
Stratas Beware: This Communications Agreement Give the Strata Worse Than Nothing

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A major Canadian telecommunications company is offering its new fibre optic network to businesses and consumers in communities across British Columbia. The new network consists of cables containing flexible, transparent fibres of glass that are slightly thicker than a strand of hair. The principal advantage of fibre optic technology is blazing fast Internet access and use, as these fibres transmit data as pulses of light, which allows large amounts of data to be sent at close to the speed of light.

As many consumers live in strata projects, this telecommunications company is also offering its new fibre optic network to strata corporations, on the condition that the strata sign the company's standard form Contract. I was contacted recently by one of my strata corporation clients, and asked to review the Contract. Here is what I told my client:

- most importantly, although this telecommunications company, which is a public corporation listed on the Toronto Stock Exchange, is referred to throughout the Contract by its brand name, the Contract is not in fact with this publicly traded company, but rather a partnership, whose partners are unknown, with the same brand name.

This is very, very significant from a legal perspective: it means the strata corporation's legal rights and remedies under the Contract cannot be enforced against the publicly traded telecommunications company; the strata's legal rights and remedies can be enforced solely against the partnership. The fundamental problem is that, in all likelihood, neither the partnership nor its partners hold any financial assets, in which case these legal rights and

remedies of the strata would not have any financial value.

- the Contract begins with a statement to the effect that all rights given to the partnership are given "at no cost" to it. In other words, the partnership does not pay any money to the strata in exchange for all the rights the partnership acquires under the Contract. These rights include the right to install cell phone antennas on the exterior of the building. Strata corporations that have agreements which permit cell phone antennas on their buildings receive a significant annual income stream from the operators of the antennas. Whenever a strata corporation signs the Contract, it is giving away this very valuable right for nothing.
- the Contract states that the initial term is for a period of 10 years, after which the Contract is automatically renewed for periods of one year each until it is terminated as stipulated in the Contract. The partnership has the right to terminate the Contract by giving 30 days' written notice to the strata; the strata does not, however, have a reciprocal right of termination.
- the Contract contains the following representation and warranty by the strata: "prior to signing this agreement the strata corporation has passed the required resolution(s) authorizing it to enter into this agreement with the partnership". The potential harm to the strata of this representation and warranty needs explanation.

Section 80(2)(a) of the *Strata Property Act* states in plain English that if a strata corporation intends to “dispose” of the common property in a certain way, the strata does not have the legal authority to do so unless the intended disposition has first been approved by a $\frac{3}{4}$ vote resolution of the strata lot owners. In the *Strata Property Act*, the word “dispose” means “to transfer by any method and includes assign, give, sell, grant, charge, convey, bequeath, devise, lease, divest, release and agree to do any of those things”.

Given the initial 10 year term of the Contract, its automatic renewal for one year periods thereafter and no reciprocal right of the strata to terminate the Contract by giving notice to the partnership, a legitimate, bona fide legal argument can be made that the grant of the rights described in the Contract to the partnership is a “disposition” of the common property which requires prior approval by a $\frac{3}{4}$ vote resolution of the owners, failing which the Contract is not legally valid.

It is common knowledge that some strata corporations have entered into the Contract without a $\frac{3}{4}$ vote approval of the owners. Now that the Civil Resolution Tribunal is in operation, an owner may file a claim with the CRT and seek an order against a strata corporation that has signed the Contract. If the owner’s claim were to be successful, the strata would be exposed to the consequences of the CRT’s order against it.

- the partnership’s rights under the Contract cover all of the common property, and are virtually unrestricted. The partnership is entitled to access any part of the common property during the hours of 8:00 a.m. to 8:00 p.m. every day of the year, including all statutory holidays, upon providing the strata with reasonable notice. In addition, the partnership may exercise this right of access at any time in the case of an emergency.
- the Contract does not restrict the purposes for which the partnership may use the common property: the Contract states that the

partnership may use any part of the common property “as deemed necessary” by it.

- the Contract states, in a roundabout way, that the partnership is not responsible for any loss or damage it causes to the common property or any other part of the strata project unless the loss or damage is “direct”, and was caused by the negligence or willful misconduct of the partnership.
- the Contract contains the following clause: “Notwithstanding any other provision of this Agreement, the strata corporation agrees that it will not enter into any agreement with another service provider relating to the provision of a public Wi-Fi network (or any other similar technology) on the strata project.”

This clause is not legally valid because it contravenes the “MDU access condition”. I will explain.

The Canadian Radio-television and Telecommunications Commission (“CRTC”) issues decisions on cases from time to time, just like a Court does. On June 30, 2003, the CRTC issued decision 2003-45. In this decision, the CRTC established what is commonly referred to in the telecommunications industry as the “MDU access condition”. This condition is set out in paragraph 141 of the CRTC decision (note that “LEC” is a telecommunications service provider, and “MDU” is a multi-dwelling unit). Paragraph 141 reads as follows:

“As noted earlier, pursuant to Decision 97-8, all LECs are required, as a condition of providing service, to ensure that the end-users they serve are able to have direct access, under reasonable terms and conditions, to services provided by any other LEC serving in the same area. Based on the record of this proceeding, the Commission considers that it is necessary to amplify the condition imposed in Decision 97-8 in order to ensure that existing and potential end-users in new and existing MDUs can

have direct access to the LEC of their choice. Accordingly, pursuant to its powers under section 24 of the Act, the Commission requires that the provision of telecommunications service by a LEC in an MDU be subject to the condition that all LECs wishing to serve end-users in that MDU are able to access end-users in that MDU on a timely basis, by means of resale, leased facilities or their own facilities, at their choice, under reasonable terms and conditions (the MDU access condition)."

- the Contract states that the partnership is permitted to use the strata's "electrical service", and further, that if the strata's electrical service "requires upgrading", the partnership "shall have the right to install any such upgrade".

The partnership's right to make a determination that the strata's electrical system requires upgrading is not subject to any control by the strata. Nor does the Contract impose any restriction on the partnership's exercise of its right to install upgrades. Readers may recall an incident at an Expo/Millennium line station when a transit worker made a mistake that caused an electrical fire, which in turn caused a temporary shutdown of the rapid transit system.

- the partnership has the right to transfer the Contract to any third party of its choice without the strata's consent. There is no requirement that the third party be associated with or connected in any way to the partnership.

Why do I say the Contract gives a strata corporation worse than nothing? Because the strata does not receive any financial benefit from the Contract, and yet virtually all risks of the Contract are allocated to the strata.

The Contract does not contain the usual clauses (an indemnity from the partnership in favour of the strata, and an agreement by the partnership to maintain appropriate insurance) that mitigate against these kinds of risks. The absence of an indemnity from the partnership and an insurance obligation on its part

increases the likelihood the strata will experience legal problems and conflict with the partnership arising from the Contract's operation. That in turn increases the significance of the fundamental problem outlined above: the strata's legal rights and remedies under the Contract cannot be enforced against the publicly traded telecommunications company.

As everyone well knows, legal problems and conflict arising from the Contract's operation would be a drain on the resources of council members, staff and a strata property manager, not to mention the potential out-of-pocket expenses that the strata may have to incur.