

Who should pay for the utilities?

Disclaimer: This article is written for informational purposes only and should not be relied upon as legal advice. In each case, specific legal advice should be obtained which will be responsive to the circumstances of the individual requiring it.

In a rental situation, hydro can be paid in one of three ways on behalf of a tenant.

- The landlord can simply include an arbitrary dollar amount as part of the monthly rent to cover the landlord's hydro costs for the unit.
- The landlord pays the utility bill, but makes an agreement with the tenant that the tenant shall pay a flat amount or percentage of the hydro bill to the landlord upon presentation of the bill.
- The landlord can have the tenant contact the utility directly to make their own arrangements for connection and billing.

The logic used by landlords for choosing method #3 is twofold. First, it removes any problems with excessive use of hydro by the tenant or their roommates. Landlords figure that if the tenants run their air-conditioner all day and night, or never turn off their lights, that the tenant should pay for it. And second, they think it washes the landlord's hands of any utility company arrears and puts them in the tenant's lap.

Despite these apparent advantages, I had always advised landlords that they were better off with option #1, including a realistic amount for hydro in the rent, rather than having the tenant pay the utility separately or reimburse the landlord. The main reason for giving this advice, was that it was likely that if the tenant didn't pay their electricity bills, the utility company would consider that it is the landlord, not the tenant who is in arrears, and either have the charge appear as a part of their municipal tax bill, or register a lien on their property, or both. Also, by paying for the hydro directly, the landlord knows that it's getting paid and that the tenants are not simply ignoring the utility bill. It also provides some oversight for the landlord in the case where marijuana grow-ops are using excessive amounts of electricity, assuming the meter has not been bypassed. And besides, if hydro rates increase, the annual provincial guideline takes the increase into account to some extent.

I was surprised as a member of the Ontario Rental Housing Tribunal, that adjudicators generally took the position (independently arrived at of course) that hydro was not rent, and could not be claimed as part of an arrears action at the Tribunal, even with option #2, when the landlord was paying it directly to the utility but the tenant had agreed to reimburse the landlord a certain amount or share when each hydro bill arrived. This, despite the definition of "rent" in the *Tenant Protection Act*, that says that rent includes the amount of any consideration paid or given or required to be paid for the right to occupy a rental unit. Clearly, the tenant's portion of the hydro bill is consideration required to be paid for the right to occupy, yet most adjudicators during my time never saw it that way. In my mind, this was another incentive for the landlord to simply include a reasonable but arbitrary amount for hydro in the basic monthly rent. If the rent goes unpaid, at least the landlord has a quick, cheap remedy at the Tribunal both for eviction and the arrears. But if the tenant was reimbursing the landlord separate from rent, the Tribunal considered that not to be rent arrears, and therefore no eviction procedure could be commenced.

It may be that some of the reasons not to have the tenants contract directly with the utility have disappeared. In a 2004 decision by the Ontario Superior Court, Justice Gordon decided, among other things, that a departing tenant with hydro arrears was responsible for those arrears, not the landowner or building owner, and that the utility could not refuse to provide service to the owner based on a debt by a former tenant (or owner). His reasoning flowed from the differences in the *Electricity Act, 1998*, and its predecessor legislation, the *Public Utilities Act*, and the *Power Corporation Act*. The new legislation was part of the government's deregulation of the industry, creating separate classes of operators for production, distribution and sales of electricity. In a nutshell, Justice Gordon decided that the statute, along with the doctrine of privity, would not allow any sort of liability for a non-contracting party, and that it was the tenant and the utility that were the contracting parties in that case.

So what is my advice now? I'm not sure one size fits all. For those looking for piece of mind, chose options #1 or #2 and keep control of your hydro bill by paying directly to the utility, and then either including the amount in the monthly rent, or have the tenant pay their share each time you get a hydro bill. For those who see this Court decision as a way to wash their hands of any responsibility for the provision of hydro, then charge a lesser amount for rent, exclusive of hydro, and let the tenant worry about their obligations for the utility. However, you will likely now see sizable rent deposits demanded by the service provider prior to hooking up the electricity, this to hedge their bets against customers with no track record of payments skipping out without payment. If your prospective tenant doesn't have enough cash to put up as a deposit, you could lose the tenant if you are not willing to deal directly with the utility.