



CONDOMINIUM LAW ISSUES

Freedom of Choice With Your Condo's TV & Internet Services

By Heather Zordel and Jonathan Mesiano-Crookston

Photos by Jamie Z. Fenn

There is an old saying that your home is your castle. You are protected there by a ring of walls. You are free to choose who and what is allowed inside. Does the same apply in the vertical world of condominium living? It does, but!

Our downtown condos are villages where, instead of streets between houses we have floors and hallways between units. Much like a village, condo owners pay communal "condo fees" to maintain the common elements (including those floors and hallways), but owners own and control what goes on inside their unit.

One challenge to this separation arises with respect to services connected to the unit. This leads to a discussion of whether the condo corporation can or should also contract for those

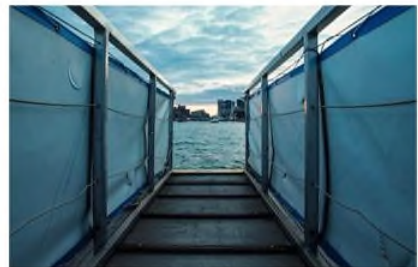
services for unit owners, and how the cost should be allocated. Differences of opinion exist, and many owners are not happy about being forced to buy services they do not want. This issue was litigated this year in an Ontario case called *Zordel and Mesiano-Crookston v MTCC 949*, 2017 ONSC 5544. A Harbourfront condominium, which had historically purchased cable television on behalf of owners, entered into a five-year contract with a new provider for Internet TV and Internet, without asking the owners to vote on the contract.

While the case dealt with technical wording in the Condominium Act, Mr. Mesiano-Crookston and Ms. Zordel (the applicants in the case) brought the application in the public interest, to have certain issues relating to freedom of choice resolved. We argued as a policy matter that condo owners should have ***"freedom of choice" to be able to decide what services they want in their suites, and how much they are willing to pay for them.*** It was also about fairness as to paying for these services, because the cost of identical services varied based on how large the condo unit was, although not many owners understood this was the case.

The first issue raised in this case was whether owners ought to be able to choose what services they want in their suites.

Technology had changed significantly since this condo was built 30 years ago. We now have choice... a lot of choice. Today, internet can be purchased separately, or bundled in a package with TV, telephone or other services, at a variety of prices and in a number of plans.

There are many more Internet service providers coming online in the short term. Prices are constantly getting more competitive. Importantly, the needs of individual owners vary significantly. When MTCC949 entered into the new contract for Internet TV and Internet, it unilaterally chose to make each owner pay for both services. But many owners don't watch TV, or don't use the Internet, and in each case those owners are paying for services they do not need. The contract is about 8% of MTCC949's annual operating budget, so a significant component of their maintenance fees is now wasted money.





Furthermore, owners who wanted to keep their existing channels are now paying twice, once through their maintenance fees and separately to their chosen service provider. A related issue is that of pricing. The contract between the service provider and MTCC 949 provided for a flat monthly fee per unit, as is common in the industry.

However, MTCC949 treated the contract as a “bulk contract” common expense, meaning it was charged to owners on the basis of their individual unit’s square-footage. This means that instead of each owner paying for example \$59/month, some owners are paying much more (up to roughly 3 times), per month, than other owners.

While condo owners understand that costs of the building infrastructure are reasonably allocated on a square footage basis, an allocation that takes an unnecessary service such as television or Internet, forces owners to buy it when many may not want it, and further allocates the cost disproportionately to larger suites, to be systematically unfair. Condo owners, wherever

they live, ought to take a close look at what is included in the budget and ask what you are actually being charged for standardized services like TV and Internet.

Mr. Mesiano-Crookston and **Ms. Zordel** also brought the court application to make it clearer when owners are entitled to advance notice of large contracts, giving them an opportunity to requisition a meeting and/or an owners’ vote to approve it.

The Condominium Act requires that changes to services costing more than 10% of the annual budget be put out to vote. In this case, on its face, the new contract cost \$3.3 million dollars over five years. MTCC949’s budget was \$7 million, making 10% of that, \$700,000. While MTCC949 owners and residents had been told that a new cable contract was being considered, no vote was ever held to accept the new \$3.3 million dollar contract.

The judge held that no notice was required. He took the incremental cost of adding only Internet, which the service provider said in the middle of the case was a very small amount of approximately \$5/month, with the Internet TV component of the monthly cost being a much larger value. At \$5/month/unit, the total cost of the contract fell under the 10% budget threshold, and owners were not entitled to receive notice of the change, or for there be a vote to approve it.

We had argued that the change was the change from one contract to another, and was either the full cost of the new contract, or the difference between costs of the contracts, because the purpose of the 10% threshold is to allow owners to vote on large budget changes.

Unfortunately, now that this has been rejected, we expect that courts, going forward, will apply this incremental cost approach, meaning that fewer contracts will be subject to direct owner oversight through voting, and more often contract costs will be split out to help avoid the 10% vote threshold. Another interesting result of this decision is that it allows condo boards to approve in-suite services through enacting a by-law, even though the Condominium Act states that by-laws cannot contravene the Condominium Act (which says that in-suite is owner property) and the condo declaration (which in this case was held to only cover cable TV).

MTCC949 now has a by-law that says the board can add further “telecommunications” services in-suite under a bulk telecommunications agreement and charge them as a common expense. So, owners might now become responsible for more services they do not have the freedom to choose, as a result of expansive by-laws authorizing condos to purchase all kinds of services.



In the future, we hope condominiums will use common sense approaches to dealing with in-suite services. While it may be thought to be easy to sign a bulk contract to provide services to every unit, the longer term interest of both owners and tenants is better served by working to negotiate deals using economy of scale (so that the more owners there are that want the services, the better the price would be), but allow each owner to purchase exactly what the owner wants; or tailor the services for individual units and specifically allocate the costs, rather than simply allocating them to all owners unequally.

However, with the rapid change of technology and technology use, and different use patterns for each owner, we believe condominiums should stay clear of forcing owners to buy the same "one size fits all" package for discretionary services, as it is just a big waste of money in the end.

As a final comment, if you own a condo unit that you rent out, you have other reasons to be concerned. You may be liable for your tenant's use of the services.

That means you should get an indemnity from them, costing you legal fees. Also, when condominium maintenance fees increase faster than the capped increases on rent (currently 1.5%), owners literally lose money.

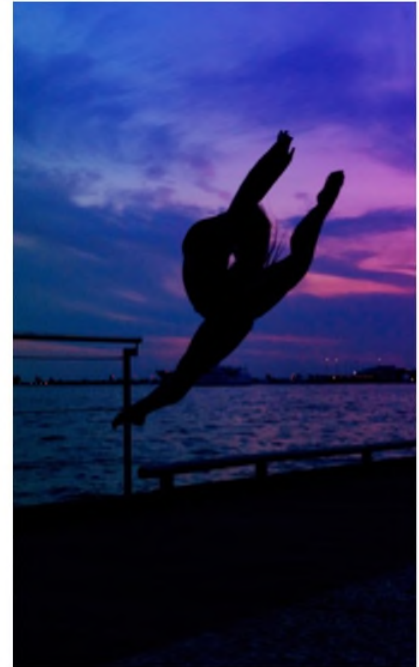
It is also important, for corporate governance purposes, that condominium boards and management consider the effect of their actions on individual owners and the community as a whole, rather than taking a decision merely on the basis that an interpretation of the Condominium Act might allow it. Condominiums are in many ways the new "fourth level of government". However, this is a whole other discussion best left for another day.

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