

## CONDOMINIUM AUTHORITY TRIBUNAL

**DATE:** July 16, 2021

**CASE:** 2021-00097R

**Citation:** Buddell v. Peel Condominium Corporation No. 395, 2021 ONCAT 66

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

**Member:** Mary Ann Spencer, Member

**The Applicant,**

Peter Buddell

Self-Represented

**The Respondent,**

Peel Condominium Corporation No. 395

Represented by Mary Kahn, Agent

**Hearing:** Written Online Hearing – May 14, 2021 to July 7, 2021

### **REASONS FOR DECISION**

#### **A. INTRODUCTION**

- [1] Peter Buddell (the “Applicant”) is an owner of a unit of Peel Condominium Corporation No. 395 (the “Respondent”). He alleges that the Respondent failed to respond to his December 27, 2020 Request for Records in the prescribed time and has not provided some of the requested records which he is entitled to receive. He also alleges that the Respondent is not keeping adequate records as required by the *Condominium Act, 1998* (the “Act”).
- [2] The Applicant requests that the Tribunal order the Respondent to provide the outstanding records and to assess a penalty to the Respondent for unreasonably refusing to provide records. He also requests his costs in this matter.
- [3] The Respondent’s position is that it did not receive the Applicant’s Request for Records and was unaware of it until the Applicant filed his application with the Tribunal after which it provided the records. It submits that the case should be dismissed.
- [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 provide the outstanding records to the Applicant at no cost and to pay the

Applicant a penalty of \$500 and \$200 in costs. I also find that the Respondent is keeping adequate records with respect to its financial statements. The evidence is insufficient for me to make any finding with respect to the adequacy of the records of the mathematical calculation used to determine common expenses.

## **B. BACKGROUND**

- [5] On December 27, 2020, the Applicant submitted a Request for Records to the Respondent in which he requested paper copies of the most recent approved financial statements and auditor's report and of "the mathematical calculation used to determine monthly common expenses fees" for his unit for the years 2015 to 2020 inclusive. The Applicant received no response from the Respondent.
- [6] The Applicant and his spouse purchased their condominium unit in 2013. The Applicant advised that they intend to sell the unit. He alleges that the Respondent has mis-calculated the common expense assessment ("CEA") for his unit and advised that he requested the Respondent's records of the mathematical calculation it used to determine the CEA in order to seek reimbursement of an alleged overpayment before the intended sale.
- [7] The Applicant provided the Tribunal with background information detailing a history of his and his spouse's interaction with the Respondent. The Applicant's witness statement included details about a dispute over responsibility for a bathroom leak and a resulting application to Superior Court; a complaint filed with the Condominium Management Regulatory Authority of Ontario; a lien registered against their unit; and, correspondence and documents relating to the alleged miscalculation of their CEA.
- [8] The Applicant expressed his hope that the Tribunal would consider the history of interaction with the Respondent in making its decision on the records issues before it and suggested that the Tribunal might have authority to issue an order if it discerned oppression when considering those issues. In this regard, he referred me to the decision in *Siemon v. Perth Standard Condominium Corporation*, 2020 ONCA 503 (CanLII), in which the Court noted that "the motion judge had broad remedial power to make any order she deemed proper upon a finding that the conduct complained of was oppressive" notwithstanding that there was not a specific application for an oppression remedy.
- [9] The Respondent was represented in this matter by its condominium manager. In her closing submission, the Respondent's representative stated that the Applicant's "issues and requests deal with the issue of CEF fees" and "therefore is not applicable at this tribunal" and submitted that the case should be dismissed.

[10] The jurisdiction of the Tribunal is set out in Ontario Regulation 179/17. The Tribunal has jurisdiction to hear disputes with respect to s. 55 of the Act. The issues which the Applicant detailed with respect to his interaction with the Respondent before he submitted his Request for Records are outside of the Tribunal's jurisdiction and I will not consider the Applicant's evidence with respect to those issues. I also reject the Respondent's submission that the matter be dismissed: issues relating to the Applicant's December 27, 2020 Request for Records are within the jurisdiction of the Tribunal. Those issues include whether the Applicant has received the records he is entitled to receive and whether the Respondent is keeping adequate records.

### **C. ISSUES & ANALYSIS**

[11] The issues to be addressed in this matter are:

1. Is the Applicant entitled to receive copies of the records requested in the December 27, 2020 Request for Records?
2. Is the Respondent keeping adequate records?
3. Should the Respondent be required to pay a penalty under s.1.44 (6) of the Act for failure to provide the Applicant with the requested records without reasonable excuse, and if so, in what amount?
4. Should the Applicant be awarded any costs?

#### **Issue No. 1: Is the Applicant entitled to receive copies of the records requested in the December 27, 2020 Request for Records?**

[12] In his December 27, 2020 Request for Records, the Applicant requested paper copies of the Respondent's most recent audited financial statements and auditor's report and "the mathematical calculation used to determine monthly common expenses fees" for his unit for the years 2015 to 2020 inclusive.

[13] Section 55 (1) of the Act requires a condominium corporation to keep adequate records and sets out a list of those records which includes "the financial records of the corporation". The right of an owner to examine or obtain copies of the corporation's records is set out in s. 55 (3) of the Act. I find that the requested records are financial records and the Applicant is entitled to receive copies of them.

[14] The evidence is that the Applicant has now received a copy of the approved financial statements and accompanying auditor's report for the fiscal year ended

July 31, 2020. He testified that the Respondent provided these records on April 29, 2021 during the Stage 2 Mediation in this matter.

- [15] With respect to the Applicant's request for the record of the mathematical calculation used to determine common expenses fees, the Respondent's representative uploaded three documents to the CAT-ODR system during the disclosure phase of the Stage 3 hearing. The document labelled "CEF Calculation 1998" is entitled "Unit Master Summary Listing" and sets out the percentage of total expenses to be charged to the Applicant's unit. The document labelled "CEF Calculation 2007" is a copy of the Respondent's 2007 budget and includes a chart indicating the percentage of that budget to be charged to each unit. Finally, the document labelled "CEF Calculation" is a spreadsheet setting out the 2020 budget, the percentage of that budget charged to the Applicant's unit, and the resultant monthly CEA. It is unclear whether the 2020 document is a copy of a record of the Respondent or an information summary prepared for this hearing.
- [16] I note that the Applicant requested records for the years 2015 to 2020 inclusive and that the three documents uploaded by the Respondent refer to 1998, 2007 and 2020. It may be that the uploaded documents comprise the full records of the Respondent which are responsive to the Applicant's request. For example, it may be that the "Unit Master Summary Listing" provides the input for an automated system calculation of the CEA and that the specific records requested by the Applicant do not exist. However, no witness testified on behalf of the Respondent, notwithstanding that I twice advised the Respondent's representative that testimony was needed to explain the relevance of the documents she uploaded. Therefore, there is no evidence before me to explain what those documents represent or to indicate that the records requested by the Applicant do not exist.
- [17] Therefore, I will order the Respondent to provide the requested records together with the accompanying statement required by s. 13.8(1) of Ontario Regulation 48/01 which states "each copy of a record that the corporation makes available for examination or delivers under any of sections 13.4 to 13.7 shall be accompanied by (a) *a separate written document that is addressed to the requester and that clearly identifies the record that is being made available or delivered, as the case may be*". I will also order the Respondent to provide written notice to the Applicant if the specific records requested do not exist.
- [18] The records of the mathematical calculation of the CEA are not defined as a core record in O. Reg. 48/01 and therefore the Respondent is entitled to charge a fee for their production. However, given the delay in the provision of these records, I am ordering they be provided to the Applicant at no cost.

## Issue No. 2: Is the Respondent Keeping Adequate Records?

### The Financial Statements

[19] The Applicant questioned the accuracy of the Respondent's 2020 financial statements. He asked that the Tribunal require the Respondent "to answer (i) who signed these statements, (ii) why the 2020 revenues did not exceed the budget by the additional \$653.40 we paid, and (iii) explain how the figure \$680,855 in the Auditors' Report was derived."

[20] Section 55 (1) of the Act states "the corporation shall keep adequate records" and sets out a list of the records which must be kept. The word "adequate" is not defined in the Act. Cavarzan J. provides some guidance in *McKay v. Waterloo North Condominium Corp. No. 23, 1992 CanLII 7501 (ON SC)*:

The Act obliges the corporation to keep adequate records. One is impelled to ask – adequate for what? An examination of the Act provides some answers. The objects of the corporation are to manage the property and any assets of the corporation (s. 12 (1)). It has a duty to control, manage and administer the common elements and the assets of the corporation (s. 12 (2)). It has a duty to effect compliance by the owners with the Act, the declaration, the by-laws and the rules (s. 12 (3)). Each owner enjoys the correlative right to the performance of any duty of the corporation specified by the Act, the declaration, the by-laws and the rules. The records of the corporation must be adequate, therefore, to permit it to fulfil its duties and obligations.

[21] The Applicant's concerns about the adequacy of the financial statements relate to their content and his requests are for information. As the Tribunal noted in its decision in *Ravells v. Metropolitan Toronto Condominium Corporation No. 564, 2020 ONCAT 44*, it assesses adequacy based on the requirements of the Act and not on whether an owner finds the records adequate for their own purposes:

However, the extent to which the corporation's records enable an owner to gain a "true understanding of their investment" is necessarily a subjective assessment. Each owner of a corporation might have a different perspective based on their own priorities and understanding of the records. The issue before me is not whether the Applicant finds the records she received sufficient for her purposes but whether the Respondent is keeping adequate records in accordance with section 55(1) of the Act.

[22] There is no evidence before me to indicate that the corporation is not keeping adequate records with respect to its audited financial statements. The evidence is that they were signed by a firm of chartered accountants and the auditor's

statement indicates they were prepared in accordance with Canadian generally accepted auditing standards. Therefore, I find that with respect to the financial statements and auditors' report, the Respondent is keeping adequate records. I also note that in her closing statement, the Respondent's representative provided the names of the individuals who signed the statements and indicated that she had sent the "auditor's explanation of the difference in numbers" to the Applicant.

### The Mathematical Calculation of the CEA

- [23] The Applicant testified that he believes that the Respondent has incorrectly recorded the percentage of common expenses to be charged to his unit and consequently has mis-calculated the CEA resulting in a significant cumulative overcharge. He asked that "the condominium be compelled to produce a correct record going forward, this to include any statement of monthly expenses appearing on a status certificate." To support his position, he uploaded a copy of the corporation's declaration which sets out the percentage of common expenses to be charged to each unit, a copy of a Service Ontario printout which sets out the legal description of his unit, and a copy of a ledger showing the actual CEA charged by the corporation.
- [24] The Tribunal has determined that accuracy is a component of the adequacy of records. In *Yeung v. Metropolitan Toronto Condominium Corporation No. 1136*, 2020 ONCAT 33, a case which addressed the accuracy of the minutes of a board meeting, the Tribunal ordered the corporation to correct the minutes based on undisputed evidence that the board's proceedings had been inaccurately recorded.
- [25] The Applicant framed his request to the Tribunal as an issue about the adequacy of records by alleging that the Respondent has recorded an incorrect percentage to determine his unit's CEA. However, his Request for Records is a request for the very records he alleges are incorrect and which, as noted above, it is unclear that he has received. He is effectively asking the Tribunal to determine what the correct percentage should be based on the documents he uploaded; that is, the declaration, the legal description of his unit and the ledger setting out the history of the CEA. The jurisdiction of the Tribunal with respect to s. 55 (1) of the Act does not extend to determining the correctness of a corporation's actions or decisions. The question before me is not whether the percentage applied by the Respondent was the correct one but rather whether the Respondent has kept accurate, and therefore adequate, records of the percentage it did apply.
- [26] I make no finding with respect to the adequacy of the Respondent's records of the calculation of the CEA for the Applicant's unit because there is insufficient information before me to do so. It is unclear what records the Respondent

maintains. As noted above, I am ordering the Respondent to provide the records requested by the Applicant in his Request for Records because without any testimony from the Respondent, I cannot determine what the documents posted to the CAT-ODR system represent or whether they comprise the full records responsive to the Applicant's request.

**Issue No. 3: Should the Respondent be required to pay a penalty under s.1.44 (6) of the Act for failure to provide the Applicant with the requested records without reasonable excuse, and if so, in what amount?**

- [27] 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. The maximum penalty payable is \$5000.
- [28] The Applicant testified that on December 28, 2020, he sent the Request for Records (dated December 27, 2020) to the condominium management firm by e-mail; hand-delivered it to the management office at his condominium building; and, mailed a copy to the condominium management firm's office by regular mail. He testified that he received no response. On February 25, 2021, he sent an e-mail to the corporation's board of directors in which he again requested the records and noted that he had received no reply to the Request for Records. He testified he received no response to this e-mail.
- [29] The Respondent's representative advised that the Respondent had not received the Applicant's Request for Records and indicated she did not become aware of it until this case was filed with the Tribunal. She advised that she had subsequently checked e-mail records and found none from the Applicant with the Request for Records.
- [30] The required manner of delivery of a Request for Records is set out in s. 13.3(4) of O. Reg. 48/01 which states in part that a request is sufficiently delivered if it is sent by prepaid mail to the address for service of the condominium management firm. Therefore, I find that the Request was properly delivered. I acknowledge that the Request could have been misplaced given it was mailed during a holiday period when, as the Respondent's representative noted, people were not working in offices because of the Covid-19 pandemic. However, even if the Request was misplaced, there is no explanation before me with respect to why the Respondent did not reply to the Applicant's February 25, 2021 follow-up e-mail.
- [31] Lateness in providing requested records is not necessarily an unreasonable refusal to provide them under the Act. I note that the Respondent did provide the

Applicant with the most recent financial statements and auditor's report during the Stage 2 mediation in this matter. However, the evidence is also that the Respondent did not provide any records of its method of calculation of the CEA until the Stage 3 hearing and, because the Respondent called no witnesses, it is unclear whether the documents it did upload to the CAT-ODR system are in fact those fully responsive to the Applicant's request.

[32] The Applicant requested a penalty of \$5,000 be assessed due to the "personal nature" of this matter. While the background the Applicant provided indicates there has been what he described as "a most adversarial relationship with the Respondent", the purpose of a penalty is not to compensate for perceived and/or actual past mistreatment. Rather, the purpose of a penalty is to deter future similar action with respect to an unreasonable refusal to provide records.

[33] I find the Respondent's delay in providing records until the Stage 3 hearing in this matter to be an effective refusal to provide records without reasonable excuse and I assess a penalty of \$500 to be appropriate. In determining this amount, I have considered that while the Respondent did provide a reason for its initial failure to respond to the Applicant's Request for Records and did provide some records during the Stage 2 mediation in this matter, it provided no reason for the delay in providing other documents until the Stage 3 hearing. An owner should not have to proceed to a Stage 3 hearing to obtain a response to their Request for Records.

#### **Issue No. 4: Should the Applicant be awarded any costs?**

[34] Rule 45.1 of the Tribunal's Rules of Practices states that the Tribunal may order a User to pay to another User or the CAT any reasonable expenses or other costs related to the use of the CAT. Rule 45.2 states that if a case is not resolved by Settlement Agreement or Consent Order and a CAT Member makes a final Decision, the unsuccessful User will be required to pay the successful User's CAT fees and reasonable dispute-related expenses, unless the CAT member decides otherwise.

[35] The Applicant requested costs of \$245.28 comprising \$200 in Tribunal fees, \$12 in costs to deliver the Request for Records and \$33.28 to obtain a copy of his parcel registration from the land registry office. He also requested compensation for an estimated 40 hours of his time. The Respondent requested no costs.

[36] The Applicant was partially successful in this matter and therefore I award costs of \$200 representing the fees he paid to the Tribunal. The \$12 the Applicant spent to deliver his Request for Records would have been paid whether the case proceeded to the Tribunal or not. With respect to the \$33.28 spent to obtain the



parcel registration, this cost was incurred with respect to the issue of determining the correct percentage to be applied to determine the Applicant's CEA, an issue outside of the Tribunal's jurisdiction. Finally, I award no compensation for the time the Applicant spent to prepare and participate in this proceeding; that he had to spend time is to be expected.

**D. ORDER**

[37] The Tribunal Orders that:

1. Within 15 days of the date of this decision, the Respondent, at no cost to the Applicant, shall provide the Applicant with either paper copies of the records of the mathematical calculation used to determine monthly common expenses fees for the Applicant's unit for each of the years 2015 to 2020 inclusive or with written confirmation that these records do not exist. Each record provided to the Applicant shall be accompanied by a separate written document which clearly identifies the record that is being provided.
2. Within 30 days of the date of this decision, the Respondent shall pay a penalty of \$500 to the Applicant.
3. Within 30 days of the date of this decision, the Respondent shall pay costs of \$200 to the Applicant.
4. 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: July 16, 2021