

Smart-Metering and the Declaration

By Michael H. Clifton, LLB, MA

WHETHER it's smart metering or submetering, this topic is beginning to smell like old news. But it is a smell that will linger for yet a while. As recently stated by Ron Danks, "condominium corporations and their Boards should treat this issue of submetering as a serious issue and one which may yet again become mandatory at some point in the future" (in *Condo News* of the Golden Horseshoe, Winter 2008 CCI Golden Horseshoe Chapter).



Even if it never becomes mandatory again, the issue is one that every condominium corporation should contemplate if for no other reasons than environmental concern and resource management.

■ The Issues to Consider

In doing so, there are various issues that condominium boards have to consider. Amongst them are such things as choosing suppliers and reviewing contracts: subjects about which some competent articles have already been printed in various condo magazines.

One issue that seems to be skimmed over or sometimes forgotten is the matter of what one needs to do, if anything, with the condominium documentation – particularly the declaration – to enable an effective smart or sub-metering program.

One reason for general disregard of this issue seems fairly obvious: for all intents and purposes, the legislation appears designed to bypass this concern entirely. In various places and ways the legislation specifically says that it applies despite anything in a condominium bylaw, declaration or even the *Condominium Act, 1998*.

However, as one sifts through the applicable statutes (including the *Energy Conservation Leadership Act* and the *Electricity Act, 1998*) and associated regulations it is not long before one finds that several questions remain unanswered, and some answers give rise to further questions. It appears that several of these gaps in the legislation both can and should be filled by appropriate provisions in condominium declarations.

In this article I mention just four recommendations regarding provisions that could be helpful to be included in a declaration to ensure the effective installation and operation of a smart/sub-metering system in a condominium. If they are not already in your declaration in some form, then it might be advisable to seek specific legal advice and consider amendments that put them in. Please note, however, these recommendations are not the be-all and end-all on this subject. It is only hoped that this article will introduce a few basic points of relevance and interest to boards and managers.

■ Recommendation 1

The declaration should specifically grant the board authority to install the smart or sub-meters in units.

Section 53.17(1) of the *Electricity Act, 1998*, states:

Despite the Condominium Act, 1998 and any other Act, a distributor and any other person licensed by the Board to do so shall, in the circumstances

prescribed by regulation, install a smart meter, metering equipment, systems and technology and associated equipment, systems and technologies or smart sub-metering systems, equipment and technology and any associated equipment, systems and technologies of a type prescribed by regulation, in a property or class of properties prescribed by regulation at a location prescribed by regulation and for consumers or classes of consumers prescribed by regulation at or within the time prescribed by regulation.

This complex paragraph essentially provides that where there are:

- prescribed circumstances, relating to
- prescribed technologies, for
- prescribed properties,
- a distributor or other licensed person has a right to install such prescribed technologies (i.e., smart/sub-metering systems) in such prescribed properties, without concern for any other legislation.

It is important to note that this only overrides the provisions of other legislation, not all applicable law.

In Canada, not all law is based on legislation. Particularly in the area of property law, the most fundamental of our rights arise out of the ethereal mass called “common law” which is not yet all written or curtailed in statute form. As a result, we can imagine the situation where the statutory “right” to install a sub-meter in a prescribed property butts up against the common law “right” of the owner of that property to refuse it.

It is fair to ask whether that would ever really happen. Does anyone actually anticipate an installer arriving on the doorstep if the metering system isn’t wanted by the owner? In most cases, one should think not; but in one circumstance it is a distinct possibility: in a condominium.

Pursuant to one of the regulations made under the *Electricity Act, 1998*, one class of “prescribed property” to which installations of smart meters can be made, is condominium (though insufficiently defined as “a building on land” that is registered or proposed to be registered as a condominium); and one of the “prescribed circumstances” allow-

ing that to happen is when the board of directors of the condominium corporation approves it. Note that no unit owner consent is required. The board, on its own, can decide that smart meters are the way to go.

When this could become a problem is when the place where the meter needs to be located is actually part of the unit and not part of the common elements. For example, even where there are traditional unit boundaries (i.e., inside face of dry-wall) it is not uncommon for a declaration to provide:

All pipes, wires, ducts, cables, conduits, sewers (both storm and sanitary), service connections, electricity transformer(s), television, internet and/or telephone cables or other access, transmission and reception facilities and lines, water mains and public utility lines that, without limiting the generality of the foregoing, provide or transmit electrical power, communication facilities, water, fuel, and/or sewage disposal, and that service only one Unit shall be considered part of the Unit despite being located within the boundaries of another

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Unit or the common elements.

The question becomes, if, where this is the case, the unit owner doesn't want the installation to be done, does the installer have the right to proceed anyway? Because the authority of the installer under the legislation is "despite any Act" and not "despite any law," I think the answer is uncertain. It seems plausible that, with the right set of facts, a unit owner could successfully refuse to permit the installation.

There are arguments to be made that this apparent problem can be overcome by relying on a variety of provisions in both the *Electricity Act, 1998* and the *Condominium Act, 1998*, and perhaps other law, but, frankly, who (other than a lawyer getting paid for it) wants to have to construct that argument? It is both costly and frustrating to hash out a solution by going to battle over statutory interpretation, and generally poor strategy to plan on doing it, no matter how certain one is of the outcome.

What is likely to be a more efficient and effective approach is to address in advance the possibility

by ensuring that the declaration, despite unit boundaries, permits the installation of smart/sub-metering systems anywhere on the condominium property including within any unit or affecting any appurtenance or component of a unit.

■ **Recommendation 2**

The declaration should provide for access to the unit or common element areas by the administrator of the smart/sub-meters for the purposes of replacement, repair and maintenance of the meters and taking readings.

As set out in the foregoing, section 53.17(1) of the *Electricity Act, 1998*, provides the installer with the right to install the smart/sub-meters; but that appears to be all that it provides. There do not appear to be any statutory provisions that similarly seek to override any legislation or other law to allow the administrator of a sub-metering contract to enter the premises for the purposes of maintaining or reading them.

The matter would appear to be resolved by reference to section 19 of

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the *Condominium Act, 1998*, which provides that,

On giving reasonable notice, the corporation or a person authorized by the corporation may enter a unit or a part of the common elements of which an owner has exclusive use at any reasonable time to perform the objects and duties of the corporation or to exercise the powers of the corporation.

However, depending on the terms of the service contract relating to the smart/sub-meters amongst other matters, an argument could be made that the reading and (see discussion or Recommendation 3 below) maintenance of the smart/sub-meters are not any of the objects, duties or powers of the corporation, and therefore entry onto the units or exclusive use common element areas for those purposes is not authorized by that section.

Again, it is advisable to avoid argument by applying clarity; and, again, the right place to do this is the declaration of the condominium. It is recommended that the declaration contain provisions that allow

for such entry to the units and common elements for such purposes by the corporation or any authorized person, including the sub-metering contract administrator.

■ Recommendation 3

The declaration should specify whether the meter is part of the unit or part of the common elements.

While it is possible that a supplier might maintain ownership of the meters and responsibility for their maintenance and repair, this is not always the case. If the meter will not be the property of the supplier, then it could be important to determine precisely who, as between the unit owner and the corporation, owns the meter as well as who should be responsible to take care of it.

With respect to ownership, in the majority of cases it is likely the meters should be treated as part of the common elements or at least as assets of the condominium. However, it should be kept in mind that units and common elements in condominiums are not strictly defined by who buys or installs them, but by reference to

(a) where they are located, giving heed to the surveyed unit boundaries in registered descriptions, and (b) what is set out in the exclusion/inclusion provisions in registered declarations. Therefore, the board should pay attention to the provisions in order to determine whether there might be any question as to the status of the meter once it is installed.

For example, it is arguable that a smart/sub-meter installed within unit boundaries becomes part of the unit if there is nothing that clearly says it isn't. Having said this, I believe that argument is likely not particularly strong: Presumably a bill of sale of some sort will indicate the device is an asset of the corporation that just happens to be located within the unit boundaries. However, the issue could become muddier if there is a provision in the declaration that specifies, as some do, that all meters and sub-meters servicing a particular unit are part of that unit. This could render irrelevant the fact that the condominium corporation purchased the meter. Therefore, in that case, if it is important to the board



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that the corporation retains ownership of the smart/sub-meter, it would also become essential to qualify that provision in the declaration so that the smart/sub-meter in question is expressly excluded.

The determination of who must repair and maintain the smart/sub-meter follows quickly on the heels of a determination of whether it is part of the unit or the common elements. Obligations to repair and maintain common elements and units are not defined by contract (other than a section 98 contract) but by the relevant provisions of the *Condominium Act, 1998* and the declaration of the condominium in question.

Note that even if the sub-metering contract entered into by the corporation (again, without necessity for unit owner involvement or approval) states the administrator will maintain the meters, but the

declaration makes the sub-meter part of the unit and gives the owner responsibility to maintain and repair it, the issue of who really should be doing what becomes less clear.

When installing smart/sub-meters, boards should carefully consider (with the assistance of legal counsel) the effects of the existing provisions in the declaration relating to these matters, and be prepared to propose and promote such amendments as are necessary to ensure that ownership and care of the meters are in the control of whichever party is most desirable to be held responsible (as between the corporation or the unit owners).

Note that unless the smart/sub-meter is either a part of the common elements or an asset of the corporation, costs associated with its future major repair or replacement cannot come out of the reserve fund.

■ Recommendation 4

The declaration should set out what happens if the unit owner fails to pay his or her electricity bill, and make any cost attributed to the condominium corporation chargeable as a common expense to the unit owner.

Sub-sections 53.17(2) and (3) of the *Electricity Act, 1998*, provide as follows:

2. If a smart meter or smart sub-metering system is installed in accordance with subsection (1) in respect of a unit of a condominium, the distributor, retailer or any other person licensed to conduct activities referred to in subsection (1) shall bill the consumer based on the consumption or use of electricity by the consumer in respect of the unit despite a registered declaration made in accordance with the *Condominium Act, 1998*.

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3. Subsection (2) applies in priority to any registered declaration made in accordance with the Condominium Act, 1998 or any bylaw made by a condominium corporation registered in accordance with that Act and shall take priority to the declaration or bylaw to the extent of any conflict or inconsistency.

Simply put, the intent of these two provisions is to prevent someone from arguing (successfully) that a provision in a declaration making electricity a common expense can

be relied on so that the costs for the supply of electricity get charged to the owners in accordance with the proportionate responsibility for the common expenses set out in the declaration and not in accordance with actual usage as determined by smart/sub-meter readings. This is a very important provision that goes to the heart of the purpose of smart/sub-metering to ensure that the individual user of the service pays in accordance with the quantity of his or her use.

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tial and important, in fact – but those provisions still leave open a number of other issues, such as: What happens if the unit owner doesn't pay? In the event of default, does the supplier have a right to seek payment from the condominium corporation? If the supplier shuts off service because of the defaulting unit, will that affect only the supply to the defaulting owner's unit or will it entail a service interruption for other units or common elements of the condominium? Are there any other costs of the service that could become attributed to the condominium corporation?

Although some of these issues might be dealt with in the sub-metering contract, it is not advisable to rely on this.

First, contracts can be amended and/or terminated and new contracts obtained. The terms that once were in place, could easily be changed. It is advisable to have provisions in the declaration that can cover a range of contingencies, not just those that relate to whatever contract is first entered into when the smart/sub-metering system is first obtained.

Second, there are simply some useful things that a contract cannot do that a declaration can. In particular, a contract (other than a section 98 contract) cannot impose common expense obligations on a unit owner or grant section 85 lien enforcement rights to the corporation in respect of any default under the contract. The declaration can.

Therefore, in view of the risks that:

(a) costs could become attributed to the condominium corporation despite the basic obligation of the unit owner to pay, including on account of a default of the unit owner; and

(b) the default of a unit owner could result in other undesirable consequences for the corporation or other unit owners (such as service interruptions or shut-offs affecting other units or rendering the subject unit unheated during winter);

it could be advisable to ensure there are provisions in the declaration that:

1. acknowledge that the unit owner is responsible to pay the charges billed by the supplier of the utility as

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determined by measurements taken by the smart/sub-meter for the owner's unit, and that the same does not form part of the budgeted expenses of the condominium;

2. allow the condominium corporation to pay any arrears or other charges of the unit owner relating to supply of electricity, although it is not obligated to do so;

3. acknowledge that any amounts paid by the corporation on account of arrears or other charges of the unit owner are additional common expenses payable by the owner in question and therefore will be subject of a lien pursuant to section 85 of the *Condominium Act, 1998*, if unpaid when demanded by the board;

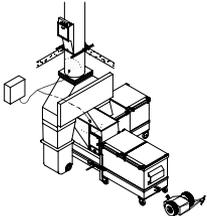
4. provide that the unit owner fully indemnifies the condominium corporation in respect of all costs, charges, claims, liabilities, etc., that arise on account of the supply of electricity to the unit owner's unit, or on account of the unit owner's default, act or omission in respect thereto, and that all amounts payable pursuant to such indemnity also are common expenses attributed to the owner's unit and subject of a lien pursuant to section 85 of the *Condominium Act, 1998*, if unpaid when demanded by the board.

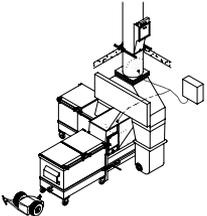
Refinements to these recommendations would be required in the situation where the supplier bills the condominium corporation in-

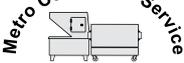
stead of the unit owner directly and the corporation itself must read the meters and determine the individual charges for each unit.

Again, in respect of all these matters and recommendations legal counsel should be obtained to help the board of the condominium corporation review the existing provisions of its declaration and determine whether any such or other additional provisions could be of any benefit to it in the context of its plan to implement smart/sub-metering of its electrical supply. ■

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