

CONDOMINIUM AUTHORITY TRIBUNAL

DATE: April 7, 2020

CASE: 2019-00206R

Citation: Surinder Mehta v. Peel Condominium Corporation 389, 2020 ONCAT 9

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

Member: Nicole Aylwin

The Applicant

Surinder Mehta

Self-Represented

The Respondent

Peel Condominium Corporation 389

Azza Nefzaoui, Agent

Hearing: November 12, 2019 – March 16, 2020, Written on-line hearing.

REASONS FOR DECISION

A. INTRODUCTION

[1] The Applicant, Surinder Mehta, is a unit owner of Peel Condominium Corporation No. 389 ("PCC 389"). Mr. Mehta submitted a Request for Records on September 19, 2019 to the Respondent PCC 389, which was represented by Ms. Azza Nefzaoui. In his Request for Records, Mr. Mehta sought a variety of records including several related to the finances of the corporation, minutes of the Board and AGM meetings, and contracts or agreements the corporation has or has had with management companies and any members of the Board of Directors. The Respondent replied to Mr. Mehta's request on the mandated form on October 19, 2019 denying Mr. Mehta the majority of the requested records. PCC 389 did indicate on their response form that Mr. Mehta was entitled to examine the most recent financial statements and the budget for the current fiscal year. However, Mr. Mehta was not satisfied that the financial statement he received was the most recent and submits he did not receive the budget. Therefore, Mr. Mehta submitted a case to the Tribunal. He asked that the Tribunal order that he be given copies of all the requested records and that PCC 389 pay a penalty under the *Condominium Act, 1998* (the "Act") for refusing to provide the records without a reasonable excuse.

- [2] I have identified three issues to be decided in this case:
- a. Is Mr. Mehta entitled to the records he has requested under the *Act*?
 - b. Has the Corporation provided a reasonable excuse for not providing the records? As part of this issue, I have had to decide if not having kept or produced 'adequate' records constitutes a reasonable excuse for refusal.
 - c. If PCC 389 does not have a reasonable excuse for refusing the records, is a penalty warranted under s.1.44 (1) 6 of the *Act*?
- [3] Both Mr. Mehta and PCC 389 participated actively in this hearing process. While, both sides provided evidence and submissions on the issue of records, they also made a number of submissions that make reference to what appears to be a very dysfunctional relationship between Board and owners, and which included serious accusations about the behavior of the other. The distrust, animosity, and poor communication on both sides is very real. However, it is not something I can address in this hearing and I will not be dealing with that evidence unless it touches specifically on what is in dispute before me, which is entitlement to the records.
- [4] For the reasons set out below, I find that that Mr. Mehta is entitled to the records he has requested, although not all records are ordered to be produced as some simply do not exist. In the instances where the record doesn't exist, I have found this to be refusal without a reasonable excuse. Therefore, PCC 389 will pay the maximum penalty of \$5000 for refusing to allow Mr. Mehta to examine or obtain copies of records to which he is entitled without a reasonable excuse.

B. PRELIMINARY MATTERS

- [5] As a preliminary matter, Mr. Mehta requested that the current Board not be allowed to represent PCC 389 in this hearing. In his submissions, Mr. Mehta raised several concerns about the management of the condominium, the role of the Board President Ms. Nefzaoui, who was also PCC 389's representative in this hearing, and a concern over whether or not the Board of Directors is duly constituted. In response, Ms. Nefzaoui submitted that these issues were not relevant to this case and requested that the issues for this hearing be restricted to records.
- [6] After considering the submissions and the jurisdiction of the Tribunal, I determined that many of the issues raised by Mr. Mehta fell outside of the jurisdiction of this Tribunal. The only issues that properly came before me are those related to the s. 55 records dispute, which I have defined above as the issues to be decided in this case. Additionally, with respect to Mr. Mehta's objection regarding representation

of PCC 389, I have taken note that Ms. Nefzaoui, representing the Board, whether or not properly constituted, has been the agent acting on behalf of PCC 389 throughout the previous stages of this Tribunal proceeding (i.e., Stage 1 - Negotiation and Stage 2 - Mediation) and that Mr. Mehta engaged in mediation and negotiation with Ms. Nefzaoui in these stages. For the purposes of this Stage 3 hearing, I accepted Ms. Nefzaoui as the representative of the Respondent.

C. ISSUES & ANALYSIS

- [7] It was not clear at the outset of the hearing what records were being sought by Mr. Mehta. I reviewed both the initial Request for Records, as submitted to PCC 389, and PCC 389's response to the request. Then, with the parties' agreement, I initiated a discussion with them to determine the specific records at issue. The records were identified as follows:
- a. The 2018 audited financial statement.
 - b. The 2019 budget, with any amendments.
 - c. Board meeting minutes from September 23, 2018 - September 23, 2019.
 - d. Minutes from the Annual General Meetings for 2014 – 2019.
 - e. The most recent Periodic Information Certificate, which should contain names and service address of the current Board of Directors.
 - f. A copy of PCC 389's by-laws, and any recent amendments to the by-laws that deal specifically with the term of the Board.
 - g. Any existing employment agreements between members of the Board and the Corporation, including start dates and end dates.
 - h. Agreements that PCC 389 has or has had with any condominium management service company, for the period of September 2018-September 2019, which the Applicant expected to contain the following information:
 - i. The company/person with whom the contact is with.
 - ii. The contract start date.
 - iii. How much the corporation is paying for management services.
- [8] During this discussion, Mr. Mehta asked that the record of owners and mortgagees and records related to the removal of the condominium jacuzzi be added to the list of requested records that were at issue in this proceeding. These records were not part of his initial Request for Records. Since PCC 389 is entitled to 30 days to respond to any new records requests, these records were not included as issues/records in this hearing.

Issue 1 - Is Mr. Mehta entitled to the records he requested?

- [9] Under s.55 (3) of the Act, a unit owner is entitled to “examine or obtain copies of the records of the corporation in accordance with the regulations, except those records described in subsection (4).” There was no evidence before me to suggest that s.55 (4), which outlines exceptions to this entitlement, applied to the records in this case. Therefore, as an owner Mr. Mehta is entitled to examine the records requested.
- [10] None of the records requested by Mr. Mehta should have given the Corporation pause when considering entitlement as they are all listed in s. 55 (1) of the Act and Reg 48/01 as records the corporation is required to maintain, and no exceptions as per s. 55 (4) apply. Some of the records requested, such as the Board meeting minutes may have been subject to redaction, but as set out below, these records do not exist. In not providing the records, PCC 389 has refused Mr. Mehta records to which he is entitled.
- [11] In deciding if PCC 389 should be assessed a penalty for refusing the records, I must consider if PCC 389 has a reasonable excuse for the refusal as per s.1.44 (1) 6 of the Act.

Issue 2 - Has the Corporation provided a reasonable excuse for not providing the record?

- [12] PCC 389 provided different reasons for refusing Mr. Mehta access to specific records so I will address each type of record individually.
- [13] **The 2018 audited financial statement and the 2019 budget, with any amendments.** In its Response to Request for Records, the Board determined that Mr. Mehta was entitled to these two records. However, Mr. Mehta submits that he was not provided with the 2019 budget and that he was given the 2017 audited financial statement, not the most recent financial statement which would have been 2018.
- [14] I will deal first with the audited financial statement. PCC 389 confirmed that Mr. Mehta was provided with the audited statement from 2017 not 2018. Two reasons were given as to why: that the Request for Records did not specify a year so 2017 was provided; and, that the 2018 statement was not available.
- [15] Speaking to the latter, Ms. Nefzaoui stated during cross-examination that the head of the accounting company that the Corporation usually hires to prepare its financial documents and work with the auditor suffered a heart attack. As a result,

the audit was deferred. No date was provided as to when the audit would take place. I understand this to mean there is currently no 2018 audited financial statement available, and therefore, the reason PCC 389 did not provide is because it does not exist.

- [16] As per s. 55 (1) 1 and Reg 48/01 (1) 5. of the Act, a Corporation is required to keep annual audited financial statements. These audited statements are to be prepared every year, as stated in s. 67 (1) of the Act. While it is unfortunate that accountant the Board had worked with in the past suffered a severe health issue, the Board could have worked with a different accountant in the same company or hired a different accounting company. Audited financial statements are important documents for owners. They provide them with an overall picture of corporation's fiscal health and would identify any discrepancies or irregularities in the finances of the corporation. Failing to keep a record required by the Act, in this case, does not constitute a reasonable excuse for refusing to provide the record.
- [17] Regarding the 2019 budget, the evidence provided by Mr. Mehta and PCC 389 is contradictory. In its closing submission, PCC 389 states that the 2019 budget was delivered to Mr. Mehta by email on October 23, 2019 and could be sent again to Mr. Mehta. Mr. Mehta submits that he has not received any of the records requested, including this budget. As indicated in my discussion of entitlement above, the 2019 budget is a record to which Mr. Mehta is entitled. I accept Ms. Nefzaoui's evidence that it has been provided. However, in the interest of certainty, I would encourage PCC 389 to make good on the offer made in its closing submission to resend this budget to Mr. Mehta.
- [18] **Board meeting minutes from September 23, 2018 - September 23, 2019.** In the Board's Response to Request for Records, the Board determined that Mr. Mehta may not examine a copy of this record due to what the Board characterized as harassing and intimidating behavior directed at staff, board of directors and other unit owners. Mr. Mehta denied this behavior and submitted that it is the Board who is engaged in such behavior. Both parties entered into evidence the same lawyer's letter to support their assertion. The letter was sent from PCC 389's legal representative to Mr. Mehta. The letter insisted that Mr. Mehta discontinue a number of unwanted behaviors and informs Mr. Mehta that he is no longer allowed to enter the management office or approach any PCC 389 staff member. It is not for me to decide whether the contents of the letter are fact, and I am not determining the validity of the accusations in the letter. I will acknowledge, however, that both Mr. Mehta and PCC 389 believe this letter to be evidence of each other's inappropriate behavior. PCC 389 submitted this letter as evidence of

Mr. Mehta's unwanted behavior, while Mr. Mehta presented this letter as evidence that the Board was trying to intimidate him into halting his inquiries into the governance of the PCC 389. Mr. Mehta also called two witnesses, Mr. Muhammad Kashif and Mr. Ravi Haider Naqvi, who testified to their belief that the Board is engaging in misconduct and inappropriate behavior.

[19] As mentioned at the outset of this decision, at various times throughout the hearing both sides accused the other of poor conduct and harassing behavior. I accept that this is a very real situation for both parties. However, I cannot bring relief to this situation. I can only address this behavior and evidence insofar as it relates to the issue of records. In *Sohail Benjamin v Peel Standard Condominium Corporation No. 1008, 2019 ONCAT 10*, the Tribunal addressed the question of whether poor conduct is a reasonable excuse for denying an owner records. The Tribunal found that: "there is no provision in the Act that requires an owner to display non-disruptive or 'good' conduct as a condition to obtaining records under subsection 55 (3) of the Act." Whether or not the Board was unhappy with Mr. Mehta's behavior, does not change the entitlement to the records under the Act. If it is the case that PCC 389 was concerned about face-to-face interactions between members of the Board and/or staff and Mr. Mehta, the records could have been delivered electronically or left for pick-up. There was no need for the two sides to interact directly.

[20] Putting the behavior of the parties aside, Mr. Mehta further submitted that the reason that the Board did not provide him with the requested minutes is because they do not exist.

[21] PCC 389 submits that it is a 'self-managed' corporation and because of this, no formal Board meetings are held as the Directors deal with corporation business every day. In her testimony on behalf of PCC 389, Ms. Nefzaoui states, "*this is a self-managed corporation and as such the board deals with the affairs of the corporation on a regular basis could be daily.*" She further notes on examination that:

"given the involvement of the board in the day to day affairs of the corporation, in this self-managed model, it is not possible to be taking meeting minutes on a daily basis as everything and anything can be discussed or talked about or handled during the get together of the board members. Similarly to when you have a management company that deals with the affairs of the corporation on a daily basis, and no one expects the manager or the administrator to take daily minutes."

- [22] A determination of the appropriateness of the Board's approach to governance of the condominium is outside the current jurisdiction of the Tribunal. However, a determination of the adequacy of record keeping is not. The responsibility to keep adequate records under the Act applies to all corporations. The Act does not outline any exceptions or exemptions for corporations that are self-managed.
- [23] While the Act and Regulations do not provide an exhaustive list of what constitutes adequate records, they do establish a minimum standard. One of the records described as required to satisfy this minimum standard is "minutes of board meetings."
- [24] I think it is well understood that the keeping of board meeting minutes and providing them to owners upon request (subject to appropriate redactions) is a fundamental factor in providing the openness, transparency and accountability to which owners are entitled. It is also an expression of the board's good faith, care and diligence in regard to corporate record keeping. (See s. 37 (1) of the Act.)
- [25] While, of course, it is possible that some of the records required to be maintained by the Act and Regulations to meet this minimum standard of adequacy might not apply to every condominium, I take note of s. 32 (1) of the Act, which states that no business of the corporation may be transacted by the board "*except at a meeting of directors at which a quorum of the board is present.*"
- [26] Although, again, I make no determination here regarding the appropriateness of the manner in which the board conducts the business of the corporation, I do note that Ms. Nefzaoui's evidence is that the board is conducting the business of the corporation. Therefore, as per s. 32 (1), there need to be meetings of the board in some form or fashion, and the minutes of these meetings are required to be maintained in order for the corporation to satisfy the minimum standard for adequate record keeping that is set out in the Act and Regulations.
- [27] Even if it is the case that no board meetings are being held (and, again, it is outside of the jurisdiction of this Tribunal at this time to determine what impact that has on the validity of board activity), it is clear that the Act requires there to be board meetings. Of course, not holding board meetings would render it impossible to have minutes of those meetings, however, I cannot treat a clear failure or refusal to comply with the Act as a reasonable excuse for not providing the requested records. I therefore must deem and determine that the non-existence of such records is a refusal without reasonable excuse.

- [28] **Minutes from the Annual General Meetings (“AGM”) for 2014 – 2019.** The evidence before me is that no AGM’s have taken place since 2014, which was, according to Ms. Nefzaoui, when the corporation became ‘self-managed.’ Since there have been no meetings, there are no minutes.
- [29] Again, whether or not PCC 389 is governing itself in accordance with the Act, is beyond what I can decide, and I cannot order PCC 389 to produce something that does not exist. But I must decide if not having the record due to the absence of meetings constitutes a reasonable excuse for not providing it.
- [30] I take note that the Act requires the corporation to hold annual general meetings of all of the owners. It also requires that the minutes of owners’ meetings be retained as part of the minimum standard for adequate record keeping. While I recognize that occasionally, in a given year, there might be a legitimate cause for the annual general meeting requirement to be missed, and that there would therefore be no minutes for that year, it defies reason that this should be the case from year to year for five years (2015-2019). In my view, the non-existence of minutes arising from what appears to be a clear failure to hold annual general meetings for several years, which is contrary to the requirements of the Act, cannot constitute a reasonable excuse for not providing those minutes.
- [31] While the above speaks to the AGM minutes between 2015-2019 it does not address the 2014 AGM minutes, which were refused for different reasons. The evidence before me is that prior to 2015, a Condominium Management company, Marquis Property Management (“Marquis”), recorded and stored the AGM minutes. PCC 389 submits that the 2014 minutes were not provided to Mr. Mehta because Marquis never provided them. Marquis claimed they were lost as a result of computer issues. I have no evidence before me that disputes this so I will accept that, based on these facts, PCC 389 did not intentionally withhold the 2014 minutes from Mr. Mehta. Rather, it did not provide them because they were lost due to an error by a previous management company.
- [32] **A copy of PCC 389's by-laws, and any recent amendments to the by-laws that deal specifically with the term of the Board.** In Mr. Mehta’s Request for Records form, he requested “*Tenure of current Board, its expiry and next election dates*”. After some discussion with both parties at the outset of the hearing, where it was made clear that I cannot order access to information but to records that might contain that information, it was determined and understood by the parties that Mr. Mehta was seeking a copy of PCC 389’s by-laws including any recent amendments to the by-laws that deal specifically with the term of the Board.

Neither party made submissions related to this record specifically. Mr. Mehta is entitled to this record, but because the request for records did not identify the record specifically and there is no evidence before me to suggest that PCC 389 actively refused a request for by-laws, I do not deem it to be a refusal without a reasonable excuse.

- [33] **The most recent Periodic Information Certificate (“PIC”).** In the Request for Records form delivered to PCC 389, Mr. Mehta asked for information about the Board, rather than a record. Specifically, he asked “*Who are / were the Board of Directors and what are their contact details*”. In discussion with both parties at the beginning of the hearing, it was determined and understood that the record that contained the information Mr. Mehta was seeking is the most recent PIC, which, as per s. 76 (1) of the Act, must contain the names and service address for of the Directors of the board.
- [34] In his submissions, Mr. Mehta expressed a desire for this record because he was having difficulty getting in contact with the Board of Directors and wanted up-to-date contact information. He also expressed frustration over the fact that the Board would not return his emails. In Ms. Nefzaoui’s testimony, she stated that Mr. Mehta already has the names and email address for all members of the Board. I accept this to be true. However, already having contact information does not disentitle Mr. Mehta to the most recent PIC. He is entitled to receive this, and I will order that it is to be provided. However, I do not see PCC 389’s refusal of the record as unreasonable as Mr. Mehta’s Request for Records form did not make clear which records he wanted.
- [35] **Any existing employment agreements between members of the Board and the Corporation, including start dates and end dates.** Mr. Mehta claims that the members of the Board are being remunerated for their services and thus he would like to see any employment agreements between members of the Board and PCC 389. It is PCC 389’s position that no employment agreements exist between it and members of the Board.
- [36] It is possible that the claims of both parties are true. It is possible that Board members are receiving financial compensation from the Corporation, but that this remuneration has not been put in a formal employee agreement. It is clear that Mr. Mehta believes they exist. If they did exist, Mr. Mehta would be entitled to them. However, I have not been presented with any evidence that establishes that there is any such agreement. Moreover, in this instance, an employment agreement does not fall into the same category of records as the minutes of board meetings

and the minutes of owners meeting. Therefore, I will not order that the record be produced, and I do not find that the employment agreements have been refused without a reasonable excuse.

[37] **Agreements that PCC389 has or has had with any condominium management service company, for the period of September 2018-September 2019.** Throughout the hearing, PCC 389 took the position it is a self-managed corporation and thus does not have agreements with any condominium management company. This position was reinforced in Ms. Nefzaoui's testimony where she states, "*I am also testifying that PCC 389, self-managed corporation, does not have an agreement with any entity to receive property management services.*" However, on cross-examination, Ms. Nefzaoui admitted that the management company "Manifold" had been appointed by the Board to "keep the office open and manage day to day items." This clearly contradicts her earlier testimony. It was further revealed during cross-examination that Manifold is owned by Ms. Nefzaoui.

[38] In denying that a property management company was contracted to oversee the day-to-day affairs of the building and then providing testimony to the contrary, Ms. Nefzaoui's testimony only served to obscure the issue. Given the evidence, I accept Mr. Mehta's submission that PCC 389 does have a contract with a property management company – specifically Manifold - and that this contract has been withheld without a reasonable excuse and I will order it to be provided to Mr. Mehta.

Issue 3 - If PCC 389 does not have a reasonable excuse for not providing the records, is a penalty warranted under s. 144 (1) 6 of the Act?

[39] Under s. 1.44 (1) 6 the Tribunal may order a condominium corporation "*to pay a penalty that the Tribunal considers appropriate to the person entitled to examine or obtain copies under s.55 (3) if the Tribunal considers that the corporation has without reasonable excuse refused to permit the person to examine or obtain copies under that subsection.*" As per s.1.44 (3) this penalty may be up to a maximum of \$5000.

[40] As has been noted in many of the Tribunal's decisions, the purpose of a penalty is to impress upon condominium corporations that they must be aware of their responsibilities under the Act, understand what is involved in meeting these responsibilities, and take these responsibilities seriously. The evidence in this case has not persuaded me that PCC 389 is aware, understands, or takes seriously its

responsibilities to maintain proper records and provide owners with the records they are entitled under the Act.

- [41] For example, in at least two instances PCC 389's refusal to provide records that an owner is entitled to, was premised on the fact that large swaths of records simply do not exist. I refer here to 12 months' worth of Board meeting minutes and five years' worth of AGM minutes, which are both records that are to be maintained under s. 55 (1) of the Act in order for the corporation to meet a minimum standard of adequate record keeping. Minutes of board meetings and owner's meetings are foundational records. The most recent year's minutes are defined as core-records in s.1 of Reg48/1. Owners are clearly entitled to access them. These records provide corporate history and help ensure transparency and accountability around Board decision making and the general conduct of the business of the corporation. They are one of the ways owners are kept informed of important issues, decisions and the overall financial health of the corporation. As set out in my analysis above, I do not consider the failure to hold these important meetings as a reasonable excuse for the refusal to provide minutes of them.
- [42] The same is true in regard to 2018 audited financial statement. While the circumstances for deferring the audit are unfortunate, no evidence was presented that indicated that the Board had taken or intends to take any concrete steps to commence with the audit. Therefore, based on these facts, refusing to provide the statement, which is a core-record, because it has not been created, is not a reasonable excuse.
- [43] Additionally, PCC 389 refused Mr. Mehta a contract to which he is entitled on the grounds that it did not exist, only to later admit that it does exist.
- [44] PCC 389 attempted to address the shortcomings in its record keeping by arguing that the Act provides little guidance on how to 'self-manage' a corporation. I do not accept this explanation. Directors are required to undertake training and are expected to be aware of their responsibilities under the Act. Being self-managed does not excuse the Board from these responsibilities and does not provide a reasonable excuse for denying an owner the opportunity to examine records to which they are entitled.
- [45] Based on these facts, a penalty at the top end of the scale is warranted. It is not the case that the records requested by Mr. Mehta fall into a category that may have given the Board pause to consider an owner's entitlement. Entitlement is clear. This is also not a situation where only one or two records have been refused.

Nor, is it a situation where a reasonable excuse has been provided for the refusal. Large numbers of records, spanning many years, have not be kept as per the Act. Given the number of records refused without a reasonable excuse and the foundational nature of these records, I find the maximum penalty of \$5000 appropriate.

[46] Mr. Mehta has asked for costs to be awarded. Given that he has been successful in this proceeding, I will award Mr. Mehta costs for the fees required to bring an application before the Tribunal, which includes the \$25 fee to file an Stage 1 – Negotiation application for dispute resolution with the Tribunal, the \$50 fee to move to Stage 2 Mediation and the \$125 fee to move the case to Stage 3, for a total of \$200.

ORDER

[47] For the reasons set out above, the Tribunal orders as follows:

1. PCC 389 provide Mr. Mehta with the following records within 30 days of this decision:
 - a. The most recent Periodic Information Certificate (“PIC”), which should contain names and service address of the current Board of Directors.
 - b. A copy of PCC 389's by-laws, and any recent amendments to the by-laws that deal specifically with the term of the Board.
 - c. Agreements that PCC339 has or has had with any condominium management service company for the period of September 2018-September 2019.
2. These records will be provided in electronic format where available. If not available electronically, the records will be provided in paper copy. There will be no cost to Mr. Mehta for the records.
3. PCC 389 will pay a penalty in the amount of \$5000 to Mr. Mehta within 30 days of this decision.
4. PCC 389 will pay costs in the amount of \$200 to Mr. Mehta within 30 days of this decision.
5. In the event that the penalty or costs are not provided to Mr. Mehta within 30 days of this Order, Mr. Mehta will be entitled to set-off this amount against the

common expenses attributable to the Applicant's unit(s) in accordance with Section 1.45 (3) of the Act.

6. In order to ensure that Mr. Mehta does not have to pay any portion of the penalty and cost awards, he will also be given a credit toward the common expenses attributable to his unit in the amount equivalent to his proportionate share of the penalty and costs awarded.

DATE: April 7, 2020

Member

Nicole Aylwin, Member

Condominium Authority Tribunal