

**CONDOMINIUM AUTHORITY TRIBUNAL
AMENDED – ORIGINAL RELEASED ON JANUARY 10 2020**

DATE: January 19, 2020

CASE: 2019-00039R

Citation: Ram Shakyaver v. Metropolitan Toronto Condominium Corporation No. 971,
2020 ONCAT 2

Order under section 1.44 of the Condominium Act, 1998

Member: Susan Sapin, Member

The Applicant
Ram Shakyaver

Victor Yee and Taheratul Haque,
Counsel

The Respondent
Metropolitan Toronto Condominium Corporation No. 971

Zahir Antia, Agent

Hearing: April 29 to September 24, 2019, written on-line hearing

REASONS FOR DECISION

A. OVERVIEW

- [1] Ram Shakyaver is a unit owner and former board director of Metropolitan Toronto Condominium Corporation No. 971 (“MTCC 971” or “the condominium”). On January 15, 2019, he requested electronic records from MTCC 971, most of which it provided, except for: (1) the record of owners and mortgagees; (2) minutes of board meetings from January 15 to October 31, 2017; and (3) directors’ and officers’ liability insurance from January 16, 2016.
- [2] MTCC 971 would not provide the first two items unless Mr. Shakyaver complied with certain conditions. It submits that based on his past conduct, he would use those records to secretly publish false, misleading, defamatory and hostile information about the board of directors to undisclosed recipients, which the condominium states would undermine the board and harm property values.
- [3] For his part, Mr. Shakyaver maintains he is entitled to the records, his past conduct is irrelevant, and MTCC 971’s insistence on conditions amounts to a refusal under the Act. He submits the refusal is motivated by a longstanding personal animosity towards him on the part of MTCC 971’s representative in these proceedings (and current member of its board of directors), Zahir Antia. Accordingly, he is seeking a penalty against the condominium for refusing to provide the records without a reasonable excuse.

[4] As for the insurance documents (item 3), the condominium is willing to provide them, but Mr. Shakyaver disputes the proposed \$150 fee to produce the documents.

B. ISSUES AND ANALYSIS

[5] The issues to be decided are:

1. Is the condominium permitted to impose conditions on the release of records? If so, are the conditions warranted on the facts?
2. Does the condominium's requirement that conditions be met before it will release the owner's list and past board meeting minutes constitute a refusal under the Act?
3. If so, is a penalty warranted under s. 1.44(1)(6) of the Act because the corporation did not have a reasonable excuse for refusing to allow Mr. Shakyaver to examine/obtain the records?
4. Regarding the director' and officers' liability insurance documents, is the proposed fee of \$150 to produce these records reasonable?
5. Are either of the parties entitled to costs under the Act or the Tribunal's Rules of Practice?

C. RESULT

[6] For the reasons set out below, I find that Mr. Shakyaver is entitled to all the documents he has requested, a reasonable fee to produce the records is \$78.75, and a penalty is not warranted in the case.

Issue 1: Is the condominium permitted to impose conditions on the release of records?

[7] At the outset of the hearing, the condominium confirmed that it required Mr. Shakyaver to comply with the following three conditions before it would give him the requested records:

1. Provide a complete and verifiable list of email addresses to which he sent an email on January 22, 2018 that the condominium considered defamatory;
2. Refrain from sending out mass emails concerning the governance of the corporation to anyone not a unit owner at the time the email is sent; and
3. Swear an affidavit undertaking that:
 - he will not circulate any confidential corporation documents to anyone who is not a unit owner in MTCC 971;
 - he will accurately quote and not misrepresent or falsify the content of corporation documents; and

- he will copy the Board on any communication he circulates about the condominium, with a complete and verifiable list of recipients.

[8] The condominium proposed to draft the affidavit, reimburse Mr. Shakyaver up to \$50 to have it sworn before a notary public, and not disclose it unless he breached its commitments.

[9] Mr. Shakyaver submits there is nothing in the Act or its regulations that permits a condominium corporation to require a unit owner to comply with conditions before providing records. MTCC 971 submits the conditions are necessary to prevent harm to the corporation and that imposing conditions is not the same thing as a refusal, because it is not unwilling to provide the records, it just wants Mr. Shakyaver to agree to “reasonable” conditions before it will give him the documents.

[10] I was not provided with any cogent argument or case law by either party on this point. What the Act says however, is that,

- a condominium corporation is required to keep certain records (s.55 (1));
- a corporation shall permit an owner of a unit to obtain copies of those records if requested (ss. 55(3); and
- this Tribunal may award a penalty to a requester of records if it considers that the corporation refused to provide the records without a reasonable excuse (ss. 1.44(1)6).

[11] The plain meaning of these sections, read together, and in the absence of there being any other relevant provisions of the Act itself, is that faced with a request for records, a corporation has essentially two choices: provide the records, or refuse to provide them - with a reasonable excuse if it wants to avoid a penalty. There is no third option that would permit a corporation to require conditions before providing records. Although ss. 13.3 – 13.9 of the Regulation provide specific instructions about how condominiums may deliver records, none of these sections gives a condominium corporation the right to impose additional conditions or criteria that limit the requester's right to receive records.

[12] Accordingly, I find that by imposing additional conditions on Mr. Shakyaver’s right to access the requested records before it would provide them, the condominium has effectively refused to provide them.

Issue 2: Does the condominium have a reasonable excuse for refusing to provide the records?

[13] Mr. Shakyaver submits that this Tribunal does not have jurisdiction to determine the issue of reasonable excuse because in s. 55(11) of the Act, the legislature explicitly removed a condominium corporation’s defence of reasonable excuse when an owner makes a records request which is adjudicated before this Tribunal.

I reject this argument. Subsection 1.44(1) 6 of the Act specifically gives this Tribunal the jurisdiction to order a penalty if it considers that a condominium corporation has refused to provide records without a reasonable excuse. I find therefore that the Tribunal must consider the evidence and decide that issue.

- [14] MTCC 971 submits that Mr. Shakyaver's past conduct justifies the conditions it seeks to impose on him, and so, to the extent that I have concluded the imposition of such conditions was effectively a refusal to provide the records, it has a reasonable excuse for its refusal. I do not agree, for the reasons set out below.
- [15] The underlying principle of ss. 55(3), fundamental to the Act, is to promote transparency between condominium corporations and unit owners. There is no dispute that the owner's list and past board minutes are, respectively, core and non-core records to which unit owners are entitled.
- [16] There are very few limits to an owner's right to records. One, however, is that a request for records must be "solely related to that person's interests as an owner . . . having regard to the purposes of the Act . . ." (ss. 13.3(1)(a), O. Reg. 48/01). The mandated Request for Records form requires the unit owner to certify that their request is solely related to their interests as an owner. Also, a unit owner is not required to state the purpose for which they are requesting the records. Once a unit owner certifies that their request is solely related to their interests as an owner, it is up to the condominium corporation to prove the contrary on a balance of probabilities or possibly face a penalty because it failed to provide the records without reasonable excuse.
- [17] The Regulation does not define what a person's "interests as an owner" are, nor does it specify what a purpose for a records request "solely related" to those interests would be. It simply states that the request must "have regard to the purposes of the Act." To determine what those purposes might be, one must turn to case law, or infer them from other sections of the Act.
- [18] In *Sava*, cited above, this Tribunal held that evidence of a unit owner's past conduct - even conduct that is distressing, objectionable and ultimately undermines the interests of owners - the requesting owner's included - did not demonstrate that the request was "not solely related" to their interest as an owner.
- [19] The decision in *Benjamin* upheld the same principle but differs from *Sava* in that the Tribunal found that the corporation in that case did not prove, on a balance of probabilities, that the unit owner had in fact engaged in the conduct it objected to or that the conduct related to his request for records.
- [20] Mr. Shakyaver argues that *Sava* and *Benjamin* stand for a general principle that past misconduct on the part of a requestor can not, and should not, be used to deny a records request. I do not agree. Subsection 1.44(1) 6 of the Act specifically allows for a reasonable excuse and does not restrict the scope of what factors

might be relevant. I see no reason why the conduct of a requestor could not be a factor in determining whether a board has a reasonable excuse for denying access to records. This might arise where a board could connect a unit owner's behaviour to a request for records to show that the request was not solely related to their interests as an owner "having regard to the purposes of the Act." For example, a records request might reasonably be refused if a unit owner is running a business out of their unit and asks for records for the purposes of promoting that business.

[21] "Reasonable excuse" is a very narrow exception to the well-established principle, fundamental to the Act, that unit owners are entitled to broad and liberal access to the records of the corporation. As such, it should only apply in exceptional circumstances. I find the exception should not apply in this case, for the reasons set out below.

Evidence and Analysis

[22] The current records request arises against the backdrop of a longstanding animosity fraught with conflict between Mr. Shakyaver and Mr. Antia going back ten years - when Mr. Antia was first elected to the board, and Mr. Shakyaver ceased to be a member shortly afterward, after having served for many years. It sheds light on why the board refused to provide Mr. Shakyaver with an owner's list and past board minutes unless he agreed to certain conditions. It does not provide a reasonable excuse for the refusal.

[23] In support of its position, MTCC 971 submitted several documents as evidence that Mr. Shakyaver engaged in egregious conduct and misused corporate information in the past, and for this reason cannot be trusted with the records he asks for now unless he agrees to certain conditions:

- i) E-mails about the alleged improper awarding of contracts by Mr. Shakyaver when he was on the board of directors in 2010
- ii) A November 12, 2014 Election Campaign flyer
- iii) Documents relating to a January 22, 2018 e-mail addressed to "Fellow Owners and sent by Mr. Shakyaver, which MTCC 971 characterised as defamatory.

[24] I find this evidence does not support MTCC 971's claim that they had a reasonable excuse to withhold the list of owners and mortgagees and past board minutes from Mr. Shakyaver. MTCC 971 has not demonstrated that the conduct complained of affects his entitlement to receive the records, and that it sufficiently relates to his current request to excuse the refusal to give them.

- i) *E-mails about the improper awarding of contracts*

[25] After Mr. Antia was elected to the board at the AGM in late 2010, the newly constituted board cancelled a large maintenance contract awarded by the previous

board, of which Mr. Shakyaver was a member. Mr. Shakyaver then sent two e-mails to unit owners¹ complaining of being sidelined by the new directors and warning of “huge legal fees and costs of damages in tens of thousands of dollars if the contract(s) are cancelled.”

- [26] MTCC 971 submits that these e-mails were intended to undermine the newly elected board by spreading panic among owners and they are relevant to Mr. Shakyaver’s request for records because they show he cannot be trusted with sensitive information and is likely to misuse it by misrepresenting and disseminating it.
- [27] I reject this argument for several reasons. First, the events complained of took place ten years ago, when Mr. Shakyaver was a director with legitimate access to confidential information without needing to request access to records. The e-mails were sent in the context of a particular dispute between Mr. Shakyaver and Mr. Antia at the time – one which resulted in a lawsuit in Small Claims Court, where it properly belonged. Although I agree Mr. Shakyaver’s e-mails were inappropriate then, he is not a director now, nor has he been for ten years. The facts surrounding the past dispute, and Mr. Shakyaver’s conduct then, are not relevant to his current records request.
- [28] Second, providing a list of owners is not relevant to the concern that Mr. Shakyaver might email other owners. Although ss. 1(1) of the Regulation defines this list as a core record the corporation is required to keep under s. 46(1) of the Act, and which it must permit a unit owner to examine under s. 55(3), the record includes only the names of owners and mortgagees and their addresses for service. It does not include their electronic addresses. Decisions of the Superior Court of Justice (*Wu v. Carleton Condominium Corporation*, 2016 30525 (ON SCSM) (Canlii)) and of this Tribunal (*Margaret Samuel v Metropolitan Toronto Condominium Corporation No. 979 and Metropolitan Toronto Condominium Corporation No. 989*, 2019 ONCAT 9 (CanLII)) have held that owners are not entitled to examine or receive copies of the email addresses of other unit owners. This should address MTCC 971’s concern about Mr. Shakyaver using the list to send emails to other owners. I find MTCC 971 does not have any reasonable excuse for not providing the owner’s list simply because of speculation that he might send emails to other owners about an unspecified topic.
- [29] Third, I accept Mr. Shakyaver’s evidence that Mr. Antia engaged in conduct similar to his own when he responded to Mr. Shakyaver’s emails by also sending emails to owners. I find this undermines MTCC 971’s position that Mr. Shakyaver’s past behaviour was so unacceptable behaviour that it now serves as a reasonable excuse to deny his records request.

¹ “First directors report and Urgent report” – emails from the Mr. Shakyaver to owners dated January 3 and 11, 2011

ii) *November 12, 2014 Election Campaign Flyer*

- [30] MTCC 971 cites this document as a further example of conduct that warrants imposing conditions on Mr. Shakyaver's access to an owner's list and past board minutes. In 2014, Mr. Shakyaver decided to run for the board and authored a document that MTCC 971 describes as an election campaign letter from Mr. Shakyaver and another candidate that was "distributed throughout the building." MTCC 971 submits that this letter took information out of context and misrepresented it, and "illustrates the need for the board to be able to address false rumours designed to panic owners, frustrate potential sales and damage property values."
- [31] I was provided with no evidence that owners were panicked, or sales lost, or property values damaged by this letter. Furthermore, there is no evidence before me that Mr. Shakyaver's current records request is related to any purported false rumours or allegations made or intended to be made by him. I accept that the board was concerned by the content of the flyer. However, it was distributed as part of an election campaign, a specific context which does not apply to the current records request. I find this example of past conduct does not show that MTCC 971 has a reasonable excuse to deny Mr. Shakyaver access to its records.

iii) *Mr. Shakyaver's email January 22, 2018 e-mail to unknown recipients*

- [32] This is the most recent example cited by MTCC 971 in support of its reasonable excuse defense. I find it was this email that precipitated the board's decision to impose conditions on Mr. Shakyaver before it would provide him with the owner's list and board minutes he requested. I have found that in imposing conditions, the board in effect refused to provide the records. I further find that the board's refusal was directly related to Mr. Shakyaver's January 22, 2018 email. I find it is not appropriate for a condominium board to seek to interfere with a unit owner's entitlements under the Act in retaliation for conduct they do not like, and that this email does not provide a reasonable excuse for the board to refuse the records, for the reasons set out below.
- [33] The events that led to the board's decision to impose the conditions disputed in this hearing (outlined in paragraph 9, above) before it would release the owner's list and board minutes unfolded as follows. On January 22, 2018, Mr. Shakyaver sent an e-mail to an unknown group of recipients, but addressed to "Fellow Owners," that purported to impugn Mr. Antia's integrity as a director.
- [34] The board responded to this email by having its legal counsel send Mr. Shakyaver an "enforcement letter" dated February 16, 2018, outlining its concerns. The letter threatened further legal action unless Mr. Shakyaver agreed to provide an apology, a retraction and a list of e-mail addresses to which he had sent his e-mail. It further demanded he pay the cost of the enforcement letter (\$896.86). (This last issue is currently before the Small Claims Court and is not before me).

[35] When Mr. Shakyaver submitted his request for records on January 15, 2019 – almost a year after receiving the enforcement letter - the board’s “Response to a Request for Records Form” included an appendix dated February 20, 2019 listing the conditions it required before it would provide the records (the conditions at issue in this hearing) and one additional condition – that Mr. Shakyaver comply with the terms set out in the February 16, 2018 enforcement letter.

[36] I find that by tying Mr. Shakyaver’s records request to its enforcement letter, MTCC 971 in this case was in effect using the reasonable excuse provision as a punitive measure aimed at dealing with his antagonistic behaviour towards the board.

[37] In conclusion, having considered all of the relevant evidence presented, I find that MTCC 971 has not established on a balance of probabilities that the concerns it has raised are a reasonable excuse for its refusal to provide Mr. Shakyaver with the records he has requested.

Issue 3 – Is Mr. Shakyaver entitled to a penalty under ss.1.44 (1)6 of the Act because MTCC 971 refused to provide records “without reasonable excuse”?

[38] Although MTCC 971 has not made out a defense of reasonable excuse in the circumstances of this case, I find a penalty is not justified because there were mitigating circumstances. I find that MTCC 971’s submission that it felt Mr. Shakyaver’s emails, particularly the most recent, were harassing, provoking and antagonistic towards the board, is credible. His emails led to consequences he essentially brought upon himself, such as the enforcement letter. Although I have found that MTCC 971 was wrong to tie Mr. Shakyaver’s records request to its attempts to deal with his behaviour, the impulse is understandable. I also note that MTCC 971 gave Mr. Shakyaver most of the records he asked for. The deterrent value of a penalty does not apply in this case.

Issue 4 – Is the proposed fee of \$150 to produce the Director’ and Officers’ liability insurance documents and the past board minutes reasonable?

[39] Because these two records are non-core records, MTCC 971 is entitled to charge a reasonable fee for the time and labour required to find, redact and print or photocopy the records, as well as photocopying charges of 20 cents per page. MTCC 971’s Response form indicates the records are in paper form, and Mr. Shakyaver asked for electronic copies. It also indicates the corporation proposed to charge \$60 per hour for a half hour of labour to produce the insurance records, or \$30. Mr. Shakyaver feels the rate and the amount of time are unreasonable because the documents should be readily available and cites this Tribunal’s decision in Shaheed Mohamed v. York Condominium Corporation No. 414, 2018 ONCAT 3 which held that a rate of \$63/hour was not reasonable.

- [40] For the past board meeting minutes from January 15 to October 31, 2017, the corporation proposed to charge for 2 hours' labour, or \$120.
- [41] I understand Mr. Antia's evidence to be that MTCC 971 calculated the hourly rate by dividing the audited annual cost of property management services of \$128,603 by "the gross number of working hours in a year based on the Manager's 40-hour week." I am unable to determine from this limited evidence whether this equates to a reasonable fee for the time and labour to produce the records, and I received no evidence from Mr. Shakyaver or submissions from MTCC 971 on that point. In this respect, this case is similar to Mohamed, where the Member concluded that there was basis upon which to conclude that the rate proposed by the condominium was reasonable or otherwise in compliance with the legislation. In that case, the Tribunal adopted an hourly rate of \$31.50, roughly twice the minimum wage in Ontario, on the basis that the labour involved in producing the documents consisted of basic clerical functions. In the absence of any helpful evidence or submissions from either party in the case before me, and to avoid prolonging this dispute, I adopt both the reasoning and the hourly rate set out in Mohamed. This amounts to a fee of \$78.75 for the 2 ½ hours MTCC 971 has estimated as the labour required.

Issue 5 – Is either party entitled to their costs of this proceeding?

- [42] Costs in a proceeding are in the discretion of the Tribunal under ss. 1.44(1)4 of the Act and under Rule 32 of the Tribunal's Rules of Practice. There are two considerations in the award of costs. Does the conduct of one party justify the award of costs to the other and, if so, in what amount?
- [43] In this case, I find both parties' insistence on submitting documents and evidence that were not relevant to the issues in dispute despite my rulings and instructions had the effect of unnecessarily prolonging and complicating the proceedings and, no doubt, increasing their own costs. Furthermore, I was not provided with any submissions as to the amount of costs. Accordingly, I make no order as to costs.

ORDER

- [44] The Tribunal orders that:
1. MTCC 971 shall deliver to Mr. Victor Yee of Elia Associates, Mr. Shakyaver's legal representative, the most recent record of owners and mortgagees, minutes of past board meetings from January 15 to October 31, 2017, and the directors' and officers' liability insurance from January 16, 2016, in electronic format via email to the representative's email address or in paper format to their Toronto office in accordance with the Applicant's original Request for Records dated January 15, 2019, no later than 5 days after the amended Order is released.

2. Mr. Shakyaver shall pay to MTCC 971 a fee of \$78.75 for the records
3. No penalty or costs are awarded in this case.

Susan Sapin
Member, Condominium Authority Tribunal

Released On: January 19, 2020