COMPENSATION FOR THE OCCUPATION AND USE OF MUNICIPAL LAND BY TELECOMMUNICATIONS CARRIERS

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INTRODUCTION

On January 25, 2001, the Canadian Radio-television and Telecommunications Commission ("CRTC" or the "Commission") issued its decision in *Ledcor/Vancouver - Construction, operation and maintenance of transmission lines in Vancouver* ("CRTC Decision 2001-23" or the "Decision"). On its facts, the significance of the Decision is limited to the installation of fibre optic transmission lines in 18 street crossings in Vancouver. However, when the CRTC issued the Public Notice relating to the proceeding, it indicated that the principles developed in the proceeding would, ". . . inform the Commission's consideration of any disputes that may arise anywhere". The CRTC also stated in the Decision that it had developed principles in it that would ". . . assist carriers and municipalities in negotiating terms and conditions under which municipalities will grant carriers consent to construct, maintain and operate transmission lines on or in municipal property". Accordingly, the principles developed and applied by the CRTC in the Decision have broad implications in terms of the relationship between municipalities and telecommunications carriers who use municipal land for their transmission lines. The Decision also raises significant issues concerning the nature and scope of the jurisdiction of the CRTC.

This paper includes a brief summary of CRTC Decision 2001-23 and a discussion (from the point of view of a municipality) of some of the issues arising out of the Decision.

CRTC DECISION 2001-23

Under s. 43(2) of the *Telecommunications Act*, S.C. 1993, c. 38 a telecommunications carrier may ". . . enter on and break up any highway or other public place for the purpose of constructing, maintaining or operating its transmission lines . . ." This right is not absolute, however. It is qualified by s. 43(3) which provides that a carrier may not construct its transmission lines without the consent of the municipality (or other public authority which has jurisdiction over the highway or other public place). If a municipality refuses to consent, or to consent on terms acceptable to a carrier, s. 43(4) of the *Act* provides that the carrier may make an application to the CRTC which has the power to permit access on conditions determined by the Commission.

The proceeding which ultimately resulted in CRTC Decision 2001-23 was commenced when Ledcor (after unsuccessful negotiations with the City of Vancouver) applied to the CRTC under s. 43(4) seeking the Commission's permission to construct its transmission lines in 18 street crossings in Vancouver.

"Causal Costs"

In the proceeding before the CRTC, Vancouver took the position that it was entitled to recover all of the additional costs that it incurred as a result of the use and occupation of its land by carriers. This included costs relating to plan approval and inspections, and construction disruption costs (e.g., traffic signing costs, lost parking meter revenue, costs relating to pavement restoration and degradation, lost productivity of city operations, etc.).

The CRTC decided that Vancouver was entitled to recover from a carrier all "causal costs" it incurs when the carrier occupies and uses municipal land. Although accepting this notion in principle, the Commission rejected Vancouver's approach to the calculation of these causal costs in a number of respects. For instance, in calculating these causal costs, Vancouver proposed applying a 62% loading factor to the actual costs it incurred in order to recover indirect

costs, variable common costs, and fixed common costs (with the specific loading for fixed common costs being 25%). Although the CRTC has allowed telephone companies to include a mark-up in the price they charge for their services representing a contribution to fixed common costs, the Commission refused to allow municipalities to recover any amount for increased fixed common costs arising out of carriers' use of municipal land. The stated rationale of the CRTC for this aspect of the Decision was that, "A municipality differs from a business in that it derives its revenues primarily from taxes, and the fixed common costs of running the municipality are appropriately covered by this tax revenue". The CRTC did not explain why it was "appropriate" that municipal taxpayers, rather than telecommunications carriers, should be required to pay for these additional costs arising out of the carriers' use of municipal land.

As well as refusing to allow municipalities the right to recover a contribution to the increase in their fixed common costs, the CRTC concluded that a number of the causal costs claimed by Vancouver would be difficult to calculate (e.g., net revenue losses from parking meters put out of service during construction of telecommunications facilities in city streets; lost productivity for city operations caused by factors such has having to work around carriers' facilities in city streets). The CRTC dealt with these causal costs by allowing for a 15% loading on plan approval and inspection costs. However, because the costs relating to plan approval and inspection are very small, this loading factor will not actually result in full recovery of the causal costs the loading factor was intended to cover.

Although the CRTC stated that municipalities should recover the additional costs they incur as a result of carriers' use and occupancy of municipal land, the method used by the Commission to calculate these costs may, in practice, result in municipalities being unable to fully recover these causal costs.

Land Compensation

Under the *Vancouver Charter* S.B.C. 1953, c.55, Vancouver holds fee simple title to its streets. As well, Vancouver has broad powers under the *Vancouver Charter* to prohibit, and to

regulate, encroachments on, over, and under its streets; the power to lease or license the subsurface beneath its streets; and the power to stop up streets and dispose of them.

In the proceeding before the CRTC, Vancouver took the position that it was entitled to compensation for the municipal land that telecommunications carriers occupy and use for their transmission lines and other facilities. Vancouver based its approach to determining the amount of that compensation on a model used by the Greater Vancouver Regional District to compensate landowners when GVRD subsurface facilities are installed under privately owned land. This compensation is based on the market value of the land and the degree to which the property is alienated from other uses by the GVRD use. Applying this model, Vancouver proposed that telecommunications carriers who occupy and use municipal land should pay an annual per-metre charge based on the following formula:

Land Value (based on land sales data for adjacent land)

X Rate of Return (Vancouver's borrowing rate)

X Occupied Width

X Alienation Factor (an adjustment to reflect the actual use, i.e., the degree to which the land is "alienated" from other uses)

With respect to the issue of land compensation, the carriers took the position before the CRTC that its jurisdiction to award compensation was limited to compensation for clearly identifiable "out-of-pocket" expenses incurred by municipalities when carriers occupy and use their municipal land. This does not include the power to award compensation for the value of the land occupied and used by carriers.

The CRTC rejected the argument advanced by the carriers and concluded that it had the jurisdiction under s. 43(4) of the *Telecommunications Act* to award land compensation. However, it declined to do so. In reaching this conclusion, the Commission noted that in most cases it would be extremely difficult to establish a "market-based" rate for the use of municipal property, as there is no "free market" consisting of totally willing buyers and sellers for

municipal consent to use and occupy municipal land. In the end, the CRTC decided it was ". . . not necessary or appropriate" to impose market-based charges, or charges based on a percentage of carriers' revenues. In so far as the principles established in CRTC Decision 2001-23 are applied generally to carriers seeking access to municipal land, it appears that carriers may enter, occupy and use municipal land without being obligated to pay municipalities for that use and occupation.

Other Rulings Made by the CRTC

Vancouver took the position that, to avoid unnecessary and repetitive excavation of city streets, it should have the ability to require carriers to provide extra duct capacity when a street is initially excavated and to require that this extra duct capacity be used by other carriers wanting to use the same alignments. The CRTC decided that it was "not appropriate" for municipalities to impose a requirement on carriers to construct extra duct capacity or to require other carriers to use this capacity rather than constructing their own facilities.

Vancouver took the position that carriers, rather than municipalities, should be responsible for the cost of relocating carriers' facilities if that relocation was required for *bona fide* municipal purposes. The CRTC declined to prescribe a mechanism to deal with relocation costs and stated that, if a municipality requires relocation in the future, it should negotiate the cost of relocation with the carrier. Failing agreement, either the municipality or the carrier could apply to the Commission to resolve the dispute.

Vancouver took the position that it should be able to require carriers who occupy and use municipal land to indemnify Vancouver (on terms satisfactory to Vancouver) for all forms of loss arising out of the carriers' use and occupation of municipal land. The CRTC seemed to have concerns about "one-sided" provisions relating to liability and indemnity. In the end, the Commission ruled that unless municipalities and carriers could agree on provisions relating to liability and indemnification, then "provincial principles of liability for negligence would apply".

TWO MAIN ISSUES ARISING OUT OF DECISION 2001-23

Vancouver sought leave to appeal Decision 2001-23 to the Federal Court of Appeal. Four other applications for leave to appeal the Decision were also filed (by the Federation of Canadian Municipalities, Calgary, Halifax, and Toronto/Ottawa). In May 2001, the Federal Court of Appeal granted leave, and all five appeals have effectively been consolidated. Although the grounds of appeal are more numerous, all five appeals raise two central issues: (1) the constitutional limits on the jurisdiction of the CRTC when it grants permission to carriers to occupy and use municipal land; and (2) whether municipalities are entitled to compensation for the value of the land occupied and used by carriers.

The Constitutional Issue

When the CRTC grants permission to a telecommunications carrier to occupy and use municipal land for the purpose of constructing and maintaining transmission lines, it exercises the powers conferred on it under s. 43(4) of the *Telecommunications Act* which provides as follows:

> (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.

The CRTC made the following comments about this provision in relation to the division of powers between the federal Parliament and the provincial Legislatures in the *Constitution Act, 1867* (the "*Constitution*") in para 34 of the Decision:

> In the Commission's view, sections 43 and 44, and this decision, relate in pith and substance to telecommunications. Any effects on property and civil rights in the province are incidental. All matters that are a vital part of the operation of a federal undertaking are within the exclusive legislative control of Parliament. Whether to construct and where to construct transmission lines (a vital part of a telecommunications undertaking) are matters of exclusive federal concern, as are the design of the transmission lines, the material to be incorporated and other similar specifications. All terms and conditions that will be permanently reflected in the structure of the transmission lines, or have a direct effect on the operational qualities of the transmission lines, are within exclusive federal jurisdiction. Finally, the use of property (such as a municipal highway) for the purposes of a

transmission line cannot be divorced from the exclusive federal constitutional jurisdiction over telecommunications.

Based on this view of the constitutional division of powers, the CRTC concluded that the only limit on its power to impose conditions under s. 43(4) of the *Telecommunications Act* relating to the use and occupation of municipal land by carriers is that the Commission must have due regard to the use and enjoyment of the highway or other public place by others. Subject to this express limitation in s. 43(4), the CRTC is free to impose any condition it wishes relating to the use and occupation of municipal land. It is equally free to refuse to impose any condition sought by a municipality.

In the appeal pending before the Federal Court of Appeal, Vancouver takes issue with the CRTC's interpretation of the nature and scope of its powers under s. 43(4) of the *Telecommunications Act*. Vancouver (along with the Federation of Canadian Municipalities and the other three municipalities who are appealing CRTC Decision 2001-23) takes the position that the use and occupation of municipal land by carriers for their transmission lines is not subject to exclusive federal jurisdiction. The powers conferred on the CRTC under s. 43(4) are limited not only by express language in the provision (concerning the use of highways and other public places by others). It is also limited by the powers conferred on the provinces (and municipalities) under s. 92 of the *Constitution*.

The position taken by Vancouver is based on a well-established line of cases that have considered when, and to what extent, provincial and municipal regulations apply to "federal undertakings" (such as telecommunications carriers) under the *Constitution*. The roots of this line of authority reach back over a century to a decision of the Privy Council in *Canadian Pacific Railway Co. v. Corporation of the Parish of Notre Dame de Bonsecours*, [1899] A.C. 367. This case concerned the applicability to Canadian Pacific of provincial legislation requiring the cleaning and removal of obstructions from ditches. Canadian Pacific argued that the ditches it owned were part of the railway and that everything affecting the physical condition of a railway was within the exclusive jurisdiction of Parliament. The Privy Council found that the ditch in

question was part of the railway works, but held that the provincial legislation applied to Canadian Pacific and to its railway ditches.

In this case, Lord Watson stated the following (at p. 372):

> The British North America Act, whilst it gives the legislative control of the appellants' railway *qua* railway to the Parliament of the Dominion, does not declare that the railway shall cease to be a part of the provinces in which it is situated or that it shall, in other respects, be exempted from the jurisdiction of the provincial legislatures. Accordingly, the Parliament of Canada has, in the opinion of their Lordships, exclusive right to prescribe regulations for the construction, repair, and alteration of the railway, and for its management, and to dictate the constitution and powers of the company. . . It was obviously in the contemplation of the Act of 1867 that the "railway legislation", strictly so called, applicable to those lines which were placed under its charge would belong to the Dominion Parliament. It therefore appears to their Lordships that any attempt by the Legislature of Quebec to regulate by enactment, whether described as municipal or not, the structure of a ditch forming part of the appellant company's authorized works would be legislation in excess of its powers. If, on the other hand, the enactment had no reference to the structure of the ditch, but provided that, in the event of its becoming choked with silt or rubbish, so as to cause overflow and injury to other property in the parish, it should be throughly cleaned out by the appellant company, then the enactment would, in their Lordships' opinion, be a piece of municipal legislation competent to the Legislature of Quebec. Whether the appellant company ought or ought not to prevail in this appeal depends upon what was the character of the railway ditch in question, and the real nature of the operation which the company were required to perform [under the municipal code of Quebec]. . . [emphasis added]

The Privy Council concluded that the verb "reparer" in the legislation did not mean that any structural alteration of railway ditches was required; rather, it only required the removal of obstructions that affected the physical condition of the ditches (part of the railway). Based on this distinction, it held that the provincial legislation applied.

In *Ontario (A.G.) v. Winner*, [1954] 4 D.L.R. 657, the Privy Council considered the applicability of provincial legislation to an interprovincial (and international) bus undertaking. A license issued under the provincial legislation permitted the operation of a bus service from

Boston through New Brunswick to Nova Scotia, but prohibited the picking up and dropping off of passengers in New Brunswick. Lord Porter said the following at p. 677:

> The Province has indeed authority over its own roads but that authority is a limited one and does not entitle it to interfere with connecting undertakings. It must be remembered that it is the undertaking not the roads which come within the jurisdiction of the Dominion, but legislation which denies the use of provincial roads to such an undertaking or sterilizes the undertaking itself is an interference with prerogative of the Dominion. [emphasis added]

The Privy Council held that the province of New Brunswick did not have the power to prohibit the operator of an interprovincial bus undertaking from picking up and dropping off passengers within the province. In doing so, however, it recognized that other provincial legislation regulating highways would apply to such an undertaking.

In *Construction Montcalm Inc. v. Minimum Wage Commission*, [1979] 1 S.C.R. 754, the Supreme Court of Canada considered whether provincial minimum wage legislation applied to the employees of a Quebec construction company doing construction work on the runways of Mirabel airport, on federal Crown land, under a contract with the federal Crown. The Court held that the legislation applied to the workers and Beetz J., writing for the majority, said the following at p. 770:

> The construction of an airport is not in every respect an integral part of aeronautics. Much depends on what is meant by the word "construction". To decide whether to build an airport and where to build it involves aspects of airport construction which undoubtedly constitute matters of exclusive federal concern. . . This is why decisions of this type are not subject to municipal regulation or permission. . . Similarly, the design of a future airport, its dimensions, the materials to be incorporated into the various buildings, runways and structures, and other similar specifications are, from a legislative point of view and apart from contract, matters of exclusive federal concern. The reason is that decisions made on these subjects will be permanently reflected in the structure of the finished product and are such as to have a direct effect upon its operational qualities and, therefore, upon its suitability for the purposes of aeronautics. But the mode or manner of carrying out the same decisions in the act of constructing an airport stand on a different footing. . . . [emphasis added]

In *Construction Montcalm*, Beetz J. analysed *Notre Dame de Bonsecours* in detail and

said the following (at p. 774):

> The *Notre-Dame de Bonsecours* case is one of a line of cases which have established the general principle that federal works, undertakings, services and businesses remain subject to provincial law as long as provincial law does not reach them *qua* federal organizations, that is, as long as provincial law does not regulate them under some primary federal aspect. . . The general principle was qualified in this sense, that the application of provincial law must not interfere with the operation of a federal undertaking [reference omitted] or result in its dismemberment [reference omitted] . . . This qualification is irrelevant in the case at bar where the application of provincial law would neither interfere with the operation of a federal undertaking nor result in the dismemberment of a federal work. The principle was further qualified [reference omitted] that the regulation of the labour relations of a federal undertaking, service or business is a matter for exclusive federal control. . . [emphasis added]

Bell Canada v. Quebec (CSST), [1988] 1 S.C.R. 749 concerned the applicability of a provincial occupational health and safety law to a federal undertaking. The Supreme Court of Canada concluded that the legislation "entered directly and massively" into the field of working conditions, labour relations, and the management of an undertaking and, therefore, was constitutionally inapplicable to a federal undertaking engaged in interprovincial communications.

After a detailed analysis of the decision in *Commission du salaire minimum v. Bell Telephone Co. of Canada*, [1966] S.C.R. 767 (which Beetz J. referred to as *Bell Canada 1966*), he said the following (at p. 833):

> I think it is quite impossible to distinguish the circumstances of the case at bar from those of *Bell Canada 1966*. The working conditions and labour relations as well as the management of federal undertakings such as Bell Canada, are matters falling within the classes of subject mentioned in s. 91(29) of the *Constitution Act, 1867*, and consequently fall within the exclusive legislative jurisdiction of the Parliament of Canada.
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> Moreover, as I indicated at the start of these reasons, the exclusivity rule approved by *Bell Canada 1966* does not apply only to labour relations or to federal undertakings. It is one facet of a more general rule against making works, things or persons under the special and exclusive jurisdiction of Parliament subject to provincial legislation, when such application would bear on the specifically federal nature of the jurisdiction to which such works, things or persons are

subject.

> This rule dates back to *Bonsecours*, in which the Judicial Committee of the Privy Council held that municipal legislation and regulations regarding ditches applied to a ditch alongside a federal railway when those rules are limited to the maintenance of the ditches and clearance of obstacles which might obstruct them, but would not apply if they specified what the structural form of the ditches should be, such as their width or depth. [emphasis added]

Beetz J. made it clear that provincial legislation generally is not constitutionally inapplicable to federal undertakings, and he said the following (at p. 762):

> . . . works, such as federal railways, things, such as land reserved for Indians, and persons, such as Indians, who are within the special and exclusive jurisdiction of Parliament, are still subject to provincial statutes that are general in their application, whether municipal legislation, legislation on adoption, hunting or the distribution of family property, provided however that the application of these provincial laws does not bear upon those subjects in what makes them specifically of federal jurisdiction [references omitted and emphasis added]

Provided that provincial (or municipal) regulation does not affect a vital or essential "federal" aspect of an undertaking and provided that the regulation does not fundamentally impair the operations of the undertaking, it will apply.

In *Ontario v. Canadian Pacific Ltd.* (1993), 13 O.R. (3d) 389, the Ontario Court of Appeal considered whether provincial environmental protection legislation applied to the Canadian Pacific Railway which had conducted controlled burns on its right of way in the Town of Kenora. Under a provision in the federal *Railway Act*, the railway had a duty to keep the right of way free from dead grass, weeds, and other combustible matter. Controlled burning was an economical and efficient means, and the historical means, of fulfilling this statutory duty. There were other methods available, however, that the railway could use to keep its right of way free of combustible matter.

The Court concluded (at p. 394) that, because controlled burning was not essential to right of way management, the provision in the provincial legislation which had the effect of

making it an offence ". . . cannot be said to be directed at the management of the railway, nor can it be said to impinge upon an integral part of its operation. It cannot prevent the appellant from carrying out its statutory mandate." The court also rejected the argument that the provincial legislation as a whole did not apply to the railway because its principal purpose or effect was the management and operations of the railway.

The Supreme Court of Canada upheld the decision of the Ontario Court of Appeal in this case based on the authority of *Notre Dame de Bonsecours* [*Ontario v. Canadian Pacific Limited*, [1995] 2 S.C.R. 1031].

In *Air Canada v. Ontario (Liquor Control Board)*, [1997] 2 S.C.R. 581, the Supreme Court of Canada considered whether a provincial liquor authority could charge mark-ups on liquor purchased by an airline outside of Canada which was intended for in-flight consumption by airline passengers. In a unanimous decision, the Court held that it could. It reached this conclusion despite the fact the Court accepted (at p. 606) the assertion of the airline that "flying dry" was not an option and the Court's own conclusion that, under some circumstances, the provision of food and beverages could form a vital part of an airline's undertaking.

Writing for the Court, Iacobucci J. gave as an example of a provincial regulation which might affect a vital part of an airline's undertaking and therefore be constitutionally impermissible, a regulation which prohibited an airline from placing food and water on its aircraft. He noted that, although food and water do not propel an aircraft, without them on board it is unlikely an aircraft could venture safely from Canada to a distant destination.

Iacobucci J. concluded, however, that the facts before the Court in the *Air Canada* case were more akin to the facts in the *Montcalm* case, and the Court held that the province had the power to charge a mark-up on liquor purchased by an airline outside of Canada to be consumed by its passengers during flights.

The constitutional issue arising out of CRTC Decision 2001-23 is a novel one. The Decision raises, for the first time, the issue of the relationship between the federal constitutional jurisdiction over telecommunications undertakings and the provincial (and municipal) jurisdiction over municipal land. Based on the authorities referred to above, Vancouver will argue that municipalities have the power to regulate and control the use of municipal land by carriers, provided that this regulation does not affect a vital or core part of the carrier's telecommunications undertaking or fundamentally impair the carrier's operations.

Vancouver will also argue that the powers conferred on the CRTC under s. 43(4) of the *Telecommunications Act* are limited by the division of powers in the *Constitution*. Vancouver accepts that the CRTC has the power to grant permission to carriers to occupy and use municipal land for their transmission lines. However, Vancouver will argue that when the CRTC grants this permission, it may only impose conditions that relate to core aspects of the carrier's telecommunications undertaking. And, the CRTC only has the power to intervene to prevent a municipality from imposing conditions on carriers relating to the use and occupation of municipal land if those conditions affect a vital or core aspect of the carriers' telecommunications undertaking or fundamentally impair the carriers' operations.

The Land Compensation Issue

Based on the constitutional argument set out above, Vancouver will argue that it may impose conditions on carriers relating to compensation for the use and occupation of municipal land, provided that those conditions do not fundamentally impair the operations of the carriers. However, even if the division of powers in the *Constitution* gives the CRTC, rather than municipalities, the power to deal with the issue of land compensation, Vancouver will argue that the approach taken by the Commission in CRTC Decision 2001-23 (to grant a carrier the right to occupy and use municipal land without an obligation to pay any compensation for that right) violates the fundamental principle that when there is a "taking" pursuant to statutory authority, compensation must be paid unless the language of the statute makes it very clear that no compensation is payable.

The Supreme Court of Canada expressed this fundamental principle in *Manitoba Fisheries Limited v. The Queen*, [1979] 1 S.C.R. 101 at p. 109:

> There is no express language in the Act providing for the payment of compensation by the federal Crown but the appellant relies upon the long-established rule which is succinctly stated by Lord Atkinson in *Attorney-General v. De Keyser's Royal Hotel Ltd.*, at p. 542 where he said:
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> > "The recognized rule for the construction of statutes is that, unless the words of the statute clearly so demand, a statute is not to be construed so as to take away the property of a subject without compensation."
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> The rule of construction is more amply stated in *Maxwell on Interpretation of Statutes*, 11th ed., pp. 275 to 277 in language . . . which is set out at length in the judgment of Mr. Justice Collier at [1977] 2 F.C. p. 462 where reference is also made to the approach adopted by Lord Radcliffe in *Belfast Corporation v. O.D. Cars Ltd.*, at p. 523 (H.L.(N.I.)). In considering whether a particular piece of legislation contemplates taking without compensation, Lord Radcliffe there said:
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> > "On the one hand, there would be the general principle, accepted by the legislature and scrupulously defended by the courts, that the title to property or the enjoyment of its possession was not to be compulsorily acquired from a subject unless full compensation was afforded in its place. Acquisition of title or possession was 'taking'. Aspects of this principle are found in the rules of statutory interpretation devised by the courts, which required the presence of the most explicit words before an acquisition could be held to be sanctioned by an Act of Parliament without full compensation being provided, or imported an intention to give compensation and machinery for assessing it into any Act of Parliament that did not positively exclude it. . . ." [emphasis added]

Under the *Vancouver Charter,* Vancouver holds fee simple title to its streets. When municipal land is used as a street or highway, the public has the lawful right to use the surface of the street or highway for the purpose of passage [*Vancouver v. Burchill*, [1932] S.C.R. 620]. The right to pass and repass is the full extent of this public right. It does not change the fact that Vancouver owns this property. As well, Vancouver has broad powers under the *Vancouver Charter* to prohibit, and to regulate, encroachments on, over, and under its streets; the power to lease or license the subsurface beneath its streets; and the power to stop up streets and dispose of them.

The fact that the Commission has the power under s. 43(4) of the *Telecommunications Act* to give permission to Carriers to enter, occupy and use municipal property without invoking the formal expropriation provisions in the *Act*, does not change the fact that the granting of that permission constitutes a "taking" [*B.C. v. Tener*, [1985] 1 S.C.R. 533; *Casamiro Resource Corp. v. B.C. (A.G.)* (1991), 80 D.L.R. (4th) 1 (B.C.C.A.)].

When the Commission grants permission under s. 43(4) of the *Telecommunications Act* to a carrier to enter, occupy, and use Vancouver's streets for their facilities, it gives the carrier possession of municipal land for an indeterminate period that is not under the control of the municipality. This deprives Vancouver of its right to use this portion of its land and from exercising its powers to sell, lease, or dispose of this portion of its land to any other party. Vancouver will argue that this constitutes a "taking".

Nothing in the *Telecommunications Act* expressly states, or even impliedly suggests, that this can be done without payment of full compensation to Vancouver. To the contrary, s. 42(1) of the *Act* provides as follows:

> 42.(1) Subject to any contrary provision in any Act other than this Act or any special Act, the Commission may, by order, in the exercise of its powers under this Act or any special Act, require or permit any telecommunications facilities to be provided, constructed, installed, altered, moved, operated, used, repaired or maintained or any property to be acquired or any system or method to be adopted, by any person interested in or affected by the order, and at or within such time, subject to such conditions as to compensation or otherwise, and under such supervision as the Commission determines to be just and expedient. [emphasis added]

Vancouver will argue that when the CRTC grants permission to a carrier to enter, occupy, and use Vancouver's land, Vancouver is entitled to receive full compensation for what was taken from it and acquired by the Carrier. The fact that it might be "extremely difficult" for the Commission to determine its value [CRTC Decision 2001-23, para. 117] does not deprive Vancouver of the right to full compensation.

CONCLUSION

CRTC Decision 2001-23 raises novel and important issues concerning the relationship between municipalities and telecommunications carriers who use and occupy municipal land for their transmission lines. In particular, it raises the issue of whether municipalities are entitled to be compensated for the value of the land occupied and used by carriers. As well, the Decision raises important constitutional issues concerning the power of the CRTC, and the power of municipalities, to and regulate and control municipal land when that land is occupied and used by telecommunications carriers.