



B R O W N L E E
L L P
B a r r i s t e r s & S o l i c i t o r s

Suite 2200, Commerce Place
10155 - 102 Street
Edmonton, AB Canada T5J 4G8
Telephone: (780) 497-4800
Telecopier: (780) 424-3254
E-Mail: e-mail@brownleelaw.com
WebSite: www.brownleelaw.com

Refer to: B.A. Sjølie, Q.C.
Direct Line: (780) 497-4818
E-mail: bsjolie@brownleelaw.com
Your File#:
Our File#: 71075-0085/BAS/LIR

April 11, 2008

Mr. Robert Morin
Secretary General
Canadian Radio-television and
Telecommunications Commission
Ottawa, Ontario K1A 0N2

Dear Sir:

RE: Part VII Application by Shaw Cablesystems Limited seeking an order granting access to highways and other public places in Wheatland County, Alberta

1. Further to Wheatland County's (the "County") letter of April 9th, 2008, the County submits to the CRTC its position on the still remaining disputed issues and a compromised Municipal Access Agreement (MAA) with reasonable terms and conditions of access.
2. Further to the County's negotiations meeting on April 7th, 2008 with Shaw Cablesystems Limited ("Shaw"), the County has attempted good faith negotiations with Shaw to come to a resolution over the terms and conditions of consent to enter and occupy the County's highway rights of way; and in particular, to finalize an MAA to the satisfaction of both parties to ensure servicing to the Lakes of Muirfield Development.
3. The County reiterates that it has not denied Shaw access to its Rights-of-Way and have indicated to Shaw on numerous occasions that it may enter and conduct work in the County's Rights-of-Way pursuant to consent under the County's Bylaw No. 2007-83.
4. As previously noted to the CRTC, the County has undertaken its discussions and negotiations with Shaw, from the beginning, in good faith. During the more recent negotiations with Shaw, the County has provided a number of concessions and compromises to Shaw in an attempt to act in good faith and encourage a settlement of the issues, including the agreement to a number of Shaw's proposed revisions (such as the removal of the Excess Capacity provision). It is the County's submission that it has been more than reasonable in these negotiations and has provided a number of concessions even in the more principled issues in the MAA.

5. During the days following our negotiation meeting with Shaw, the parties have exchanged proposed revisions to the MAA, based on “agreed upon compromises”. The County, however, has found that Shaw to be quite difficult in these discussions in that Shaw is only willing to consider its own revisions and proposals to the MAA even though their interpretation of the discussions differ significantly from what was agreed upon at the negotiation meeting on April 7th. Shaw has simply been unwilling to consider any compromise or any other reasonable wordings other than its own. In some issues, Shaw has even proposed more one-sided and limiting terms than originally proposed in its Part VII application, despite concerns being raised by the County and acknowledged by Shaw during the negotiations as reasonable and agreeable.
6. The County contacted Shaw on the date of this letter to inquire if it is willing to further discuss the provisions of the MAA and again found Shaw to be difficult to deal with and unwilling to compromise an issue. As such, based on the County’s experience with Shaw over the last few days, it is clear that Shaw has simply gone through the motions of negotiations and had no intention of acting in good faith in first place in order to come to an acceptable resolution.
7. Shaw’s actions have amounted to a bullying of the County to enter into a one-sided MAA and in our opinion, an abuse of the CRTC process under sections 43 and 44 of the *Telecommunications Act* in order to achieve its objections. It is the County submission that it is not the intent of the legislation that telecommunication providers use this to their advantage to force conditions of access to a municipality’s own rights of way.
8. As indicated in the County’s submission of April 9th, 2008, the County and Shaw remain in dispute over a number of terms. Following this submission, the parties have not been able to resolve any of these disputed terms and have found other terms that there was agreement on following the negotiation meeting are no longer in agreement due Shaw’s change in position. The significant issues in dispute include:
 - i. Inclusion of “other public place” as a point of access;
 - ii. Routine Work;
 - iii. Utility coordination, specifically Alberta One Call;
 - iv. Relocation;
 - v. Tax and Utilities;
 - vi. Obsolete and Abandoned Equipment;
 - vii. Default and Termination;
 - viii. Insurance terms;
 - ix. Dispute Resolution;
 - x. Force Majeure;
 - xi. Confidentiality provision.

ISSUES IN DISPUTE

Public Places

9. As previously submitted, Shaw had acknowledged that there are differences between highway rights-of-way and other public places and had agreed to consider the County's concerns. Shaw had proposed at the meeting an amendment to the preamble indicating that access to "other public places" was granted but that they would be subject to its own negotiations and terms and conditions. However, following the April 7th meeting, Shaw has denied any such recognition and reverted back to its original position.
10. The County is agreeable to the MAA addressing access by Shaw to the County's rights of way for telecommunication and broadcasting services. The County's originally proposed MAA was for the access to a specific highway (Range Road 264), which was requested by Shaw and was identified in Schedule A of the original MAA. Broadening the Agreement to deal with all future access requests to the County's highway rights of way is acceptable to the County; however, the County is not agreeable to expanding the access to all other public property.
11. Although the County is agreeable to the MAA addressing access by Shaw to the County's rights of way for telecommunication and broadcasting services, it is the County's position that other public property be negotiated on a specific case by case basis, having regard for the different considerations that will need to be taken into account in with the specific property. Nevertheless, the County is not agreeable to Shaw's proposed rewording defining "other public places" with one CRTC decision that may be overruled or distinguished in future CRTC and court decisions.

Routine Work

12. As previously indicated, the County had agreed to include a Routine Work provision requested by Shaw to remove the requirement of Shaw to obtain a permit for Routine Work (as defined by the MAA). However, the County concern was with the impact that Routine may have on the use and safety of the rights-of-way.
13. Although Shaw had acknowledged this concern and agreed to certain measures to be placed on how Routine Work is undertaken (i.e. to be treated in the same manner as Work, save and except the requirements of permits and formal inspections), Shaw proposed revisions to the conditions under section 7 that limit and restrict the County's ability to ensure undue interference and safe use of the rights-of-way in not only Routine Work but also for Work (i.e. where there are break ups and excavations) requiring permits. The County submits that Shaw position on this during negotiations is a clear example of its bad faith in reverting to more restrictive terms than originally proposed to the CRTC in its Part VII Application.

Utility Coordination and Membership in Alberta One Call

14. The Alberta One Call issue was not discussed at the negotiation meeting and remains a disputed matter that will require the assistance of the CRTC. The County had agreed to include a term in the MAA recognizing that CRTC would be deciding on the issue of whether Shaw would be required to be a good standing member of Alberta One Call. Even in negotiating this provision, Shaw was defiant in including a term that provided that even if the CRTC (and subsequent courts) ruled that it be a member of an alternate locate service other than DIG SHAW, that further “good faith” negotiations would be required to amend the MAA to incorporate such a term. It is the County’s position that if the CRTC rules that this is a requirement, than Shaw must abide by this order, as per the CRTC’s jurisdiction under Sections 43 and 44 of the *Telecommunications Act*.

Relocation Costs

15. Further to our submissions of April 9th, the County and Shaw have been unable to resolve this issue. Although Shaw had agreed to 100% of the relocation costs of its equipment for all purposes upon reasonable notification in the July 2007 and the County’s experience with other utility providers to pay for all relocation costs, the County proposed to Shaw a reasonable compromise of a six year sliding scale for relocation costs. As well, the County provided a reasonable compromise regarding third party request for relocations by the Company. Given the County’s specific situation as previously described, the County was quite reasonable in its proposal. Shaw, however, has refused to negotiate at all on this issue, with the County either accepting its proposed relocation cost provisions or nothing.
16. Evidence of Shaw’s further bad faith during these negotiations is also clear for its agreement for a 90 day notice period for a relocation. Although Shaw agreed to this revision at our meeting, it is subsequent proposal it qualified this 90 day period to its advantage (i.e. subject to other third party availability and permits etc.) which could result in Shaw undertaking a requested relocation even more than its proposed 180 days. Shaw had also agreed to pay for all relocation costs in cases of emergency, but refused to acknowledge such an agreement after the April 7th meeting.

Taxes and Utilities

17. The County’s version of the taxes and utilities provisions reflects the statutory obligations of Shaw to pay taxes for the use and occupancy of the Rights-of-Way (e.g. linear property taxes). As well, it requires Shaw to be responsible for any costs of services and utilities related to its operations. The County should not be responsible for such costs associated with Shaw’s use and occupancy of the Rights-of-Way.
18. The County and Shaw had an extensive discussion on this provision, including how the *Municipal Government Act* determines when penalty and interests apply to taxes. That is, where a tax notice is issued and the taxpayer is in arrears. In such a situation, the responsibility of late or non-payment ought to be the responsibility of the party in arrears. Although a municipality may cancel taxes, this is to be determined on an annual basis and to

agree to cancellation of tax penalties in advance by contract would be an illegal fettering of statutory discretion of the municipal council. Shaw acknowledged these concerns, and agreed to include the County's original taxes and utilities provision wording and to discuss the necessity of their proposed provisions (i.e. on tax penalty and statutory declarations) with their internal departments. In reply to these concerns, Shaw replied with a revised provision that changed the County's provisions and included that it is not responsible for any penalties or interest and neglected to include the requirement regarding utilities. This is clear example of Shaw not acting in bad faith with the County and willing to only consider its proposals.

Obsolete and Abandoned Equipment

19. It is the County's position that all obsolete and abandoned Equipment be removed from its rights-of-way. The County has the statutory authority to manage its rights-of-way and has the right to require utility providers to remove its obsolete and abandoned Equipment. Despite this, the County had agreed to a compromise with Shaw where it would consider whether the Equipment was required to be removed when the Equipment is abandoned or no longer used by the Shaw. At such time, the County agreed to meet with Shaw and would then make the decision whether the Equipment be removed or remain. This was a reasonable compromise and is clear evidence of the County's good faith during these negotiations.
20. Upon further review of Shaw's proposed revision to this section, Shaw has proposed a more limiting ability for the County to have Shaw remove its Equipment than Shaw had original proposed in its Part VII Application. Shaw's proposal in the Part VII Application was that all surface Equipment would be removed immediately and subsurface Equipment would be removed if in the opinion of the County it was in "poor, dilapidated or deteriorating physical condition and constitutes a hazard to persons or property, or interferes with the efficient management and operation of the Rights-of-Way." Following negotiations and the compromise that the County believed had been made, Shaw revised the provision to read that the County may only request removal of abandoned equipment if it is an area identified in the County's 5 Year Capital Works Plan and where the Equipment "constitutes an imminent threat to public safety." This is by no means a compromise nor does it reflect the agreement made between the parties in principle at its negotiations meeting.

Default and Termination

21. The County's original MAA provided that in the event of a default the defaulting party had 180 days to cure the default, failure of which would result in a termination of the MAA. Shaw proposed that this default and termination provision only apply to "material obligations." In the spirit of good faith negotiations, the County agreed to the inclusion of material obligations provided that it be given a reasonable definition. In that regard, the County proposed that material obligation include any obligation of the parties that is fundamental to the uninterrupted and safe use of the Rights-of-Way. Shaw has refused to consider this proposal and again insists on its proposed wording, without any compromise.

22. In regards to section 30, the County, acting reasonably, is agreeable to Shaw's proposed rewording; however, this is subject to the agreement over the dispute resolution process and the obsolete and abandonment or equipment provision. The intent of this latter portion is that if the MAA is terminated, the County has the ability to require Shaw to remove its obsolete and abandoned Equipment for its Rights-of-Way.

Insurance terms

23. Recognizing Shaw's insurance structure, the County agreed to a number of revisions to the insurance requirements of Shaw. However, the County requested that it be informed of any material change to the policy. Shaw indicated that its insurer would not be willing to notify the County of any material change in its insurance policy. In that regard, the County provided Shaw a compromise that Shaw endeavour to provide the County notification of any material changes in the policy within thirty days. This is a reasonable compromise, which Shaw has refused. Rather, Shaw has proposed to endeavor to request its insurer to notify the County of material changes in the policy. Such wording is completely contrary to the intention of both the original insurance requirements and the County's reasonable compromise.

Dispute Resolution

24. The County has agreed to the inclusion of dispute resolution provision. However, as indicated in the County's previous submission, the parties are still in dispute over the structure of this provision. In regard to this provision, Shaw is unwilling to consider anything but their own proposal.

Force Majeure

25. Again the County, acting reasonably, agreed to a force majeure clause that will essentially benefit Shaw's operations. The parties continue to disagree with the definition of force majeure in that the County will not agree to a force majeure clause that is beyond the scope of the definition in law. In that regard, the County proposed a logical and reasonable revision to this provision providing that the term force majeure be defined as "according to the law in the Province of Alberta." Shaw, however, acting unreasonably, has indicated that it is only agreeable to its proposed rewording of the provision.

Confidentiality

26. In an effort to work towards an agreement with Shaw, the County again, acting reasonably, agreed to the inclusion of a confidentiality provision. The County indicated to Shaw that it must be able to still manage its Rights-of-Way and not be bound by any onerous confidentiality obligations. In that regard, the County proposed a reasonable alternative confidentiality provision that more properly reflects the County's abilities to ensure utility coordination and safe use of its rights of way as well as its statutory obligations under the

Freedom of Information and Protection of Privacy Act. Shaw, however, has refused to consider any revision of this confidentiality provision.

CONCLUDING COMMENTS

27. The County has acted in good faith throughout its dealings and negotiations with Shaw. Despite the County's best efforts, Shaw has failed to act in any reasonable manner and in our opinion, has only gone through the façade of negotiating in good faith for the benefit of the CRTC's perception.
28. As commented by the CRTC in the CRTC Decision 2001-23, the County has created a level playing field regarding reasonable terms and conditions of access to its Rights-of-Way. Notwithstanding, the County has attempted to negotiate with Shaw in good faith to come to terms of consent that are more suitable to Shaw's operations.
29. However, Shaw has continued to act in bad faith and is unwilling to negotiate with the County, as was directed by the CRTC, in order to resolve the issues with the proposed MAA. This is evident from Shaw's actions during its dealings with the County, which include, for example, where:
 - a. Shaw had agreed to and signed the County's Work and Access Agreement in July 2007, which included many of the same provisions as the County's MAA (including the obligation on Shaw to be 100 percent liable for relocation costs and liability and indemnification provisions) subject to only the revision that DIG SHAW be used as the locate service over Alberta One Call. Then later raising these same issues to the County and then the CRTC as being unreasonable terms of access;
 - b. Shaw refused to consider any compromise with registering its alignments with Alberta One Call, even when the County and the developer of the Lakes of Muirfield agreed to an arrangement where Shaw's lines for this development would registered with Alberta One Call under the developer's membership; and
 - c. Both before and after the negotiation meeting of April 7th, the County on numerous issues has provided concessions and reasonable compromises, while Shaw has continually refused to provide any middle ground (and in some cases, providing even more onerous positions than originally proposed) in order to resolve outstanding issues of dispute.

30. In conclusion, the County submits that the bad faith and bullying tactics of Shaw in entering into a MAA and abuse of the CRTC processes under Sections 43 and 44 of the *Telecommunications Act* should not be discarded by the CRTC. In that regard, the County submits that the CRTC accept and endorse the County's proposed revised MAA, which reflects the County's good faith and reasonableness in these proceedings.

Respectfully submitted,
On Behalf of Wheatland County,

BROWNLEE LLP

PER:



BARRY A. SJOLIE

LIR/

Cc: Wheatland County
Attention: Jennifer Deak, Chief Administrative Officer

Shaw Cablesystems Limited
Attention: Jean Brazeau, Vice-President Telecommunications Regulatory Affairs

Alberta One Call Coporation
Attention: Robert R. Chisholm, President

Alberta Association of Municipal Districts and Corporations
Attention: Gerald Rhodes, Executive Director & Donald Johnson, President

Rural Utilities and Safety Association
Attention: Bryan Bepalko, President

Alberta Damage Prevention Council
Attention: Lee Travis, Chairman

Alberta Public Works Association
Attention: Darwin Durnie, President

Alberta Roadbuilders and Heavy Construction Association
Attention: Dennis Locking, Member of Board