

## CONDOMINIUM AUTHORITY TRIBUNAL

**DATE:** August 13, 2021

**CASE:** 2020-00301R

**Citation:** Florentine Financial Corporation v. Peel Condominium Corporation No. 346, 2021 ONCAT 77

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

**Member:** Nicole Aylwin, Member

**The Applicant,**

Florentine Financial Corporation  
Represented by Sana Hussain, Agent

**The Respondent,**

Peel Condominium Corporation No. 346  
Represented by Victor Yee, Counsel

**Hearing:** Written Online Hearing – March 3, 2021 to July 27, 2021

### **REASONS FOR DECISION**

#### **A. INTRODUCTION**

[1] The Applicant, Florentine Financial Corporation (“Florentine”) is the owner of Unit 3 in Peel Condominium Corporation No. 346 (“PCC 346”), which is a condominium that consists of four commercial condominium units. Florentine has requested several records from the Respondent, PCC 346, and has asked that the Tribunal order that the requested records be provided, unredacted, to Florentine. PCC 346 has refused to provide these records relying on s. 55(4)(b) of the *Condominium Act, 1998* (“the Act”), which provides an exemption to the right of examination if the records requested relate to “to actual or contemplated litigation”. Florentine has also requested that the Tribunal order PCC 346 to pay a \$4000 penalty and its costs in the amount of \$1500.

[2] Before setting out the records in dispute, some context relating to the parties is worth noting. Florentine and PCC 346 are engaged in an ongoing legal dispute at the Superior Court of Justice (“SCJ”). This dispute concerns allegations of unpaid common expenses by Florentine dating back to 2016 and allegations of oppression made by Florentine against PCC 346. While the issues in dispute at the SCJ are not matters before this Tribunal, they are relevant to the records

dispute at issue in this hearing insofar as, as noted above, one of the arguments made by PCC 346 is that Florentine is not entitled to examine or obtain the requested records because they relate to ongoing litigation and thus are exempt from examination under s. 55(4)(b) of the Act.

- [3] It is within this context that I permitted the parties to submit some evidence and make submissions that refer to this SCJ legal action, but always with the reminder that the issues in front of me relate to a dispute over records and that any submissions made should be relevant to the records dispute. Nonetheless, both parties attempted to take this opportunity to advance and argue their positions in the SCJ matter. The volume of evidence and submissions provided in relation to the SCJ matter was excessive.
- [4] Further, having been engaged for several years in ongoing litigation, there is significant animosity between these two parties. Throughout the hearing, allegations of improper, unfair, dismissive, and illegal behavior of board members and former board members were made by the parties. These issues are outside the scope of this Tribunal.
- [5] As a result of the factors above, both parties contributed to lengthening and making this proceeding more complicated than necessary. In this decision, I will only address the evidence and submissions relevant to my analysis and the issues to be decided by me.

## **B. ISSUES**

- [6] At the outset of the hearing, Florentine was requesting the following records:
1. Bank records and cheque copies for the period of January 2013 - August 2020.
  2. The most recent auditor's report (January 1, 2019 - December 31, 2019).
  3. Section 98 agreements for units 1, 2 and 4
- [7] However, the bank records and cheque copies for the period of January 2013 - December 2016 and the requested s. 98 agreements were not ultimately included in this hearing. The bank records and cheque copies were excluded in the preliminary stages of the hearing because it was determined, after submissions from both parties, that the question of entitlement to these records was decided by Small Claims Court in March 2017 as part of the ongoing legal dispute between the two parties. The s. 98 agreements were excluded because Florentine withdrew its request for these agreements during the hearing.

[8] Having excluded these records, the Tribunal was left to determine several issues related to the bank records and cheque copies for the period of January 2017 - August 2020 and the most recent auditor's report. These issues were:

1. Is Florentine entitled to the requested records as per the s. 55 of the Act or are the records exempt from being examined or obtained due to s. 55(4)(b) of the Act?
2. If Florentine is entitled to examine or obtain the records, is PCC 346 entitled to redact the records in accordance with the Act?
3. If the records are to be redacted, is PCC 346 entitled to charge a fee for the labour associated with the redaction and production of these records and, if so, what is a reasonable fee?
4. Is PCC 346 required to pay a penalty under s 1.44(1)6 of the Act for refusing to provide the records without a reasonable excuse? If so, in what amount?

[9] There is one other issue that was raised in this hearing, and it should be addressed at the outset. As part of its submissions, PCC 346 argued that the records request submitted by Florentine should not be considered a valid request because it was not delivered in accordance with s.13.3(4) of O. Reg. 48/01 of the Act. Section 13.3(4) of O. Reg. 48/01 of the Act sets out that a request for records is sufficiently delivered to a corporation if it is "sent by facsimile transmission, electronic mail or any other method of electronic communication if the board has, by resolution, decided that it is a method for receiving delivery of the request." It is the position of PCC 346 that since no such resolution has been passed by the board of PCC 346, Florentine's request is invalid as it was delivered by email.

[10] The evidence on this issue is as follows. In his witness testimony for PCC 346, president of the board, Bill Hristovski notes:

Despite the invalid delivery of Florentine's purported records requests, PCC 346 has nevertheless responded to same on a good faith and without prejudice basis.

If the CAT were to find that PCC 346's responses to Florentine's invalid records requests constitutes sufficient acceptance by PCC 346 of those records requests, then going forward PCC 346 will simply ignore any invalid attempts at email delivery of records requests from Florentine and any other unit owner of PCC 346. PCC 346 will not respond to any emails whatsoever from Florentine containing any purported records requests.

[11] However, despite the claim that this request is invalid and the issuing of

ultimatums, the evidence shows that PCC 346 responded, on multiple occasions, to Florentine's Request for Records using the mandated response form, even noting in one of its initial responses in August 2020 that "PCC 346 accepted Unit 3's Request for Records." It was only in a letter dated November 3, 2020, sent to Florentine, which (perhaps ironically) also included an "updated" response to Florentine's record request, that PCC 346 stated that:

The Corporation reserves the right to assert that your Requests were not validly delivered to the Corporation pursuant to the Condominium Act, 1998. SO. 1998, c. 19 ...and O. Reg 48/01...made thereunder.

- [12] When asked under cross-examination if the board had ever advised owners that it would not accept delivery of any request for records via email, Mr. Hristovski answered 'no'.
- [13] The purpose of s.13.3(4) of O. Reg 48/01 does not seem to be to provide an opportunity for a corporation to invalidate a records request on a technicality, but rather to ensure that the corporation receives the request and has a fair chance to acknowledge and respond to the request. PCC 346 had this opportunity. PCC 346 clearly received the request without incident, and they responded to it on multiple occasions. It is only in PCC 346's November 3, 2020 "updated" response to Florentine, which contains a cover letter from PCC 346's legal counsel that PCC 346 begins using language such as "purported request" and making claims that the request is invalid. The initial response forms from August 2020 use no such language and do not indicate in any way that the PCC 346 does not accept the request as valid. For all intents and purposes PCC 346 treated this request as valid and acted as if it were valid. Thus, I find Florentine's request valid in this case.
- [14] Should PCC 346 wish to "ignore" future requests for records from owners which are delivered by email, that is its choice. However, in the interests of maintaining a harmonious condominium community, I would strongly encourage PCC 346 to be consistent in the application of this rule and to be transparent with their owners by notifying them in writing of the fact that PCC 346 will only be responding to requests that are in strict accordance with s.13.3(4) of O. Reg. 48/01 of the Act and will not be accepting requests for records that are delivered by email.

### **C. RESULT**

- [15] For the reasons set out below, I find that that Florentine is not entitled to examine or obtain a copy of the bank records and cheque copies for the period of January 2017 - August 2020 as they are "records relating to actual or contemplated

litigation” and are exempt from examination under s. 55(4)(b) of the Act.

[16] Regarding the auditor’s report, I find that s. 55(4)(b) does not apply and that Florentine is entitled to examine or obtain an unredacted copy of this record for the fiscal year of January 1, 2019 - December 31, 2019. PCC 346 shall provide them with a unredacted copy of the report within 14 days of its completion.

[17] Finally, I find no penalty or costs are appropriate in this case.

#### **D. ISSUES**

**Is Florentine entitled to the requested records as per the s. 55 of the Act or are the records exempt from being examined or obtained due to s. 55(4)(b) of the Act?**

##### **Bank Statements and Cheque Copies**

[18] Florentine has requested a copy of bank records and cheque copies for the period of January 2017 - August 2020. Florentine submits that they are entitled to these records under s. 55 of the Act and that they should not be exempt from examination because they are not related to the ongoing SCJ action between the parties. They further submit that the PCC 346 has denied them the records “for no reasonable reason other than to simply be difficult.” They argue that because PCC 346 has provided them with the 2016 bank statements and cheque copies in an unredacted form (after an endorsement was made to this effect by Small Claims Court), PCC 346 should do so again.

[19] PCC 346 has taken the position that these records are directly related to the SCJ matter between the parties and thus are exempt from the right of examination as per s. 55(4)(b) of the Act. PCC 346 referenced *Mara Bossio v Metro Toronto Condominium Corporation 965 (2018 CAT 6)* (“Bossio”) to support their position.

[20] In Bossio, the Tribunal found that the exception to an owner’s right to examine or obtain records as set out in s. 55(4)(b) of the Act applied to the records the Applicant was seeking and that the Applicant was not entitled to the requested records. In Bossio, the Respondent denied the Applicant’s request for records because they believed the Applicant was contemplating litigation. In this case, the exemption is claimed on the basis that the records are related to actual ongoing litigation.

[21] Section 55(4) of the Act provides in part:

The right to examine or obtain copies of records under subsection (3) does not

apply to,

...

(b) records relating to actual or contemplated litigation, as determined by the regulations, or insurance investigations involving the corporation

[22] Section 1(2) of the Regulation provides a definition of the relevant terms as follows:

In the Act and this Regulation,

“actual litigation” means a legal action involving a corporation;

“actual or contemplated litigation” means actual litigation or contemplated litigation;

“contemplated litigation” means any matter that might reasonably be expected to become actual litigation based on information that is within a corporation’s knowledge or control.

[23] In this case there is “actual litigation” ongoing between the parties. This fact is not disputed. What is disputed is the relevance of the requested records to the SCJ action and if the records are relevant enough to the ongoing action to exempt them from examination.

[24] A central issue in the SCJ matter is the allegation of unpaid common expenses. As a result of this allegation, PCC 346 claims that the bank records and cheque copies are directly relevant to the issue in front of the SCJ as the banking records and cheque copies are likely to show transactions made between PCC 346 and Florentine, including any payments towards common expenses.

[25] When questioned during cross-examination about how the bank records and cheque copies may be related to the SCJ matter, Ms. Hussain, the Secretary for Florentine Financial Corporation stated:

“We [Florentine] are asking for an accounting of Unit 3’s payments as there have been multiple legal charges, lien threats, etc...

...the accounting we are demanding relates specifically to the charges that were charged to Unit 3. These would not form a part of the banking records of the corporation.

[26] Although Ms. Hussain states that the ‘accounting’ at issue would not form part of the banking records I am not convinced by her testimony. She specifically notes

that Florentine is asking for an accounting of Unit 3's payments, payments that bank records and cheque copies are likely to show, a fact that makes them directly related to the SCJ dispute.

[27] I am also not convinced by the argument that because PCC 346 had been ordered by Small Claims Court to provide Florentine with similar records in the past, they should be ordered by this Tribunal to do so again. The Small Claims Court endorsement is not relevant here. I must consider the facts before me and the sections of the Act that determine entitlement, or in this case limit entitlement to a record. Based on the facts before me, I find that, s. 55(4)(b) does apply in this case because the bank records and cheque copies for the period of January 2017 - August 2020 are directly related to the ongoing litigation between these two parties. As such, they are exempt from the right of examination and do not need to be provided to Florentine.

### **Most Recent Auditor's Report**

[28] Florentine has also requested a copy of the most recent auditor's report, which would be the report for the fiscal year January 1, 2019 – December 31, 2019. In deciding the issue of entitlement to this record some context is necessary as the auditor's report for 2019 does not exist, a fact agreed upon by both parties.

[29] According to PCC 346, annual unaudited financial statements of PCC 346 are prepared each year by chartered professional accountants and circulated to all owners, including Florentine. Mr. Hristovski testified to this effect, stating that since at least August 3<sup>rd</sup> 2000, all four of PCC 346's units, including Florentine, have treated the unaudited annual financial statements as satisfactory. Mr. Hristovski further testified that it was only after Samil Khan, who served as Florentine's representative to the board and President and General Manager of PCC 346 from 2013 - 2016 was removed from the board and PCC 346 commenced litigation against him and Florentine, that Florentine began demanding that PCC 346 provide audited financial statements. He notes that during the years of Mr. Khan's tenure on the board Mr. Khan did not call for PCC 346 to comply with the auditing requirements under the Act.

[30] Finally, Mr. Hristovski notes that in 2019, PCC 346 attempted to have the audit requirements for PCC 346 waived as per s. 60(5) of the Act, which allows a condominium to forego audit requirements if they meet certain conditions. To meet these conditions, PCC 346 asked unit owners to sign a "Consent to Waive Audit" form. This form was executed by 3 of the 4 units in PCC 346. The unit that did not consent was Florentine. Despite having consent from only 3 of the 4 units, Mr. Hristovski testified that the board held an "honest belief" that Florentine did not

need to consent to waiving the audit requirement because Florentine was in arrears (a fact that continues to be disputed in the SCJ action). Regardless, Mr. Hristovski submits that PCC 346 is now in the process of obtaining a proposal from a professional accounting firm for the preparation of auditor's reports for 2019 and 2020 but notes that the process has been delayed due to COVID-19.

- [31] Turning to Florentine's position, Florentine does not dispute the fact that for many years Florentine did consent to waive the audit requirements. In her witness statement, Ms. Hussain acknowledged that during Mr. Khan's tenure on the board all owners had agreed that audited financial statements were not necessary. However, she also expressly notes that Florentine has now removed their consent to waive the audit requirements and has submitted evidence in the form of emails demonstrating that they did not endorse the "Consent to Waive Audit" form.
- [32] It is within this context that I address the question of whether the auditor's report is exempted from the right of examination due to s. 55(4)(b).
- [33] PCC 346's position on this issue is that the auditor's report is exempt from examination, pursuant to s. 55(4)(b) of the Act. However, PCC 346 also notes that even if the record is not exempt from examination, they should not be required to provide it as it does not exist.
- [34] Florentine disagrees. They argue that the auditor's report is a core record that they are entitled to it under s. 55 of the Act and that PCC 346 is using the SCJ action as a blanket excuse to deny all of Florentine's requests for records. Florentine takes the position the auditor's report is central to their ability to know the status of PCC 346's financials, which is particularly important now that they are no longer represented on the board and are not included in "key decisions of the Corporation." They note that not only is the auditor's report a core record, but the Act also requires the board to provide the Auditor's report to each unit owner before each annual general meeting as per s. 69(1) of the Act, which demonstrates the significance of the record. Finally, they note that they have 'no way of knowing' the financials of the corporation without such records.
- [35] I agree with Florentine's arguments that the auditor's report is a central mechanism through which condominium owners can be informed of and assess the financial health of the corporation. The annual auditor's report provides an opportunity for unit owners who may not have input into the day-to-day operations of the corporation assurance that the money they provide to the corporation is being used in an appropriate manner and that the corporation is attending appropriately to its financial health. Presumably, the importance of making this document available and accessible to all owners is why it is listed as a core record



in the Act and why it is required to be provided to all unit owners prior to the Annual General Meeting as per s. 69(1) of the Act.

[36] The evidence offered by PCC 346 to support its position is that the record be exempt from examination because it is related to the SCJ litigation is not extensive nor detailed. At various times in its submissions, PCC 346 makes general claims that the auditor's report is part of the 'accounting records' of the Corporation. For example, in his witness statement, Mr. Hristovski's asserts that the auditor's report should be exempt because "a central issue in the ongoing SCJ Action is PCC 346's accounting and financial records."

[37] At its most specific, PCC 346 provides the following in its closing statement:

At para. 69 of Florentine's own sworn Affidavit filed in the ongoing Action, Florentine explicitly alleged that PCC 346 has "*failed to comply with other requirements of the Act such as having audited statements done*".

As such, Florentine by its own pleadings has made the issue of the Auditor's Report – or lack thereof – a live issue in the ongoing Action in the Brampton Superior Court.

[38] I am not persuaded by these submissions. If I was to order this record to be exempt from examination, I would, in effect, be denying Florentine the ability to access a record that would provide them with the means as an owner to assess PCC 346's financial status. A general assertion that 'accounting' records are at issue at the SCJ, and a single out of context quote, pulled from hundreds of pages of pleadings (the quote provided is from p. 391 of the pleadings) where Florentine happens to refer to the auditor's report as an example of an allegation that PCC 346 is not complying with the Act, is not enough, in this case, to convince me that the auditor's report is a "live issue" at the SCJ and should be exempt from examination.

[39] Given that PCC 346 is claiming that the record is exempt, it is incumbent upon them to demonstrate, on the balance of probabilities, that this record is related to the ongoing litigation between the parties and that Florentine is disentitled to the report. Based on the facts before me, I find that they have not done so. Accordingly, I find that Florentine is entitled to examine or obtain a copy of the auditor's report for the period of January 1, 2019 – December 31, 2019, without redaction.

[40] Although I have found that Florentine is entitled to examine the record, I will not order that it be produced, at least not immediately. This is because as both parties acknowledge that this report does not currently exist. However, PCC 346 has

indicated they are in the process of retaining a proposal from an accounting firm to produce said report, thus I will order that they provide auditor's report to Florentine within 14 days of its completion.

- [41] Having found the bank records and cheque copies are exempt from the right of examination and that the auditor's report should be provided unredacted, I do not need to decide the issue of what constitutes an appropriate fee for the production and redaction of these records. This leaves me to decide if a penalty or award of cost is appropriate in this case.

### **Should there be an award of a penalty in this case?**

- [42] Both parties provided submissions on the question of whether a penalty and costs should be awarded in this case. I will first deal with the penalty first.
- [43] Under s 1.44(1)6 of the Act, 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. Because I have found that the bank records and cheque copies are exempt from examination, there is no basis for a penalty related to these records. And, while I have found that Florentine is entitled to examine the auditor's report, for the reasons set out below, I have concluded that a penalty is not appropriate in this case.
- [44] In its submissions, Florentine argued that a monetary penalty in the amount of \$4000 would be appropriate in this case. They referred me to *Anvari v. CCC 95 (2021 ONCAT 24)*, noting that in this case the Tribunal found a "penalty was appropriate where the Corporation 'willfully disregarded' its legal requirements relating to a request for records." They submitted that similar disregard was "evident" from PCC 346 in this case.
- [45] PCC 346 argued that a penalty is not appropriate as they did not unreasonably refuse the record since it was either exempt from examination or, in the event that it was not exempt, the record does not exist and thus could not be provided, which they claim is a reasonable excuse. They referred me to several cases including, *Emerald PG Holdings Ltd. v. TSCC 2519 (2020 ONCAT 24)*.
- [46] Again, the history around the auditor's report is helpful here. Both parties have agreed that the auditor's report does not exist. Both parties also agree that for many years (perhaps as early as 2000) all units had agreed that unaudited annual financial statements would suffice and that audited statements were not required. This unanimous agreement ended sometime after 2016 when Florentine withdrew their consent and asked the corporation to provide audited financial statements.

The withdrawal of their consent happened to correspond with the removal of Florentine's representative on the board, Mr. Khan, who for many years acted as the President and General Manager of PCC 346, and the commencement of legal action against both Florentine and Mr. Khan by the PCC 346.

- [47] Based on these unique facts, I disagree with Florentine that it is "evident" that PCC 346 "willfully disregarded" its legal requirements relating to a request for records. There is no doubt that the Act requires PCC 346 to solicit and provide an annual auditor's report to owners. However, when Florentine made the request for the auditor's report it was with full knowledge that that report did not exist and could not be provided. The timing of such a request, under the circumstances and given the history between the two parties, seems somewhat disingenuous.
- [48] The imposition of a penalty by the Tribunal is discretionary. As noted in, *Terence Arrowsmith v Peel Condominium Corporation No. 94*, not every refusal, even those without an excuse, will give rise to a penalty. Whether or not a penalty is appropriate will be a function of the facts in each case.
- [49] Given the unique facts in this case, I find that no penalty is warranted here. In prior Tribunal cases it has been noted that one of the purposes of the penalty is to impress upon condominium corporations the seriousness of their obligations to comply with the provisions of the Act and to provide unit owners with a remedy when those obligations are not met. This is not necessary in this case. PCC 346 has demonstrated that they are aware of their obligation to solicit an auditor's report and have testified that are actively attempting to do so. They are also now aware that s. 55(4)(b) does not apply to this record and have been ordered to provide it when it is completed. Moreover, the refusal of this record should not have been unexpected by Florentine who made the request with full knowledge that it could not be fulfilled. Imposing a penalty at this point would not serve the purposes for which it is intended, thus I find the facts of this case do not warrant a penalty.

### **Should there be an award of costs in this case?**

- [50] Florentine has requested \$1500 in costs and cited *Rahman v. PSCC 779 (2021 ONCAT 13)* to support their claim. While I note that PCC 346 objected to Florentine's reliance on this case as it is currently under judicial review, the objection is unnecessary as I do not find Rahman to be relevant here. In Rahman, a costs award in the form of damages was made to Mr. Rahman after he was aggressively pursued for parking violations by the condominium corporation which issued him multiple tickets that required him to spend time and energy to cancel at the municipality. The Tribunal also found that Mr. Rahman suffered stress and

anxiety related to this aggressive behaviour for which he had to seek medical help. No similar facts or circumstances are found in this case and Florentine has not provided any other evidence to support their claims for costs.

[51] I do note that it has been the practice of the Tribunal to award costs for Tribunal filing fees when the applicant is successful in their application. However, in this case I do not find a costs award for Tribunal fees appropriate. Florentine was successful in one of its claims, but it was not successful in the other. Based on the history between these parties there was enough uncertainty regarding entitlement to these records to make a Stage 3 - Tribunal Decision necessary. For these reasons no costs will be awarded.

#### **E. ORDER**

[52] For the reasons set out above the Tribunal orders that:

1. Florentine is not entitled to the bank records and cheque copies for the period of January 2017 - August 2020.
2. PCC 346 is required to provide an unredacted copy of the auditor's report for the period of January 1, 2019 – December 31, 2019, within 14 days of its completion.
3. No penalty is awarded.
4. No costs are awarded.

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Nicole Aylwin  
Member, Condominium Authority Tribunal

Released on: August 13, 2021