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.

(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] Where a carrier or distribution undertaking cannot obtain the consent of the municipality or other public authority on terms acceptable to it, it may apply to the CRTC for the necessary permission. The CRTC may grant 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 47 governs the CRTC's exercise of its statutory powers.

47. The Commission shall exercise its powers and perform its duties under this Act and any special Act

(a) with a view to implementing the Canadian telecommunications policy objectives and ensuring that Canadian carriers provide telecommunications services and charge rates in accordance with section 27; and

(b) in accordance with any orders made by the Governor in Council under section 8 or any standards prescribed by the Minister under section 15.

47. Le Conseil doit, en se conformant aux décrets que lui adresse le gouverneur en conseil au titre de l'article 8 ou aux normes prescrites par arrêté du ministre au titre de l'article 15, exercer les pouvoirs et fonctions que lui confèrent la présente loi et toute loi spéciale de manière à réaliser les objectifs de la politique canadienne de télécommunication et à assurer la conformité des services et tarifs des entreprises canadiennes avec les dispositions de l'article 27.

[31] The Policy Direction, dated December 14, 2006, issued to the CRTC by the Governor in Council under the authority of section 8 of the Act, emphasizes that in exercising its statutory powers the CRTC should rely on market forces to the greatest extent feasible in achieving the statutory objectives, and reduce regulatory burdens wherever possible.

1. In exercising its powers and performing its duties under the *Telecommunications Act*, the Canadian Radio-television and Telecommunications Commission (the "Commission") shall implement the Canadian telecommunications policy objectives set out in section 7 of the Act, in accordance with the following:

(a) the Commission should

(i) rely on market forces to the maximum extent feasible as the means of achieving the telecommunications policy objectives, and

(ii) when relying on regulation, use measures that are efficient and

1. Dans l'exercice des pouvoirs et fonctions qui lui confère la *Loi sur les télécommunications*, le Conseil de la radiodiffusion et des télécommunications canadiennes doit mettre en œuvre la politique canadienne de télécommunication énoncée à l'article 7 de cette loi selon les principes suivants :

a) il devrait :

(i) se fier, dans la plus grande mesure du possible, au libre jeu du marché comme moyen d'atteindre les objectifs de la politique,

(ii) lorsqu'il a recours à la réglementation, prendre des mesures qui sont efficaces et proportionnelles

proportionate to their purpose and that interfere with the operation of competitive market forces to the minimum extent necessary to meet the policy objectives;

aux buts visés et qui ne font obstacle au libre jeu d'un marché concurrentiel que dans la mesure minimale nécessaire pour atteindre les objectifs;

[32] The CRTC is explicitly granted power to decide questions of law and fact, and its decisions on questions of fact are “binding and conclusive”. On questions of law and jurisdiction, its decisions are subject to appeal to this Court, with leave of the Court.

52. (1) The Commission may, in exercising its powers and performing its duties under this Act or any special Act, determine any question of law or of fact, and its determination on a question of fact is binding and conclusive.

52. (1) Le Conseil connaît, dans l'exercice des pouvoirs et fonctions qui lui sont conférés au titre de la présente loi ou d'une loi spéciale, aussi bien des questions de droit que des questions de fait; ses décisions sur ces dernières sont obligatoires et définitives.

...

[...]

64. (1) An appeal from a decision of the Commission on any question of law or of jurisdiction may be brought in the Federal Court of Appeal with the leave of that Court.

64. (1) Avec son autorisation, il peut être interjeté appel devant la Cour d'appel fédérale, sur des questions de droit ou de compétence, des décisions du Conseil.

E. ISSUES AND ANALYSIS

Issue 1: Did the CRTC have jurisdiction to adjudicate the Alberta One-Call issue?

[33] Whether the CRTC has the legal authority to adjudicate the Alberta One-Call issue is a question of jurisdiction, Wheatland argues, and is not within the CRTC's expertise in the area of telecommunications. Accordingly, it is submitted, the Court must apply a standard of review of correctness in determining whether the CRTC's decision not to require Shaw to become a member of Alberta One-Call was authorized by its statutory power to grant permission to construct a

transmission line “subject to any conditions that the Commission determines”. I do not agree with this conceptualization of the problem.

[34] The question in dispute involves the interpretation of the CRTC’s broad statutory powers to impose conditions on the grant of permission to access municipal property for the purpose of constructing a transmission line. The CRTC’s express power in subsection 52(1) to decide any question of law in exercising its powers and performing its duties under the Act must include the question of whether subsection 43(4) enables it to impose conditions that impinge on a municipality’s exercise of its powers over the management and safety of its highways.

[35] As the first step in a standard of review analysis, *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190 at para. 62, requires a court to determine whether previous jurisprudence has settled the question in a satisfactory manner. Perhaps the most relevant decision of this Court is *Federation of Canadian Municipalities v. AT & T Canada Corp.*, 2002 FCA 500, [2003] 3 F.C. 379 (“*FCM*”), where Justice Létourneau, writing for the majority, said this:

[28] ... Subsection 43(4) gives the CRTC a wide discretion, based on its expertise, to fix conditions of access so as to implement the objectives of the Act contained in section 7, one being "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. In so doing, the CRTC has to strike a delicate balance between public, private and municipal interests.

[29] It cannot be doubted that the CRTC had jurisdiction to embark upon an inquiry into the terms and conditions sought to be imposed by the city of Vancouver: it did not lose or exceed its jurisdiction by rendering the decision that it did. A finding of a lack or an excess of jurisdiction is not a finding that can be made lightly... (Emphasis added).

[36] The danger of conflating the concept of a tribunal's jurisdiction and the interpretation of its enabling statute was expressed by Justice Abella writing for the majority of the Court in *Council of Canadians With Disabilities v. VIA Rail Canada Inc.*, 2007 SCC 15, [2007] 1 S.C.R. 650 at para. 96:

By attributing a jurisdiction limiting-label, such as “statutory interpretation” ... to what is in reality a function assigned and properly exercised under the enabling legislation, a tribunal's expertise is made to defer to a court's generalism rather than the other way around.

[37] In *Dunsmuir* (at para. 59), the Court emphasized the narrow scope of “true” questions of jurisdiction or *vires* that involve an adjudicative tribunal's interpretation of provisions of its enabling statute which do not demarcate competing administrative tribunals or processes: *Dunsmuir* at para. 61; *Johal v. Canada Revenue Agency*, 2009 FCA 276 at para. 30. More recently, writing for the Court in *Nolan v. Kerry (Canada) Inc.*, 2009 SCC 39, Justice Rothstein commented (at para. 34) that only questions about “a broad question of the tribunal's authority” should be characterized as jurisdictional.

[38] Indeed, in *PSAC v. Canadian Federal Pilots' Association*, 2009 FCA 223 at paras. 36-52, I doubted whether a specialized adjudicative tribunal's interpretation of its enabling statute should ever be labelled as a “jurisdictional” issue if a standard of review analysis would otherwise indicate that it should be afforded deference, provided that tribunal had authority to decide the question. However, in the present case it is clear that when the CRTC decided to adjudicate the Alberta One-Call issue it had, to use the language of *Dunsmuir* (at para. 59), “the authority to make the inquiry”, that is, in this case, to resolve the dispute between the parties about the conditions of access.

[39] Counsel relies on *Barrie Public Utilities v. Canadian Cable Television Assn.*, 2003 SCC 28, [2003] 1 S.C.R. 476 (“*Barrie Public Utilities*”). In that case, Justice Gonthier, writing for a majority of the Court, held that the CRTC’s decision that the phrase “the supporting structure of a transmission line” was broad enough to include provincially regulated power poles for the purpose of subsection 43(5) of the Act was reviewable on a standard of correctness.

[40] In my view, however, this case does not assist counsel in this part of his argument. The Court in *Barrie Public Utilities* arrived at the applicable standard of review through what was then called a pragmatic and functional analysis, not by labelling the disputed provision as a “jurisdictional” issue.

[41] In my opinion, therefore, the CRTC’s decision did not involve a jurisdictional question so as automatically to attract a correctness standard of review. The applicable standard of review must be determined in accordance with the methodology prescribed in *Dunsmuir* for the decisions of specialized tribunals’ interpretation of “non-jurisdictional” provisions of their enabling legislation.

ISSUE 2: What is the standard of review for determining if the CRTC erred in law by adjudicating the Alberta One-Call issue?

[42] The CRTC imposed conditions on the grant of permission to Shaw to construct a transmission line on Wheatland property in the exercise of its discretion under subsection 43(4). The exercise of discretion by an administrative tribunal is normally reviewable on the standard of reasonableness: *Dunsmuir* at para. 53.

[43] However, counsel for Wheatland argues that the CRTC also decided a question of law that should be reviewed for correctness, namely whether the CRTC may adjudicate a dispute, like the Alberta One-Call issue, which concerns highway safety and management, and has little, if anything, to do with the construction of Shaw's transmission line. While I am not convinced that it is appropriate in the present case to segment the issues in this way, I shall nonetheless determine the standard of review applicable to the question of law as framed by Wheatland.

[44] Looking first to previous jurisprudence for guidance on the standard of review applicable to the CRTC's decision that it could resolve the Alberta One-Call by selecting Shaw's version of the relevant article of the MAA, I turn again to Justice Létourneau's judgment in *FCM*, where he said (at para. 30)

In the present instance, the exercise by the CRTC of its jurisdiction involved the exercise of a discretionary power to grant access to a carrier and to determine the conditions of such access. At most, it can be argued that the CRTC erred in law in the exercise of its jurisdiction or that it improperly exercised its discretion in granting access and fixing the conditions that it did. That being the case and since the decision relates to issues that fall squarely within the domain of expertise of the CRTC, this Court ought to defer to the CRTC. Consequently, this means the applicable standard of review of the CRTC's legal conclusions on matters within its expertise is that of reasonableness. (Emphasis added)

[45] The appellants in that case submitted that the conditions imposed by the CRTC were not authorized by subsection 43(4) because they prevented municipalities from regulating and managing in an orderly manner the increasingly heavy traffic on the highways used by the carriers. If, as Justice Létourneau found, that condition nonetheless came within the expertise of the CRTC, then so must the condition in the present case.

[46] In my view, *FCM* has resolved in a satisfactory manner that unreasonableness is the standard of review applicable to the CRTC's interpretation and exercise of its power under subsection 43(4) to impose "any conditions that the Commission determines" on its grant of permission to a carrier to enter municipal land for the purpose of constructing a transmission line.

[47] A *Dunsmuir* standard of review analysis only serves to underline the soundness of the analysis in *FCM* that reasonableness is the applicable standard of review.

(a) A *Dunsmuir* analysis

(i) *nature of the question in dispute*

[48] *Dunsmuir* says (at para. 54) that a specialized tribunal's interpretation of its enabling statute is normally afforded deference. The question of law in dispute here is not one that may be subject to review for correctness as a question of "general law 'that is both of central importance to the legal system as a whole and outside the adjudicator's specialized area of expertise'": *Dunsmuir* at para. 60 (emphasis added).

(ii) *right of appeal or preclusive clause*

[49] The existence of a right of appeal from the CRTC on questions of law, albeit one that requires leave of the Court, is an indication that Parliament intended a correctness standard of review. However, this factor is not determinative but must be weighed with others. In *Canada (Citizenship and Immigration) v. Khosa*, 2009 SCC 12, [2009] 2 S.C.R. 339, at paras. 23 and the Court endorsed its decision in *Pezim v. British Columbia (Superintendent of Brokers)*, [1994] 2

S.C.R. 557, where the tribunal's interpretation of provisions in its enabling statute was reviewed on a standard of unreasonableness, despite the existence of a statutory right of appeal from the tribunal to a court.

(iii) relative expertise

[50] The CRTC has a broad mandate to regulate telecommunications in Canada and a corresponding breadth of expertise with which to ensure that it discharges its responsibilities in a manner that best advances the statutory objectives (*Bell Canada v. Bell Aliant Regional Communications*, 2009 SCC 40 at para. 36), including: facilitating the orderly development throughout Canada of a telecommunications system; fostering the provision of reliable and affordable telecommunications services; and promoting reliance on market forces (paragraphs 7(a), (b) and (f) of the Act; section 1(a) of the Policy Direction). In my view, it is within the scope of the expertise of the CRTC to decide whether to impose the regulatory burden on Shaw of requiring it to become a member of Alberta One-Call as a condition of granting it access to Wheatland's right of way to construct its transmission line. The CRTC is better placed than the Court in this respect.

(iv) statutory purposes

[51] As for the objectives underlying the statutory provisions in question, the purpose of subsection 43(4) is to enable the CRTC to step in when the parties cannot reach an agreement on terms acceptable to the carrier, in order that, among other things, telecommunications services can be provided to the public without undue delay and expense. This consideration suggests a deferential standard of review so as to keep litigation to a minimum, an objective also served by provisions of

the Act making the CRTC's decisions "binding and conclusive" on questions of fact (subsection 52(1)) and requiring leave to appeal on questions of law and jurisdiction (subsection 64(1)).

(b) *Barrie Public Utilities*

[52] Counsel relies heavily on the pre-*Dunsmuir* decision in *Barrie Public Utilities* for the proposition that correctness is the applicable standard of review in this case because the issue is one of statutory interpretation and is thus not within the CRTC's expertise in the regulation of telecommunications. He points in particular to the following passage from the majority reasons of Justice Gonthier (at para. 16):

... The proper interpretation of the phrase "the supporting structure of a transmission line" in s. 43(5) is not a question that engages 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. Rather, it is a purely legal question and is therefore, in the words of La Forest J., "ultimately within the province of the judiciary" (*Ross v. New Brunswick School District No. 15*, [1996] 1 S.C.R. 825, at para. 28). This Court's expertise in matters of pure statutory interpretation is superior to that of the CRTC. This factor suggests a less deferential approach. (Emphasis added)

[53] In my respectful view, these statements must now be approached with caution in so far as they suggest as a general proposition that a tribunal's interpretation of its enabling statute is not within its regulatory expertise. Indeed, as I have already noted, *Dunsmuir* and *Khosa* establish that reasonableness is normally the standard to be applied to such questions.

[54] In view of these decisions, the assumption of the parties, with which the Court agreed, in *Edmonton (City) v. 360Networks Canada Ltd.*, 2007 FCA 106, [2007] 4 F.C. R. 747 at paras. 33-35,

that, based on *Barrie Public Utilities*, correctness was the standard of review of the CRTC's interpretation of the words "public place" in subsection 43(4) now seems misplaced.

[55] I note, parenthetically, that Justice Bastarache wrote a strong dissent in *Barrie Public Utilities* foreshadowing the majority reasons in *Dunsmuir* that he co-authored with Justice LeBel (who did not sit in *Barrie Public Utilities*). Thus, he said (at para. 78):

I agree with Gonthier J. that the "CRTC's expertise lies in the regulation and supervision of Canadian broadcasting and telecommunications" (para. 15). We seem to differ, however, as to the extent to which this expertise extends generally to the CRTC's interpretation of its enabling legislation... Gonthier J. suggests that the CRTC's special expertise in the regulation and supervision of Canadian broadcasting and telecommunications does not apply to statutory interpretation of the Act. In contrast, I am more inclined to think that interpretation of enabling legislation by a specialized tribunal is more akin to administration of that statute, a core part of the tribunal's mandate. (Emphasis added)

[56] Finally, *Barrie Public Utilities* was distinguished recently in *Bell Aliant* (at paras. 49-50), on the ground that the statutory provision at issue in *Barrie Public Utilities* (subsection 43(5)) did not confer the same broad discretion as the provision considered in *Bell Aliant*. In my view, *Barrie Public Utilities* is similarly distinguishable from the present case by virtue of the broad power in subsection 43(4) authorizing the CRTC to impose any conditions on access that it determines.

(c) Conclusion

[57] Hence, in my opinion, unreasonableness is the standard of review applicable to the question of whether the CRTC erred in law by adjudicating the Alberta Call-One issue. The next question is whether the CRTC's decision that it could adjudicate the issue was unreasonable.

ISSUE 3: Was the CRTC's decision to adjudicate the Alberta One-Call dispute unreasonable?

[58] An application of the unreasonableness standard starts with an examination of the reasons given by the tribunal, in order to see whether the decision-making process has the degree of “justification, transparency and intelligibility” (*Dunsmuir* at para. 47) necessary to ensure that administrative decision-making complies with the rule of law.

[59] Although succinct, the CRTC's reasons for deciding to adjudicate the Alberta One-Call issue in my opinion satisfy this standard, even though they do not expressly address the fact that roadway management and safety are principally the concerns of Wheatland as the local municipality. Relying on an earlier decision (Telecom Decision 2004-17) about a condition concerning locate processes and procedures, the CRTC stated that it would be inconsistent with the Commission's goal of reducing regulatory burdens, where appropriate, to impose additional requirements on carriers. It concluded that Wheatland had not demonstrated that Alberta One-Call's service was more efficient than that provided by DIGSHAW.

[60] Nor am I persuaded that the decision under appeal falls outside “a range of possible, acceptable outcomes which are defensible in respect of the facts and law”: *Dunsmuir* at para. 47. I note in particular the breadth of the CRTC's discretion to impose conditions on the grant of permission. The decision also has a rational relationship to the statutory objectives of ensuring the provision of reliable and affordable telecommunications, because of the nexus between the disputed condition and the cost to Shaw, and ultimately to consumers, of providing telecommunications services to the new development.

[61] Counsel conceded in argument that if the CRTC did not commit a reviewable error in adjudicating the Alberta One-Call issue, he was no longer contending that the conditions imposed on the permission in the exercise of its discretion were unreasonable.

[62] Finally, I should add that I do not agree with the complaint by Wheatland that the CRTC strayed beyond its role of intervener in this appeal by addressing the merits of the issues, instead of simply explaining the record, making submissions on the appropriate standard of review, and defending its jurisdiction. In my view, counsel's written and oral submissions on these issues were of great assistance.

F. CONCLUSIONS

[63] For these reasons, I would dismiss Wheatland's appeal with costs.

“John M. Evans”

J.A.

I agree

Carolyn Layden-Stevenson J.A.

I agree

Johanne Trudel J.A.

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET: A-544-08

(APPEAL FROM AN ORDER OF THE CANADIAN RADIO-TELEVISION AND TELECOMMUNICATIONS COMMISSION (CRTC) DATED MAY 30, 2008, No. 2008-45)

STYLE OF CAUSE: WHEATLAND COUNTY
and
SHAW CABLESYSTEMS
LIMITED

PLACE OF HEARING: Edmonton, Alberta

DATE OF HEARING: October 6, 2009

REASONS FOR JUDGMENT BY: Evans J.A.

CONCURRED IN BY: Layden-Stevenson J.A.
Trudel J.A.

DATED: October 13, 2009

APPEARANCES:

Barry A. Sjølie, Q.C. and Lorne I. Randa FOR THE APPELLANT

Leslie J. Milton and Lori Assheton-Smith FOR THE RESPONDENT

Christopher Bredt and Morgana Kellythorne FOR THE CRTC

SOLICITORS OF RECORD:

Brownlee LLP - Edmonton, Alberta FOR THE APPELLANT

Fasken Martineau DuMoulin LLP - Ottawa, Ontario FOR THE RESPONDENT
Lori D. Assheton-Smith Professional Corporation –
Ottawa, Ontario

Borden Ladner Gervais LLP – Ottawa, Ontario FOR THE CRTC

