

CONDOMINIUM AUTHORITY TRIBUNAL

DATE: October 28, 2020

CASE: 2019-00152R

Citation: Mills-Minster v. York Condominium Corporation No. 279, 2020 ONCAT 41

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

Member: Patricia McQuaid, Member

The Applicant

Sonia Mills-Minster

Self-represented

The Respondent

York Condominium Corporation No. 279

Represented by John De Vellis, Counsel

Hearing: June 29 – October 1, 2020, Written online hearing

REASONS FOR DECISION

A. OVERVIEW

- [1] It has become almost trite to state in Tribunal decisions that the records dispute is just one aspect, or a symptom of, other contentious issues between the parties. This case is no exception. Indeed, if, in most cases, the Tribunal is only catching a glimpse of the proverbial ‘tip of the iceberg’ through the records dispute, here far more than the tip was made visible.
- [2] Sonia Mills-Minster (the “Applicant”) is the owner of a unit in York Condominium Corporation No. 279 (“YCC 279” or the “Respondent”). The Applicant submitted a Record Request (the “Request”) on July 4, 2019 for eight non-core records. She wished to examine them in paper format. YCC 279 responded on the prescribed form on August 2, 2019. In its response, the board stated that the Applicant could examine or obtain copies of four of the records and gave an estimate for the fee for the records. The response for the other records was essentially that the corporation could not determine what was intended from the request and therefore asked for more specifics. Thereafter, the Applicant filed her case with the Tribunal,

on August 8, 2019, seeking certain records, a penalty under s. 1.44(1)6 of the *Condominium Act, 1998* (“the Act”) and her costs.

- [3] To understand the current dispute between the parties, further details about the manner in which the case developed are important. As set out in the Stage 2 Summary and Order, four records were identified as being in issue. These are as follows, with the further clarification provided at the outset of this hearing noted.
- a. Water invoices. On the Request, the Applicant was seeking invoices from 2012 to the present. This was a record that YCC 279 stated it would provide and gave a fee estimate. In Stage 2, the Applicant narrowed her request to invoices for three months only: July 2017, July 2018 and July 2019.
 - b. Landscaping invoices. Again, on the Request, the Applicant sought invoices from 2012. The board responded that it could not determine what was requested by the Request and asked for further confirmation. In Stage 2, the Applicant stated that she was requesting invoices for January and August 2019 only. At the hearing, the Applicant provided further details for her Request. She stated that these invoices would include those for grass cutting, flower and ground maintenance as well as snow removal.
 - c. Computer invoices. This Request was for invoices from 2012. The board again responded that it could not determine what was intended by the Request and asked for specificity. In Stage 2, the Applicant stated that she was requesting one invoice from each of the companies or contractors who provided computer services to YCC 279 between January 1, 2016 and January 31, 2019, including the name and contact information for each company. At the hearing, the Applicant provided further clarification. She confirmed that she was seeking invoices for all IT services that included website, email system and electronic distribution of flyers.
 - d. Get Quorum invoices from 2017. YCC 279 stated on its response that it would provide the record and gave a fee estimate. In Stage 2, the Applicant stated that she was only requesting the most recent Get Quorum invoice.
- [4] It was also noted in the Stage 2 Summary and Order that the Applicant was abandoning all other requests. In addition, the Stage 2 Member noted that YCC 279 was taking the position that the Applicant was making the Request for an improper purpose.

- [5] At the outset of the hearing, I sought clarification from YCC 279 that notwithstanding the Board Response form in which it stated that it would provide the water invoices and the Get Quorum invoices (requests much wider in scope at that time) and that it was seeking specificity regarding the other requests, it was now taking the position that the Applicant was not entitled to the records. Mr. De Vellis confirmed the Respondent's position: it asserts that the Applicant is requesting the records for a purpose that was not "solely related to her interest as owner...having regard to the purposes of the Act", based on her actions both before and after the request was filed. The Respondent relies on s.13.3(1)(a) of Regulation 48/01 (the "Regulation").
- [6] What is important to note from the detail outlined above is that YCC 279 is not disputing that the records in issue are records of the corporation to which an owner would otherwise be entitled. The Board Response form of August 2, 2019 was clear in that regard. Further, the Applicant has stated that she is prepared to pay a reasonable fee for the records. As a result, the central issue in this hearing became whether the Applicant was disentitled to the records because of s. 13.3(1)(a) of the Regulation.
- [7] In this decision, I will not refer to all the evidence and submissions before me. I will address the evidence and submissions most relevant to my analysis and the issues to be decided. I note here that this was the third records request made by the Applicant. Evidence and submissions addressed issues that arose in the context of those prior requests, which I advised the parties on several occasions were of limited relevance to this case.

B. ISSUES

- [8] Therefore, the issues to be decided by the Tribunal are as follows.
- a. Is the Applicant disentitled to the records as described in paragraph 3 above because her request is not solely related to her interest as owner having regard to the purposes of the Act?
 - b. If the Applicant is not disentitled, what is the fee payable for the records?
 - c. Should the Applicant be awarded a penalty under s. 1.44(1)6 because the Respondent refused without reasonable excuse to permit her to examine or obtain copies of the records?
 - d. Is the Applicant entitled to costs?
 - e. Is the Respondent entitled to costs against the Applicant, pursuant to Rule 46.1 of the Tribunal's Rules of Practice?

C. RESULT

- [9] For the reasons set out below, I find that the Applicant is entitled to the records requested, as clarified in this hearing. The fee payable for these records is set out in paragraph 20 below. I award no penalty. I make no award of costs to the Applicant or the Respondent.

D. ANALYSIS

ISSUE: Is the Applicant disentitled to the records requested because her request is not solely related to her interest as owner having regard to the purposes of the Act?

- [10] The Applicant testified, as did two former board members, in support of her Request. The Respondent called two witnesses, a current board member and the “operational manager” of YCC 279. Collectively, their testimony reflected the fractures within this condominium community. Testimony was at times acrimonious. An inordinate amount of time was spent on objections to both witness evidence and questions to witnesses. There were perceived attacks on integrity. I was required to make numerous rulings to the effect that the evidence must be relevant to the issues before me.
- [11] Touching upon the evidence of the two former board members (for terms of September 2017 to April 2020) John Triantos and Otto Steenkamp, both made particular note of the fact that the board had not tabled a resolution to deny the Applicant the records. They emphasized that in their view, Ms Mills-Minster, as an owner, was entitled to view financial documents, of which these records formed a part. Whether or not there was a board resolution is largely irrelevant to this dispute, but their evidence did highlight that there are contentious board governance issues at YCC 279.
- [12] This perception was reinforced by the evidence of Robert Appel who was, at the time of the hearing, a current board member. He testified about the proposals before the board for a water submetering bylaw that may have been the catalyst for some of the requests for records and the evolving conflict. He testified about anonymous flyer campaigns as well as an allegedly defamatory notice circulated by Mr. Steenkamp. Mr. Appel concluded his testimony with the following statement:

Ms Mills and her two witnesses are not at arms-length, but are part of an active and hostile “agendized” entity that based on extraordinary past behavior, means to harm

the corporation and upset the residents on a serial basis. It is my firm belief that Ms. Mills was never acting solely as owner but as part of, and on behalf of others from day #1, taking on the role of victim when it is in fact the condo that is threatened: and it is the volunteer, good-faith directors who are faced with the quandary of deciding where their primary duty lies, and what would be the correct legal and ethical response to this extraordinarily difficult situation.

[13] The above statement is the crux of the Respondent's position. This Request is not the first one made by the Applicant. Both the Applicant and Ms Hooper-Rowlands, the operations manager, testified about requests made in September 2018 (which records were provided) and February 2019, the latter of which led to a case before the Tribunal that was ultimately withdrawn by the Applicant. Ms Hooper-Rowlands testified that that in August 2019 when they responded to this request, they indicated that the Applicant could access them and provided the anticipated cost. This is reflected in the Board Response form. Where it was not clear what the Applicant was seeking, they sought more information from her. This too was reflected in the Board response.

[14] Based on Ms Hooper-Rowland's evidence, though she may have found the Applicant's behavior problematic as it related to her various records requests, in August 2019 there was no suggestion that this Request did not relate to the Applicant's interest as an owner. That assertion appeared to develop as time passed and board governance disputes gained momentum. However, the fact that these disputes have come to the fore and perhaps reflect an unravelling of any sense of cohesiveness in this community, does not mean that this Request does not relate solely to the Applicant's interest as owner.

[15] As stated by Cavarzan , J. in [McKay v. Waterloo North Condominium Corp. No. 23, 1992 CanLII 7501 \(ON SC\)](#), ("McKay") in which the learned Cavarzan J. states,

The Act embodies a legislative scheme of individual rights and mutual obligations whereby condominium units are separately owned and the common elements of the condominium complex are co-operatively owned, managed and financed. In the interest of administrative efficiency an elected board of directors is authorized to make decisions on behalf of the collectively organized as a condominium corporation, on condition that the affairs and dealings of the corporation and its board of directors are an open book to the members of the corporation, the unit owners.

[16] The Court was clear: members of a condominium corporation have a unique interest in how the corporation is managed. It may be, as Mr. Appel asserts, that

the Applicant, perhaps together with others, takes issue with certain actions of the board, and its proposal for a water metering bylaw, but as stated in McKay, an owner has legitimate interest in the management of the corporation. The records request is not rendered any less related to that same interest, as owner, because there may be, in parallel, percolating board governance issues.

[17] I find that the Applicant is not disentitled to the records on the basis of s. 13.3(1)(a) of the Regulation. I make no comment on actions that may have been taken by the Applicant or statements made by her, or any of the witnesses, as she pursued her Request. In the Tribunal decision of *Ram Shakyaver v. Metropolitan Toronto Condominium Corporation No.971*¹ (“Shakyaver”), cited by both parties, the respondent there alleged that the applicant would use the records to secretly publish fake, misleading, defamatory and hostile information about the board in an attempt to undermine it, not dissimilar to this Respondent’s assertions. In the Shakyaver decision, the Tribunal noted that the records request arose against a backdrop of longstanding animosity fraught with conflict between the applicant and the respondent. The Tribunal found that the evidence was credible that the applicant’s conduct was provocative and antagonistic, but it did not find that the behavior diminished his entitlement, as owner, to the records requested.²

ISSUE: Given that the Applicant is not disentitled to the records, what is the fee for the records?

[18] As stated above, there was no dispute that the records requested, as clarified by the Applicant, are records that an owner is entitled to receive. These are non-core records and the Respondent is entitled to charge a fee for them. The Applicant does not disagree. Pursuant to ss 13.3(8) and (9) of the Regulation, the Respondent had calculated the fee in its Board Response form. It proposed a photocopying cost of 20 cents per page and a labour fee of \$30 per hour for the examination or for providing access to the records. Time estimates were provided in August 2019, before the request had been narrowed in scope. This fee for labour is reasonable and accords with Tribunal decisions on this issue.

¹ 2020 ONCAT 2 (CanLII)

² The Tribunal in Shakyaver cited the decision in *Sava v. York Condominium Corporation No. 386 2019 ONCAT 8* (CanLII) where the Tribunal held that evidence of a unit owner’s past conduct, even if distressing, objectionable and ultimately undermines the interests of owners, does not demonstrate that the request is not ‘solely related to their interest as owner.

[19] In submissions, the Applicant stated that though the initial request was to view the documents in paper format, she would accept electronic copies to reduce the costs. She has agreed that she will pay a reasonable fee but requires a breakdown of those costs before delivery of the documents.

[20] Therefore, the Tribunal will order that the Respondent provide the Applicant with a breakdown of the costs to provide the records set out in paragraph 3, in both paper and electronic format. The fees charged will be at a rate of \$30/hour for labour (and that estimate shall reflect the narrowed scope of the request) and 20 cents per page for photocopying. The Applicant is required to pay the fees prior to receipt of the documents.

ISSUE: Should the Applicant be awarded a penalty under s. 1.44(1)6 because the Respondent refused without reasonable excuse to permit her to examine or obtain copies of the records?

[21] The Applicant asserts that the Respondent has denied her the records without a reasonable basis. As set out in detail above, the Respondent did not, initially, refuse any of the records. In its Response, the board in fact stated that it would provide some of the records and sought more details regarding others. The Applicant chose not to examine those records that were made available to her in or about August 2019 and did not provide the further clarification asked for at that time. It was not until this case progressed that the request was further clarified and narrowed.

[22] I do not accept the Applicant's assertion in submissions that the Respondent has attempted to delay, obfuscate and use its greater resources to frustrate this request. Nor do I accept the Applicant's submission that there was a power imbalance and that the board and management had superior knowledge which they used to frustrate her requests. It was apparent throughout this proceeding that all participants were sophisticated, well informed and articulate individuals. Further, the Applicant was not without legal guidance. Her spouse is a lawyer and did on occasion make submissions on her behalf in this proceeding.

[23] It was not until the Respondent advanced its position that the Applicant was disentitled to the records because of its belief that the requests was not solely related to her interest as owner, that it could be said that there was a refusal to provide the records.

[24] While I have found that this is not a proper response to the Applicant's Request, I conclude that a penalty is not appropriate. Tribunal jurisprudence has pointed to a

penalty as a means by which to impress upon a condominium corporation the seriousness of their obligations to diligently comply with the Act. In its response of August 2019, this board did so. While there was a refusal, at least by Stage 2 of this proceeding, and perhaps earlier, there was a period of time when the Applicant could have accessed the records in her Request, and she chose not to. She did not provide the clarification for some of the records until Stage 2. This was not a situation where the condominium corporation disregarded the rights of a unit owner with respect to a request for records from the outset.

[25] The imposition of a penalty is discretionary. The Tribunal is called upon to determine, based on the evidence before it, whether a penalty is appropriate. While I was not persuaded by the Respondent's arguments on which it based its ultimate refusal, I am also not persuaded that a penalty is necessary or justified here. In its decisions, the Tribunal has stated that one of the purposes of the Tribunal process is to promote healthy condominium communities. The evidence from all five witnesses made it abundantly clear that this community is far from healthy. A penalty, on these particular, and perhaps unusual, facts will not serve the purposes for which it was intended. This Request and the manner in which it was dealt with evolved into a convenient vehicle for both parties to express and escalate the acrimonious and fractious relationship between some owners and some board members.

ISSUE: Is the Applicant entitled to costs?

[26] Section 1.44(1)4 of the Act gives the Tribunal discretion to order costs. And as a general rule, an unsuccessful party will be required to pay the costs of the other party unless the Tribunal orders otherwise.³ Here, the Applicant decided to engage the CAT process mere days after she received the board response. She did not avail herself of the opportunity provided then to examine the records that the board clearly was prepared to provide and brought these records forward as part of this proceeding. She did not provide the clarification requested until Stage 2 of this proceeding. While the Applicant has been successful in obtaining the records requested, this proceeding could have been avoided in August 2019. In the circumstances such as this, where the Applicant consciously chose to pursue the CAT process, I do not find that an award of costs is appropriate.

ISSUE: Is the Respondent entitled to costs?

³ CAT Rules of Practice – Rule 45.2

[27] While I have noted that the case before the Tribunal might have been avoided initially, at some point after August 2019 the Respondent made a decision, seemingly based on the ongoing interactions between the parties and the various witnesses, to deny the Applicant access to the records. The Respondent states that it has been forced to incur significant expense due to this Request and the Applicant's prior ones.

[28] The relevant rule in the Tribunal's Rules of Practice is Rule 46.1 which states that the CAT will not order a User to pay to another User any fees charged by that User's lawyer or paralegal, unless there are exceptional reasons to do so. To find "exceptional reasons", I would need evidence that the Applicant had been grossly unreasonable, or had taken positions that unduly complicated this Application, or had acted in bad faith or with malice. I found no such evidence in this case. As noted above, the escalation of this dispute did not rest solely with the Applicant.

[29] No costs shall be awarded to the Respondent.

E. ORDER

[30] Therefore, for the reasons set out above, the Tribunal orders as follows.

1. The Respondent shall provide the Applicant with the following records:
 - a. Water invoices for July 2017, July 2018 and July 2019
 - b. Landscaping invoices (including grass cutting, flower and ground maintenance and snow removal) for January 2019 and August 2019.
 - c. Computer invoices from each of the companies or contractors who provided computer services (including all IT services related to the website, email systems and electronic distribution of flyers) between January 1, 2016 and January 31, 2019
 - d. Get Quorum invoice most recent to August 2019
2. Prior to delivery of the records, the Respondent shall give an estimate for fees on the basis of \$30/hour for labour required to provide the records to her, as well as photocopying costs of 20 cents per page (if paper versus electronic copies are required). This fee estimate is to be provided within 20 days of this decision. Payment shall be made by the Applicant to the Respondent prior to delivery of the records.
3. No penalty or costs are awarded.

Patricia McQuaid
Member, Condominium Authority Tribunal

Released: October 28, 2020