CONDOMINIUM AUTHORITY TRIBUNAL

DATE: August 1, 2019
CASE: 2018-00340R
Citation: Ronald Smith v Metropolitan Toronto Condominium Corporation No. 773, 2019 ONCAT 24

Order under section 1.44 of the *Condominium Act, 1998.*

Member: Anne Gottlieb, Member

The Applicant Ronald Smith	Self-Represented
The Respondent Metropolitan Toronto Condominium Corporation No. 773	Natalia Polis, Counsel

Hearing: January 28, 2019 to June 7, 2019, Written electronic hearing

REASONS FOR DECISION AND ORDER

A. OVERVIEW

[1] This Application is brought pursuant to the jurisdiction of the Condominium Authority Tribunal (the "Tribunal") and deals with a Request for Records.

[2] The Applicant is the owner of a unit in Metropolitan Toronto Condominium Corporation No. 773 ("MTCC 733"). He served on the Respondent's Board of Directors ("the Board") as Treasurer of MTCC 773 (the "Respondent") from 2014-2017. The Applicant made a Request for Records on August 7, 2018 pursuant to s.55 of the *Condominium Act, 1998* (the "Act"). Participants in this hearing are collectively referred to as Users.

[3] For the reasons set out below, I find that the Applicant is not entitled to the records that he has requested, save and except for a copy of what may be called the "February sessions" including the February 8th and February 16, 2018 notes that the Respondent's Board approved, at its February 2018 Board meeting, to be included in the corporation's minute book. The Applicant's request for costs of this Application is denied. There will be no penalty imposed on the Respondent. I find that there are no exceptional circumstances to warrant that the legal costs of the Respondent be paid by the Applicant.

B. BACKGROUND

[4] On August 7, 2018 the Applicant made a Request for Records (the "Request") asking the Respondent for the following records from Oct 2017 to the date of the Request:

- Most recent approved financials (i.e., financial statements)
- Minutes of meetings held in the last 12 months
- June 2018 monthly financial statement package
- Management reports and attachments from October 2017 to date

[5] Copies of minutes of the Board meetings were sent via a series of emails from the Respondent's property manager to the Applicant. A copy of the financial package and approved financials were also sent to the Applicant.

[6] In an email dated September 18, 2018 to the Applicant, the Respondent's property manager stated:

> I sent you the minutes and you emailed that you had received them - and as you were on the Board you had the earlier ones and did not need them - Please let me know which minutes you did not receive. I even sent you last year's audited statement which are the approved Financial Statements within the last 30 days. The in-camera minutes pertain to individual owner information and privacy act. Management reports are for Board members and all discussions are reflected in the minutes….

[7] In his response email dated September 18th the Applicant asked to see a list of all the meetings so that he could identify what was missing. He stated that he believed that there was a right to redact in-camera minutes but not withhold them. He indicated that if the in-camera minutes referred to him, then there was no need to redact. He also requested the actual management reports (with attachments).

[8] The Board Response to Request ("the Response") was attached in an email from the property manager to the Applicant. Both were dated October 9, 2018. The Response stated that:

> The In Camera Minutes are a separate and confidential record of the Corporation. After discussion with our legal counsel, we can inform you that you have a right to receive only those parts of the In Camera Minutes which refer to your suite and residents of your suite. Also, we can confirm that for the 12 months ending August 7, 2018, there were no items in the In Camera Minutes which referred to your unit or the residents of your unit.
>
> The Management Report are working papers and items only become a Record of the Corporation if and when an item is acted upon at which time they are reflected in the Minutes.

[9] The Applicant acknowledged receipt of the Response in his email to the property manager dated October 9th and stated that he did not accept the Response. Subsequently, he brought this application to the Tribunal.

C. PRELIMINARY MATTERS AND PROCEDURAL DETERMINATIONS

[10] Preliminary matters in this hearing commenced on January 28, 2019 due to the Users' scheduling conflicts during the month of January and continued until April 9th with a few adjournments. Opening statements commenced on April 10th and the hearing continued until June 7th, 2019. There was a brief adjournment in April and another adjournment at the request of Counsel for the Respondent from May 3rd to May 27th, 2019.

a. Request to Anonymize This Case

[11] The Applicant raised issues regarding the privacy of this proceeding and the publication of this decision. He spoke of his professional reputation and livelihood. I considered his request to anonymize this decision. The Applicant did not raise any safety or security issues that would give rise to the need to anonymize this decision. I determined that the openness and transparency of this Tribunal outweighed the concerns raised and I denied the Applicant's request.

b. Request to Conduct Oral Cross Examination of Witnesses

[12] Both the Applicant and Respondent indicated that they preferred 'live' testimony. This Tribunal does not hold 'in person' hearings. Ultimately both Users agreed that testimony would be submitted in writing. The Applicant made a request to conduct oral cross-examination. Cross-examination may be done over the telephone, or through video conferencing in certain cases, when warranted.

[13] It is within the jurisdiction of this Tribunal to consider an alternate method to the hearing of applications. Section 5.1 of the Rules of the Condominium Authority Tribunal (the "CAT") provides that:

> 5.1 Unless the CAT allows another method, all Users must use the CAT-ODR system to communicate, and exchange documents and messages.

[14] Counsel for the Respondent submitted that there was "no inherent right to cross-examination, let alone oral cross examination of witnesses at this Tribunal". I referred the Users to the s.10 of the *Statutory Powers and Procedures Act* (SPPA) which provides:

> 10.1 A party to a proceeding may, at an oral or electronic hearing,
> (a) call and examine witnesses and present evidence and submissions; and
> (b) conduct cross-examinations of witnesses at the hearing reasonably required for a full and fair disclosure of all matters relevant to the issues in the proceeding. 1994, c. 27, s. 56 (20).

[15] I indicated to both sides that “from a perspective of natural justice and procedural fairness, both Users will get a chance to fully present their case and cross examine witnesses”. I deferred the determination of the method of cross-examination, until the end of the preliminary phase of the hearing, so I could assess the issues.

[16] Numerous process requests were made in the preliminary phase which required me to issue a direction or written interim ruling. These rulings were provided to the Users and form part of the record of the hearing. They will not be repeated in this decision.

[17] After receiving further submissions about oral cross-examination, I ruled that cross examination would be conducted in writing. I put into place protocols to ensure that witnesses would respond to questions posed in cross-examination truthfully and independent of input from others.

D. ISSUES

[18] The issues in this dispute may be summarized as follows:

1. Is the Applicant entitled to a copy of in-camera minutes from Board meetings from Oct 1, 2017 to the date of the Request for Records?

2. Is the Applicant entitled to receive a copy of management reports and their attachments for the time period requested?

3. Is the Applicant entitled to receive a copy of notes of ‘informal meetings’?

4. Did the Respondent provide a reasonable excuse for denying the documents requested?

5. Should a penalty be awarded?

6. Should costs be awarded?

E. EVIDENCE AND LEGAL ANALYSIS

[19] All the evidence and submissions of both Users have been carefully considered. Reference to any evidence is for the purpose of clarifying the basis for the decision and Order.

1. Is the Applicant entitled to a copy of in-camera minutes from Board meetings from Oct 1, 2017 to the date of the Request for Records?

[20] The Act does not contemplate or define the term “in-camera”. The term in-camera was used in this proceeding to generally refer to parts of a Board meeting that might take place on a confidential basis.

[21] Section 55(1) of the Act states that the corporation shall keep adequate records and cites financial records of the corporation and a minute book containing the minutes of owners' meetings and minutes of board meetings. This is the basis for the Applicant's Request. He asked for information not available in the minutes provided. By way of example, he specified that Christmas bonuses for 2017 were not reflected in the minutes provided and therefore stated "one can only conclude that they would be found in the in-camera minutes".

[22] Section 55(3) of the Act sets out the right to examine or obtain a copy of records:

> 55(3) The corporation shall permit an owner, a purchaser or a mortgagee of a unit or an agent of one of them duly authorized in writing, to examine or obtain copies of the records of the corporation in accordance with the regulations, except those records described in subsection (4).

Records that relate to "specific units or owners" fall into one of the exceptions to the right to examine or obtain records, as set out in section 55(4)(c):

> 55(4) The right to examine or obtain copies of records under subsection (3) does not apply to,
> […]
> (c) subject to subsection (5), records relating to specific units or owners;

Section 55(5) provides that the exception in section 55(4)(c) would not prevent a unit owner from examining or obtaining copies of records that relate to that owner's unit.

[23] The Respondent advised the Applicant that it would provide any in-camera minutes that related directly to the Applicant or the Applicant's unit. Ms. Roveto, the witness for the Respondent, (the "Witness") serves as Treasurer on the Respondent's Board. In her sworn affidavit she stated that the in-camera minutes requested do not relate to the Applicant. This information is the same information that was previously provided to the Applicant by the property manager via email and submitted by the Applicant into evidence. I accept the testimony of the Witness that the in-camera minutes do not relate to the Applicant or Applicant's unit.

[24] The Witness testified that in-camera sessions at Board meetings which she has attended "have been for the purpose of candidly discussing such items as: (i) specific unit and owners; (ii) on site staff or contractors including security, property managements, etc.; (iii) actual or contemplated litigation involving the Corporation and; (iv) reports from professional such as lawyers and communications to this effect". These may be appropriate topics for the Board to treat confidentially, to the extent that they may come within the explicit exemptions for access to records set out in subsection 55(4) of the Act.

[25] Section 55(4) of the Act sets out exemptions to the right to obtain records and specifies:

> Section 55(4) The right to examine or obtain copies of records under subsection (3) does not apply to,
> (a) records relating to employees of the corporation, except for contracts of employment between any of the employees and the corporation;
> (b) records relating to actual or contemplated litigation, as determined by the regulations, or insurance investigations involving the corporation;
> (c) subject to subsection (5), records relating to specific units or owners; or
> (d) any prescribed records.

[26] In cross-examination, the Applicant put questions to the Witness about information not included in the regular minutes and which he assumed must be in the in-camera minutes. The Witness gave answers to the questions posed and explained why the information was not in the minutes. The explanations were explicit and reasonable.

[27] The Witness also stated in her affidavit that the building only has 42 units, and to redact in-camera minutes, would "not properly or effectively privatize the identity of the unit, unit owners or residents…." She stated that the Applicant is very well informed of the events that transpire in the building and regularly speaks to staff and other unit owners about the building. This statement is plausible and credible, based on the level of details provided by the Applicant in the evidence that he uploaded to the CAT-ODR system, and based on the questions he posed in cross-examination. The Applicant himself testified that he is well acquainted with the residents of the Corporation and knows approximately 46 residents (in a building of 42 units).

[28] The Witness stated that providing in-camera minutes would open further requests and inquiries by the Applicant into why decisions were or were not made by the Board. This is not acceptable grounds for refusing a request for records that the Applicant might be entitled to receive, and this was not given consideration.

[29] I accept the submission of the Respondent that redacting the names and unit identifiers will not guard the privacy of the owners or their units, in this building. I acknowledge the testimony of the Witness and the submission of Counsel that here, proper redaction to ensure privacy would produce pages with 'headings and dates and black lines'.

[30] I find that the Applicant is not entitled to a copy of the in-camera minutes. I am satisfied that redactions would not ensure the privacy of the owners and their units. The Respondent has also satisfied me that the in-camera information contains matters to which the Applicant is not entitled, pursuant to the exemptions listed in s. 55 (4) of the Act.

2. Is the Applicant entitled to receive a copy of management reports and their attachments for the time period requested?

[31] The Applicant stated that he wished to "see what management recommended…that was not acted on." The Witness stated that these requests are attempts by the Applicant to micromanage the Board.

[32] The Applicant had specific questions that were raised by the minutes of the Board meetings provided that related directly to the management reports, and yet the management reports were not attached. This absence of information was, in part, a reason for the Applicant's request to see the reports. He provided examples of minutes where management reported items as "completed, deferred or pending" and no further information was provided.

[33] The Respondent stated that "providing the Applicant with management reports would open a floodgate of additional questions and unsubstantiated speculations, allegations and criticism that would inevitably cost the Corporation further expenses." The Applicant has provided a volume of correspondence to and from the property management. However, that would not be a reason to deny access to the management reports, if they are a record of the corporation.

[34] It is noted by both Users that property management reports are not specifically itemized as a record under s. 55 of the Act. The Applicant argued that this list is not exhaustive, and that the language of the section is inclusive and uses the word "including". The Respondent submitted that the reports consist of notes or drafts for the Board to consider and are not records of the condominium corporation within the definition of s.55 of the Act.

[35] The Applicant may be correct that the minutes provided do not fully capture the management report items considered by the Board. It does not necessarily follow that the Applicant is entitled to copies of the management reports and their attachments. I accept the submission of the Respondent that the management reports are drafts or notes and only become a record of the corporation to the extent that they are accepted by the Board and reflected in the minutes of a Board meeting. It may be helpful going forward, for the Board to append or fully include the agenda and other items approved by the Board, as segments in the Board minutes.

[36] I find that the Applicant is only entitled to see the parts of the management reports that are approved and reflected in the minutes of the Board meetings. As the Applicant has acknowledged receipt of the Board minutes requested, there is nothing further to be provided to the Applicant in this regard.

3. Is the Applicant entitled to receive a copy of notes of 'informal meetings'?

[37] With respect to the Applicant's request for notes of informal meetings of the Board, the Act provides protocols for Board meetings and Directors should be aware of these requirements. The Act provides for the minutes of Board meetings and regards them as a record of the corporation, to which an owner is entitled. An 'informal meeting' is not a term found in the Act.

[38] As previously outlined, section 55(1) of the Act requires a condominium corporation to keep adequate records and sets out a list of those records, which includes, at paragraph 2, "a minute book containing the minutes of owners' meetings and the minutes of board meetings."

[39] Here the Applicant submitted into evidence Minutes of the February 2018 Board, including this excerpt:

> Special Board Meeting Notes – The Director informal meeting Notes of February 8, 2018 (Borrowing By-Law; Window Project); February 16, 2018 (Property Management services discussion; security requirements, Edison Engineering fee proposal). It was proposed and agreed that these Notes be kept in the Minute Book.

[40] The Respondent submitted that the inclusion of the Directors' notes was referred to in the President's report in the Minutes of the meeting held on February 26th and that the minutes of the February 26th meeting were already provided to the Applicant. It is the inclusion of these notes in the minutes that prompted the Applicant's request for other such notes of 'informal meetings'. The Board chose to include these notes in the formal minutes of a later February 2018 Board meeting. The Applicant wants copies of notes from other such informal meetings.

[41] The Witness stated that decisions are properly made by the Board. She states that meetings of Directors require a quorum and notice as per s. 35 of the Act. She indicated that meetings of the Board complied with s.32 and s.35 of the Act.

[42] The Respondent submitted that "the Corporation has no obligation to maintain minutes of personal conversations between Board members or staff or other individuals, contractors, etc. outside the owner's meetings and board meetings." The Respondent submitted that in the event that a director took personal notes during discussions and/or conversations with other directors, staff, management, or contractors the notes would not constitute meeting minutes for the purposes of section 55 of the Act.

[43] On cross examination, the Witness provided an explanation for the irregularity and inclusion of what the Respondent referred to as the February 8, 2018 session and the February 16, 2018 session, which were collectively called "the February sessions". She stated that these notes were included by the Board and were "indicative of the Boards efforts to ensure that the Minute Book is reflective of the Boards' discussions during this time period". She also indicated on cross-

examination that no decisions were made at those sessions and that decisions "were held for the official board meeting".

[44] Both the Applicant and the Respondent put forth arguments from the case of *Stewart v. Toronto Standard Condominium Corporation No. 1591*, 2012 Carswell Ont. 10003, (ONSC). I note that this case was decided prior to the current Act and deals with notes of meetings, and not with notes of 'informal meetings'.

[45] In his opening statement, the Applicant stated that "notwithstanding that the minutes of the February 8, 2018 and February 16, 2018 sessions were supposed to be kept in the minute book they were not given to me." I accept that while generally notes might not be considered a record, in this case, the Board itself decided to incorporate these specific notes into the minute book, to form a record of the corporation. I therefore rule that the 'February sessions' are records that are to be provided to the Applicant.

4. Did the Respondent provide a reasonable excuse for denying the documents requested?

[46] The Respondent claimed that the Applicant sent the Board and property management "incessant questions and emails" and "constant requests for information, emails and complaints." Based on the selection of emails submitted as evidence in this application it is reasonable to infer that there has been a large volume of emails exchanged between the Users and between the Applicant and property management.

[47] The Respondent claimed that the Applicant is on a "fishing expedition" and that "the Applicant has continuously tried to micromanage the board and inundate MTCC 773 with emails questioning the board's decisions". The Applicant vehemently denied these allegations. As I stated to the parties during the hearing, "to the extent that these matters are extraneous and are not relevant to the issues to be decided in this application - I will not consider them or address them."

[48] The Applicant had specific issues and questions that he wanted answered. They did not appear random. However, many of the documents and questions related to the management and governance of the condominium and were not specifically issues before this Tribunal.

[49] I do not see any reference to a request for the 'February sessions' in the emails provided by the Applicant as evidence of events leading up to this application. The Applicant did provide copies of emails from the Respondent asking the Applicant "if you are missing anything, please let me know", or words to that effect, referring to the document request. The fact that the notes of the 'February sessions' were not identified as 'missing' by the Applicant, might be a reasonable excuse for not providing them, prior to this application.

5. Should a penalty be awarded?

[50] The Applicant asked the Tribunal to award a penalty in the maximum amount of $5,000.00 for the behaviour of the Respondent. The Applicant also requested an award of aggravated and punitive damages. The latter two types of damage awards are not within the current jurisdiction of this Tribunal.

[51] Pursuant to s. 1.44 (6) of the Act this Tribunal may order a penalty to be paid if it finds that "the corporation has, without reasonable excuse, refused to permit a person to examine or obtain records". Where a penalty is awarded, it is in part meant to act as a caution not to repeat these actions, in the future. I find that there is no basis upon which to award a penalty against the Respondent.

6. Should costs be awarded?

[52] In his closing statement, the Applicant requested that the Tribunal award costs representing compensation for his time at the rate of $400 per hour for 100 hours. In his submission, he asked for $40,000. Less than a week later, when presenting the bill of costs, the amount increased to $67,122. The Applicant did acknowledge that the Tribunal may award him a lesser amount.

[53] During this proceeding, the Applicant held out his professional credentials to this Tribunal, as an expert. At other stages of the process, he characterized himself as someone who should be granted more time to fulfil tasks. I did grant him a great deal of leeway, and time, as a self-represented party.

[54] Costs are at the discretion of the Tribunal under subparagraph 1.44(1) 4 of the Act and under the Tribunal's Rules of Practice. Rule 32 states:

> 32.1 The CAT may order a User to pay to another User or to the CAT any reasonable expenses or other costs related to the use of the CAT, including:
> (a) any fees paid to the CAT by the other User;
> (b) the other User's expenses or other costs that were directly related to this other User's participation in the Case; and
> (c) the other User's or the CAT's expenses or other costs that were directly related to a User's behaviour during the Case that was unreasonable or for an improper purpose, or that caused an unreasonable delay.

[55] This application put both the Applicant and the Respondent to time and expense that could have been avoided. The conduct of a User may be assessed to justify the award of costs to either party. It can be used to consider whether the conduct of a party tended to shorten or lengthen the proceeding unnecessarily, or whether any step in the proceeding was unnecessary or improper. Behaviour exhibited at the Tribunal or in relation to a matter before the Tribunal may be relevant to an

award of costs.

[56] I am aware that the Applicant reviewed and prepared each step very thoroughly. He submitted lengthy documents and made difficult arguments before the Tribunal. There were also times when the evidence or questions on cross-examination did not relate directly to the specific Request for Records, and only reflected on the behaviour or interaction of the Users.

[57] There is no basis for the Applicant to have any expectation of compensation at the level he is claiming. The Rules of Practice for this Tribunal only contemplates awards of costs for legal services in exceptional circumstances, and he does not fall into that professional category. I also do not accept his request for reimbursement of his out of pocket costs to bring this matter before the Tribunal. I find his submission excessive and unsupportable and I decline to award any costs to him.

[58] The Respondent also claimed an award of costs. In her submission, Counsel for the Respondent asked for $13,780.50. When asked to present a bill of costs less than a week later, she provided a detailed bill of costs totalling $14,901.88. The time spent by Counsel on this application and hearing and the amount claimed seem reasonable in the context of this hearing.

[59] The Respondent submits that there are exceptional reasons to award legal costs in this case and cited Rule 33 of the Tribunal's Rules of Practice: "the Tribunal will not order one User to pay to another User any fees charged by that User's lawyer or paralegal, unless there are exceptional reasons to do this."

[60] The Respondent submits that the emails to and from the Applicant in this application are a small sample of the number of emails and requests submitted by the Applicant. That is indicative of the interaction with the Applicant, but it is not a basis upon which to award costs under Rule 33. This Tribunal is designed for self-represented parties to file their applications and represent themselves as both applicants and respondents. That means that some extra time is granted while the hearing process is explained or unfolds.

[61] I have reviewed the Respondent's submissions in her claim for costs. I find that there are no exceptional circumstances in this case, and I make no award for costs.

ORDER

[62] The Tribunal orders that:

1. The Respondent, through its property manager or through its Counsel, shall provide the Applicant with a copy of the notes from February 8, 2018 and February 16, 2018 known as the ‘February sessions’ which were to be kept in the minute book and were referenced in the Feb 2018 Board meeting minutes, as approved by the Board of MTCC 773. The Respondent is to provide these to the Applicant, no later than 30 days from the date of the release of this decision to the Users. These are to be produced, at no cost to the Applicant. They may be forwarded to the Applicant electronically.

2. There is no order for costs and no penalty awarded.

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Anne Gottlieb
Member, Condominium Authority Tribunal

Released on: August 1, 2019