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Electricity liability can be shocking

Judge rules in favour of homeowners in tenant arrears case

These stories strange but true

Is it possible for a homebuyer to get stuck with the unpaid electricity bill of the former owner or tenant?

That was the question, which had to be decided by Justice Donald J. Gordon in a recent Ontario Superior Court of Justice case against Waterloo North Hydro.

Back in July 2001, Lam Dui Duong and Chau Minh Duong bought a single-family house on Water St. in St. Jacobs, not far from Kitchener-Waterloo.

They leased the house to a tenant who set up a hydro account directly with Waterloo North Hydro. Unknown to the landlords or the utility, the tenant bypassed the hydro meter in order to steal electricity for a marijuana-growing operation.

The police discovered the enterprise in February 2002, and shut it down. At the same time, Waterloo North Hydro disconnected the power supply and repaired the bypassed connection. Hydro calculated its damages for lost electricity and repair costs to be $23,541 a huge amount for an eight-month operation, and refused to restore service unless the bill was paid.

The Duongs eventually paid the hydro bill under protest, in order to get service restored to the premises, and then sued the utility to cover the amount they were forced to pay.

This past summer, before the case got to trial, the judge was asked to decide whether the tenants' arrears for the stolen electricity could form a lien on the property.

If the judge ruled that was the law, then every new owner of a home in Ontario could be responsible for the hydro arrears of the previous owner or occupant.

Prior to November 1998, real estate lawyers acting for purchasers had to conduct a search by mail for hydro arrears.

Under the old Public Utilities Act, arrears became a lien on the property that would have to be paid by the new owners.

If the arrears were not paid, they would be added to the tax bill.

On Nov. 7, 1998, the Electricity Act 1998 came into force and the supply and distribution of electricity became deregulated.

Municipalities under the new law are required to operate a hydro distribution system as a private, rather than a public, business.

Looking at the new legislation in the Duong v. Waterloo North Hydro case, Justice Gordon decided that the right of utility companies to impose a lien on a property for unpaid arrears had disappeared.

His decision was released last August, and published this week by the Law Society in the Ontario Reports, distributed to all Ontario lawyers. (It's also online at http://canlii.org/on/cas/onsc/2004/2004onsc11981.html, and below.) Even if it couldn't apply a lien, Waterloo North Hydro argued that the owner of a property could still be responsible for a defaulting tenant's hydro bill, even though the owner was not a party to the tenant's utility contract.

That argument was also unsuccessful.

The judge ruled that the 1998 law did not have the required level of "irresistible clarity and unambiguity" needed to make the landlord responsible for the tenant's hydro bill.

Justice Gordon concluded:

A hydro utility cannot demand payment from property owners for a tenant's arrears, whether or not the electricity was stolen.

A hydro utility cannot demand payment from a property owner for losses resulting from tenant theft of electricity without the landlord's knowledge or consent.

A hydro utility must provide electric service to a property even though the prior owner or occupant had stolen hydro.

The Electricity Act, 1998, makes the distribution and sale of electricity a matter of private contract between the user and the utility. No one else can be held responsible for payment.

Under the prior, regulated hydro regime, unpaid hydro arrears would be added to the tax bill and collected as arrears.

Since that alternative is no longer available, some utility companies are now asking for prepaid utility deposits when consumers with no credit history, or a poor track record, want to open an electricity account.

Toronto Hydro, for example, now charges all customers a security deposit based on 2.5 times the average monthly bill, or 1.75 times the amount of a bi-monthly bill. Waterloo North Hydro has the same policy.

Security deposits are waived for residential customers who have had a good payment history for at least one year.

For new customers, Toronto Hydro waives a security deposit if it receives a letter of reference indicating a good payment history from a Canadian gas or electric utility, or if it receives a good credit check conducted at the customer's expense.

For Toronto Hydro's purposes, a good payment history includes not more than one Disconnect Notice, not more than one NSF cheque, and no disconnections.

Since 1998, buyers of new or resale homes who do not qualify for a waiver of the security deposit have had to budget for paying perhaps $250 or more to their local hydro utility. For many homebuyers, it's a significant cost of deregulation.

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SUPERIOR COURT OF JUSTICE - ONTARIO

RE: Lam Dui Duong and Chau Minh Duong v. Waterloo North Hydro Inc.

BEFORE: The Honourable Mr. Justice D.J. Gordon

COUNSEL: P.J. Forte, for the moving party/defendant

C. Parry, for the responding party/plaintiffs

ENDORSEMENT

[1] This motion, pursuant to Rule 21.01(1)(a), involves a determination of a question of law relating to the interpretation of s. 31 of the Electricity Act, 1998 S.O. 1998, c. 15, Schedule A ("Electricity Act, 1998"). Counsel for the plaintiffs and defendant appeared on the motion and presented extensive oral and written submissions. The third party is represented by counsel but did not participate in the motion.

FACTS

[2] The facts relevant to the issues are not in dispute.

[3] The plaintiffs acquired a residential property located at 154 Water Street, St. Jacob's, Ontario, in July 2001. The property was leased to the third party from July 2001 to February 2002.

[4] The third party entered into an agreement with the defendant for the provision of electricity to the premises. The third party installed a bypass to steal electricity for a marijuana growing operation without the knowledge of either the plaintiffs or the defendant.

[5] In February 2002, the police discovered this illegal activity. The defendant disconnected the electrical power to the property and repaired the connection. The defendant calculates its loss for the theft of electrical power, damage to its equipment and cost of repair to be $23,541,25. The plaintiffs dispute this amount but such is not a factor in this motion. The defendant refused to restore electrical power to the property unless payment was made.

[6] In April 2002 the plaintiffs paid the amount demanded by the defendant in order that the electrical power be restored. Payment was made under protest and the plaintiffs then commenced this lawsuit to recover this amount, together with other relief claimed.

[7] The plaintiffs were not parties to the contract between the defendant and the third party regarding the provision of electrical power to the premises.

QUESTIONS OF LAW

[8] Ms. Forte, counsel for the defendant, frames her questions as follows:

Does s. 31 of the Electricity Act, 1998, authorize the defendant to demand and receive payment of arrears of electricity from the plaintiffs, who are owners and landlords of the property, when the arrears arise from electricity that was stolen to power an illegal marijuana growing operation?

-or-

In what circumstances will the defendant be required to comply with a request to provide electrical service to a property, where a previous occupant of that property has stolen electricity from the defendant, having regard to section 28 and 31 of the Electricity Act, 1998?

Having regard to sections 28 and 31 of the Electricity Act, 1998, is the defendant entitled to demand and receive payment from an owner of a property to compensate the defendant for economic loss suffered as a result of theft of electricity by a tenant of the property, without the knowledge or consent of the landlord?

[9] Mr. Parry, counsel for the plaintiff, says the questions might be phrased as follows:

In what circumstances will the defendant be required to comply with a request to provide electrical service to a property, where a previous tenant of that property stole electricity from the defendant at that property, having regard to sections 28 and 31 of the Electricity Act, 1998?
Having regard to sections 28 and 31 of the Electricity Act, 1998, is the defendant entitled to demand and receive payment from the landlord of a property to compensate the defendant for economic loss suffered as a result of the theft of electricity from the defendant on the said property by the tenant of the said property without the knowledge or consent of the landlord of the said property?

[10] The questions posed by counsel, in my view, essentially ask whether the defendant can impose liability on a non-contracting party, that is, does it have a lien against the property for the debts of the contracting party for electricity consumed but not paid for by the contracting party.

LEGISLATION

[11] Before examining the current legislation and the electrical distribution system created by it, it is important to consider the former legislation.

[12] Prior to the Electricity Act, 1998, distribution of electrical power was governed by the Public Utilities Act, R.S.O. 1990, c. P. 52 and the Power Corporation Act, R.S.O., 1990, c. P. 18. Both statutes made reference to a lien and charge upon the property in specific circumstances.

[13] Subsection 31(1) of the Public Utilities Act, now repealed, provided:

The amount payable to a municipal corporation or to a public utility or hydro-electric commission of a municipality by the owner or occupant of any lands for the public utility supplied to the owner or occupant for use thereon is a lien and charge upon the estate or interest in such land of the person by whom the amount is due, and may be collected by distress upon the goods and chattels of the person and by the sale of the person's estate and interest in the lands and in the case of an amount payable by the owner of lands, the amount is a lien and charge upon the lands in the same manner and to the same extent as municipal taxes upon land. 1982, c. 45, s. 1.

[14] Similarly, subsection 89(1) of the Power Corporation Act, also now repealed, provided:

Where the Corporation supplies or distributes power directly to the consumer either on its own behalf or by arrangement or under contract with a municipal corporation, the amount payable by the owner of any building or lot, or part of lot, for the power supplied to him, her or it for use therein or thereon, and all rents, rates, costs and charges in connection with the service or supply of such power or the installation of any works for such service or supply are a lien and charge upon the building or lot or part of lot in the same manner and to the same extent as municipal taxes on land, and, in default of payment, the clerk of the municipality, upon being notified in writing by the Corporation of the sum due, shall forthwith enter the same upon the collector's roll and it shall be collected in the same manner as municipal taxes on land and upon recovery thereof shall be paid over to the Corporation, but when a mortgage or lease of the building or lot or part of lot in question has been duly registered before an entry upon the collector's roll as above described, the lien and charge hereby created rank after advances actually made under such mortgage and after rent accrued due under such lease before such entry.

[15] But for the Electricity Act, 1998, the Public Utilities Act would have applied to the property involved in this lawsuit.

[16] The electrical distribution system was dramatically altered with passage of the Energy Competition Act, S.O. 1998 c. 15, to which the Electricity Act, 1998 is attached as Schedule A. As I understand the purpose of this legislation, deregulation was intended to create a competitive market for the supply of electricity and natural gas. The former Ontario Hydro monopoly was dismantled and replaced by a number of entities having different functions, from generating electrical power, through to actual delivery to the ultimate users.

[17] Local distribution companies, such as the defendant, handle the wire business within its geographic area and charge a regulated price for delivering electricity to homes and businesses. They also are responsible for collecting the charges of the other entities who are involved in electricity generation, transmission and debt retirement of the former monopoly.

[18] Section 3 of the Electricity Act, 1998 provided, "This Act applies despite the Public Utilities Act". This section came into effect on 7 November 1998, which indicates the Public Utilities Act no longer had application with respect to electricity, but continued only as to other utilities. Other sections in the Electricity Act, 1998 came into effect at different times and did the repeal of various sections in the former legislation.

[19] As part of the new system, every municipal corporation that had operated a public utility commission was required to incorporate a separate entity under the Business Corporations Act, R.S.O. 1990, c. B., for the purpose of distributing electricity before 7 November 2000. In this case, the City of Waterloo, the Township of Wellesley and the Township of Woolwich caused to be incorporated Waterloo North Hydro Holding Corporation. These municipalities are the only shareholders of this entity. The defendant, Waterloo North Hydro Inc., is a fully owned subsidiary of this holding company. As a result, the new legislation required the municipalities to operate the distribution system as a private, as opposed to public, business by reference to the Business Corporations Act. This, in my view, is a significant factor when considering the issues raised in this lawsuit.

[20] The relevant sections of the Electricity Act, 1998, unlike the prior legislation, made no reference to a lien on the land for unpaid amounts for electricity, as can been see from the following:

28. A distributor shall connect a building to its distribution system if,

(a) the building lies along any of the lines of the distributor's distribution system; and

(b) the owner, occupant or other person in charge of the building requests the connection in writing.

29. (1) A distributor shall sell electricity to every person connected to the distributor's distribution system, except a person who advises the distributor in writing that the person does not wish to purchase electricity from the distributor.

(2) If, under subsection (1), a person has advised a distributor that the person does not wish to purchase electricity from the distributor, the person may at any time thereafter request the distributor in writing to sell electricity to the person and the distributor shall comply with the request in accordance with its licence.

(3) If a person connected to a distributor's distribution system purchases electricity from a retailer other than the distributor and the retailer is unable for any reason to sell electricity to the person, the distributor shall sell electricity to person.

(4) The Board may exempt a distributor from any provision of this section if, after holding a hearing, the Board is satisfied that there is sufficient competition among retailers ion the distributor's service area.

(5) An exemption under subsection (4) may be subject to such conditions and restrictions as may be specified by the Board.

(6) The Board shall not exempt a distributor entirely from all the provisions of this section unless, after holding a hearing, the Board is satisfied that consumers in the distributor's service area will continue to have access to electricity.

31 (1) A distributor may shut off the distribution of electricity to a property if any amount payable by a person for the distribution or retail of electricity to the property pursuant to section 29 is overdue.

(2) A distributor shall provide reasonable notice of the proposed shut off to the person who is responsible for the overdue amount by personal service or prepaid mail or by posting the notice on the property in a conspicuous place.

(3) A distributor may recover all amounts payable despite shutting off the distribution of electricity.

ANALYSIS

[21] These new sections indicate the distribution of electricity is a matter of contract, in this case between the defendant and the third party, who was the tenant occupant of the property. As there is no reference to lien rights, it is appropriate to conclude the legislature intended to abandon the former system as set out in the Public Utilities Act. The learned author, Ruth Sullivan, in Sullivan and Driedger on the Construction of Statutes, 5th Ed. (Markham, Butterworth Canada Ltd., 2000) at p. 189, says:

Consistent expressions is a basic convention of legislature drafting. As much as possible, drafters strive for uniform and consistent expression, so that once a pattern of words has been devised to express particular purpose or meaning, it is presumed that the pattern is used for this purpose or meaning each time the occasion arises. Patterns in legislation are assumed to be intended rather than advertent. Once a pattern has been established, it becomes the basis for expectations about legislative intent.

[22] This issue has been considered previously. In Prassad v. Canada (Minister of Employment and Immigration) (1989), 57 D.L.R. (4th) 663 (S.C.C.), the court was asked to determine whether an adjudicator conducting an inquiry under the Immigration Act, R.S.C. 1985, c. I-2, was required to adjourn it in order to allow an alien to seek a Minister's permit to remain in Canada. Sopinka J. ruled that no such requirement existed by reference to other provisions of the Act and indicated that where the legislature wished to require an adjournment with respect to other provisions of the Act, it did so by giving an express and mandatory direction. Similarly, in Canada (Attorney General v. Public Service Alliance of Canada (1991), 80 D.L.R. (4th) 520 (S.C.C.), Sopinka J. concluded the Public Service Relations Board did not have exclusive jurisdiction to determine who is an employee within the meaning of the Public Service Staff Relations Act, R.S.C. 1970, c. P-35, one of the reasons being that the Act did not contain the typical wording found in other federal and provincial labour statutes in which it was intended the Board should have the final word on this matter.

[23] Accordingly, it appears that in creating a private electrical distribution system under the Electricity Act, 1998, the legislature must have rejected the former system of lien rights and left it as a matter of contract. In my view, had the legislature intended to attach liability for arrears to the property, and not merely to the contracting person, it would have used language similar to the lien provisions as it did under the Public Utilities Act and the Power Corporation Act.

[24] The question then arises as to whether the Electricity Act, 1998, imposes a liability on a non-contracting party for the debt of the contracting party.

[25] The starting point in this analysis is the long-established common law doctrine of privity which as the learned author, G.H.L. Fridman, The Law of Contract in Canada, 4th Ed. (Scarborough, Thomson Canada Limited, 1999), at p. 197, points out developed in the nineteenth century in England. This doctrine stipulates that only the original parties to a contract acquire or are exposed to liability: see, for example, Maritime Life Assurance Co. v. Regional Capital Properties Corp. (1996), 44 Atla. L.R. (3d) 257 (Alta. Master); aff'd. (1996), 195 A.R. 102 (Alta. Q.B.); aff'd. (1997) 57 Alta. L.R (3d) 401 (Alta. C.A.); and Bilson v. Kokotow (1995), 8 O.R. (2d) 264 (Ont. H.C.); aff'd. (1978), 23 O.R. (2d) 720 (O.C.A.); leave to appeal refused (1978), 23 O.R. (2d) 700 (S.C.C.).

[26] G.H.L. Fridman, at pp. 203-206, goes on to say the restrictive character of this doctrine has been modified to cure impractical effects in certain areas, such as:

(a) the equitable doctrine of restrictive covenants in relation to land and enforcement of same as against successors in title;

(b) the law of agency which enables third parties to become involved or be liable in contracts by the use of agents;

(c) merchant law regarding the acceptance of negotiable instruments;

(d) insurance law, where a non-contracting party may be a beneficiary or the principles of subrogation;

(e) the tort of negligence whereby a non-contracting party has the right of action in tort arising from the negligent breach of a contract between other parties; and,

(f) by employment of the trust concept, where equity has enabled third parties to acquire enforceable rights under contracts to which they were not a party.

[27] Further, at p. 212, the author points out that, in appropriate circumstances, a statute may enable a third party to sue or be sued on a contract to which it is not a party. Does this apply here? The doctrine of privity, at the outset, says the plaintiffs are strangers to the contract between the defendant and the third party. The defendant relies on the use of indefinite and definite articles in s. 31(1) of the Electricity Act, 1998. It takes the position the use of the indefinite article "a" and the definite article "the" in the context, "...if any amount payable by a person for the distribution or retail of electricity to the property..." means that electricity to the property may be shut off when there are arrears payable and the arrears attach to the property. Ms. Forte relies upon the decision of Kindred J. in Arch Equipment v. Houbein, [1985] S.J. No. 916 (Sask. Q.B.). With respect, I disagree.

[28] The starting point is the general presumption against changing the common law as explained by Ruth Sullivan, Sullivan and Driedger on the Construction of Statutes, supra, at p. 341, as follows:

Although legislation is paramount, it is presumed that legislatures respect the common law. More precisely, it is presumed that legislatures do not intend to interfere with common law rights, to oust the jurisdiction of common law courts, or generally to change the common law. As explained in Halsbury, in a formulation adopted by many Canadian courts:

Except in so far as they are clearly and unambiguously intended to do so, statutes should not be construed so as to make any alteration in the common law or to change any established principle of law. (36 Hals., 3rd Ed. P. 412)

These presumptions permit the courts to insist on precise and explicit direction from the legislature before accepting any change. The common law is thus shielded from inadvertent legislative encroachments.

[29] At p. 396, the author comments on the reasons for the existence of a presumption against changing the common law as follows:

A number of interests are served by this presumption. It is invoked, first of all, when courts are anxious to protect the law from legislative innovation that they consider undesirable. It also is invoked in response to rule of law concerns. The stability of law is enhanced by rejecting vague or inadvertent change while certainty and fair notice are promoted by requiring legislatures to be clear and explicit about proposed changes.

[30] In Goodyear Tire & Rubber Co. of Canada v. T. Eaton Co., [1956] S.C.R. 610 (S.C.C.), Fauteny J. wrote:

...a Legislature is not presumed to depart from the general system of the law without expressing its intentions to do so with irresistible clearness, failing which the law remains undisturbed.

[31] Lamer J., as he then was, in Slaight Communications Inc. v. Davidson (1989), 93 N.R. 183, at 225 (S.C.C.) added:

...in the absence of a clear provision to the contrary, the legislator should not be assumed to have intended to alter the pre-existing ordinary rules of common law.

[32] Accordingly, clear and unambiguous direction from the legislature is required to override the common law. The use of indefinite and definite articles in s. 31(1), Electricity Act, 1998, in my view does not rise to the requisite level of "irresistible clarity and unambiguity" needed to thwart the doctrine of privity of contract and to give the defendant the right to demand payment from the non-contracting plaintiff landowners.

PUBLIC POLICY

[33] The defendant is a private company incorporated under the Business Corporations Act. On its behalf, Ms. Forte argues that by providing a public commodity, the economic loss suffered by the defendant ought be paid by the landowner, not the taxpayer, that landlords bear a responsibility to take care of their business. In response, Mr. Parry argues such a concept is a fundamental alteration on the landlord and tenant business that would require statutory amendment.

[34] In this case, it is clear both the plaintiffs and defendants are innocent parties. The loss results from the criminal act of the third party. The Electricity Act, 1998, changes the distribution system to a private for profit business. It is no longer a public utility. Therefore, public policy considerations cannot be used to support one private business over another without clear and unambiguous legislation.

ANSWERS

[35] In response to the questions posed by counsel:

1. Section 31, Electricity Act, 1998, does not authorize the defendant to demand and receive payment from the plaintiff landowners for arrears of a previous tenant occupant resulting from theft of electricity. Under s. 28, the defendant is obliged to connect the building to its distribution system, notwithstanding the actions of the prior occupant.

2. The defendant is not entitled to demand and receive payment from an owner of a property for economic loss resulting from theft of electricity by a tenant, without the knowledge or consent of the landlord.

3. The defendant is required to comply with a request by a landowner or occupant to provide electrical service to a property notwithstanding the theft of electricity from the defendant by a prior occupant.

4. The defendant is not entitled to demand and receive payment from a landlord to compensate the defendant for economic loss suffered as the result of theft of electricity from the defendant by tenant occupant without the knowledge or consent of the landlord.

[36] The applicable sections in the Electricity Act, 1998, clearly indicate the distribution and sale of electricity is now a matter of contract. The common law doctrine of privity prohibits the defendant from seeking recovery of its economic loss from any person or entity other than the contracting party which, in this case, was the third party tenant.

[37] If the parties cannot agree on the issue of costs, further direction will be provided upon written request.

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D.J. GORDON J.

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