CONDOMINIUM AUTHORITY TRIBUNAL

DATE: November 18, 2019
CASE: 2019-00030R
Citation: Shelley Dubois v Algoma Condominium Corporation No. 17, 2019 ONCAT 47

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

Member: Michael Clifton, Member

The Applicant Shelley Dubois	Self-Represented
The Respondent Algoma Condominium Corporation No. 17	Sonja Hodis, Counsel

Hearing: June 11, 2019 to September 9, 2019, Written Online Hearing.

REASONS FOR DECISION

A. INTRODUCTION

[1] The Applicant is a unit owner in the Respondent condominium corporation, and has made three requests for records under section 55 of the *Condominium Act, 1998* (the "Act") since October 2018.

[2] The Applicant withdrew the first request, and only the second and third requests are the subject of this case.

[3] The Applicant's second request for records was made jointly with two other unit owners and was delivered in December 2018, seeking access to copies of the paid invoices and payroll records used by the Respondent's auditor to prepare the audited financial statements for the period from July 1, 2017 to June 30, 2018.

[4] The Respondent replied that it could provide the paid invoices upon receipt of a fee estimated to be $900, but that provision of the payroll records was prohibited under subsection 55(4) of the Act. The Respondent further stated that, in any event, it had no employees under contract.

[5] The Applicant took issue with the estimated $900 fee and applied to the CAT for resolution of that issue.

[6] The Stage 2 Summary and Order indicates that the parties came to an agreement on the amount of the fees, but there was a dispute between the parties as to whether or not the Applicant is permitted to share records (if provided access to them) with other unit owners. Also, at or before Stage 3, the Respondent changed

its position, alleging that the Applicant was not entitled to receive any of the requested records.

[7] The third request – for copies of the Respondent's bank statements and employment contracts for the period of July 1, 2017 to June 30, 2018 – was made during the course of the Stage 2 proceedings. The parties agreed to have this request dealt with in these Stage 3 proceedings.

B. ISSUES & ANALYSIS

[8] The issues to be decided in this case are as follows:

1. Is the Applicant entitled to examine the records requested in the second and third requests for records?

2. If so, did the Respondent unreasonably refuse to provide the requested records such that a penalty should be ordered?

3. What is a fair and reasonable fee for the requested records?

4. Is the Applicant is entitled to share the records received with other owners?

[9] I find that the Applicant is entitled to all of the records requested other than the payroll records. I also find that the fee agreed upon by the parties in Stage 2 is reasonable, and that a penalty should not be imposed.

[10] In view of the facts of this case, I find that it is not necessary or appropriate for me to make a determination as to whether the Applicant is entitled to show the records to other unit owners, but I conclude that the Applicant is not prohibited from sharing the information she obtains from them.

[11] No costs are ordered against either party.

ISSUE 1: IS THE APPLICANT ENTITLED TO EXAMINE THE RECORDS REQUESTED IN THE SECOND AND THIRD REQUESTS FOR RECORDS?

[12] I will first answer the question of entitlement relating to the requested payroll records, as this is capable of being treated simply and discretely from the Applicant's entitlement to the other records requested.

[13] Subsection 55(4)(a) of the Act states that an owner's right to examine or obtain copies of records under subsection 55(3) of the Act, "does not apply to… records relating to employees of the corporation, except for contracts of employment". Payroll records clearly relate to employees of the corporation. Further, subsection 55(6)(a) of the Act allows for no exceptions to this prohibition. Therefore, the Respondent was correct to refuse to provide those records.

[14] In regard to the balance of the documents requested by the Applicant – namely, paid invoices used by the Respondent's auditor to prepare the audited financial statements for the period from July 1, 2017 to June 30, 2018, and the bank statements and employment contracts of the Respondent for the same period – I note that there are no such statutory prohibitions restricting access to them. Therefore, absent other justifiable reasons, the Applicant is entitled to receive them.

[15] The Respondent has given the following reasons for refusing to provide any of the requested records to the Applicant:

a. It believes the Applicant is on a "fishing expedition" similar to the plaintiff in Lahrkamp v Metropolitan Toronto Condominium Corporation No. 932, 2017 CanLII 74184 (ON SCSM) ("Lahrkamp 2017"), and that such requests do not solely relate to the Applicant's interests as an owner, having regard to the purposes of the Act, as required as required by subsection 13.3(1)(a) of Ontario Regulation 48/01 (the "Regulation"); and

b. the production of the requested invoices in particular places a significant burden and cost upon the unit owners of the Respondent.

[16] To demonstrate that the Applicant is on a fishing expedition, the Respondent relied heavily on the facts and disposition of Lahrkamp 2017, especially comparing the requests and stated reasons of the plaintiff in that case to those of the Applicant in this case. The Respondent encouraged me to rely on Lahrkamp 2017 as an authority for making a determination that the Applicant is on a fishing expedition and therefore is not entitled to receive the requested records.

[17] Several of the Respondent's arguments also rely on reference to the content and credibility of the Applicant's stated reasons for wanting access to the requested records. If I were to accept such arguments as they are framed by the Respondent in reliance on the judgment in Lahrkamp 2017, this might give the impression that an onus rests on the person requesting records to provide justifiable reasons for the same. However, this conclusion would be contrary to the current legislation.

[18] Subsection 13.3(2) of the Regulation – which was neither made nor in force or applicable at the time Lahrkamp 2017 was decided – states a requester is not to be required to provide reasons for the request. Therefore, the onus is on the condominium corporation to demonstrate that a request does not satisfy the requirements of subsection 13.3(1)(a) of the Regulation.

[19] In this case, the Respondent benefits from the fact that the Applicant, without the benefit of legal counsel, has freely expressed her reasons for wanting the records in question. This has given the Respondent the opportunity to assess them. However, I do not find the Respondent's conclusions in regard to them to be

persuasive.

[20] In summary, I do not find that the Applicant is on a fishing expedition or that there is other compelling and credible evidence that the Applicant's requests do not solely relate to her interests as an owner, having regard to the purposes of the Act. I also do not agree with the Respondent's strict comparison of the plaintiff or plaintiff's requests in Lahrkamp 2017 with the Applicant and the Applicant's requests in this case.

[21] By way of explanation of this conclusion, in the balance of this part of this decision I examine the following arguments that were put forward by the Respondent:

a. That the Applicant's request for one years' set of invoices should be treated in the same manner as Lahrkamp's request for copies of the General Ledgers of his condominium corporation;

b. that the Applicant provided no credible evidence for the concerns that motivated her requests for records;

c. that the Applicant's stated general purpose for wanting access to the records is itself evidence that the Applicant is on a fishing expedition;

d. that the Applicant's stated general purpose for wanting access to the records is not the Applicant's actual purpose, and that her actual purpose is not answered by the records requested;

e. that the Applicant's refusal to speak with the auditor of the condominium is evidence that the Applicant is on a fishing expedition;

f. that the Applicant had other "ulterior motives" for her request for records, including to be elected to the board of directors and to harass the current board;

and then I conclude this section with an assessment of the Respondent's argument that the Applicant's requests impose too great a burden and cost on the Respondent.

[22] Contrary to the Respondent's submissions, I do not find that the decision of the Court in Lahrkamp 2017 regarding Lahrkamp's request for copies of the General Ledgers of his condominium corporation for the eight-year period running from 2007 to 2014 is applicable to the Applicant's request for one years' set of invoices. Both the type and time period of the records requested by the Applicant are significantly narrower in scope than what Lahrkamp requested.

[23] Discussing the request for the General Ledgers, the Court in Lahrkamp 2017 concluded that Lahrkamp "provided no credible evidence as to what specific

information may be contained in the GLs that would be of interest to him, nor any credible evidence that access to the GLs…would permit him to ascertain whether the Board or property manager had properly disclosed their obligations." The Respondent would have this conclusion applied to the Applicant in this case. However, in her submissions in this hearing, the Applicant clearly cited a number of specific types of expense that are of concern to her, and the Respondent has affirmed some of the circumstance do exist, even though it disagrees with the Applicant's view of them. I believe that these facts put to rest the Respondent's allegations that the Applicant had not identified information in the invoices or bank statements that might be of interest to her, and that the Applicant did not provide any credible evidence of the same.

[24] The Respondent further argued that the Applicant's most generally stated purpose for her requests for records – to determine the financial health of the condominium – was itself evidence of a fishing expedition. The Respondent stated that since there was sufficient information to determine the financial health of the corporation from the audited financial statements that the Applicant, as well as every other unit owner, already has, this stated reason could not justify a request for the records in question. Again, the Respondent is relying on a comparison with the situation and reasoning in Lahrkamp 2017, which I find does not apply perfectly in this case.

[25] While the Respondent's assessment of the usefulness of the audited financial statements might be correct, I find that the Respondent places too much stock on the Applicant's general statement of her purpose for requesting records in order to make its comparison with Lahrkamp 2017. Unlike Lahrkamp, the Applicant cited several specific issues of concern and, in providing her general statement of purpose, seemed to be trying to summarize the general character of those various motivating issues rather than to suggest that this sets out her entire or sole purpose in requesting the records. In view of her interest in some specific transactions or types of transaction, the desire to access records that present details about those transactions does not appear to be inappropriate.

[26] The Respondent's focus on that generally stated purpose also appears disingenuous since, in its other submissions, the Respondent argued that it did not actually believe that concern for the financial health of the condominium was the Applicant's actual concern. Instead, the Respondent argued that her actual concern was with several specific decisions of the board.

[27] The Respondent submitted,

> The questions the Applicants have raised in their submission, although most of them deal with matters outside the jurisdiction of the CAT, can be summarized as questions about "why" the Board made certain decisions…
>
> …The Applicants are not saying that they don't know where money was spent. Their position is that they don't like what the Board has spent the money on.

and the Respondent's witness, Dan Kiperchuk, stated,

> …the Applicants real reasons for wanting financial records is rooted in the fact that the do not like decisions made by the Board of Directors.

[28] Concern about the manner in which the board of directors uses the condominium's funds may reasonably fall within the interests of unit owners, having regard to the purposes of the Act. The Respondent does not actually say that this is not the case, but suggests – based on its view that answers to those concerns "are not found in the invoices and bank statements" – that if the Applicant's concerns over board decisions are the actual reason for her requests, this demonstrates that she was on a fishing expedition.

[29] The Applicant expressed concerns about some specific expenditures, and it is plausible that relevant information about those expenditures might be disclosed in the requested invoices and bank statements. Yet, even if the Respondent is right about the relative uselessness of those records and the Applicant is mistaken about which records will best address her concerns, such a mistake does not disentitle her from accessing the requested records.

[30] Another fact cited by the Respondent to demonstrate that the Applicant is on a fishing expedition is the allegation that the Applicant refused to speak with the Respondent's auditor. While this was not denied by the Applicant, it does not, on balance, suggest the Applicant was likely on a fishing expedition when requesting records. Although there is the opportunity for unit owners to make inquiries of their condominium's auditor – and a special opportunity to do so might have been provided by the Respondent in this case – it is not a requirement that they do so rather than make inquiries directly of their board of directors.

[31] The last argument put forward by the Respondent is that the Applicant has "ulterior motives" for her requests. While the Respondent's formal submissions state such unknown motives should be "presumed" to be not related to any purpose under the Act, Mr. Kiperchuk, identifies them as being to harass the board of directors and to be elected to the board.

[32] In principle, the existence of ulterior motives is not a reasonable basis for refusing to provide copies of records. I take note that the word "ulterior" refers to something hidden, not obvious or not admitted. A person requesting records is not required to provide the corporation with a statement of the purpose of the request. Technically, therefore, the motives for any request for records might almost always be viewed as "ulterior," being unexpressed in the request and potentially not otherwise known to or knowable by the condominium board that received it. It would be contrary to the Act to adopt a presumption that the unadmitted motivations of a requester for records are necessarily contrary to the purposes of the Act.

[33] It is therefore not relevant whether the Applicant has "ulterior" motives but, again, only whether the Respondent has demonstrated that the Applicant's reasons are

not solely related to her interests as an owner, having regard to the purposes of the Act. As noted, the Respondent has identified two such "ulterior" motives that it believes are inconsistent with the purposes of the Act.

[34] Regarding the allegation that the Applicant's request is motivated by a desire to be elected to the board, I am not prepared to suggest that a unit owner's desire to be elected to their condominium's board of directors cannot relate to their interests having regard to the purposes of the Act, but the failure of the Respondent's argument here is that the Respondent provides no actual evidence of this motivation and simply asserts it as a belief.

[35] The Respondent's further allegation of harassment – if proven – would undermine the Applicant's entitlement to the records; yet here, again, the Respondent's evidence is not compelling.

[36] Mr. Kiperchuk, states that the Applicant and the owners with whom she jointly submitted the second request for records "are constantly emailing, calling or confronting Board members." No details about the number, frequency or content of such calls, emails or confrontations were provided. The Respondent merely states that those owners "enjoy harassing the Board with their demands" and "have continually harassed the Board." While such conduct, carried on to a certain degree or based upon its manner and tone, could constitute harassment, the submissions of the Respondent are not sufficient for me to draw that conclusion in this case.

[37] Also in connection with this allegation, and again seeking to compare the Applicant to the plaintiff in Lahrkamp 2017, the Respondent states that the Applicant has made "numerous" requests for "numerous" records. I note that the Applicant has made only three requests for records, each one being more limited in its scope than the one before. Although somewhat close together in time (having been delivered over just a seven-month period), in the context of all the facts of this case I do not consider the submission of these three increasingly focused requests for records to be numerous in any sense that might support a claim of harassment.

[38] The Respondent also complained that the Applicant frequently changed her mind about her requests and related matters. The Respondent cites that the Applicant (1) withdrew her first request for records, (2) requested the same records again during the Stage 2 proceedings, and then withdrew the request again, and (3) during Stage 2 agreed to a fee of $923.20 for the records, but at the commencement of Stage 3 asked that the reasonableness of this fee be reviewed.

[39] I cannot consider or comment on what was discussed or done during Stage 2, other than what was clearly set out in the Stage 2 Summary and Order. The Respondent ought not to have sought to submit such information as evidence in this case. I do not find the other alleged changes of mind to be clearly unreasonable in the circumstances or, even if mildly irritating, that they should

cause the board to feel harassed by the Applicant.

[40] I do not find that any of the foregoing conduct of the Applicant, or any other conduct disclosed in the parties' submissions in this case, amounts to harassment.

[41] In general, based on the evidence of both parties, I find that the Applicant is not like the plaintiff in Lahrkamp 2017. In that case, the plaintiff made many more requests for records than the Applicant has made. Further, such requests were for a significantly greater number and range of records; and not only had this been going on for years, but the Court stated that the plaintiff also "pestered" the condominium's staff and litigated against the condominium frequently "for sport". In many respects, the conduct and requests of the plaintiff in Lahrkamp 2017 are clearly more egregious than any of the conduct or requests made by the Applicant in this case. Comparison of the Applicant with the plaintiff in Lahrkamp 2017 appears to be a significant exaggeration of the nature and effects of the Applicant's conduct.

[42] In regard to the submission that the production of the requested records – particularly the invoices – places a significant burden and cost upon the unit owners, the Respondent is again borrowing from the reasoning in Lahrkamp 2017. In that case, the Court stated (at paragraph 37),

> [The corporation] may refuse a record if the burden and expense to the corporation is an issue.

[43] While concern for the burden and cost of producing requested records might be a reasonable basis for refusal in some cases, I do not find it to be the case here.

[44] Regarding cost, I note that under the current legislative scheme, there is, with a few exceptions, an obligation on those requesting records to pay a fee that should compensate the corporation for its expense of providing them. The process set out in the Regulations grants the condominium corporation the opportunity to determine a reasonable estimate of the cost for preparing the requested records, and to demand that the requester pay the same before access to the records is provided. It is therefore possible for the condominium to be fully compensated for granting access to those records. Where the actual cost turns out to be greater than estimated, the Regulation also provides for at least a portion of the difference to be collected from the requester, but not all of it. This appears clearly intended to motivate or encourage condominium boards and managers to provide as accurate an estimate as possible in the first place, and not to burden the requester of records with the total consequences if they fail to do so.

[45] If the Respondent had a genuine issue with the cost of providing the Applicant with access to the requested records, the time to address this was when it responded to that request. The Respondent did, in fact, set out an estimated fee in its response, which is comparable to the fee that the Stage 2 Summary and Order indicates was agreed to by them during Stage 2.

[46] Of course, money is not the only resource expended in relation to a request for records. Such requests may impose burdens on the time and attention of the board, particularly if the board seeks to do the work itself. However, as this may be true of every request for records, such burdens should only be treated as a basis for refusal when, as the court stated in Lahrkamp 2017, they are clearly "an issue," which I understand to mean when they are unreasonably excessive on account of such factors as the scope or volume of the records requested.

[47] In Lahrkamp 2017, the issue related to the production of records for a project of the condominium that occurred several years prior to the time of the request or hearings on it, and also to the production of eight years' worth of General Ledgers for no apparent good cause. Further, the burden and cost were not considered as sufficient in and of themselves as a basis for refusing the records, but were raised as concerns in conjunction with other factors that helped justify a refusal.

[48] In this case, the Applicant has requested copies of a single year's set of invoices, bank records and employment contracts. It is a recent year of operation. Several of the records are those that were already assembled once for the auditor's review. The Respondent originally agreed that it could provide the records. The Respondent offered no persuasive evidence that locating, sorting, redacting and copying these records would be a significant burden. I cannot find that the Applicant's requests should be refused on the basis that it is a burden or cost to do so.

[49] I conclude that the Applicant is entitled to receive the requested copies of the paid invoices used by the Respondent's auditor to prepare the audited financial statements for the period from July 1, 2017 to June 30, 2018, and the Respondent's bank statements and employment contracts for the same period.

ISSUE 2: DID THE RESPONDENT UNREASONABLY REFUSE TO PROVIDE THE REQUESTED RECORDS SUCH THAT A PENALTY SHOULD BE ORDERED?

[50] Under clause 1.44(1)6 of the Act, the CAT may order a condominium corporation to pay a penalty to the person entitled to examine or obtain copies of records if it finds that the corporation has without reasonable excuse refused to permit the person to examine or obtain such records.

[51] The fact that I have determined the Applicant was not "on a pure fishing expedition," as the Respondent contended, does not in and of itself mean the Respondent's refusal to provide the requested records was unreasonable.

[52] The Respondent appears to have consistently replied to the Applicant's requests for records in accordance with time limits and formal requirements of the Act and the Regulation. I find that the Respondent did this despite any frustration or irritation the board of directors might have felt (based on the Respondent's

evidence in this case) regarding the Applicant. Further, the Respondent did not initially refuse to provide the Applicant with its paid invoices in response to the second request, and was correct in its refusal to provide payroll records. This is not a case in which a condominium corporation has clearly and deliberately disregarded the rights of a unit owner with respect to a request for records.

[53] The Respondent's eventual refusal to provide the records was based on the advice of its legal counsel. Although I have determined that such advice was not ultimately correct or persuasive, I do not find that either it or the Respondent's reliance on it were unreasonable.

[54] On balance, I do not think a penalty is necessary or justified in this case.

ISSUE 3: WHAT IS A FAIR AND REASONABLE FEE FOR THE REQUESTED RECORDS?

[55] As the requested records are all non-core records, the Respondent is entitled to charge a fee for them.

[56] As noted above, in its original reply to the Applicant's second request for records, the Respondent estimated that the cost for providing just the requested invoices would be $900. The Applicant disputed this, but the Stage 2 Summary and Order indicated that during Stage 2 the parties agreed on a fee of $920.23 for provision of all the requested records.

[57] In their submissions, the Applicant asked me to consider the reasonableness of that fee, and the Respondent stated that its actual costs for providing the records would exceed $2500, of which $2465 was attributable to the production of the requested invoices. The Respondent submits that the Applicant should pay the full amount on account of the Applicant's allegedly "unacceptable behaviour".

[58] Fees charged for the provision of records requested under subsection 55(3) of the Act should not be calculated or imposed for punitive purposes. They are not a penalty, and it would not be reasonable to treat them as such.

[59] The Respondent also provided no explanation as to why this new estimate differed so greatly from its original estimate of $900 for just the invoices, or the subsequent agreement for $920.23 for the provision of all the requested records.

[60] If the Applicant had accepted the $900 estimate set out in the Respondent's reply to the second request when it was delivered, and the actual cost was $2465, as the Respondent suggested during this hearing, the Applicant would not have been required to pay more than an additional $90 under subsection 13.8(2) of the Regulation, and the Respondent would have had to bear the difference of $2375 itself.

[61] If the parties had agreed at Stage 2 for provision of the records, when the agreed upon fee was just $920.23, that would have been the extent of the Applicant's liability regardless of the actual cost of producing all of the requested records.

[62] In the circumstances of this case, and taking into account my earlier analysis that the intent of the Regulations is not to place on the requester of records the total burden of the difference between the Respondent's estimated and actual costs for producing them, it would be unfair to the Applicant, who I have determined is entitled to the records, to grant the Respondent the significantly higher fees it proposed in Stage 3. Rather, it seems most fair to require the parties to comply with the agreement made during the Stage 2 proceedings, which is that the fee for provisions of all of the requested records shall be $920.23.

ISSUE 4: IS THE APPLICANT ENTITLED TO SHARE THE RECORDS WITH OTHER OWNERS?

[63] According to the Stage 2 Summary and Order, a question arose as to whether or not the Applicant may share the records it receives with other owners.

[64] In her submissions in Stage 3, the Applicant stated,

> We have no intention of giving copies of 1700 invoices or bank statements to any of the owners; we requested for the other owners to be able to know what we discover after we review them. We agreed not to share any of this information with any renters at our condo corporation.

[65] On the other hand, the Respondent submitted,

> [The Applicant] previously stated that they would not agree to any term that would limit their ability to share documents with others who were not applicants.

[66] Again, I cannot address what might or might not have been said during Stage 2, and must, in the absence of other clear and admissible evidence, consider only the positions presented at Stage 3.

[67] Therefore, while I do not disregard the detailed arguments put forward by counsel for the Respondent relating to why the Applicant might not have the right to share copies of records received, it is not necessary to make a determination of this issue in this case since the Applicant has clearly stated she does not intend to share copies of the records with other unit owners.

[68] The Applicant has stated she desires only to share with other owners the information contained in the records. As unit owners have a general right to communicate with one another in regard to matters and information of concern relating to their shared property and interests, I find that the Applicant is entitled to share with other unit owners the information she learns upon examination of the requested records.

C. COSTS

[69] Neither of the parties requested costs in this case. I conclude there is no basis for an award of costs.

D. ORDER

[70] The Tribunal orders that:

1. Within 30 days of payment by the Applicant to the Respondent of $923.20, the Respondent shall provide to the Applicant:

    a. The paid invoices of the Respondent from the period of July 1, 2017 to June 30, 2018; and

    b. the Respondent's bank statements from the period of July 1, 2017 to June 30, 2018; and

    c. the Respondent's employment contracts from the period of July 1, 2017 to June 30, 2018.

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Michael Clifton
Member, Condominium Authority Tribunal

Released On: November 18, 2019