

## CONDOMINIUM AUTHORITY TRIBUNAL

**DATE:** September 3, 2020

**CASE:** 2019-00242R

**CITATION:** Lagan v Carleton Condominium Corporation No. 331, 2020 ONCAT 30

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

**Member:** Mary Ann Spencer, Member

**The Applicant,**  
Bernard Lagan  
Self-represented

**The Respondent,**  
Carleton Condominium Corporation No. 331  
Represented by Nancy Houle, Counsel

**Hearing:** Written Hearing – June 27, 2020 to August 21, 2020 with a teleconference held on August 5, 2020

### **REASONS FOR DECISION**

#### A. INTRODUCTION

- [1] Bernard Lagan (the “Applicant”) is the owner of a unit of Carleton Condominium Corporation No. 331 (the “Respondent”). He alleges that the Respondent delayed providing some records to him and also deliberately falsified certain records. He requests an Order from the Tribunal assessing a penalty to the Respondent for refusing to provide records. He also requests his costs in this matter.
- [2] The Respondent’s position is that it did not refuse to provide records to the Applicant who has received all of the requested records. The Respondent submits that the delay in providing one record until the Stage 2 mediation in this matter was due to administrative oversight and the Respondent should not be penalized. The Respondent denies that any records have been falsified.
- [3] The Respondent requests its costs in this matter submitting that the Applicant had received all of the requested records at the end of the Stage 2 mediation process but continued this matter to the Stage 3 hearing for vexatious purposes.

[4] For the reasons set out below, I find that the Respondent refused to provide records to the Applicant without reasonable excuse and order the Respondent to pay the Applicant a penalty of \$150 and \$200 in costs.

B. BACKGROUND

[5] After units in the Respondent condominium corporation had suffered tornado damage, the Applicant sought information about the repair work that had been undertaken.

[6] Concerned unit owners requisitioned a meeting which was held on June 19, 2019. The Applicant was not one of the requisitioners but did attend the meeting. The performance of the Respondent's condominium manager Kate McMullen, who was not invited to the meeting, was among the issues to be addressed.

[7] In a Request for Records dated September 15, 2019, the Applicant asked for an electronic copy of the minutes of the June 19, 2019 owners meeting.

[8] In a second Request for Records dated September 16, 2019, the Applicant asked for multiple records including minutes of the Respondent's board meetings held within the last 12 months and a contract the Respondent had entered into with KGMS Contracting Inc. (the "CCDC contract").

[9] On October 8, 2019, Ms McMullen replied to the Applicant by e-mail and enclosed the Respondent's Response to Request for Records form and multiple electronic records, including a redacted copy of the minutes of the June 25, 2019 board meeting. A second copy of these minutes with less redaction was provided during the mediation in this matter.

[10] The Respondent's Response to Request for Records did not specifically address the request for the minutes of the June 19, 2019 owners' meeting; a board member hand delivered a paper copy of the draft minutes to the Applicant on October 15, 2019. Electronic versions of this record were later provided to the Applicant.

[11] Ms McMullen's e-mail indicated the CCDC contract would be sent separately due to its length. However, the Applicant did not receive the contract until the mediation and different versions of the signature page were uploaded to the CAT-ODR system during that process.

[12] It is the Applicant's position that the actions of the Respondent outlined above amount to an effective refusal to provide records.

### C. ISSUES

[13] The parties agreed the issues to be addressed in this matter are:

1. With respect to the minutes of the June 19, 2019 owners' meeting, the minutes of the June 25, 2019 board meeting and/or the CCDC contract, did the Respondent effectively refuse to provide records to the Applicant?
2. If it is found that the Respondent did refuse to provide records to the Applicant, should a penalty be assessed?
3. Is the Applicant entitled to an award of costs?

### D. EVIDENCE & ANALYSIS

[14] Seven witnesses testified in this hearing. Only the key evidence relevant to the issues to be decided is set out in this decision.

#### **Issue 1: Did the Respondent effectively refuse to provide records to the Applicant?**

##### The Minutes of the June 19<sup>th</sup> Owners' Meeting

[15] The Applicant testified that he requested an electronic version of the June 19, 2019 owners' meeting in his September 15, 2019 Request for Records but a paper copy, which was not marked as a draft, was delivered to his mailbox on October 15, 2019. On October 18, 2019, he e-mailed the Respondent's board of directors and requested an electronic copy.

[16] Edith Gagnon was a member of the Respondent's board of directors from November 2019 to June 2020. Ms Gagnon testified that she also received a paper copy of the owners' meeting minutes which did not indicate it was not final. She also testified that although the main topic of concern at the meeting had been the performance of the condominium manager, the minutes included no notation of this.

- [17] Diane Soutif, the current President of the Respondent's board of directors, testified that she was the board's Secretary at the time of the owners' meeting and she prepared the minutes based on her own notes and those of another board member. Ms Soutif testified that she did not include what she described as "hurtful" items in the minutes. In addition to the minutes, she prepared a second document summarizing the meeting's main issues. She sent the minutes to the board members on June 23, 2019 and they decided not to share them with Ms McMullen. Therefore, only the issue summary was tabled and discussed at the June 25, 2019 board meeting.
- [18] On October 15, 2019, Ms Soutif hand delivered paper copies of the minutes with an annotated version of the issue summary and a cover note to the Applicant and Ms Gagnon. She testified that she did this because of the "time sensitivity" in responding to the Applicant's request. After she delivered the documents to the two owners, she e-mailed them to Ms McMullen and copied the Respondent's board of directors.
- [19] The Applicant challenged the authenticity of Ms Soutif's October 15, 2019 e-mail to Ms McMullen and objected to it being entered into evidence, suggesting it had been fabricated for purposes of this hearing. I accept the authenticity of this document. The affirmed testimony of Ms McMullen, board members Linda Moyes and Carine Grant and former board member Mike Adams is that they all received Ms Soutif's e-mail on October 15, 2019. Mr. Adams explained that the board has one g-mail address which automatically forwards mail to the individual board members. The e-mails received by Ms Soutif, Ms Moyes and Ms McMullen were entered as evidence. While this e-mail may not have been disclosed during the mediation, it is neither unusual nor unreasonable for additional evidence to be disclosed at a hearing.
- [20] The Applicant attended the November 26, 2019 meeting of the Respondent's board of directors to discuss his concerns about repairs to his unit. The meeting minutes indicate that he advised the board that he had not received an electronic copy of the minutes of the owners' meeting and state "electronic copy will be provided." The documentary evidence indicates that on November 27, 2019, as part of an e-mail sent on another subject, the Applicant reminded Ms McMullen that he had not yet received the promised electronic copy. On December 3, 2019, he filed his application with the Tribunal in respect of this record.
- [21] Kate McMullen has been the Respondent's condominium manager since September 2017. She explained that while she is responsible for preparing the responses to record requests, she always advises the board of the requests. Ms

Soutif, Mr. Adams, Ms Moyes and Ms Grant confirmed that preparing responses to records requests is Ms McMullen's responsibility and the board is kept informed.

- [22] Ms McMullen testified that she received the owners' meeting minutes from Ms Soutif on October 15, 2019 and therefore became aware that the Applicant had received a paper copy. She subsequently produced an annotated version of the minutes for her own use. She explained that she does this to prepare for meetings; she removes items that do not require further action and makes her own notes. She testified that on January 15, 2020, she mistakenly e-mailed her annotated version of the owners' meeting minutes to the Applicant.
- [23] The Applicant testified that he carefully compared the version sent by Ms McMullen to the paper version he had received from Ms Soutif and found substantial differences which he set out in a document he posted to the CAT-ODR system during the mediation. Ms McMullen testified that when she learned she had sent the Applicant her annotated version by mistake, she posted the correct version of the minutes to the CAT-ODR system on January 25, 2020. Ms Soutif testified that Ms McMullen advised Ms Soutif of the mistake and asked for the "proper" version which Ms Soutif furnished.
- [24] Ms Soutif testified that the owners' meeting minutes are not yet approved. Approval of the minutes was not included as an agenda item at the Respondent's November 2019 AGM. She explained that although she had consulted the director's training module on the CAO's website and had contacted the CAO, it was not until the mediation that she learned that approval of the minutes by the owners should have been included as an AGM agenda item.
- [25] The Applicant submits that the Respondent's time lag in providing the electronic version of the owners' meeting minutes and the fact that different versions were provided to him amount to an effective refusal to provide records.
- [26] With respect to the minutes of the June 19, 2019 owners' meeting, I find that there was no refusal by the Respondent to provide records. The Act states that corporation records may be kept in paper or in electronic form. While the Applicant requested and may have preferred an electronic version, he received a paper copy of the draft meeting minutes on October 15, 2019, within the required 30 day time frame for responses to records requests set out in section 13 of Ontario Regulation 48/01. However, draft minutes of meetings do not form part of a corporation's records. Because the owners' meeting minutes had not yet been approved by the

owners, it was not a corporation record and the Respondent was not required to provide any copy to the Applicant.

[27] I note that the Applicant characterized Ms McMullen's annotated version of the minutes as "falsified" and cross-examined Ms McMullen on some of the differences between it and the paper document Ms Soutif had delivered. In his closing statement, he submitted "every deletion or alteration is favourable to the individual doing the editing. And this is an individual that has already been shown to be more than capable of taking documents and altering them in order to deceive." I find these allegations to be unfounded. Given that Ms McMullen was aware that the Applicant had already received a paper copy of the minutes and the fact that she rectified her error by uploading a correct electronic version to the CAT-ODR system, I accept her explanation that she simply made a mistake when she e-mailed the Applicant a document intended for her own use. Any edits or annotations she might have made for her own purposes are not relevant to the case before me.

#### The Minutes of the June 25, 2019 board meeting

[28] The Applicant testified that he received a redacted version of the minutes of June 25, 2019 as part of the Respondent's October 8, 2019 response to his Request for Records. He e-mailed Ms McMullen that same day and asked for the minutes "in their entirety." Ms McMullen's response was "minutes must be redacted if they contain discussion pertaining to a unit."

[29] A second version of the June 25, 2019 minutes was provided to the Applicant during the mediation. A portion of item 7.2 relating to the board's discussion of the owners' meeting is no longer redacted in this second version.

[30] Section 55(4) of the Act sets out exemptions to an owner's right to examine or obtain copies of records. Among others, these exemptions include records related to employees, to litigation and to specific units or owners.

[31] The exercise of some judgment by a condominium manager and/or board members is required to apply the Act's exemptions. Although the originally redacted portion of item 7.2 does not appear to fall under the exemptions, the evidence is that Ms McMullen redacted the document to comply with the Act's requirements. I heard no evidence to indicate the redactions were done in bad faith. The Applicant received the June 25, 2019 board meeting minutes on October 8, 2019 and I find that the fact there was a subsequent revision of the redaction of

one item in the record does not amount to a refusal by the Respondent to provide the record.

### The CCDC Contract

[32] The Applicant testified that he did not receive the CCDC contract until January 30, 2020 during the mediation and that two versions of the signature page were uploaded to the CAT-ODR system. He agreed that he has now received the full contract but noted that a portion of the signature page is blacked out.

[33] The Applicant further testified that he asked Ms McMullen for the record multiple times before he filed his application to the Tribunal on November 1, 2019. The documentary evidence indicates that he asked for a copy in an e-mail to Ms McMullen dated October 23, 2019 and volunteered to provide a USB key to download the document. Ms McMullen's October 24, 2019 reply indicates she would scan and send the document. The Applicant testified that he did not ask the board for a copy of the CCDC contract when he attended the November 26, 2019 board meeting because he had already filed his application with the Tribunal.

[34] Ms McMullen testified that she had difficulty initially uploading the document as she set out in the October 8, 2019 e-mail she sent in response to the Applicant's Request for Records. She believes that she tried to send it to the Applicant before the mediation but indicated she could not specifically recall. She explained that the document was a PDF fillable form and the black box which appears above her name in the "witness" area of the signature page was system-produced when she inserted her electronic signature. She also noted that the only difference between the two versions of the signature page is the addition of her signature.

[35] The evidence is that the Respondent intended to provide a copy of the CCDC contract to the Applicant as set out in the October 8 and 24, 2019 e-mails. I note that there is some dispute between the parties as to whether the contract was provided on January 30, 2020 or on January 24, 2020. Regardless of the actual date, I find the fact that the record was not produced until the mediation in this matter was a refusal, albeit a temporary one, to provide records.

### The November 26, 2019 Board Meeting Minutes

[36] The minutes of the Respondent's November 26, 2019 board meeting is not one of the specific records at issue in this matter and is dated well after the minutes the Applicant requested in his September 16, 2019 Request for Records. However,

the Applicant submitted that this record demonstrates a pattern of behaviour on the Respondent's part and described its provision as "a selfish, intentional, dishonest act," "intended to deceive" both the Applicant and the Tribunal.

[37] The Applicant testified that he received a "falsified" version of the November 26, 2019 minutes during the mediation. Ms McMullen testified that to be helpful, before she uploaded the document to the CAT-ODR system, she had inserted the words "draft" and "final" into its description of the minutes of the owners' meeting. Ms Soutif testified that Ms McMullen told her the change was made for clarity. Ms Soutif further testified that she subsequently advised Ms McMullen that no changes should be made to minutes approved by the board.

[38] I accept Ms McMullen's explanation of the reason she changed the minutes. The change was minor and does appear to have been done for clarity. While a condominium manager should not change approved board minutes, I find the Applicant's characterization of this document as "falsified" and his allegations of dishonesty to be overdrawn.

**Issue 2: If it is found that the Respondent did refuse to provide records to the Applicant, should a penalty be assessed?**

[39] Section 1.44(1)6 of the Act provides that the 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. I have found that the failure of the Respondent to provide the Applicant with a copy of the CCDC contract until the mediation in this matter was a refusal to provide records. The question to be addressed is whether this refusal was without reasonable excuse.

[40] The Applicant submitted that there was "a persistent, dedicated and extreme refusal to provide records" on the part of the Respondent. He requests the Tribunal award the maximum penalty of \$5,000.

[41] Counsel for the Respondent submitted that the evidence indicates the corporation intended to provide the Applicant with the requested CCDC contract; the delay was due to an inadvertent error and no penalty should be assessed. The fact that Ms McMullen was dealing with numerous requests from the Applicant contributed to her failure to send the record. Counsel referred me to the decisions in *HiLevel International Corp. v Toronto Standard Condominium Corporation No. 1858*, 2019 ONCAT 40 and *Lenny Chiro v. Toronto Standard Condominium Corporation No. 1615*, 2019 ONCAT 6, cases in which no penalty was assessed.



[42] The current case can be distinguished from the two cited cases. In *HiLevel*, there had been a number of changes in the Respondent's condominium management firm. Because the only employee providing continuity had no role in record filing, there was difficulty identifying and locating records. In *Chiro*, the corporation was unable to locate records because of the practices of its previous board and the Tribunal found that the corporation had made all reasonable efforts to locate them. In the current case, the evidence is that Ms McMullen had the CCDC contract but simply failed to provide it to the Applicant.

[43] One of the purposes of assessing a penalty is to deter future similar action. O. Reg. 48/01 sets out specific time frames for the provision of records in response to Requests for Records. It should not be without consequence if a corporation fails to meet these time frames without the provision of valid reasons.

[44] In *Maureen Moloney v Durham Condominium Corporation No. 124*, 2020 ONCAT 3 (CanLII), the Tribunal found that a delay in the provision of two records was equivalent to a refusal to provide the record and that there was no valid reason for the delay which was "due only to inadvertence on the part of the Property Manager." The Tribunal assessed a penalty of \$250.

[45] I find that in this case administrative oversight is not a reasonable excuse for the delay in providing the CCDC contract to the Applicant. Ms McMullen committed to providing an electronic version in e-mails sent to the Applicant on October 8 and 24, 2019 but failed to do so. The contract was not sent until late January 2020, some four months after the Applicant's September 16, 2019 request. I note that the Applicant did not remind the Respondent's board of this unfulfilled request when he attended the November 26, 2019 board meeting. While a further reminder might have resulted in the production of the contract, it is the Respondent's responsibility to ensure it complies with the requirements of the Act and regulations.

[46] I assess a penalty of \$150. In determining this amount, I considered that the evidence is that the Respondent did intend to provide the CCDC contract and that this document was the only record which the Respondent did not provide within the prescribed time frame.

### **Issue 3: Is the Applicant entitled to an award of costs?**

[47] Rule 32.1 of the Tribunal's Rules of Practice (effective July 1, 2018) states that the Tribunal may order a User to pay any reasonable expenses related to the use of the Tribunal.

- [48] The Applicant requests costs of \$225 in respect of Tribunal filing fees and \$1500 in respect of the estimated 75 hours he spent participating in the Tribunal's three stage process.
- [49] I note that the Applicant filed applications with the Tribunal on November 1, 2019 and on December 3, 2019 and paid the \$25 filing fee for each of these applications. Before the Stage 2 process began the Tribunal ordered the cases merged and therefore the Applicant paid only one fee for Stages 2 and 3.
- [50] The Respondent requests its costs related only to counsel's participation in the Stage 3 proceeding. The Respondent submitted its counsel's bill of costs totaling \$12,980.88 but confirmed in submissions that it is seeking \$7,500. In the alternative, the Respondent requests that the Tribunal award no costs in this matter.
- [51] Rule 33.1 of the Rules of Practice states that the Tribunal will not order a User to pay another User's legal fees unless there are exceptional reasons. Counsel for the Respondent submitted that there are exceptional reasons in this case. She submitted that the Applicant had received all of the requested records at the end of the mediation and he behaved unreasonably and demonstrated that he was acting in bad faith by making false allegations of fraud on behalf of the Respondent and its condominium manager. She submitted that this behaviour "should be deterred and that costs and expenses incurred due to this behaviour should be reimbursed."
- [52] The allegations made by the Applicant did complicate this proceeding. Before testimony was heard, the Applicant alleged that Ms Soutif's October 15, 2019 e-mail had been fabricated. He characterized both Ms McMullen's annotated version of the owners meeting minutes and the minutes of the November 26, 2019 board meeting, the latter of which not at issue in this matter, as 'falsified' and submitted that Ms McMullen had altered documents with an "intent to deceive." To respond to these serious allegations, the Respondent was required to submit additional documents to authenticate Ms Soutif's e-mail and the teleconference testimony in this proceeding was prolonged.
- [53] However, I cannot conclude that the Applicant requested a hearing in this matter for vexatious reasons and therefore I award the Respondent no costs. While the evidence is that the Applicant had received all of the requested records by the end of the mediation, he had the right to pursue the matter to seek the assessment of a penalty. I note that he represented himself throughout the Tribunal's three stage

process and therefore did not have the benefit of legal advice which might have assisted him in framing his arguments in a more measured manner.

[54] I have addressed the Applicant's allegations in this decision and found them to be without merit. The evidence indicates that Ms McMullen did make some mistakes which undoubtedly contributed to the Applicant's concerns. However, these mistakes were admitted and rectified. The Applicant's unwillingness to accept Ms McMullen's explanations and his attribution to her of an intent to deceive suggest he has some antipathy towards her. It is unfortunate that the result will be that the additional costs the Respondent incurred to respond to the allegations will be allocated to all of its owners. I urge the Applicant to work with both the condominium manager and the Respondent's board of directors with a more conciliatory approach in the future.

[55] The Applicant's November 1, 2019 application was successful and I award him costs of \$200 in respect of the fees he paid to the Tribunal. I award him no costs in respect of the \$25 fee he paid to file his December 3, 2019 application or the \$1500 requested as compensation for the time he spent on this matter. That he had to spend time to participate in the Tribunal's process is to be expected. The agreed issues in this matter were not complex. And, as noted, the Applicant's allegations of record fabrication and deliberate wrongdoing both complicated and prolonged this proceeding.

#### **E. CONCLUSION**

[51] I find that the Respondent's delay in providing the Applicant with the CCDC contract requested in his September 16, 2019 Request for Records to be a refusal to provide records without reasonable excuse. The Respondent shall pay a penalty of \$150 and costs of \$200 to the Applicant.

#### **ORDER**

[52] The Tribunal Orders that:

1. Within 30 days of the date of this decision, the Respondent shall pay a penalty of \$150 to the Applicant.
2. Within 30 days of the date of this decision, the Respondent shall pay costs of \$200 to the Applicant.

3. To ensure the Applicant does not pay any portion of the costs or penalty awards, the Applicant shall be given a credit towards the common expenses attributable to his unit in the amount equivalent to his unit's proportionate share of the above costs and penalty.

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Mary Ann Spencer  
Member, Condominium Authority Tribunal

Released on: September 3, 2020