

CONDOMINIUM AUTHORITY TRIBUNAL

DATE: July 29, 2021

CASE: 2020-00438R

Citation: Mawji v. York Condominium Corporation No. 415, 2021 ONCAT 72

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

Member: Janice Sandomirsky, Member

The Applicant,

Gulshan Mawji

Represented by Sheila Mawji, Family member

The Respondent,

York Condominium Corporation No. 415

Represented by Tony Bui, Counsel

Hearing: Written Online Hearing – May 6, 2021 to June 19, 2021

REASONS FOR DECISION

A. INTRODUCTION

- [1] The Applicant, Gulshan Mawji, is a unit owner of York Condominium Corporation No. 415 (“YCC415”), the Respondent.
- [2] The Applicant made a request for records on December 31, 2020. She requested access to core records, including the minutes of board meetings held within the prior 12 months, and auditors’ reports from October 2018 to December 2020. YCC415 responded to the request and agreed that the Applicant could examine or obtain a copy of all the records requested at no cost.
- [3] The Applicant disputes that YCC415 provided access to all requested records. The main issue relates to the minutes of the board meetings for the 12 months between December 2019 and December 2020. YCC415 provided minutes from board meetings held on May 11, 2020, and September 22, 2020. The Applicant submits that it is implausible that the board conducted all business for the year at only two meetings, and that it either held additional meetings, and failed to provide the records of those meetings, or that the records provided are not adequate within the meaning of s.55(1) of the *Condominium Act, 1998* (the “Act”).

- [4] The Applicant also claims that YCC415 did not provide access to a 2018 auditor report.
- [5] YCC415 maintains that the board met only two times in 2020, and the Applicant received the minutes from those two meetings, and that it provided access to all the financial records requested.
- [6] For the reasons set out below, I find YCC415 provided access to all existing records requested by the Applicant. I conclude, however, that the minutes of the board meetings are not adequate records of the board's proceedings.

B. ISSUES & ANALYSIS

- [7] The issues the parties have asked me to consider are:
1. Did YCC415 provide all the records the Applicant requested in her December 31, 2020, Request for Records?
 2. Are the records "adequate" within the meaning of s. 55(1) of the *Act*?
 3. If the records are inadequate, what is an appropriate remedy?
 4. Should YCC415 pay a penalty under s. 1.44(1) 6 of the *Act*?
 5. Is either party entitled to an order for costs?

Issue 1: Did YCC415 provide the requested records?

- [8] Upon review of the evidence and submissions of both parties, I accept the YCC415's statement that the board held two meetings in 2020, on May 11 and September 22. While one can certainly infer from the evidence (which is discussed later in this decision) that the board made corporate decisions without holding meetings, there is no specific evidence of any actual additional board meetings. I conclude, therefore, that YCC415 provided the Applicant with access to all existing board meeting minutes.
- [9] On the issue of access to the audit report for 2018, the Applicant acknowledges that YCC415 provided the more recent audit report, dated October 31, 2019, but argues it failed to provide the report for 2018. The Applicant relies on the financial statements from the June 2019 annual general meeting showing payment of \$2,269 in audit fees in fiscal year 2018-2019. The Applicant submits that it would be an unusual business arrangement for YCC415 to pay an auditor without first receiving the report along with an invoice.
- [10] YCC415 maintains that it did not receive an audit report in 2018 and it has

provided the Applicant with all the financial records requested.

[11] While paying for an audit it did not receive is questionable, and may suggest poor management, I accept YCC415's claim that it did not receive an audit report for 2018, and it provided the Applicant with all the available financial records requested.

[12] Having found that YCC415 provided the Applicant with all existing requested records, I make no order to produce records.

Issue 2: Are the records provided adequate?

[13] When arguing that the board must have met more than two times in 2020, the Applicant referenced s.32 of the *Act* which requires, "...the board of a corporation shall not transact any business of the corporation except at a meeting of directors at which a quorum of the board is present." She submitted that, as the board is mandated to transact business at a meeting, it follows that all business of the corporation should be set out in the minutes of board meetings.

[14] The Applicant identified numerous indications in the documents issued by YCC415 supporting the argument that the board made decisions in the course of transacting the business of the corporation that are not set out in either the May 11 or September 22 meeting minutes, including the following:

1. Review of legal advice – the May 11 minutes approve payment of fees for the legal advice received in December 2019 and February 2020, inferring that the board met to discuss the legal advice prior to the May 11 meeting.
2. Correction of errors in owners meeting minutes – the May minutes note a request from the board on March 4 that the condominium manager corrects errors in the February 27 owners' meeting minutes, inferring that the board met on March 4 to discuss and order that correction.
3. Landscaping contract – the May minutes include approval of a landscaping contract for the period April 15 to November 15, 2020, inferring that the board met prior to April 15 to review the contract.
4. Deferral of special assessment – the May minutes include a decision to defer the April 1 special assessment payment, inferring that the board met to make decisions about the special assessment prior to the May meeting.
5. Letters from the board of directors to owners dated May 15 and May 27 - the May 15 letter confirmed the board's decision to defer the April special assessment but collect the June assessment; the May 27 letter, however, states that the board had decided to defer all upcoming special assessment

payments until the next fiscal year in light of financial constraints that some owners might experience due to Covid 19, inferring that the board met sometime between May 11 and May 27 to change the special assessment schedule.

6. Letters from the board of directors to owners dated October 15 and 26 - the September minutes include an action item to review and schedule a special assessment, however, payments letters issued by the board on October 15 and 26 outline different special assessment payment schedules, neither of which are reflected in deliberations or decisions set out in the minutes.
7. Letters from the condominium management company to owners dated October 15 - the September minutes include an action item to review and approve the budget year ending October 31, 2020; the October 15 letter notes that, "after much deliberation" by the board of directors, there would be a 0% increase in the common element fee, however, this decision is not reflected in the minutes.
8. Roof Shingles – a November 4, 2020, letter to the owners states that the board approved a shingles replacement project after reviewing and considering three different quotes but this decision is not reflected in either of the minutes provided.

[15] The Applicant argues that it follows from this evidence that either the board held additional meetings to transact this business, for which there must be minutes that YCC415 did not make or produce, or the board made those decisions outside of a duly constituted board meeting, contrary to the requirements of the *Act*. And, as a result, the decisions are not recorded, as they ought to be, in the minute book of the corporation. Under either of these scenarios, the Applicant argues that the board is not keeping adequate minutes.

[16] YCC415 argues that the documents relied on by the Applicant, and her conjecture based on the documents, do not support a conclusion that the board held additional meetings, and rejects the Applicant's argument that these matters could not be dealt with unless there was a meeting. It argues that the Applicant misunderstands how a board conducts business and that not every item of day-to-day administration requires a board meeting. Therefore, the minutes are a complete, accurate and adequate record. YCC415 suggests that the Applicant's grievances relate to the board's business decisions and not the records themselves and that, while the latter is squarely within the Tribunal's jurisdiction, the former is not.

[17] The Applicant submits that she is not questioning the board's decisions, or asking about the rationale for the decisions, or taking issue with whether they are good or

poor decisions. She notes, for example, that the board may have had very good reasons to make the decisions it did, such as deferring special assessment fees out of concern for owners who may experience financial hardship due to COVID-19. Her stated concern is that board decisions must be made at board meetings and recorded in the minutes, or else the minute book of the corporation is not an adequate record of the business transacted.

[18] In addition, the Applicant argues that the minutes YCC415 provided from the May and September meetings do not meet the standard of adequacy in two additional respects: first, they are not signed or dated; and second they are missing significant information and detail.

[19] The minutes YCC415 provided include an item simply stated as, “review and approval of previous minutes,” without referencing the dates of the approved minutes. The minutes are not signed by the board members. The Applicant argues that, without signatures or the date of the approved minutes, it is not possible to know if the documents provided are official approved minutes or merely draft minutes. She notes that board minutes from prior years were signed by the board of directors.

[20] The Applicant also argues that the board minutes are missing many details leaving them unclear and confusing. She notes, for example, open questions relating to the deferred special assessment fees that are not clearly answered by the minutes, such as: was this a retroactive deferral approved on May 11 for the April payment already processed on April 1? if so, did the board approve a refund to owners for the April payment? or did the board decide to accept the processed fees as payment for June?

[21] And in relation to the summer landscape contract, she argues that the minutes leave it unclear whether the board approved hiring the contractor on May 11 to begin services retroactively to April 15 or gave approval at an earlier meeting prior to the service start date. Further, the minutes do not indicate when the board reviewed the quotes for landscaping or how much the board awarded for the contract.

[22] The Applicant set out a list of questions like these in relation to each item referenced in the minutes.

[23] YCC415 characterizes the Applicant’s position as untenable arguing that she relies on an unrealistic standard of perfection. It submits that the Applicant fails to appreciate that minutes are not intended to be a word-for-word transcript of everything that is discussed at a meeting. YCC425 maintains that the minutes

provide adequate documentation of the board's business transactions.

- [24] Section 55(1) of the *Act* requires that a condominium corporation not simply keep records, but that they keep "adequate" records. The question of what constitutes an adequate record has been discussed in several court and Tribunal decisions. The starting point of this discussion is often the *McKay v. Waterloo North Condominium Corp. No. 23, 1992 CanLII 7501 (ON SC)* where the court states:

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.

- [25] When considering the adequacy of board minutes in particular, Tribunal decisions have adopted "a reasonably high standard of expectation for accuracy" in light of the "special place and purpose in helping to ensure that 'the affairs and dealing of the corporation and its board of directors are an open book to the unit owners,' and in helping owners protect their "unique interest in how the corporation is managed.'" (*Yeung v. Metropolitan Toronto Condominium Corporation No. 1136, (2020 ONCAT 33)*).

- [26] And as noted in *Rahman v. Peel Standard Condominium Corporation No. 779, (2021 ONCAT 32)*,

In matters before the Tribunal, we see a wide variety of minutes in terms of form and detail. Issues about the adequacy of minutes arise frequently. It is well settled law at this point that the purpose of minutes is to document a board's business transactions and to show how the corporation's affairs are controlled, managed, and administered. There is an implied requirement that the minutes be accurate, but the *Act* does not impose a standard of perfection. Minutes are not required to be a verbatim account of a meeting.

- [27] These decisions establish that an adequate record of a board meeting is a document with sufficient detail to allow the owners to understand what is going on in their corporation, how decisions are being made, when the decisions are made and what the financial basis is for the decisions.

- [28] I agree with the Applicant that a review of the May 11 and September 22 board

minutes in this case suggests that the board discussed many matters identified in the minutes before and after those meetings. Further, the letters from the board and the property management company to the owners make references to board decisions that are not included in the minutes provided.

- [29] As noted by the Applicant, s. 32 of the *Act* requires that condominium boards “shall not transact any business of the corporation except at a meeting of directors.” Although Covid 19 may have limited the opportunity for in-person meetings, the legislation does allow boards to meet by telephone or electronic means. In this case, the evidence indicates that the board followed a practice of making ad hoc decisions between meetings rather than transact the business of the corporation in accordance with s.32 of the *Act*.
- [30] YCC415 argues that it is reasonable to expect the board of a condominium to make day-to-day management decisions outside of actual board meetings. This may be the case, but it is beyond the Tribunal's current jurisdiction to consider such governance practice questions. It is, however, within its jurisdiction to determine the adequacy of the corporation's records, including the board minutes.
- [31] The requirement of s. 32 of the *Act* that the board hold meetings to conduct business, combined with the requirement of s. 55(1) of the *Act* that board keep adequate minutes of meetings, supports a finding that the *Act* contemplates that there ought to be minutes that record every decision constituting the "transact[ion of] any business of the corporation." As a result, an assessment of the adequacy of the board minutes necessarily includes a consideration of whether the minutes contain a record of all the business transacted by the board.
- [32] Based on the evidence presented in this case, it appears that the board of directors conducted some business of the corporation in relation to such matters as the payment and deferral of special assessments, budgeting, and contracts, without holding meetings. Accordingly, regardless of whether the board's practice of making certain decisions on an ad hoc basis between meetings is acceptable (which I make no finding on), it is evident that its record keeping practices of the corporation's business transaction falls below the standard required by the *Act*. As a result, I find that the YCC415's minutes do not meet the standard of adequacy.
- [33] Furthermore, the items that are set out in the May 11 and September 22 minutes read more like an agenda for a meeting than a record of the business conducted by the board. As noted in the cases cited above, it is expected that the minutes meet a reasonably high standard of accuracy considering their special place and purpose in creating the corporate memory. The minutes provided in this case includes little if any information about what was discussed or decided about each

point on the agenda. For example, on such an important topic as the special assessment payments and schedule, the information is scant and incomplete unless read together with the letters from the board to the owners.

- [34] Finally, in reviewing the Applicant's suggestion that the minutes are not adequate because they do not include the date of the minutes approved and are not signed, I agree that the failure to include the dates creates some uncertainty about which minutes were adopted by the board. Further, that a best practice could include signed minutes as suggested in *Wei v. Toronto Standard Condominium Corporation No. 2297* (2021 ONCAT 8). However, I conclude that these defects in and of themselves may not affect the adequacy of the minutes if the record otherwise met the more significant criteria of including a full listing of the board's decisions and a reasonable overview of the business conducted by the board.

Issue 3: If the records are inadequate, what is an appropriate remedy?

- [35] The Applicant requests an order that YCC415 provide corrected approved minutes for the May 11 and September 22 board minutes. She relies on the *Yeung* (2020 ONCAT 33) decision which determined that the Tribunal has jurisdiction and authority to order the respondent to correct the inadequacy in the minutes to ensure that the affairs and dealings of the corporation and its board are maintained as an open book.
- [36] In this case, unlike the *Yeung* case where the Tribunal ordered a correction of the information included in one specific item in the minutes, there appear to be a number of board decisions that are not fully reflected in the minutes. As a result, I find that the more appropriate approach is to leave it to the corporation to determine how best to ensure that it records all business transactions and decisions in its minute book.

Issue 4: Should YCC415 pay a penalty under s. 1.44(1) 6 of the Act?

- [37] The Applicant requests an order for a penalty against YCC415. She argues that the board agreed to provide access to the 2018 audit report in its YCC415 to the Request for Records, implying that such a report existed, and then denied access claiming that the report does not exist. She submits that this amounts to a refusal to provide access to a record without a reasonable excuse. She also requests an order for a penalty against YCC415 on the basis that it has not taken its legal obligations seriously and breached the requirements of the *Act*.
- [38] The Tribunal's jurisdiction to order a penalty is limited. Section 1.44(1) 6 provides that a penalty may be ordered if there is a finding that the board refused access to

records without a reasonable excuse. Given the finding that YCC415 provided the existing records, and cannot reasonably be expected to provide a non-existent record, (despite the misstatement in its Response cited by the Applicant), there is no basis for an award of a penalty in this case.

Issue 5: Is either party entitled to an order for costs?

[39] The Applicant requests an order for costs. The Tribunal general orders that an applicant is entitled to recover the \$200 filing fees when the application is successful. The Applicant is successful on the issue of the adequacy of minutes and, therefore, I find that her costs, being the \$200 fees paid to the Tribunal, ought to be reimbursed.

[40] YCC415 requests an order for costs on the basis that the application was unnecessary, frivolous and a misuse of the Tribunal's and corporation's limited resources. It argues the Applicant provided no evidence supporting her claims that she did not have access to the requested records and that her entire position about the adequacy of the records is unfounded in fact and law. Having concluded that the minutes do not meet the standard of adequacy under the *Act*, I find there is no basis to order payment of YCC415's costs.

C. ORDER

[41] The Tribunal Orders that:

1. YCC415 shall pay costs of \$200 to the Applicant within 30 days of the date of this decision.
2. If the payment is not made within 30 days of this Order, the Applicant will be entitled to set-off the \$200 against the common expenses attributable to the Applicant's unit in accordance with Section 1.45 (3) of the Act.

Janice Sandomirsky
Member, Condominium Authority Tribunal

Released on: July 29, 2021