

## Sub-Metering In Condominiums

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### The Legal Implications

By Ray Mikkola

Rising costs of utilities and services are a universal concern for Boards of Directors across the province. As common expenses increase, particularly beyond the prevailing rate of inflation, the increase has a deleterious effect on the property values of condominium units, thereby adversely affecting the investment of its owners. The increases are often the result of matters entirely out of the control of the Board, such as the spiraling cost of utilities. All indications are that utility prices in general, and electricity prices in particular, will continue to rise as the province comes to grips with rising input costs and the replacement of antiquated power generation facilities.

#### Controlling Spiraling Costs is Necessary

Controlling spiraling utility costs is particularly challenging for Boards in condominiums which are bulk metered. In such condominiums, the cost of a bulk-metered utility is parceled out among owners based on the mandated percentage contribution to common expenses, along with the costs of all other services which the corporation maintains. As a result there is little or no incentive, particularly in buildings with many units, for any particular owner or occupant to decrease their use of a bulk-metered utility.

#### Occupants Need Incentive to Cut Utility Use

The inability of the Board to control the use of these unmetered utilities has wide ramifications (Board members will bear the wrath of the owners for failing to keep common expenses in check) but also the local municipality, the province, and, indeed, all of us who occupy the earth and need to deal with the increasingly important issue of greenhouse gas emissions. Energy conservation is an important aspect of the solution.

#### Those Who Use More, Pay More

One solution to encourage conservation is to allocate the costs of the utilities used to the owners who consume them. This requires the sub-metering of the bulk-metered utility to each of the owners, together with a mechanism to enforce collection of individual bills. The challenge in implementing any such process in a bulk-metered condominium arises from the Condominium Act (1998) (the "Act") and the declaration of the condominium corporation itself.

#### The Difficulties in Amending The Declaration

The Act provides that common expenses are to be shared among unit owners in the proportions set out in the declaration, and allocates those percentages to all of the owners. These percentages are fixed and can be modified only by an amendment to the declaration which requires the approval of at least 80 percent of unit owners. The budget process itself is predicated on the allocation of anticipated expenses for the next year, in order to fix the monthly contributions payable by unit owners throughout the year. The monthly contributions are to be amended only by the introduction of a new budget or, more commonly, a special assessment for unanticipated increases in expenses.

The proportionate common expenses and the proportionate ownership of the common interest (which need not be identical) are typically allocated at the time of the registration of the condominium based on the size of the units, although there is no particular requirement to do so. However under the new Act, the declarant is required to provide a statement in the disclosure documents if the proportion of a

common interest or the proportion of common expenses differs 10 percent or more from that required of the owner of any other type or proposed unit of the same type, size and design.

### **A Precedent For Separate Metering**

Re-allocating bulk-metered utilities on any basis other than the fixed percentages set out in the declaration is very problematic for a Board. In one case, a condominium corporation was able to obtain some relief where, in a mixed-use building, a particular commercial owner was using almost twice the amount of bulk-metered water that all other units taken together were using. In view of the circumstances, the court in that case determined the owner would be required to pay the payments determined by separately metering the water to the commercial unit owner's premises, despite the fact that the declaration contemplated separate metering and separate billing only where separate metering was provided to each of the units in the condominium. At the trial, the judge said as follows:

*"The philosophy of a condominium development is that the common expense proportions cannot be examined under a microscope. The persons occupying a unit on the first floor cannot avoid any costs of the elevator because they don't use it. Similarly, a family with a large number of members may use a lot more of the utilities than a single person. Different retail units have different requirements of various services in the condominium. It is not until there is a flagrant, excessive use, such as the present one, that there should be an adjustment."*

In actual fact, the court came to the conclusion that the separate metering was permissible on the basis that the expense for excessive water usage did not form part of the common expenses. (See York Region Condominium Corporation No. 771 v. Year Full Investment (Canada) Inc.) The court did confirm that the intention of a declaration is to apportion common expenses as closely as possible to allocate the benefit among owners from matters included as common expenses, but these allocations, as set out above, were not to be revisited willy-nilly, and in particular, not on an individual service or utility basis.

### **New Legislation on Metering is Coming**

The good news for Boards is that the ability to allocate the cost of utilities among unit owners based on consumption, rather than fixed percentages under the declaration, may soon be authorized by new provincial legislation. Bill 21 (2006), which recently received third reading, is the outgrowth of a discussion paper, released on December 21, 2004, entitled "Electricity Transmission and Distribution in Ontario – A Look Ahead" which works hand-in-hand with the Ontario Government's Smart Metering Initiative. This is a demand side management policy proposal designed to tackle the ever-increasing problem of the growing demand for electricity in Ontario. The government has set a goal to install 800,000 so called "Smart Meters" by December 31, 2007, and to arrange for all Ontario consumers to have Smart Meters by December 31, 2010. The proposed Energy Conservation Leadership Act, 2006 (the "Bill") is designed to assist in the removal of barriers to, and to promote opportunities for energy conservation, and in particular, to support the Smart Metering initiative. A specific section provides that, despite the Condominium Act, 1998, distributors and "licensed persons" may be required to

install Smart Meters in respect of condominium units, in which event the consumer shall be billed based on the consumption or use of electricity, despite a registered declaration.

The manner in which the Board needs to proceed to implement sub-metering will in large measure depend on the regulations which are made to give effect to the Bill. However, it is clear that the government has signaled its intention to tackle seriously the issue of allocating costs to users of electricity without the barrier which would otherwise be imposed by the Condominium Act and the declaration.

### **The Benefits of Sub-metering**

The benefits of sub-metering are significant. Based on the presentations made to the Standing Committee on Justice Policy (the "Committee") in February, 2006, the following statistics show the relevance of the initiative:

- (a) Only 15 percent of the approximately 2.6 million apartments, social housing suites and condominium units, receive a monthly electricity bill directly. This means that for condominium units in the remaining 85 percent, the cost of electricity is hidden in the common element fees;
- (b) Ten percent of residents use 25 percent of the electricity in bulk-metered buildings;
- (c) Seventy percent of the residents use 50 percent of the electricity;
- (d) The above-described percentages apply regardless of the "economic strata" of the owners and residents;
- (e) The average savings as a result of an enforceable method of sub-metering is 15 to 20 percent in electricity in gas-heated buildings, and a 20 to 30 percent in electrically-heated buildings; and
- (f) It is anticipated that separate metering will save 530 megawatts of electricity annually in the province, and 210 megawatts in the city of Toronto alone.

### **A Smooth Transition is Necessary**

The regulations under the Bill will need to deal with several important issues, including the ability of condominiums to continue to obtain electricity on the basis of a bulk rate for an entire condominium building, the ability to continue to enforce the collection of sub-metered utilities by means of the condominium lien procedure, and the authority of a Board to proceed to separately meter utilities. Boards will need to adequately transition the move to separate metering so that there is not a "double bill" period for owners, and, as always, communication to owners and residents will be of paramount importance to ensure an effective transition to separate metering.

### **An Opportunity To Add Value**

Boards that seize the opportunity to secure the efficiencies of separate metering will reap the rewards of lower costs of separately-metered utilities for the owners in the building, and will ultimately add value to each owner's property by reducing common expenses and operating a more efficient building.

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