

## Keeping the Lights On: Sub-Metering Contracts

Few could argue that for many condominium corporations, keeping the heat and lights on, represents a 'core responsibility'. If performed well and without interruption, nary a thought or complaint is lodged. If performed poorly or with interruption, directors may raise the ire of the unit owners, or worse. Although no two condominiums are exactly alike, traditionally, the vast number of corporations purchase utilities, in bulk, for their unit owners. Water, gas and electricity, are commonly delivered to the condominium's front door, metered once, and then distributed to each unit. Either monthly or quarterly the condominium corporation receives an invoice which unit owners indirectly pay, via their monthly common element fees. For some, this proposition seemed fair, as each unit owner would pay for these utilities in proportion to the size of their unit, as set out in corporation's declaration. For others, especially the careful conservationists, this seemed unfair, as there was little reward for one's conservation, or penalty for another's lack of it.

The adage, 'change is the only constant', recurrently applies to condominiums. In keeping with the growing worldwide concern for the environment, the Legislature for Ontario recently passed the *Energy Conservation Responsibility Act*. In essence, it mandates that no later than December 31<sup>st</sup>, 2010, all condominium units shall have a hydro 'sub-meter'. Rather than having one global meter, hydro shall be metered as it is consumed by each individual unit. The intention is that all unit owners shall be individually responsible for their specific consumption of hydro, regardless of a condominium's particular declaration. By removing the pooling of the utility, it is intended that those who conserve are rewarded with a lower bill, while those who don't, are not.

From a legal vantage, condominium corporations shall be faced with a new level of issues as all condominiums prepare for December 31<sup>st</sup>, 2010, deadline. These issues revolve around two points, being;

1. the need to purchase and install the hardware, or sub-metering, and;
2. the need to hire an administrator in order to generate and collect each unit owner's hydro bill.

As with all things legal, the purchase of a good or service falls to the contract to ensure that the condominium corporation is both served and protected. To this end, every condominium corporation would be mindful to consider the following when considering the installation and administration of sub-meters.

First, retaining an experienced engineer is an advantage. A skilled and experienced engineer, comfortable in both the field of condominiums and hydro supply would be an invaluable guide. Like the purchase of a car or a home, there are lots of options on the market, and every seller promises that their product is the best. Having an independent engineer advising between what are genuine needs and what are genuine options, would serve both the condominium corporation and the unit owners ably. A skilled engineer also

brings with him or her the knowledge of who is both reputable and skilled. Finally, engineers can also provide excellent insight into the installation of smart-metering. Although installing sub-meters shouldn't be intrusive, having a skilled and trusted engineer looking over the proposed installation is worthy of consideration.

Secondly, retaining an experienced condominium lawyer is also an advantage. Many people wonder when it is time to retain the services of a lawyer to review a contract. One lawyer has commented, "If you have no problem with the proposed contract falling to the ground and shattering into a million pieces, then you probably do not need a lawyer." Many might think keeping the lights on would not fall into this category.

Thirdly, the contract must be carefully reviewed to determine who will own the sub-metering hardware and wiring. For many sub-metering contracts, ownership is ambiguous. There are many pros and cons to having the hardware owned by either the installer or the condominium corporation, but if the purpose of a contract is to avoid ambiguity and risk, this issue should be squarely met.<sup>1</sup>

Fourthly, understand the terms of the contract, especially payment and costs. Aside from paying the utility to provide the electricity, there is now going to be the payment of the sub-meter installation and the new administration. Leave no doubt as to the costs for such. The fine print is famous for lurking charges and fees never mentioned by the savvy sales staff. Will the installation be paid up-front or will it be factored into the administration contract?

Fifthly, know and understand, "who does what". The majority of companies that offer the installation of sub-meters also offer the administration service. Often the installation of the hardware is factored into the administration service as a 'sweetener', styled as "we will do the installation at no charge if we can do the monitoring." Know that the installer does not have to be the administrator. It may often make sense that these two go hand in hand, but as with your car, all repairs do not have to be done by the dealer. Sub-metering administration could be the purview of another group.

Sixthly, be mindful of the warranties that come with the sub-metering or hardware. If and when the sub-meters break-down or require repair, the first question will be if a warranty covers the work. Know the answer now.

Seventhly, it will also be important to spell out in the contract the manner in which any overall charges will be paid. In contrast to sub-metering, which attributes a figure to each unit based on consumption, the overall charges will need a method of allocation and payment.<sup>2</sup>

Eighthly and lastly, be wary of looking to the condominium corporation's reserve fund to pay for the installation of the sub-metering. The *Condominium Act, 1998*, S.O. 1998, c.19, clearly spells out that the reserve fund may only be looked to for, "major repairs or replacement of the common elements". The installation of a new electrical monitoring system does not strike the writer as falling into that category, rather, it appears to be an upgrade, albeit legislatively mandated. Regardless, it is doubtful that the reserve fund

study for any condominium corporation has allocated the cost of installing sub-metering. Even if your condominium lawyer can see his or her way clear to using the reserve fund, then using it will represent an unanticipated liability, so repayment to the reserve fund will be required.

In closing, many have seen the new sub-metering demand to be a positive development. Individual conservation, environmental responsibility and the prospect of lower utility bills are very attractive to many. That said, a variety of legal issues require that the condominium corporation thoughtfully and carefully wade into these new waters so that swimming with the sharks is replaced with dancing with the dolphins.

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**Notes:**

1. & 2. With special thanks to Jeff Jeffcoat, P. Eng., of Construction Control Inc. for "Smart Meters - Why Me?" CM Condominium Manager Magazine, Spring 2007.