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

This paper was prepared by Patsy J. Scheer, Assistant Director of Legal Services for the City of Vancouver, for the 2001 Fall Seminar of the British Columbia Expropriation Association.

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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.
>
> 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:
>
> > "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."
>
> 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.

UPDATE ON THE DECISION OF THE CRTC IN *LEDCOR/VANCOUVER-- CONSTRUCTION, OPERATION AND MAINTENANCE OF TRANSMISSION LINES IN VANCOUVER*: THE UNHAPPY HISTORY OF THE "LEDCOR PRINCIPLES"

This paper was prepared by Patsy J. Scheer, Assistant Director of Legal Services for the City of Vancouver, for the 2005 Fall Seminar of the British Columbia Expropriation Association.

INTRODUCTION

In January 2001, the Canadian Radio-television and Telecommunications Commission (the "CRTC") issued its decision in *Ledcor/Vancouver—Construction, operation and maintenance of transmission lines in Vancouver* (the "*Ledcor Decision*"). This decision was discussed in a paper ("Compensation for the Occupation and Use of Municipal Land by Telecommunications Carriers") that was presented at the 2001 Fall Seminar of the British Columbia Expropriation Association.

On its facts, the *Ledcor Decision* has little significance. The case was concerned merely with the installation of a fibre optic transmission line in 18 street crossings in Vancouver. However, the CRTC indicated that it would develop "principles" in the *Ledcor Decision* that would inform its consideration of all disputes between carriers and municipalities about carrier access to municipal property that might arise anywhere. In the years since the *Ledcor Decision*, these so-called "Ledcor Principles" have had a significant impact on the use of municipal land by telecommunications carriers. This paper provides an update on developments that have occurred since 2001 arising out of the *Ledcor Decision* and the subsequent litigation spawned by the decision.

THE *LEDCOR DECISION*

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 it.

The proceeding which ultimately resulted in the *Ledcor Decision* was commenced when Ledcor, after unsuccessful negotiations with the City of Vancouver (the "City"), applied to the CRTC

under s. 43(4) of the *Act*. Ledcor sought the CRTC's permission to construct its transmission lines in 18 street crossings in Vancouver.[1] Two main issues were raised before the CRTC. One was a constitutional issue concerning with the scope of the jurisdiction or power of the CRTC to impose conditions under the *Telecommunications Act* regulating carrier use of municipal land. This issue was discussed at some length in the earlier paper. The second issue concerned the right of the City to receive compensation for the value of the municipal land carriers occupy and use for their transmission lines.

Under the *Vancouver Charter*, S.B.C. 1953, c. 55, the City holds fee simple title to its streets. It has broad powers to prohibit and regulate encroachments on, over, and under its streets. The City may lease or license the subsurface beneath its streets, and stop up streets and dispose of them. Before the CRTC, the City argued that it was entitled to compensation for the value of the municipal land carriers occupy and use for their transmission lines and other facilities.

The CRTC rejected the argument advanced by the City. It concluded that it had jurisdiction under the *Telecommunications Act* to award the compensation the City sought, but it declined to do so. In reaching this conclusion, the CRTC noted that in most cases it would be extremely difficult to establish a "market-based" value for the use of municipal streets and highways because there is no "free market" consisting of totally willing buyers and sellers for consent to occupy and use this municipal land. The CRTC rejected the methodology advanced by the City for determining the appropriate amount of compensation for carrier use of municipal streets[2] and then simply stated that it was "not necessary or appropriate" to require the carrier to pay the City for its use and occupation of the City's streets.

The City (and Toronto, Ottawa, Calgary, Halifax and the Federation of Canadian Municipalities) appealed the *Ledcor Decision* to the Federal Court of Appeal. The Court delivered its judgment

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[1] For most of its length in Vancouver, Ledcor's transmission line runs in a Canadian Pacific Railway right-of-way. Ledcor pays CPR for the right to bury its cable in this right-of-way. CPR's right-of-way crosses 18 street crossings or road allowances owned by the City of Vancouver, and it was these 18 crossings that were at issue in the case.

[2] Vancouver based its approach to determining the amount of 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, the City proposed that telecommunications carriers which 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

in December 2003 and dismissed the appeal.[3] The three member panel of the Federal Court of Appeal unanimously rejected the City's argument on the constitutional issue raised by the *Ledcor Decision* but the panel split with respect to the compensation issue. In his dissenting reasons, Pelletier J.A. said the following:

> While Vancouver's submissions to the CRTC made it clear that it is asserting a claim to compensation, the CRTC appears to have disposed of the question on the basis of rejecting Vancouver's proposals with respect to the manner in which the compensation is to be determined. It does not deal with the question of entitlement apart from the question of method of calculation. The two issues are obviously distinct; the rejection of particular methodologies does not necessarily lead to the conclusion that municipalities have no right to compensation for the use and occupation of their lands. On the other hand, a finding that municipalities are not entitled to compensation makes any discussion of the method of determining such compensation superfluous. Since the CRTC took the trouble to consider Vancouver's proposals, it cannot be said to have dismissed the claim for compensation out of hand.
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> . . . The CRTC rejected Vancouver's proposed methodology for calculating fees to be charged to carriers. It also rejected certain arguments as to management of scarce resources which the appellants had tied to "market based" compensation. And, in the end, it declined to order Ledcor to compensate Vancouver for the use and occupation of its land. However, it did so on the basis of rejecting particular means of calculating that compensation rather than on the basis of a finding of an absence of entitlement to such compensation. The question of Vancouver's entitlement to compensation, however calculated, remains unanswered. It was a question which was clearly before it and which it was required to answer.
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> The counter-argument is that the CRTC did exactly what it was required to do by the terms of subsection 43(4): it determined the conditions of Ledcor's access to Vancouver's streets. Having done so, it had fulfilled its mandate. It was not obliged to go beyond Vancouver's demands to see if some other form or type of compensation was appropriate. If, on a subsequent application, a municipality proposes a different compensation formula, the merits of that proposal can be considered then.
>
> The difficulty is that the CRTC invited the participation of entities who were not implicated in the specific dispute, and then held its decision out as providing assistance to carriers and municipalities in negotiating the terms of access in the future. It is somewhat disingenuous, in that context, to argue that the decision should be treated as simply disposing of the specific demand for compensation. The [carriers] certainly supported the decision on the basis that municipalities have no right to compensation for the use of their streets by federally regulated entities. And the [municipalities] approached the appeal on the basis that it was the right to compensation which was in issue. . . .

Return (the City'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).

[3] *Federation of Canadian Municipalities v. AT&T Canada* [2003] 3 F.C. 379.

> The question of entitlement to compensation is implicit in a request for a particular form of compensation. Whether the question of entitlement must be specifically addressed depends upon the context. On the facts of this proceeding, I believe it was incumbent upon the CRTC to address the implicit as well as the explicit question before it.

Mr. Justice Pelletier would have allowed the appeal on this issue and remitted the case back to the CRTC for a determination of the question of the entitlement of Vancouver to compensation for the use and occupation of its land. The majority of the three-member panel of the Federal Court of Appeal did not agree, however.

Vancouver (and the Federation of Canadian Municipalities and the other municipalities involved in the case) sought leave to appeal to the Supreme Court of Canada. The application for leave to appeal was dismissed, and the Court proceedings arising directly out of the *Ledcor Decision* finally came to an end in September 2003. Accordingly (and despite the conclusion reached by Mr. Justice Pelletier that the CRTC had not actually decided the issue of the City's entitlement to compensation), in so far as the CRTC will rely on the "principles" it established in the *Ledcor Decision* to inform its future decisions concerning carrier use and occupation of municipal streets and highways, it appears that carriers may enter, occupy, and use this municipal land without any obligation to pay municipalities any compensation for the value of the land.

Although the litigation directly related to the *Ledcor Decision* came to an end in September 2003, the hope expressed by the CRTC that the decision would assist carriers and municipalities in the future to negotiate the terms of carrier access to municipal land has not been realized. Writing for the majority of the Federal Court of Appeal, Letourneau J.A. made the following statement about the so-called "Ledcor Principles":

> It is true that, in the context of settling the dispute before it, the CRTC elaborated a number of principles with a view to assisting carriers and municipalities in their future negotiations of terms and conditions of access. . . It is possible that these principles, although well intended, may in effect turn out to be less helpful and more problematic than anticipated. . . .

Unfortunately, this statement has proven to be prophetic. The years since the CRTC delivered the *Ledcor Decision* have been filled with disputes and litigation between carriers and municipalities concerning carriers' use and occupation of municipal property.

EXPANSION OF THE "LEDCOR PRINCIPLES": "OTHER PUBLIC PLACE"

Under s. 43 of the *Telecommunications Act*, carriers have a qualified right (either with municipal consent or the "permission" of the CRTC) to construct their transmission lines on "a highway or other public place". The interpretation of "other public place" was not dealt with by the CRTC in the *Ledcor Decision*. In an application filed with the CRTC in July 2003, Allstream Corp. (now called MTS Allstream Inc. ["Allstream"]) sought to expand the so-called "Ledcor Principles" (including a carrier's right to occupy and use municipal property without any obligation to pay compensation for the value of the property) to property other than streets and highways.

The application before the CRTC concerned Allstream's right to occupy and use Edmonton's Light Rail Transit ("LRT") property. This property included LRT tunnels and stations; an LRT bridge; and LRT rights-of-way, including pedways, stairwells, platform levels and concourse level properties owned by or under the control of Edmonton. In 1997, Allstream and Edmonton entered into a contract giving Allstream the right to occupy and use certain LRT property for its transmission lines and providing Edmonton with compensation (calculated as discussed below) for that right. The five year term of this contract came to an end in 2002. The parties attempted to negotiate a new contract, but these negotiations broke down largely because of their differing views about whether the LRT property was "other public property" under s. 43 of the *Telecommunications Act* and, therefore, whether the so-called "Ledcor Principles" applied to it.

Although the proceeding before the CRTC involved a dispute between Allstream and Edmonton, because the case raised a novel issue, the CRTC allowed other carriers and municipalities to make submissions about the interpretation of "other public property". In essence, carriers took the position that all property that is publicly owned or controlled for the benefit or use of the public (including all public parks, bridges, waterways, and all federal and provincial Crown land) was "other public property", property which carriers had a right to occupy and use under s. 43 of the *Telecommunications Act*.[4] Municipalities took the position that "other public place" could not be interpreted as meaning all publicly owned property. Rather, it must be interpreted as meaning other public land similar to, or having the same nature as, a street or highway, i.e., land where the

[4] Edmonton responded by noting that, if the argument advanced by the carriers was accepted, the CRTC would be extending its jurisdiction over all municipal public parks, National Capital Commission lands, and shortcuts across mountains and valleys in Banff National Park, as well as the Parliament Buildings, the War Memorial on Rideau Street in Ottawa, and the Supreme Court of Canada building!

members of the public may freely pass and repass either as pedestrians or by other independent means such their own vehicles.

In *Telecom Decision CRTC 2005-36* (issued on June 17, 2005), the CRTC decided that Edmonton's LRT property was "other public property" under s. 43 of the *Telecommunications Act*. Accordingly, the CRTC had the jurisdiction or power to grant permission to Allstream to occupy and use this property. In reaching this conclusion, the CRTC indicated that, while it is not sufficient merely to establish that municipal property is owned and/or controlled by a municipality for a public purpose for it to be considered an "other public place" within the meaning of s. 43 of the *Act*, it is an important factor to consider. The CRTC said the following about interpreting the meaning of "other public place":

> The [CRTC] is of the view, however, that while the fact that a place may be impressed with a public purpose is not the definitive factor in determining whether it is a "public place" under the Act, the nature of that public purpose may be helpful in determining whether a place is a "public place". The [CRTC] considers that when the public purpose of the place is one that by its very nature involves extensive use of and access to it by the public, then that place is more likely to be a "public place" within the meaning of the Act than a place whose public purpose by its very nature precludes use of and access to it by the public.
>
> . . .
>
> As set out above, in the [CRTC's] view any consideration of the term "public place" under the Act must also include consideration of the degree of access afforded to the public to the place in question. . . .

Although this decision of the CRTC only concerns Edmonton's LRT property, it seems reasonable to infer that, in the future, the CRTC will consider that it has the jurisdiction or power to grant permission to carriers to occupy and use municipal property, if the public generally has access to that property. If this is correct, it represents a major expansion of both the jurisdiction of the CRTC and the potential significance of the so-called "Ledcor Principles".

Having determined that it had the jurisdiction to give Allstream permission to occupy and use Edmonton's LRT property, the CRTC then considered what costs or compensation Edmonton should recover from Allstream. Under the contract between the parties in place from 1997 through 2002, Allstream had agreed to pay Edmonton compensation in the amount of $10 per

metre and 1% of Allstream's gross revenue for the use of the LRT property.[5] When the term of this contract came to an end and the parties failed to negotiate a new agreement, Edmonton's municipal Council passed a resolution imposing a new fee structure of $20 per metre. This rate was based on a land value formula and would apply to anyone seeking to occupy or use LRT property. This rate of $20 per metre was roughly equivalent to the amount that had been paid by Allstream under its old agreement with Edmonton.

Before the CRTC, Edmonton argued that it had spent millions of dollars constructing its LRT tunnels and other structures and that Allstream should not be allowed to occupy and use these facilities without making any contribution to their construction cost. Despite this, the CRTC rejected Edmonton's fee structure by simply stating that:

> With respect to the issue of Edmonton's proposal for an occupation fee based on its land value formula, the [CRTC] considers that such a fee as proposed by Edmonton would be inappropriate in the circumstances of this case.

The CRTC decided that Edmonton was entitled to recover from Allstream only its "causal costs". This is the same conclusion that the CRTC reached in the *Ledcor Decision*. "Causal costs" consist solely of any additional costs or expenses which a municipality can prove to the satisfaction of the CRTC that it has, or will, incur as a result of carrier use and occupation of municipal property. It does not include any compensation for the value of the land or other property occupied and used by a carrier.

As a result of the decision of the CRTC in the case involving Edmonton's LRT property, the so-called "Ledcor Principle", that a municipality is not entitled to receive compensation for the value of the municipal property occupied and used by a carrier, has apparently been extended from the occupation and use of municipal streets and highways to a much broader range of municipal land and other property and facilities.[6]

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[5] Allstream also agreed to allow Edmonton to use some of Allstream's "dark" fibre.

[6] Edmonton has sought leave to appeal the decision of the CRTC. This application for leave to appeal is currently pending before the Federal Court of Appeal.

SETTING ASIDE OR VARYING THE TERMS OF EXISTING CONTRACTS BETWEEN CARRUERS AND MUNICIPALITIES

In December 1996, the City of Toronto issued a Request for Proposals ("RFP") with respect to an abandoned municipal water main system in the downtown core of Toronto. Toronto wanted to lease its underground pipe system to carriers who could convert it for the purpose of installing high speed telecommunications cables. Ultimately, Toronto entered into a long-term contract with MetroNet Communications Group Inc. ("MetroNet", which is a predecessor corporation of Allstream) for the use of this underground pipe system. Allstream is contractually bound under this agreement to pay compensation to Toronto including a lump sum annual fee of $2,500,000 in the first year of the contract and $1,000,000 per year thereafter and also $17.50 per metre per annum for any Allstream or third party cable installed in the pipe system.

After the CRTC delivered the *Ledcor Decision*, Allstream took the position that its existing contract with Toronto was inconsistent with the so-called "Ledcor Principles". In May 2001 it made an application to the CRTC asking it to change or vary the terms of the contract to make them consistent with the "Ledcor Principles". In June 2002, Allstream made a similar application with respect to a contract with the City of Calgary governing Allstream's use and occupation of streets and highways in Calgary.

The CRTC issued Public Notice 2001-99 stating that it would consider ". . . what circumstances, if any, would justify an intervention by the [CRTC] to alter terms of an existing contract between a carrier and a municipality for access to municipal rights-of-way". Numerous carriers and municipalities made submissions to the CRTC in response to this Public Notice.

Municipalities took the position that the CRTC had absolutely no jurisdiction or power whatsoever to alter or vary the terms of existing contracts between carriers and municipalities. The only jurisdiction conferred on the CRTC with respect to municipalities is under s. 43(4) of the *Telecommunications Act*. Under this provision, if a carrier cannot obtain the consent of a municipality to construct its transmission line on a highway or other public place "on terms acceptable to [the carrier]", then the carrier may apply to the CRTC which may grant it permission to do so. Obviously, when a carrier has entered into a contract with a municipality and has already gained access to municipal property under that contract, the CRTC has no jurisdiction under s. 43(4) of the *Act*.

Remarkably, the CRTC did not agree. In *Telecom Decision CRTC 2003-82* (issued on December 4, 2003) the CRTC stated the following:

> However, the Commission does not accept the contention put forward by the municipalities that a signed [municipal access agreement] is definitive proof that a Canadian carrier has obtained, on terms acceptable to it, the consent of the municipality to construct a transmission line. The [CRTC] notes that the law has consistently recognized circumstances under which a written agreement may not validly represent one or both parties' acceptance of its terms. These circumstances include, but are not limited to, cases of mistake, duress, and inequality of bargaining power.
>
> The [CRTC] is, therefore, prepared to consider applications from Canadian carriers seeking to establish that municipal consent was not obtained on terms acceptable to the carrier. The [CRTC] considers that the onus will be on the Canadian carrier applying to the [CRTC] to establish that the signed [municipal access agreement] does not represent proof that the Canadian carrier has obtained, on terms acceptable to it, the consent of the municipality to construct a transmission line.
>
> The [CRTC] is cognizant of the municipalities' concerns about the potential for bad faith bargaining by carriers. The [CRTC] will, therefore, consider all of the circumstances that led to the signing of the [municipal access agreement], including the parties' intent, and their relative bargaining power at the time.

In the specific dispute about the contract between Allstream and Toronto concerning Toronto's water main system, Allstream argued that the executed contract did not validly represent Allstream's acceptance of its terms. Allstream said that Toronto's predominance in the Canadian economy made acquiring a presence in Toronto a "business necessity". Without access to Toronto's right-of-way, MetroNet (Allstream's corporate predecessor) would have been precluded from competing in the local market and would have lost customers, financing, and its competitive advantage. MetroNet was compelled to sign the contract with Toronto because of the state of competition at the time. Allstream argued that Toronto had an "overwhelming advantage" in bargaining power because it was the only source of supply of its rights-of-way. Toronto could, therefore, dictate onerous and unconscionable terms and conditions and extract fees well beyond it "causal costs".

In response to the argument advanced by Allstream that Toronto had exercised its "overwhelming" bargaining power to force MetroNet to enter into an unconscionable contract with it, Toronto noted that during negotiations MetroNet was represented by experienced legal counsel (a large Toronto law firm), a telecommunications consultant, and a management team

(including in-house counsel) which MetroNet said were experts in the industry. Toronto, on the other hand, was represented by three municipal staff (a staff lawyer and two civil engineers) with experience only in street allowance control issues. MetroNet provided the initial form of agreement to Toronto for its review and comment and MetroNet's legal counsel prepared every draft of what ultimately became the final contract. The fees Allstream complained about that were payable to Toronto under the contract were initially suggested by MetroNet in the proposal it submitted in response to Toronto's RFP. MetroNet subsequently requested that these same terms be extended to include the entire new (amalgamated) City of Toronto area in 1998. The negotiation and subsequent entering into the contract with Toronto was part of a deliberate and highly successful business strategy utilized by MetroNet giving it large scale access to public highways in Toronto approximately three years before its competitors. The success of this strategy was evidenced by MetroNet's successful public offerings of shares in 1997 and 1998 and the subsequent merger with AT&T Canada (now Allstream).

On August 25, 2005, the CRTC delivered its decision in both of the applications made by Allstream to vary the terms of an existing contract with a municipality. In *Telecom Decision CRTC 2005-46*, the CRTC denied Allstream's application with respect to the contract between Allstream and Toronto. Based on the facts of the case, the CRTC concluded that Allstream failed to establish that its predecessor corporation MetroNet did not intend to enter into the contract and that the contract did not validly represent its acceptance of the terms because of mistake, duress, inequality of bargaining power or "other circumstances". In *Telecom Decision CRTC 2005-47*, the CRTC reached the same conclusion with respect to Allstream's contract with Calgary.

Although the CRTC dismissed both of Allstream's applications, it is clear from the CRTC's earlier decision (*Telecom Decision CRTC 2003-82)* that it considers that, in some circumstances, it has the jurisdiction or power under s. 43 of the *Telecommunications Act* to set aside or vary the terms of existing contracts between municipalities and carriers. Toronto (and a number of other municipalities and the Federation of Canadian Municipalities) sought leave to appeal this decision but were not successful. Generally the Federal Court of Appeal does not give reasons when it refuses to grant leave to appeal. However, it did so in this case. The application for leave to appeal was dismissed solely on the technical basis that it was "premature" and that the administration of justice would be better served by waiting until a detailed decision on an actual agreement was rendered by the CRTC. Accordingly, unless and until the CRTC exercises this purported jurisdiction to set aside or vary the terms of an existing contract between a carrier and a

municipality, municipalities are unable to challenge the conclusion that the CRTC reached about the scope of its own jurisdiction under s. 43(4) of the *Telecommunications Act* with respect to existing contracts between carriers and municipalities.

EXPANSION OF THE "LEDCOR PRINCIPLES" AND TWO CASES CURRENTLY PENDING BEFORE THE CRTC

There are two cases currently pending before the CRTC involving the City of Vancouver that could result in a further expansion of the application of the so-called "Ledcor Principles". In December 2004, Shaw Cablesystems Limited ("Shaw") filed an application with the CRTC seeking an order granting it City-wide access to all "public highways and other Vancouver municipal properties" for a period of 20 years. It also asked that any fees to be paid by Shaw to the City be limited to the City's recovery of "appropriate causal costs", consistent with the so-called "Ledcor Principles". In January 2005, Allstream filed a similar application with the CRTC. Both Shaw and Allstream are seeking a "blanket" order from the CRTC giving them long term, City- wide permission to occupy and use all City streets and certain other municipal property without any obligation to pay the City any compensation for the value of the municipal property they occupy and use.

This City has opposed both of these applications on the basis that the CRTC does not have the jurisdiction or power under s. 43 of the *Telecommunications Act* to grant the long term, City-wide orders that Shaw and Allstream seek. Based on the legislative history of s. 43 and the specific language used in this statutory provision, it is the City's position that the CRTC only has jurisdiction under s. 43 to deal with specific disputes between carriers and municipalities concerning the use and occupation of specific municipal property for the construction of specific transmission lines or other telecommunications facilities.

If the CRTC decides to grant the blanket orders that Shaw and Allstream seek, it would result in a further expansion of the application of the so-called "Ledcor Principles".

CONCLUSION

Almost five years have passed since the CRTC delivered the *Ledcor Decision*. In it, the CRTC expressed the view that the "principles" it articulated in the decision would assist carriers and municipalities in their future negotiations of the terms and conditions governing carriers' use and occupation of municipal property. Unfortunately, this has not been the case. The *Ledcor Decision* has left troubled waters in its wake. Rather than fostering meaningful negotiations between carriers and municipalities, the so-called "Ledcor Principles" have spawned numerous disputes and a considerable volume of litigation before both the CRTC and the courts.