



FALL 2021

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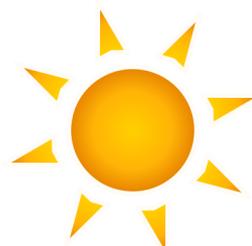
So, you want to LEASE YOUR CONDO ROOF TO A SOLAR COMPANY?

As more solar projects are approved, particularly large-scale projects, more land will be required. To meet demand, installers will need to get creative and one area that has yet to be fully exploited is rooftops.

This guide focuses on those rooftops located on condominiums. The contents of this document are designed as a primer for condominium boards, property managers, or unit owners who are interested in leasing common property for solar installation.

This focus on condominiums accompanies a more general document which looks at leasing property to solar energy companies and which can be found [here](#).

Note that these guides are not a substitute for independent legal advice and are intended to provide summary information helpful to those interested in learning more about solar leases.



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The *Condominium Property Act*

The benefits of a condo are many, including shared spaces, costs, and cooperative decision making. However, these same attributes also pose some unique challenges when considering lease agreements. Challenges arise primarily because unlike commercial properties, apartments, or other properties with a single owner, condos have multiple owners with multiple perspectives. Further, unlike commercial leases on non-condo buildings, condo corporations must ensure proper compliance with the *Condominium Property Act* and associated regulations. Considering this, the following section will highlight some of the relevant provisions in this Act.

Unlike commercial buildings, single family homes, or rental buildings; condominiums ("condos") require a more collaborative approach to decision making, taking into account the needs and preferences of all of the unit owners. In particular, the Act states that a condo corporation may transfer or lease the real property or the common property¹ (which typically includes the roof or sides of the external building) of the condo *after* a special resolution has been passed.² A special resolution is defined as a resolution that is:³

- Passed at a properly convened meeting of a corporation by a majority of not less than 75% of all the persons entitled to exercise the powers of voting conferred by the Act and the bylaws and representing not less than 75% of the total unit factors for all the units; or

- Agreed to in writing by not less than 75% of all the persons who, at a properly convened meeting of a corporation, would be entitled to exercise the powers of voting conferred by this Act or the bylaws and representing not less than 75% of the total unit factors for all the units.

Essentially, the Act requires that 75% of owners agree to a leasing proposal before it can go ahead. While this may slow down the leasing process, it also reflects the nature of condos and it is unlikely that condo boards, made up of unit owners, would want to push through an unpopular lease. After all, these are their neighbours. These challenges may be minimized if a new condo building installs solar as part of their initial build but retrofitting an already occupied building will need to abide by these procedures.

The *Condominium Property Act* authorizes a condo corporation to accept or execute an easement or restrictive covenant on behalf of the owners, again following a Special Resolution.⁴ Easements allow the property owner to retain ownership of the land in question while giving up certain defined rights on the portion of the land used for the easement.⁵

In addition to this Act, any agreements to lease a portion of the common property for solar must comply with the condo's bylaws. Bylaws are required by section 32 of the Act and are intended to regulate the corporation and provide for the control, management, and administration of the common property.⁶



Negotiating Your Lease

Leasing for solar may involve a novel technology type but the lease itself will resemble a standard commercial lease. This includes some of the same risks such as non-payment, liability issues, and lease defaults. In addition, there are certain risks inherent to solar including any legislative requirements, such as any required Alberta Utilities Commission approvals, any zoning limitations, and reclamation requirements. Taking this into account, the following section will highlight some issues that should be flagged during the lease negotiation process.

Length

One of the first issues to consider is length. Generally, solar leases are registered on title and are long-term agreements ranging in length from 20-60 years, often with a 20 year minimum.⁷ This part of the negotiation should consider how long the initial term of the lease will be and set out provisions to allow for termination or renewal.

Termination procedures can be set out in the lease and should include the required notice period, how termination can be accepted by either party, and what to do in the event of a default. Renewal provisions will be similar. They should specify how one party can propose a lease renewal including notice period, whether it needs to be in writing, and how acceptance can be issued. More details on this part of the lease negotiation can be found [here](#).

Payment Plans

Payment details are another important part of lease negotiation. For example, when negotiating payment, the condo corporation should consider whether they prefer a lump sum payment up front, periodic payments independent of energy generation, periodic payments based on generated revenue, or a more creative payment program.⁸ These details are important because the compensation structure for oil and gas leases under the *Surface Rights Act* does not apply to renewable energy projects.⁹ If there are any operating costs that may be attributed to the solar energy company

these can also be included along with the payment terms.

The condo corporation should also consider whether payments will go into the condo's reserve fund or will be used towards owner's condo fees. These decisions may be particularly important when trying to pass the initial special resolution as a reduction in condo fees may be an incentive for otherwise reticent unit owners.

Indemnification

When negotiating a lease, it will be important to consider the liability of each party. In particular, condo corporations should ensure that there is an indemnification provision that assigns proper liability to the solar energy company. This provision should ensure that any damage to the property or personal injury is the responsibility of the solar energy company rather than the condo corporation. Notably, in the event of gross negligence or intentional action on the part of the condo corporation or their agents, this provision could end up void.

When negotiating this provision, it may be helpful to ensure that the limits of the solar energy company's insurance policy are included in the lease. Large projects can require large insurance policies, in the millions of dollars. Additionally, the *Condominium Property Act* requires condo corporations to have insurance for common property including insurance for liability resulting from a breach of duty as the occupier of the common property.¹⁰

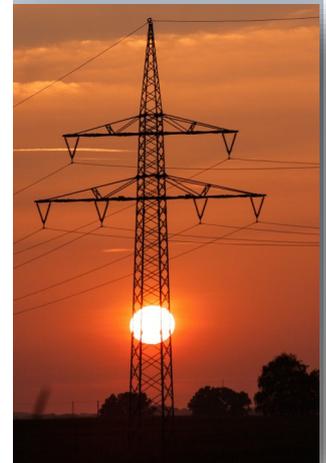
Access to Land

The lease can also specify that all equipment is the property of the solar energy company and outline how the company can enter upon condo property for maintenance or installation. For example, if you are leasing your rooftop to a solar energy company, an easement or a right of way may need to be negotiated. These legal tools allow the company to enter onto your property for installation, maintenance, and other required work that may range from innocuous site visits to check connectivity to more substantial

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Individual leases should include provisions that deal with the clean-up and reclamation of the affected area. Lease negotiations can specify that after the termination of the lease, whether through default or proper termination, the solar energy company has a specified time period during which it must remove all fixtures and restore the rooftop back to its original state.

interferences such as vehicles or equipment. These are standard parts of a lease and often, properties already have multiple easements or rights of way on title for drainage, utilities, or roads.

This portion of the lease can also highlight how other individuals can enter the area. For example, if other tradespeople need access to the rooftop what are their obligations or responsibilities around the solar energy system.

Arbitration and Mediation

The *Condominium Property Act* specifies that "any dispute respecting any matter arising under this Act or in respect of the bylaws of a corporation may be dealt with through mediation or arbitration". Specifically this means that in the event of a default, disagreement, or other issue the lease can specify that parties are to engage in a combination of mediation and/or arbitration before resorting to a court action.¹¹

Generally, lease provisions of this sort will make reference to the *Arbitration Act* and can simply state that arbitration provisions will comply with the Act.¹² Further, if the parties are unable to agree upon a mediator or arbitrator, the *Condominium Property Regulation* authorizes the Alberta Arbitration and Mediation Society to appoint one.¹³

Even if the lease has an arbitration clause, it may still be beneficial to file a Statement of Claim before the relevant limitation date to protect your claim; however, this will be something to discuss with your lawyer at the time.

Reclamation and Decommissioning

It is unlikely that a solar energy system installed on a condo roof will require Alberta Utilities Commission power plant approval. This means that reclamation requirements set out in the *Conservation and Reclamation Regulation* will not apply.¹⁴ Instead, individual leases should include provisions that deal with the clean-up and reclamation of the affected area. Lease negotiations can specify that after the termination of the lease, whether through default or proper termination, the solar energy company has a specified time period during which it must remove all fixtures and restore the rooftop back to its original state.

In order to ensure this is properly undertaken, lease negotiations can also include a provision setting out security. This refers to an amount of money held by the condo corporation in trust to be used in the event that reclamation is not properly completed. While this is possible, it may make negotiations more difficult and will require discussion with a lawyer.

Legislative Considerations

Legislative requirements will differ depending on location, size, and more and before agreeing to a lease, condo boards should make sure that the renewable energy company has properly reviewed any necessary legislative provisions and received the proper approvals. The condo corporation should ensure that the solar energy company is abiding by all bylaws, land use plans, and all regulatory requirements for solar energy operations. A warranty or representation indicating that it is the responsibility of the solar energy company to do this can be included in the lease.

1. *Condominium Property Act*, RSA 2000, c C-22, s 1 (f), common property is defined as "so much of the parcel as is not comprised in a unit shown in a condominium plan, but does not include land shown on the condominium plan that has been provided for the purposes of roads, public utilities and reserve land" [*Condominium Property Act*].
2. *Ibid*, s 49(1).
3. *Ibid*, s 1 (x).
4. *Ibid*, ss 51 & 52.
5. Marie-Ann Bowden, "Protecting Solar Access in Canada: The Common Law Approach" (1985) 9:2 Dal LJ 261 at 276.
6. *Ibid*, s 32.
7. Farmers' Advocate Office, "Negotiating Renewable Energy Leases" (1 February 2017) Ag Dex 817-15 Government of Alberta at 8 online: <https://open.alberta.ca/dataset/c0df7ced-59c9-4bc7-aa9c-2897edb6a07c/resource/521e1d42-9b76-420d-92cf-e84cd2808192/download/agdex-817-15-february-2017.pdf>.

8. Daniel B.R. Johnson, "They Ain't Making Any More of It: Land Lease Considerations for Alberta Renewable Energy Projects" (September 2020) *The Negotiator* at 6.
9. *Surface Rights Act*, RSA 2000, c S-24, s 23.
10. *Condominium Property Act*, *supra* note 1, ss 47(1) & (7).
11. *Ibid*, s 69.
12. *Arbitration Act*, RSA 2000, c A-43.
13. *Condominium Property Regulation*, Alta Reg 168/2000, s 77.
14. *Conservation and Reclamation Regulation*, Alta Reg 115/1993.
15. Kendra Sugloski, "500 solar panels cover south side of downtown Edmonton office tower" (30 March 2017) *Global News* online: <https://globalnews.ca/news/3347122/500-solar-panels-cover-south-side-of-downtown-edmonton-office-tower/>.
16. *Ibid*.

Do I Have A Right to the Sun?

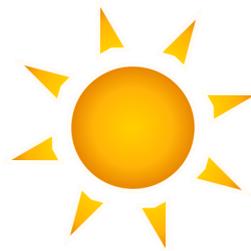
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Finally, when negotiating a solar lease, it may be important to consider whether solar access will become an issue in the future. If your condo is surrounded by other high-rise buildings, and particularly if yours is a floor or two taller than the others, this may not be an issue. However, if new developments are proposed for the area, your solar access may be impeded by future construction. This occurs when a nearby building blocks the sun that was previously hitting your solar energy system and as of 2021, there is no law in Alberta that prevents this from happening.

Simply put, you may have a solar energy system on your roof but the city could still approve a development permit for an even larger building next door. This concern arose with one of downtown Edmonton's only large scale solar energy systems which is installed on a 10-storey office tower.¹⁵ Currently, the unobstructed solar access is under threat because three 40-storey buildings were approved on a neighbouring lot.¹⁶

For many condo corporations, solar access may never become an issue; however, because it may be raised by unit owners, lawyers, or the solar energy company themselves and it should be taken into consideration. Solar access, or the potential lack thereof, should be considered when deciding on the location for a solar energy system, in negotiating the length of a lease, and when deciding upon a payment plan.

To read more about the legal issues associated with solar access check out the Environmental Law Centre's report [Here Comes the Sun: Solar Law in Alberta](#).



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About the Environmental Law Centre

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The Environmental Law Centre (ELC) has been seeking strong and effective environmental laws since it was founded in 1982. The ELC is dedicated to providing credible, comprehensive and objective legal information regarding natural resources, energy and environmental law, policy and regulation in Alberta. The ELC's mission is to advocate for laws that will sustain ecosystems and ensure a healthy environment and to engage citizens in the law's creation and enforcement. Our vision is a society where laws secure an environment that sustains current and future generations and supports ecosystem health.

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Sun and the Law Resources from the Environmental Law Centre

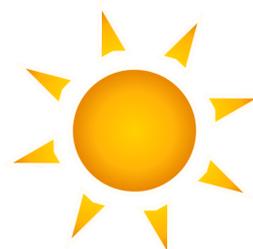
The Environmental Law Centre has created three topical guides for Albertans interested in getting involved in the solar industry.

These guides can be found here:

- [So, you want to start a solar co-op?](#)
- [So, you want to lease your condo's roof to a solar company?](#)
- [So, you want to lease your property to a solar company?](#)

In addition to these topical guides, the Environmental Law Centre has released a report on legal considerations for solar energy generation in Alberta:

Here Comes the Sun: Solar Law in Alberta provides Albertans with access to information about how the law impacts and guides the development of solar energy systems in the province. While solar power may be fast growing, it still only makes up a very small fraction of the Alberta electricity grid. This report identifies barriers to future growth and makes recommendations for improvement. Find out more at the ELC website at elc.ab.ca



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