

M I L L E R & V A N E A T O N

P. L. L. C.

MATTHEW C. AMES
KENNETH A. BRUNETTI*
FREDERICK E. ELLROD III
MARCI L. FRISCHKORN
MITSUKO R. HERRERA*
WILLIAM L. LOWERY
NICHOLAS P. MILLER
HOLLY L. SAURER
JOSEPH VAN EATON

Incorporating the Practice of
Miller & Holbrooke

1155 CONNECTICUT AVENUE, N.W.
SUITE 1000
WASHINGTON, D.C. 20036-4320
TELEPHONE (202) 785-0600
FAX (202) 785-1234

MILLER & VAN EATON, L.L.P.
400 MONTGOMERY STREET
SUITE 501
SAN FRANCISCO, CALIFORNIA 94104-1215
TELEPHONE (415) 477-3650
FAX (415) 477-3652

WWW.MILLERVANEATON.COM

OF COUNSEL:

JAMES R. HOBSON
NANNETTE M. HOULISTON†
GERARD L. LEDERER**
WILLIAM R. MALONE
JOHN F. NOBLE

*Admitted to Practice in
California Only

**Admitted to Practice in
New Jersey Only

†Admitted to Practice in
New Mexico Only

New Canadian Forced Access Rules

I. BACKGROUND

Under the guise of guaranteeing apartment and office building tenants (multi-dwelling units or MDU) their choice of phone carriers, on June 30, 2003, the Canadian Radio-television and Telecommunications Commission (CRTC) issued a decision (Order 2003-45) mandating access in favor of telecommunications carriers to MDU buildings. The regulations are stronger than anything adopted by the U.S. Federal Communications Commission or any of the individual U.S. states. Barring a successful appeal by the real estate community, the order of the CRTC creates a new class of property in Canada-- MDU telecommunications space. Such space, while privately owned will be publicly managed.

II. WHAT THE ORDER SAYS

The decision, which may be downloaded at <http://www.crtc.gc.ca/eng/welcome.htm> provides for the following: (The symbol ¶ and the number which follows it, references the paragraph of the order where such rules are outlined.)

The Right to Access

- Without requiring a tenant request their services, the CRTC mandates that NAIOP members permit any telephone company access to an MDU property for the purposes of either interconnecting with the wires of another carrier or to install their own switches and wiring. The order at ¶132 also grants incumbent carriers the right to reenter buildings, without the permission of the owner, to upgrade or maintain facilities and wiring.
- NAIOP members must also allow phone carriers to access and wire buildings during construction. Again, there is no requirement that a future tenant have expressed an interest in being serviced by the carrier seeking access to gain such access. ¶170

No Exclusive and Limited Preferred Arrangements

- NAIOP members may not enter into either exclusive or preferred access arrangements with carriers. The only exception to this rule are “preferred marketing arrangements that are limited to the marketing of a LEC's (local exchange carrier, i.e. local phone company) services in an MDU [that] ... do not have the effect of limiting access by other LECs to the MDU.” ¶153. There is no guidance, however, as to what is to become of pre-existing exclusive or preferred access arrangements.

Fees -- Limited to Recovery of Specific Costs

NAIOP members are limited in the fees they may charge a carrier for access and remaining in their buildings. The CRTC does not specify everything that may be recovered, but it does provide guidance on what may not be recovered. First and foremost among what is not recoverable is anything over and above costs such as an investment-backed expectation of return on investment. Other costs not recoverable are "costs associated with the negotiation of access agreements".

Acceptable costs listed by the CRTC include:

- A pro-rata share of any wire maintenance offered by the building owner.
- Rent for space occupied by the carriers equipment, but the CRTC hints that such rent should be low as such space is really not very valuable because of its historic uses are limited.
- The costs associated with the "approval of plans, safety and security measures and other similar services reasonably required in connection with the installation and operation of telecommunications facilities."
- Recovery of capital investment made by the building owner in a building owned wiring or upgrades.
See ¶¶154-165

Space Limitations Are No Defense

While the CRTC's recognizes that there may be instances where there is insufficient space available in the risers to install additional in-building wiring, such a limitation does not insulate a building owner from denying access. The CRTC requires that building owner permit the LEC to construct additional riser space in the MDU (i.e. drill holes through the floor plate), or allow the carrier to swap out their existing infrastructure to achieve a more efficient use of the riser. ¶168

Enforcement

While the CRTC expects such deals to be completed between carriers and NAIOP members, they state where a telephone company cannot negotiate reasonable terms and conditions on access on a timely basis, the CRTC is prepared to order access. ¶144

III. THE RATIONALE FOR FREE ACCESS

The CRTC it seems was persuaded by Bell Canada that phone companies should not have to pay for the use of space in buildings since "tenants already paid for telecommunications facilities and any costs associated with the provision of telecommunications services as part of their rent." ¶76

IV. THE ONE HIGHLIGHT

The CRTC does make clear that its mandatory access rules apply only to wireline telecommunications facilities in MDUs. ¶202 So if wireless providers come to your building demanding free access, know that the Order does not apply to them.