

CONDOMINIUM AUTHORITY TRIBUNAL

DATE: August 9, 2021

CASE: 2020-00396R

Citation: Russell v. York Condominium Corporation No. 50, 2021 ONCAT 74

Order under Rule 4 of the Condominium Authority Tribunal's Rules of Practice.

Member: Laurie Sanford, Member

The Applicant,

Rob Russell

Self-Represented

The Respondent,

York Condominium Corporation No. 50

Represented by Benjamin Rutherford, Counsel

MOTION ORDER

- [1] Mr. Russell is an owner of a condominium unit in York Condominium Corporation No. 50 ("YCC50"). He has brought an application to the Condominium Authority Tribunal (the "CAT") seeking certain records of YCC50 under section 55 of the *Condominium Act, 1998* (the "Act"). Mr. Russell has completed his testimony. Both YCC50 witnesses have given their testimony-in-chief. Mr. Russell has finished his cross-examination of one witness and is in the process of asking final, follow-up questions of the second. He seeks to introduce four additional documents. YCC50 contests the motion.
- [2] The case revolves around what Mr. Russell alleges are inadequacies in YCC50's record keeping, both in the records they have produced in response to his various requests for records and in the records which have not been produced and which YCC50 says do not exist.
- [3] The four documents that Mr. Russell wishes to introduce as exhibits may be described as follows:
1. Audited Financial statements issued by YCC50 on July 15, 2021 as part of the 2021 AGM information package;
 2. Current CAO Calendar listing of directors and term start dates, published by the CAO on July 14, 2021;

3. Notice of planned modification to the common elements, delivered to owners on January 5, 2021; and
4. Copy of YCC notice posted on a YCC50 bulletin board before this hearing began.

[4] The issues in this motion are whether Mr. Russell ought to be permitted to enter these four documents in this hearing. The time for disclosure has passed. Mr. Russell has already been permitted to disclose one document after the disclosure deadline. The hearing is nearing completion. One witness for YCC50 has completed her testimony and cross-examination. The second witness is in his second and final round of cross-examination questions. The bar for admitting new evidence becomes higher as the hearing proceeds. Proposed disclosure this late in the proceedings will only be granted in unusual circumstances. The evidence must be material, of significant probative value and cannot have reasonably been discovered earlier. Even if those conditions are met, the balance between the public interest in expeditious hearings and fairness to both parties must be assessed.

[5] There is also, as YCC50 notes, an element of proportionality that must be considered. Mr. Russell has been given considerable leeway in this matter, both because he is self-represented and because he is attempting to prove something which is quite challenging to demonstrate. He wishes to show that some of the records he has requested, both records which YCC50 keeps and does not keep, are inadequate. He also wishes to expand the scope of the hearing to consider the general adequacy of YCC50's record keeping. Introducing new evidence this late in the proceeding will prolong the matter again. There is the issue of whether the new evidence sought to be introduced is proportional to the additional time spent in adducing it, considering not only the review of the documents themselves but the further examination of one or both of YCC's witnesses.

[6] Mr. Russell submits that there is a power imbalance between the parties. The financial statements were within the control of YCC50, in his submission, and the fact that they were only released in July, 2021, should not stop him from introducing them now. He contends that the scope of the issues in this hearing extend beyond the records he is requesting into a consideration of the following:

- Did YCC50 retain all records that they are required to retain under the Act?
- Are the records of the corporation, in particular the minute book of the corporation, adequate for the purposes of establishing the business of the corporation? and,

- Is the minute book complete and accurate to a reasonable standard?

[7] It is important to understand the CAT's role and jurisdiction in this hearing for context about the decisions it will reach, both on this motion and in the decision on the merits. The case must be considered within the confines of the records Mr. Russell has requested and which remain in dispute between the parties and the provisions of the Act relating to such records requests. It cannot extend beyond that.

Audited Financial Statements

[8] Mr. Russell submits that the Audited Financial Statements mention that YCC50 had entered into agreements related to a thermostat replacement project. Mr. Russell submits that this is contrary to a YCC50's reply to one of his records requests dated April 29, 2021 and establishes the existence of an agreement. Mr. Russell also submits that the information in the Audited Financial Statements contradicts an answer by YCC50's witness, Mr. Maharaj, on cross-examination. Mr. Russell notes that the Audited Financial Statements only became available on July 15, 2021.

[9] YCC50 contests Mr. Russell's submission that the Audited Financial Statements contradict one answer given by Mr. Maharaj and calls it a mischaracterisation of the testimony. My review of the specific question posed and answer provided does not reveal any contradiction. Mr. Maharaj was asked whether the reply of YCC50 to another owner's request for records related to a planned replacement of the thermostats is correct and why YCC50 gave a different answer to Mr. Russell's request. The response was that the witness did not know who answered Mr. Russell but the answer to the other owner was the correct one. While Mr. Russell will be entitled to seek clarification of that answer in his second round of cross-examination questions, the answer on its face is clear and would not be contradicted by evidence of agreements relating to the thermostat replacement project.

[10] Concerning the issue of whether the Audited Financial Statements establish that there was an agreement for the thermostat replacement project, there are other means to establish this. It was open to Mr. Russell during his cross-examination of YCC50's two witnesses to ask questions about any agreements for the thermostat replacement project. It is not necessary to introduce new evidence at this late stage to establish a fact which might easily have been established earlier. I will permit Mr. Russell to ask one follow-up question of Mr. Maharaj to establish whether there is an agreement for the thermostat replacement project.

[11] Mr. Russell also submits that the fact that the Audited Financial Statements were made available to the owners seven months after the end of the fiscal year is evidence of inadequate record keeping. It is open to Mr. Russell to make that argument in his closing statement. It is not necessary for the Audited Financial Statements themselves to be exhibits for that argument to be made. The request for late disclosure of the Audited Financial Statements is denied.

Current CAO calendar

[12] The Condominium Authority of Ontario (“CAO”) publishes an annual calendar that includes information about the date of appointment of directors of condominiums and their tenure. The most recent calendar was published on July 14, 2021. Mr. Russell seeks to introduce this calendar as an exhibit for two reasons. Initially, he submitted that the calendar contradicts the testimony both of YCC50’s witnesses. However, he has subsequently amended his submission to state that he is not seeking to question the credibility of Mr. Maharaj but to determine if the Minute Book of YCC50 contains a reference to Mr. Maharaj’s appointment on the date specified in the CAO calendar.

[13] Mr. Russell has not apparently amended his submissions to deny that he seeks to impugn the testimony of the other YCC50 witness, Ms. Gikondi, who has now completed her testimony and cross-examination. Even if Mr. Russell planned to introduce this evidence now to undermine her credibility, there is a rule of fundamental fairness that would prevent the attempt. Referred to as “the rule in *Browne v Dunn*”, it states that if contradictory evidence is going to be presented to impeach a witness’ credibility, that evidence must be put to the witness first. In this case, Ms. Gikondi should have been confronted with the alleged conflict between her testimony about her tenure and records that might contradict such evidence. Mr. Russell submits that the CAO calendar did not issue until July of this year. However, that is not an answer to the requirement of fairness that Ms. Gikondi should have been given an opportunity to respond to evidence that is being introduced in an attempt to impugn her credibility.

[14] As noted above, Mr. Russell submits that the CAO calendar is necessary to question Mr. Maharaj about whether the Minute Book of YCC50 contains a reference to Mr. Maharaj’s appointment on the date of that appointment. The CAO calendar is not necessary to ask a question about whether the YCC50 Minute Book contains that reference. I conclude that the CAO calendar is not necessary and Mr. Russell’s request to introduce it is denied. I will permit Mr. Russell to ask one question of Mr. Maharaj about whether he is aware of a YCC50 entry in the Minute Book referring to his appointment as director.

Notice of Planned Modifications delivered January 5, 2021 and a YCC50 Notice posted before this hearing began

- [15] Mr. Russell seeks to introduce these two documents to contradict the testimony of Mr. Marahaj, in his submission. He submits that he expected that YCC50 would disclose these documents or introduce them in testimony. The “contradiction” that Mr. Russell alleges appears to be testimony that Mr. Marahaj cannot recall the January 5th notice and may not be giving specific information about the YCC50 Notice.
- [16] As noted above, one of the requirements for the late introduction of new evidence is that the evidence was not reasonably discoverable by the party seeking to introduce it. In the case of both the Notice of Planned modifications issued by YCC50 in January, 2021 and the YCC50 Notice, Mr. Russell could have discovered these before the hearing began. His submission is that he believed YCC50 would be introducing the documents, whether as records or in testimony. However, he knew following the “disclosure” phase of the hearing that YCC50 was not introducing the documents in question. At that point, he could have brought a motion for late disclosure of the documents in question. The fact that he brought such a motion for another document suggests that he was aware of the opportunity. Mr. Russell also had the opportunity in his cross-examination to question the witnesses about both documents. He continues to have the opportunity to make closing submissions about how to interpret their answers.
- [17] To attempt to introduce the evidence this late in the hearing when it was discoverable earlier introduces an element of unfairness. YCC50 would be denied a full opportunity to testify about the documents. Each party is required to put forward its full case in a hearing and a purpose of the disclosure phase is to avoid surprises. It would be unfair to YCC50 to now admit evidence that was discoverable by Mr. Russell earlier and to which YCC50 would not have an opportunity to make a full response. Mr. Russell’s motion to introduce the Notice of Planned Modifications and a YCC50 Notice posted before this hearing began is denied.

ORDER

- [18] For the reasons set out above, Mr. Russell’s motion to introduce new documentary evidence is denied.

Laurie Sanford

Member, Condominium Authority Tribunal

Released on: August 9, 2021