

CONDOMINIUM AUTHORITY TRIBUNAL

DATE: August 5, 2020

CASE: 2019-00207R

CITATION: Brown v. Peel Condominium Corporation No. 21, 2020 ONCAT 26

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

Member: Anne Gottlieb, Member

The Applicant,

Elvalyn Brown

Self-Represented

The Respondent,

Peel Condominium Corporation No. 21

Tina Gouveia, Agent

Hearing: Written Online Hearing – March 17 - March 25, 2020 and April 13 - July 6, 2020

REASONS FOR DECISION AND ORDER

A. OVERVIEW

[1] The Applicant Elvalyn Brown (the “Applicant”), is an owner of a unit that is part of Peel Condominium Corporation No. 21 (the “Respondent” or “PCC No. 21”). On August 5, 2019 she submitted a Request for Records (the “Request”) to obtain records from the Respondent. There is a history of interactions between the parties and the individuals in this case. The Applicant has been an owner since 2002. The Agent for the Respondent, Tina Gouveia (the “Agent”), has been a director on the board of the condominium corporation (the “Board”) for more than 20 years, along with her husband, Joe Gouveia.

[2] Some of the matters disclosed during the hearing are outside the jurisdiction of this Tribunal, at this time. The Applicant has raised issues concerning the running of this self managed condominium corporation and alleges that the board of directors have failed to carry out their obligations pursuant to the *Condominium Act, 1998*, (the “Act”). She claims that there is lack of financial and fiscal accountability and

oversight and has made allegations of fiscal impropriety. These issues are beyond the jurisdiction of this Tribunal.

- [3] The Applicant requests an Order from the Tribunal directing that the Respondent provide the requested records. She asks the Tribunal to award a \$5,000 penalty against the Respondent for refusing to provide the records and asks for her costs of \$200 to bring this matter to the Tribunal and other costs of \$2,000. The Respondent says that the Applicant is not entitled to receive the records.
- [4] For the reasons outlined below I find that the Applicant is entitled to a printed copy of all the requested records, except those records that are generally described as being mentioned in PCC No. 21's by-laws and are not specifically itemized. I find that the Respondent refused to provide the records and did not provide a reasonable excuse for the refusal. I assess a penalty of \$4,000 to be awarded to the Applicant and award the cost of \$200 to bring this matter before the Tribunal.

B. PROCEDURAL MATTERS

- [5] Prior to witness testimony, the Respondent brought a motion for the dismissal of this Application on the grounds that the Respondent was not properly named in the application. I found that there was no cause to dismiss this case and found that the Respondent was properly named as PCC No. 21.
- [6] At various points in this proceeding the Agent referred to circumstances that are beyond the jurisdiction of this Tribunal. This relates to a meeting of owners held on August 25, 2019 and the validity of an election that took place at that time. Following that meeting it appears that there was uncertainty as to composition of the Board.
- [7] I note that for the purposes of this proceeding the Applicant did not contend that the Agent was not authorized to represent the Respondent. At the outset of this hearing the Agent held herself out as a director (of the Board) and stated that "it wouldn't be prudent" when asked if another director could represent the Respondent. The Agent participated in other stages of this Tribunal process as the representative of PCC No. 21. Furthermore, the evidence throughout this hearing indicates that the records of the corporation are likely in the sole possession of the Agent, who acted as Treasurer of this self-managed condominium corporation, for over 20 years.

C. ISSUES

[8] The issues to be addressed were identified in Stage 2 and confirmed by the parties at the start of the hearing. They relate to the entitlement of the Applicant to the records in the Request and further clarified in the Stage 2 Summary and Order. The determination of costs and a penalty were also identified. The issues are set out as follows:

- 1a) Is the Applicant entitled to a paper copy of PCC No. 21's governing condominium documents, namely the declaration, by-laws and rules?
- 1b) Is the Applicant entitled to a paper copy of PCC No. 21 Record of Owners and Mortgagees?
- 1c) Is the Applicant entitled to a paper copy of notices indicating which units in PCC No. 21 are being leased?
- 1d) Is the Applicant entitled to a paper copy of the financial records of PCC No. 21, including; a current budget, the most recent approved financial statements, the most recent auditor's report, the current reserve fund plan and the financial audits from 2012 to 2019?
- 1e) Is the Applicant entitled to a paper copy of the 2012 to 2019 minutes of the board of director's meetings of PCC No. 21?
- 1f) Is the Applicant entitled to a paper copy of the Periodic Information Certificate?
- 1g) Is the Applicant entitled to a paper copy of the records specified in the by-laws of PCC No. 21?
- 1h) Is the Applicant entitled to a paper copy of the maintenance contracts from the years 2009-2019, where PCC No. 21 is a party?
- 2) Has PCC No. 21 provided a reasonable excuse for not providing the records requested?
- 3) Is the Applicant entitled to costs and penalties related to this case?

D. EVIDENCE AND ANALYSIS

Issue 1a: Is the Applicant entitled to obtain a paper copy of PCC No. 21 governing condominium documents, namely the declaration, by-laws and rules?

[9] The declaration, by-laws and rules are core records as defined in section 1 of Ontario Regulation 48/01 (“the Regulation”). These are records that a condominium corporation is required to maintain and to which an owner is entitled. This is clear. The Applicant has requested paper copies of all the governing condominium documents of PCC No. 21 and I find that she is entitled to receive them.

Issue 1b: Is the Applicant entitled to obtain a copy of a record of the Owners and Mortgagees?

[10] Section 46.1(3) of the Act requires a corporation to keep a record of owners and mortgagees which includes the unit number, the name of the owner or mortgagee, and their address for service in Ontario. This is a record to which an owner is clearly entitled. I find that the Applicant is entitled to a paper copy.

Issue 1c: Is the Applicant entitled to obtain a copy of notices indicating which units in PCC No. 21 are being leased?

[11] This is a core record under the Act. According to Section 83 (1)(a) of the Act, a unit owner is required to notify the condominium corporation within ten days of leasing their unit. Section 83 (3) requires the corporation to keep a record of the notices that it receives. I find that the Applicant is entitled to a paper copy of a list of the units being leased.

Issue 1d: Is the Applicant entitled to obtain a copy of the financial records of PCC No. 21 including the current budget, the most recent approved financial statements, most recent auditor’s report, current reserve fund plan and the financial audits from 2012 to 2019?

[12] The budget, the approved financial statements, the auditors report and reserve fund plan and financial audits are all records listed in section 55(1) of the Act and O. Reg 48/01 as records the corporation is required to maintain. Per section 67(1) of the Act, audited statements are to be prepared every year, and a budget is a record to which an owner is entitled. I find that the Applicant is entitled to paper copy of these records from the years 2012 to 2019.

Issue 1e: Is the Applicant entitled to obtain a copy of PCC No. 21's Board of Directors Meeting Minutes from 2012 to 2019?

[13] Section 32(1) of the Act deals with meetings of the board of directors. Minutes of these meetings are required. There is no evidence before me to suggest that board of director's meetings were not held during 2012-2019 for this condominium corporation. I find that the Applicant is entitled to receive a paper copy of these minutes.

Issue 1f: Is the Applicant entitled to obtain a copy of PCC No. 21's Periodic Information Certificates?

[14] Periodic Information Certificates (PICs) for a 12 month prior to the date of the Request are core records to which the Applicant is entitled. I find that the Applicant is entitled to a paper copy.

Issue 1g: Is the Applicant entitled to obtain a copy of PCC No. 21's records specified in the Respondent's by-laws?

[15] With regard to records specified in the by-laws of PCC No. 21, I have considered the consumer protection aspects of the Act carefully and measured them against the particular facts of this case. This request for records is not specific enough to be ordered to be produced. I recognize the difficulties faced by the Applicant to bring this matter before the Tribunal. The Applicant has provided evidence of a letter requesting information and documents dated July 5, 2019, a full month before the date of the Request. However, not all the by-laws of the corporation are before me, and the Applicant has not specified or listed the documents that she seeks under this category. I have no way of knowing what documents might be referred to in the by-laws. It would therefore not be appropriate for me to speculate on this and I decline to order the production of these records as they are unspecified.

Issue 1h: Is the Applicant entitled to obtain a copy of PCC No. 21's maintenance contracts from 2009 to 2019 where PCC No. 21 is a party?

[16] With respect to the maintenance contracts from 2009 to 2019 to which the Respondent is a party, there were concerns raised about the quotes and contracts awarded to and by PCC No. 21 and the director of maintenance. Maintenance contracts are records which the condominium corporation is required to keep under subsection 55(1) of the Act and they are records that the Applicant is

entitled to examine or obtain copies of under subsection 55(3) of the Act. I find that the Applicant is entitled to paper copies of maintenance contracts for the years indicated above, where PCC No. 21 is a named party.

Issue 2: Did the Respondent have a reasonable excuse for not providing the documents?

- [17] The evidence of the Applicant is that the Respondent did not respond to the Request. When the Respondent was given an opportunity to produce evidence of a response, the Respondent did not submit a Board Response to Request for Records or any other form of a response to either the letter request of July 5, 2019 submitted in evidence, or the Request of August 5, 2019.
- [18] The Agent states that she received the Request, on August 7, 2019, but is willing to concede the August 5, 2019 date provided by the Applicant. She indicated that the Board did not respond because of the planned meeting of the owners to be held on August 25, 2019. That meeting was almost three weeks from the date of the delivery of the Request. The Respondent provided no evidence of any communication to the Applicant prior to this proceeding, to suggest that the scheduling of the meeting of August 25, 2019 was given as a reason for refusing to provide the records to the Applicant. And to the contrary, the meeting might give an indication that there is some urgency to have the records that were enumerated in the Request.
- [19] The Respondent submits that the records were not provided because the Applicant has been in arrears of contributions to common expenses. The Applicant testified that she is not in arrears. It is important to note that there is nothing in the Act to suggest that being an owner in good standing is a prerequisite to entitlement to records. There are instances in the Act, such as serving as a director, or voting at an owners meeting, that are tied to an owner being up to date with all payments of contributions to common expenses (also known as common fees or maintenance fees). The inclusion of such requirements in one part of the Act, and the absence of such requirements in section 55 of the Act, indicates that the entitlement to records by an owner is not dependant on an owners 'good standing' with regard to payment of contributions to common expenses
- [20] The Respondent has submitted evidence that the Applicant's unit has been advertised on Airbnb. There was no evidence submitted by the Respondent of a by-law or rule of PCC No. 21 to suggest that this is something the Applicant should refrain from doing. The Act does not specify that this would disentitle an owner to

the records requested. This is therefore not relevant and does not serve as a reasonable excuse.

[21] Two witnesses testified for the Applicant, Desiree Lewis and Donna Harrison. Both provided credible testimony. Their testimony provides a glimpse into the way the Board discharged their duties to the corporation in this self-managed corporation. The testimony provided examples of how requests for documents such as status certificates and financial information requests from owners were handled by the Board, and specifically by the Agent.

[22] When the Applicant presented a summary of her own testimony she referred to the fact that she “will testify to the absence of (receiving) audited financial statements for 17 years: no AGM for years and beyond; redacted financial statements given to members, no regular homeowners' meetings, no communications, partial maintenance, governance and the rules of the condo bylaws.” While this speaks to the governance of the condominium corporation which is outside the jurisdiction of this Tribunal, it also reflects the Applicant’s desire to receive records that accurately depict the financial position of the corporation.

Issue 3: Should the Respondent be assessed a penalty for refusing to provide the records without reasonable excuse?

[23] The Tribunal may order a penalty if it finds that the corporation has, without reasonable excuse, refused to permit a person to examine or obtain records. This is in accordance with section 1.44 (3) of the Act. I have found that the Respondent has refused to provide records without a reasonable excuse as required by the Act

[24] Both sides referred me to caselaw. The Respondent cited the case of Maria Bossio v Metropolitan Toronto Condominium Corporation 965, 2018 ONCAT 6. I find that the facts of this case are not similar and I do not find that case relevant to the facts presented here. In this case the Respondent failed to respond to the Request, on the prescribed form. The Respondent did not provide any evidence to explain its refusal to produce records. There was no response made within the timelines set out in the Regulation. Based on the facts presented to me, I find this case does not fall within the exception pursuant to section 55 (4) of the Act as the Respondent suggests.

[25] The Applicant asked me to consider the following decisions of this Tribunal:

Surinder Mehta v Peel Condominium Corporation No. 389, 2020 ONCAT 9
Surinder Mehta v Peel Condominium Corporation No. 389, 2020 ONCAT 10

[26] I will refer to the Terence Arrowsmith case first. At paragraph 16, that decision reads:

I note that generally penalties operate to do two things. First, they operate to sanction conduct that is considered undesirable. Second, they communicate to the class of interested people and organisations that some conduct is unacceptable. The Tribunal is committed to providing dispute resolution that is fair, convenient and timely. These are some of the values that the Tribunal should consider in establishing the appropriate amount of the penalty.

I find that in the case before me the penalty should be substantial to indicate that the conduct of the Respondent is not acceptable and is deserving of sanction. There was no Response provided. There were no governing documents provided. There was no explanation provided, prior to the involvement of this Tribunal. There was no reasonable excuse for not providing the records.

[27] The two Mehta cases, deal with a self-managed condominium corporation. Those cases involve the same parties and were before this Tribunal within a short timeline. In one of those cases, the penalty awarded was the maximum of \$5,000, in part because the condominium corporation's refusal to produce large numbers of the records was premised on the fact that the records do not exist. There is no conclusive evidence before me that records do not exist. There is evidence before me that they were not provided to the Applicant. The penalty awarded in the other Mehta case was \$1,500. There, the Respondent did not participate in any of the Tribunal's proceedings and did not submit evidence or submissions. The Tribunal found that "individual owners should not pay twice for the same infraction". Although the penalty was for the refusal, the circumstances of this second case differ from the case before me.

[28] In this case, the Respondent's behaviour warrants a penalty to act as a deterrent. Foundational governing documents were not provided to the Applicant in a timely manner. Documents which the Respondent is required to maintain and to which there is a clear entitlement by the Applicant were never produced. The Respondent did not provide any response to the Applicant's Request and did not provide any written explanation for refusing to provide the documents to the Applicant. For all these reasons I award a substantial penalty to the Applicant. I find that \$4,000 is the appropriate penalty based on the facts of this case.

Is the Applicant entitled to an award of costs?

[29] The Applicant was largely successful in her Application before this Tribunal and is entitled to be reimbursed for the cost of the filing fees to obtain this decision from the Tribunal. She paid \$200 to participate in all three of the Tribunal stages and should be reimbursed this amount by the Respondent.

[30] In her submission, the Applicant asked for \$2,000 relating to legal advice. No invoice was produced. Throughout the proceeding she appeared as a self represented party. Earlier in the proceeding the Applicant did refer to legal advice that she sought with respect to the owners' meeting in August 2019 and the election process. That does not directly relate to matters before this Tribunal. As set out in rule 46.1 of the Tribunal's Rules of Practice, the CAT will only consider awarding legal costs in exceptional circumstances, pertaining to matters before the Tribunal. That is not the case here.

[31] The Respondent made no submission on any cost for production of any of the records, be it photocopying or labour charges that may be applicable and allowable under the Act. There is no evidence before me that the Respondent followed the process to provide a cost estimate as required in section 13.3(7) of the Act. As the Respondent did not make any submission in this regard, I find that the Respondent should bear the cost of the production of the paper copies requested by the Applicant.

[32] If any redactions are made to the records ordered to be produced, those redactions must be accompanied by statements in accordance with section 13.8 of O. Reg 48/01. Any such redaction shall be limited to exemptions permissible under section 55(4) of the Act.

ORDER

[33] The Tribunal Orders that:

1. PCC No. 21 shall provide the Applicant with the following records, in paper copy, within 30 days of the date of this decision, at no cost to the Applicant:
 - a) The declaration, by-laws and rules of PCC No. 21.
 - b) Record of Owners and Mortgagees of PCC No. 21.
 - c) Record maintained by PCC No. 21 under section 86 (3) of the Act (notices of units that are being leased).

- d) The following financial documents of PCC No. 21 including:
- Budget for the current fiscal year
 - Most recent approved financial statements
 - Most recent auditor's report
 - Current reserve fund plan
 - Financial audits from 2012 to 2019
- e) Minutes from 2012 to 2019 of PCC No. 21's board of directors meetings.
- f) All Periodic Information Certificate issued by PCC No. 21 for the twelve-month period ending August 5, 2019.
- g) All maintenance contracts from the years 2009 to 2019 to which PCC No. 21 is a party.
2. PCC No. 21 shall pay a penalty of \$4000 to the Applicant within 30 days of the date of this decision.
3. PCC No. 21 shall pay costs of \$200 to the Applicant within 30 days of the date of this decision.
4. In the event that the penalty and/or costs herein awarded are not provided to the Applicant within 30 days of the date of this Order, the Applicant will be entitled to seek enforcement of this Order.
5. To ensure that the Applicant does not have to pay any portion of the penalty and cost awards associated with this Order, she will be given a credit toward any common expenses that may be attributable to her unit, in the amount equivalent to her proportionate share of the penalty and costs awarded.

Anne Gottlieb
Member, Condominium Authority Tribunal

Released on: August 5, 2020