



Telecom Decision CRTC 2018-30

PDF version

Ottawa, 24 January 2018

Public record: 8662-Q15-201705097

Application to review and vary a procedural decision regarding the suspension of the City of Gatineau’s application to approve a Municipal Access Agreement

*The Commission **denies** an application from Bell Canada, Cogeco Connexion Inc., Rogers Communications Canada Inc., TELUS Communications Inc., and Videotron G.P. (collectively, the Carriers) to review and vary its 30 May 2017 letter decision regarding a request from the Carriers to suspend consideration of an application from the City of Gatineau (Gatineau) to approve a Municipal Access Agreement. The Commission finds that there is no substantial doubt as to the correctness of that letter decision due to an error in law or a fundamental change in circumstances or facts. The Carriers have until **23 February 2018** to file comments on Gatineau’s application, and Gatineau has until **5 March 2018** to file a reply.*

Background

1. In December 2012, Bell Canada, Cogeco Connexion Inc., Rogers Communications Canada Inc., TELUS Communications Inc.,¹ and Videotron G.P. (collectively, the Carriers) brought legal proceedings against the City of Gatineau (Gatineau) before the Superior Court of Quebec (the Superior Court), in which the Carriers sought a declaratory judgment to nullify municipal bylaw number 718-2012, which governed activities on Gatineau-owned property by telecommunications companies (the Bylaw).² The Carriers argued that the Bylaw was constitutionally invalid and inoperative, given that its purpose was to regulate telecommunications and broadcasting matters, which fall exclusively under the jurisdiction of the Parliament of Canada. Further, the Carriers submitted that the Bylaw was in conflict with the *Telecommunications Act* (the Act) and interfered with the Parliament of Canada’s exercise of its legislative authority.
2. On 13 April 2017, the Commission received a Part 1 application from Gatineau (the Gatineau application) for approval of a Municipal Access Agreement (MAA). Gatineau submitted that no agreement seemed possible between the parties and

¹ In this proceeding, submissions were received from TELUS Communications Company (TCC). However, effective 1 October 2017, TCC’s assets were legally transferred to TELUS Communications Inc. and TCC ceased to exist. For ease of reference, “TELUS Communications Inc.” is used in this decision.

² The Carriers also contested the constitutional validity of similar bylaws in the cities of Terrebonne and Laval.

requested that the Commission approve the terms and conditions of an MAA that it wished to reach with the Carriers.

3. On 3 May 2017, the Carriers requested that the Commission suspend its consideration of the Gatineau application until the Superior Court, whose hearing was scheduled for 23 May to 12 June 2017, rules on the constitutionality of the Bylaw. The Carriers also requested that in the event of the Commission's denial of the suspension request, the deadline for filing comments on the Gatineau application be deferred to 12 July 2017.
4. In a [letter](#) decision dated 30 May 2017 (the letter decision), the Commission denied the Carriers' request for it to suspend consideration of the Gatineau application. The Commission expressed the opinion that it was neither necessary nor appropriate for the Commission to suspend the Gatineau application until a final judgment was rendered by the Superior Court. In addition, the Commission indicated that (i) an application had been brought before it to establish the terms and conditions of access for some telecommunications carriers in public places for which Gatineau is the competent authority, and (ii) the Act gives the Commission the authority to rule on this type of application. The Superior Court was seized with a constitutional challenge regarding the Bylaw, which is a different issue.
5. In that [letter](#) decision, the Commission also extended the deadline for filing comments on the Gatineau application from 18 May to 16 June 2017.

Application

6. On 16 June 2017, in lieu of comments, the Carriers filed with the Commission an application to review and vary the [letter](#) decision. The Carriers submitted that the letter decision should be reviewed and varied to stay the proceeding initiated by the Gatineau application pending the Superior Court's decision because
 - the Commission erred in law by concluding that the issues before the Superior Court are distinct from those before the Commission in the context of the Gatineau application;
 - the Commission erred in law by denying a stay of the proceeding and giving a very short time frame to file comments; and
 - in the course of the Superior Court proceeding, the Carriers were informed of factual elements of which they had no prior knowledge, which constitute a fundamental change in facts.
7. As well, the Carriers requested that the Commission, before soliciting comments from them, issue a preliminary ruling on its jurisdiction to entertain the Gatineau application.
8. The Commission received an intervention from Gatineau regarding the Carriers' application.

9. On 2 August 2017, the Superior Court declared the Bylaw invalid, inapplicable, and inoperable. On 31 August 2017, Commission staff therefore requested that Gatineau and the Carriers confirm their positions regarding the Gatineau application. On 11 September 2017, Gatineau and the Carriers indicated to the Commission that the Attorney General of Quebec had appealed the Superior Court's judgment and that, as a result, that judgment was suspended. Gatineau and the Carriers therefore requested that the Commission proceed with their respective applications.³

Review and vary criteria

10. In Telecom Information Bulletin 2011-214, the Commission outlined the criteria it would use to assess review and vary applications filed pursuant to section 62 of the Act. Specifically, the Commission stated that applicants must demonstrate that there is substantial doubt as to the correctness of the original decision, for example due to (i) an error in law or in fact, (ii) a fundamental change in circumstances or facts since the decision, (iii) a failure to consider a basic principle which had been raised in the original proceeding, or (iv) a new principle which has arisen as a result of the decision.

Issues

11. The Commission has identified the following issues to be addressed in this decision:
- Is there substantial doubt as to the correctness of the [letter](#) decision due to an error in law or a fundamental change in circumstances or facts since the decision?
 - Should the Commission issue a preliminary ruling on its jurisdiction to entertain the Gatineau application?

Is there substantial doubt as to the correctness of the [letter](#) decision due to an error in law or a fundamental change in circumstances or facts since the decision?

Error in law: distinct matters

Positions of parties

12. The Carriers submitted that the Commission erred in law by determining that there is no potential conflict between its decision and the Superior Court judgment. According to the Carriers, if the Superior Court determines the Bylaw to be constitutionally valid, applicable, and operative, there would be a conflict of law.

³ Following the Commission's findings in the present matter, but prior to the publication of this decision, the Commission received a procedural letter from counsel for Gatineau (which can be found on the Commission's website under Closed Part 1 Applications [2017] in the Related Documents column by clicking on the [Related documents link](#)) advising the Commission that the Bylaw had been repealed by Gatineau City Council on 12 December 2017.

Gatineau would therefore have to continue to enforce its Bylaw and would not be able to conclude special agreements with the Carriers containing different terms and conditions than those generally applicable under the Bylaw.

13. However, the Carriers indicated that if the Superior Court finds the Bylaw to be invalid, the parties could negotiate acceptable terms and conditions among themselves, and Commission intervention would not be required unless the parties request it.
14. Gatineau submitted that the Carriers' claim that there would be a conflict of law between the Bylaw and the MAA is unfounded, since one of the Bylaw's provisions specifically states that the Bylaw does not apply to "work subject to a particular MAA with the telecommunications company." [translation] Gatineau also refuted that it would not have the authority to conclude special agreements, since the Commission, in Telecom Regulatory Policy 2009-150, noted that telecommunications companies must comply with municipal bylaws to the extent that such compliance does not change the terms and conditions of any MAA between the parties. According to Gatineau, the Commission further considered that the MAA takes precedence over any bylaw.

Commission's analysis and determinations

15. Gatineau's application regarding approval of the MAA raises certain questions involving the interpretation and application of the Act. These questions are distinct from the matter of the constitutionality of the Bylaw before the Superior Court. Further, regarding the Carriers' argument that the Commission erred in law by finding that there is no potential conflict between the Commission's ruling on the Gatineau application and the Superior Court ruling on the constitutionality of the Bylaw, the Commission did not make this specific finding in the [letter](#) decision. In any event, the Commission finds that the Carriers have failed to demonstrate that there is any such potential conflict that would require it to suspend its consideration of the Gatineau application.
16. Accordingly, the Commission finds that it did not err by concluding that the legal matters to be addressed by the Superior Court are distinct from those to be addressed by the Commission in the context of the proceeding initiated by the Gatineau application.

Error in law: denial of suspension and deadline for filing comments

Positions of parties

17. The Carriers argued that the Commission erred in law by not staying the proceeding and by not giving them enough time to file comments regarding the Gatineau application, since this contravenes the principles of natural justice. The Carriers submitted that these principles imply the right to a stay of an administrative proceeding when a related matter is pending before the Superior Court. The Carriers also indicated that if a stay is not granted, the parties are entitled to a reasonable

amount of time to put forward their positions. The Carriers argued that the deadline given by the Commission to respond to the Gatineau application (i.e. by 16 June 2017) was unreasonable, since the parties and their counsel were heavily involved in the hearing before the Superior Court between 23 May and 12 June 2017, of which the Commission was certainly aware.

18. Gatineau submitted that the Carriers could not validly claim that the Commission had not respected the principles of natural justice. Gatineau noted that the *Canadian Radio-television and Telecommunications Commission Rules of Practice and Procedure* (the Rules of Procedure) provide for 30 days for parties to respond, and that this time frame was even extended so that the Commission could rule on the Carriers' suspension request. Gatineau expressed the view that the issue of the constitutionality of the Bylaw is distinct from the matter before the Commission (i.e. establishing terms and conditions of access to municipal rights of way in Gatineau), with no risk of contradictory judgments.

Commission's analysis and determinations

19. The Commission considers that the Carriers failed to justify why they would be entitled to a stay of the proceeding in question. The case law and authorities referenced by the Carriers in support of their review and vary application do not establish that the Commission is required to grant a stay. On the contrary, the Act provides the Commission with broad powers with respect to the conduct of its proceedings. In particular, it is within the Commission's discretionary power to determine whether or not to stay its proceedings in a given case, whether pending a court ruling on a related constitutional matter or otherwise. In deciding whether to stay its proceedings, the Commission is guided by the public interest. Consistent with its previous determination, the Commission considers that the matters before the Superior Court and the Commission are distinct and that it was neither necessary nor appropriate for the Commission to approve the request for a stay. Accordingly, the Commission finds that it did not err in law by denying the request to suspend its consideration of the Gatineau application.
20. As for the time frames given, according to the Rules of Procedure, the usual deadline for filing comments regarding a Part 1 application is 30 days. The time period between the Gatineau application, filed on 13 April 2017, and the deadline for filing comments following the suspension request, which was 16 June 2017, was 45 days, taking into account the period during which the process was suspended. During that period, the Carriers had a copy of the Gatineau application and all other information necessary for informing and preparing their comments.
21. By assessing the procedural deadlines set out in the [letter](#) decision without reference to the rest of the process associated with the Gatineau application, the Carriers failed to account for the period of time from the filing of the Gatineau application on 13 April 2017 to 11 May 2017, when the Commission suspended the process. Further, as a result of the letter decision, the Carriers were provided with 29 additional days to file an answer to the Gatineau application.

22. Taking into account the time that has already elapsed since the filing of the Gatineau application (excluding the time during which the associated procedural timelines were suspended), the Carriers have not demonstrated that the procedure established to date in the proceeding initiated by the Gatineau application constituted an insufficient amount of time in which to respond to the Gatineau application. Further, the adoption of the deadlines set out below will provide the Carriers with additional time to respond to the Gatineau application.
23. Accordingly, the Commission finds that it has not breached the principles of natural justice and that the Carriers did not demonstrate that it erred in law.

Change in circumstances or facts

Positions of parties

24. The Carriers argued that a fundamental change in circumstances and facts took place since the Commission received their suspension request, because relevant information was revealed during the cross-examination of the Gatineau representative before the Superior Court. Specifically, Gatineau had adopted the Bylaw as a negotiation “tool” to “force things,” [translation] knowing perfectly well that such bylaws could be unenforceable, and that the Bylaw allowed it to not negotiate on a case-by-case basis with the Carriers, contrary to the objectives set out in section 43 and further sections of the Act. The Carriers argued that in the circumstances, they never had the opportunity to negotiate in good faith the terms and conditions of an MAA with Gatineau, since they could not expect Gatineau to be open to compromise while it continued to impose the disputed Bylaw on the Carriers.
25. Gatineau disputed the Carriers’ allegation that its negotiations toward an MAA with the Carriers were not in good faith. It indicated that it had attempted, until the end of March 2017, to settle the legal procedures and reach an MAA with the Carriers. Moreover, Gatineau submitted that the facts revealed during the hearing before the Superior Court related only to the adoption of the Bylaw and could have no impact on the content of the MAA.

Commission’s analysis and determinations

26. Facts that may be relevant to the Superior Court concerning the constitutional validity and operability of the Bylaw are not necessarily relevant to the Commission for the purpose of determining issues under the Act concerning the terms and conditions of the MAA, and vice-versa.
27. The Commission considers that the fundamental change in circumstances or facts put forward by the Carriers is not related to the [letter](#) decision regarding the suspension request, which is the subject of the present review and vary proceeding. As well, even if the Carriers were of the opinion that Gatineau had not negotiated in good faith, nothing prevented them from informing the Commission of this issue when they filed their comments on the record regarding the MAA if they considered it relevant.

28. Since the alleged facts were not relevant to the matters addressed by the Commission in the [letter](#) decision, the information on the record does not demonstrate that a fundamental change in circumstances or facts has taken place since the issuance of the letter decision on 30 May 2017. Therefore, the Commission finds that there is no substantial doubt as to the correctness of its initial decision resulting from a fundamental change in circumstances or facts since that decision.

Conclusion

29. The Commission finds that there is no substantial doubt as to the correctness of the [letter](#) decision due to an error in law or a fundamental change in circumstances or facts. Accordingly, the Commission **denies** the Carriers' review and vary application.

Should the Commission issue a preliminary ruling on its jurisdiction to entertain the Gatineau application?

Positions of parties

30. The Carriers indicated that the Commission's jurisdiction with respect to access by telecommunications carriers and distribution undertakings to the municipal public domain is set out in sections 43 and 44 of the Act. The Carriers argued that since subsection 43(4) of the Act confers a right exclusively upon carriers to apply to the Commission, the Gatineau application could only be based upon paragraph 44(b) of the Act. They added that even if Gatineau could apply to the Commission under subsection 43(4) to establish the terms and conditions of an MAA, which they dispute, Gatineau's decision to manage these matters through the Bylaw prevents it from applying to the Commission and deprives the Commission of its jurisdiction to intervene unilaterally in this matter.
31. The Carriers stated that the Bylaw was in effect and that they agreed, without admission, to comply with it until a court of justice issues a final judgment.
32. For the Carriers, to recognize the Commission's jurisdiction, in the absence of a dispute since they complied with the Bylaw, would be equivalent to
- recognizing that cities have a right to adopt bylaws that govern all the activities of telecommunications carriers in the municipal public domain;
 - with regard to these same activities, recognizing that cities also have a right to apply to the Commission for orders, the scope and effects of which differ from those of bylaws, whose validity, applicability, and operability would be upheld; and
 - imposing different conditions of access on companies that are not affected by the Gatineau application, such that these companies would be governed by a separate regulatory regime.

33. Gatineau indicated that it never denied the Commission's jurisdiction, since it supports the Commission's ultimate jurisdiction in the Superior Court file. Gatineau added that it is paradoxical that the Carriers are challenging the Commission's jurisdiction while they argued before the Superior Court that they support the Commission's exclusive jurisdiction.

Commission's analysis and determinations

34. The Commission considers that the Carriers failed to justify why the Commission should issue a preliminary ruling on its jurisdiction. The issue of the Commission's jurisdiction can be examined when the Commission disposes of the Gatineau application. The Commission finds that it is neither necessary nor appropriate for it to examine the issue of its jurisdiction in the context of the present review and vary proceeding.
35. The Commission therefore **denies** the Carriers' request for it to issue a preliminary ruling on its jurisdiction to hear the Gatineau application before soliciting comments from the Carriers. The Carriers retain the right to raise the issue of jurisdiction in their comments in the context of the proceeding initiated by the Gatineau application.

Disposition of the Gatineau application

36. In a procedural [letter](#) dated 6 July 2017, Commission staff indicated that the Commission was suspending consideration of the Gatineau application while it disposed of the Carriers' review and vary application. The letter also indicated that, having received no comments or replies regarding the Gatineau application, the Commission could decide to allow the parties to file comments at a later date in order to have as complete a record as possible.
37. The record of the Gatineau application, as it stands, is not sufficient to enable the Commission to make an informed decision. As such, the Carriers have until **23 February 2018** to file comments on the Gatineau application dated 13 April 2017. The Carriers are required to identify the terms and conditions in Gatineau's proposed MAA to which they object and suggest any wording they see fit. Gatineau has until **5 March 2018** to file a reply.

Secretary General

Related documents

- *Revised guidelines for review and vary applications*, Telecom Information Bulletin CRTC 2011-214, 25 March 2011
- *MTS Allstream Inc. – Application regarding a Municipal Access Agreement with the City of Vancouver*, Telecom Regulatory Policy CRTC 2009-150, 19 March 2009