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Court Rules on rent payable after unauthorized installation of electricity sub-meters

In 2007, the landlord of these Toronto high-rise apartment buildings decided to install individual meters to measure the amount of electricity used by each apartment and to bill the tenants based on the amount they consumed. The landlord gave sitting tenants the option of continuing to have electricity included in their rent or having their rent reduced if they took on the payment of electricity as a separate charge. The landlord gave incoming tenants no option but to participate in the scheme.

In August 2009, the Ontario Energy Board decided that the landlord had installed these meters in contravention of the *Electricity Act.* As part of their Order, they decided that any agreements or leases that were made or changed under this illegal scheme had to be "unwound".

The landlord proposed to take back the responsibility for payment of the electricity charges if the tenants agreed to an increase in rent that would put the rent back to where it would have been if the scheme had never been brought in. The tenants' position was that the landlord had to take back the payment for electricity charges, but could only increase the rents as permitted by the strict rules for increasing rents set out in the *Residential Tenancies Act.* The result would be a significantly lower rent.

After the Landlord and Tenant Board rejected the tenants' argument, the tenants retained ACTO to represent them on an appeal. In its decision, the Divisional Court accepted the landlord's argument that there was a new agreement between the landlord and the tenants after the scheme failed. Under that agreement, the Court found that the tenants agreed to add electricity to the services that they purchased from the landlord and, therefore, the landlord could raise the rent outside of the strict rent increase rules pursuant to s. 123 of the *Residential Tenancies Act*. In its decision, the Court did not consider the illegality of the landlord's conduct, the statutory framework of how electricity was provided to consumers in Ontario or the ramifications of the Ontario Energy Board's decision of August 2009. They did not address the unenforceability of the agreements made before the OEB Order or the tenants' position that they did not make any agreements with the landlord after the OEB issued its order. The Court was very concerned that the tenants not get "free" electricity at the landlord's expense despite the fact that, in previous decisions, the Court allowed landlords to unfairly prevail at the tenants' expense, and despite the fact that the tenants had been paying for electricity service for space heating that the subsequent legislation forbade.

The issue of the offloading of utilities and services by landlords onto tenants is an area of growing concern. In the United States, for example, the individual metering of water service is happening. Will landlords try to offload parking, security, and maintenance so

that, in the end, tenants will simply be renting four walls without the conveniences and efficiencies of paying one regulated amount for all the services and utilities that a tenant requires? The *Residential Tenancies Act* has clearly spoken on these issues. But is the Divisional Court listening?