CONDOMINIUM AUTHORITY TRIBUNAL

DATE: January 6, 2022
CASE: 2020-00409R
Citation: Sharma v. Toronto Standard Condominium Corporation No. 2510, 2022 ONCAT 3

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

Member: Michael Clifton, Vice-Chair

The Applicant,
Rajat Sharma
Self-Represented

The Respondent,
Toronto Standard Condominium Corporation No. 2510
Represented by Bharat Kapoor, Counsel

Hearing: Written Online Hearing – April 12, 2020 to November 30, 2020

REASONS FOR DECISION

[1] The Applicant is a unit owner of the Respondent. As is par for the course in cases before this Tribunal, the two are not getting along. For the purposes of this case, I recognize we cannot resolve the deep distrust and acrimony between these parties, but we can address their concerns relating to records of the condominium which arise in the context of their more significant disputes.

BACKGROUND

[2] In August 2020, the Applicant and several other unit owners, calling themselves "ICE Owners," requisitioned a meeting of the condominium. The Applicant states that this group has "lost faith" in the Respondent, its management and legal counsel because (amongst other things) of "the dilapidated and shabby state of affairs" at the condominium, lack of transparency, and "exorbitant" expenses. Although the Applicant set out their complaints in great detail, none of that is repeated here since they do not fall within the Tribunal's jurisdiction.

[3] The Respondent rejected the requisition for meeting based on certain technicalities under the *Condominium Act, 1998* (the "Act"). Despite this, the ICE

Owners delivered their own notice of meeting in October 2020 and attempted to hold the rejected requisitioned meeting. As a result, the Respondent took the matter to court, and the court declared the October meeting invalid and restrained the ICE Owners from proceeding with any further requisition prior to the condominium's AGM, which was scheduled to take place on November 23, 2020.

[4] The AGM took place and the Respondent states that its notices and voting procedures complied with the Act, but the Applicant believes otherwise. The parties understand that questions surrounding the propriety of the Respondent's handling of the AGM and voting are not addressed in this decision.

[5] It was during and because of these events that the Applicant made two requests for records. I address the two requests together since the parties themselves did not distinguish between them and there seems to be no practical need to do so. When responding to the requests, the Respondent answered both requests at the same time, within the time-period required for response to the earliest request.

[6] The Applicant's requests were for the following records:

- the Respondent's record of leases under Section 83 of the Act;
- the record of owners and mortgages kept under Section 46.1 of the Act (I will refer to this as the "Section 46.1 Record");
- Periodic Information Certificates (PICs) issued between November 2019 and November 2020;
- board minutes from August to November 2020;
- a wide variety of contracts, bid documents and financial records consisting mainly of invoices and receipts as well as the Respondent's current reserve fund plan;
- the Respondent's most recent approved financial statements and auditor's report;
- mutual use agreements;
- all proxies for the November 23, 2020, AGM;
- "proof" of rejected proxy forms from that meeting;
- the electronic log of the "mailbox" used to receive proxies for the meeting between October 16, 2020, and November 24, 2020;

- all “electoral data” for the meeting; and
- the video recording of the meeting.

ISSUES

[7] The majority of requested records were provided by the Respondent and, by the conclusion of Stage 2 – Mediation of the Tribunal process, only the following issues relating to records of the Respondent remained in dispute, which are the issues dealt with in this decision:

1. Was the Section 46.1 Record adequately kept by the Respondent?
2. Did the failure to keep an adequate Section 46.1 Record constitute a refusal to provide the record?
3. Is the Applicant entitled to receive a list of owners who agreed to receive notices electronically?
4. Is the Applicant entitled to unredacted proxies from the November 2020 AGM?
5. What is a reasonable fee for provision of the proxies?
6. What is a reasonable fee for provision of the requested contracts and bids?
7. Should any awards of costs or a penalty be made in this case?

[8] Other issues arose during the hearing that were addressed sufficiently as and when they arose and do not form part of this decision. These included a concern raised by the Applicant about the adequacy of the Respondent’s audited financial statements. A significant amount of the hearing process and submissions related to this, but the Applicant ultimately stated it was not part of his claim and was essentially intended as an example in alignment with his complaints regarding adequacy of the Section 46.1 Record. While this line of discussion raised valid seeming concerns about the Respondent’s audit review process, I did not find it a necessary or compelling example of inadequate record keeping; therefore, I include no further discussion about it in this case.

ISSUE 1: WAS THE SECTION 46.1 RECORD ADEQUATELY KEPT BY THE RESPONDENT?

[9] The Applicant submitted into evidence four different versions of the Section 46.1 Record that were provided by the Respondent within a 10-month period. The differences between them are significant.

[10] By way of example, one address, which both parties agree is fictional, appears in several versions of the Section 46.1 Record, sometimes set out as the Applicant's address for service, and other times as that of another unit owner. Some owners have more than one address for service in the same version of the record, and from one version of the Section 46.1 Record to the next the Applicant's own address for service changes two or three times, even though the Applicant's evidence is that none of this information matches what he or other unit owners had provided to the Respondent.

[11] The Respondent does not deny the errors in the various versions of the Section 46.1 Record. They state that most of these were caused by a "technical issue" with the program (Building Link) the Respondent uses to maintain the record. They explain that when owners' data was exported from Building Link, it somehow became confused or corrupted. Although the Respondent also stated that they maintain the record on a separate spreadsheet themselves, which is "updated regularly and checked carefully for accuracy," such updated and corrected record does not appear to have been any of the versions provided in response to the Applicant's request for records.

[12] The Respondent also states that a further error, in which a subsequent owner of a unit was shown as having the same address for service as the previous owner of the unit, was "clerical" indicating that "the system assigns the same address for services for all owners under the same unit" despite changes in ownership and that they had failed to "deactivate" the prior unit owner in Building Link.

[13] The Respondent is responsible to ensure the Section 46.1 Record contains accurate, up-to-date information, as provided by the unit owners. If the software or other systems it uses corrupt, confuse or complicate the data in some way, the Respondent is responsible to correct it and ensure that when the record is relied upon to answer unit owners' requests for records, provide notices of meetings, and accomplish other things for which it is required under the Act and the governing documents of the condominium, it is both accurate and complete. The fact that multiple inaccurate and contradictory versions of the Section 46.1 Record were provided to the Applicant within a short period of time is strong evidence that the Respondent failed to comply with this requirement of the Act.

ISSUE 2: DID THE FAILURE TO KEEP AN ADEQUATE SECTION 46.1 RECORD CONSTITUTE A REFUSAL TO PROVIDE THE RECORD?

[14] As a result of the failure to keep an adequate Section 46.1 Record, the Respondent effectively failed to deliver the Section 46.1 Record to the Applicant as requested, even though versions of the record were provided; however, in this

case I find that this is just a *failure* and not a *refusal* to provide the record.

[15] The Applicant argues that the Respondent's explanation for its failure to keep an adequate Section 46.1 Record is not credible, and that, instead, the flaws in the record were deliberate, malicious and targeted. The Applicant points to the timing of certain changes to the addresses for service set out in the various versions of the Section 46.1 Record, which implies to him that such changes were made deliberately to deny the voting rights of the Applicant and other ICE Owners in the election of directors at the AGM.

[16] While the Applicant's interpretation of the facts is not entirely incredible, I find that the balance of probabilities favours the Respondent's explanation that the errors were merely technical and clerical, rather than deliberate and malicious.

[17] This finding does not absolve the Respondent of the determination that its keeping of the Section 46.1 Record was inadequate, but it also does not demand a conclusion that its failure to deliver the Section 46.1 Record constituted an actual or effective refusal to do so, particularly as it is evident that the Respondent took steps to address the technical and clerical concerns once it was made aware of them and ultimately has delivered a corrected, up-to-date, and therefore adequate, version of the record.

ISSUE 3: IS THE APPLICANT ENTITLED TO RECEIVE A LIST OF OWNERS WHO AGREED TO RECEIVE NOTICES ELECTRONICALLY?

[18] The Applicant argued that, to verify the accuracy of the Section 46.1 Record, he should also be entitled to the list of owners who agreed to receive notices from the Respondent via email or other electronic means. This record was included in the Applicant's Request for Records, and was denied by the Respondent on the following basis, as set out in its Board's Response to Request for Records:

> If an owner agrees to a method of electronic communication, section 46.1(3)(d) of the Act requires a corporation to keep the name of the owner and a statement of the agreed method. Section 55(4)(d) of the Act states that any records that may be prescribed are excluded from the right of an owner to examine or obtain copies of records. One of the records prescribed in s. 13.11(2)(1) of O. Reg. 48/01 is the record of method of electronic communication. Therefore you are not entitled to access this information.

[19] I do not find any substantive fault with the Respondent's answer, which appears to have been drawn almost verbatim from the decision of this Tribunal in *Chai v. Toronto Standard Condominium Corporation No. 2431*, 2019 ONCAT 45 (CanLII), which the Respondent also cited in its submissions.

[20] The Applicant also sought during the hearing to have me order that he should be provided with the other owners' email addresses. As such an order would conflict, in principle at least, with the statutory prohibition against a condominium divulging such private information, and appeared to serve no over-riding beneficial purpose, the request was refused.

ISSUE 4: IS THE APPLICANT ENTITLED TO UNREDACTED PROXIES?

[21] There was some confusion about the Applicant's request for copies of proxies from the AGM. The Applicant clarified his request as follows:

> …after separation of the proxy form at the vertical line, that both the right and left half of the proxy form be provided without any redaction and in an electronic format at no charge…

[22] The proxy form is designed so that the main details of the proxy – the specific meeting to which the proxy applies, who is appointed as proxy holder, the scope of authority granted, and specific voting instructions – are set out on the left portion of the document. Along the right margin, the proxy form indicates the identity of the unit owner or mortgagee by whom it is granted and contains the authorizing signatures or initials. It is widely understood that the purpose of this design is to allow for redaction of proxies by removal of the right-hand marginal elements to protect the identities of the proxy granters, while still allowing review of those portions of the form that are relevant for determining questions relating to quorum and the outcome of voting at the meeting where the proxy was used.

[23] In fact, not only is this widely understood, but it is a matter of law. Sections 55(4)(d) of the Act and 13.11(2)4 of Ontario Regulation 48/01 (the "Regulation") together provide that the "portion of a ballot or proxy form that identifies specific units in a corporation or owners in a corporation" is exempted from the right to examine or obtain copies of records set out in section 55(3) of the Act (unless the by-laws of the corporation require otherwise, but no such by-law provisions were cited in this case). Accordingly, as stated in *Aquilina v Middlesex Standard Condominium Corporation No. 823*, 2019 ONCAT 21 (CanLII), cited along with other relevant cases by the Respondent, the Tribunal does not have the jurisdiction to direct the Respondent to provide the right-hand side of the proxy as this would be in contravention of the Act and Regulation. However, the Respondent is required to provide the Applicant with the left-side portions of each of the requested proxies. Having said this, I note that in the Board's Response to Request for Records, the Respondent indicated that it would provide the proxies. Only the dispute regarding the estimated fee for providing them appears to have delayed this.

ISSUE 5: WHAT IS A REASONABLE FEE FOR PROVISION OF THE PROXIES?

[24] In its Board's Response to Request for Records, the Respondent indicated it would require eight hours to prepare the proxies and its fee would be based on an hourly rate of $130 per hour, resulting in an estimated fee of $1040. The Respondent's legal counsel justified this fee based upon it being just about 52% of his regular rate for legal services provided to the condominium.

[25] In this hearing, the Respondent's counsel also sought to justify the fee based on the fact that the work would include scanning the paper proxies into electronic format as requested by the Applicant. This appears to contradict the Board's Response to Request for Records, which stated that the proxies were kept in electronic format. I take it that this was a misstatement on the part of the Respondent, reflecting its intention to provide the proxies in electronic format as requested, but the fact that the proxies were suggested to already be in electronic format was among the reasons the Applicant objected to the amount of the estimated fee.

[26] Whether the proxies are kept in paper or electronic format, I agree with the Applicant that the estimated fee is unreasonable, and I suggest it is obviously so. I note that in the same Board's Response to Request for Records form, the Respondent indicated that to provide copies of "all contracts signed by the corporation" between January 1, 2015, and November 10, 2020, it would take just seven hours and the hourly fee was just $30 per hour. It is not reasonable to suggest that a task that should involve little more than tearing off the right margin of proxy forms for a single meeting is more complex and specialized than the job of reviewing and preparing copies of contracts. There appears to be no reason that the hourly rate of $30 should not also apply for preparation of the proxies.

[27] I note that in other Tribunal decisions, a fee of around $30 per hour for clerical tasks associated with the preparation of requested records has typically been viewed as reasonable. The Respondent suggested that the Tribunal also affirmed that a fee of $130 is reasonable, specifically citing *Patricia Gendreau v Toronto Standard Condominium Corporation No. 1438*, 2020 ONCAT 18 (CanLII). This was not, in fact, a finding in that case, but in it and other cases the Tribunal has noted that higher fees could be reasonable based on the nature of the work involved, particularly where the task of redaction requires greater specialized knowledge or skill, which is not the case here.

[28] Regarding the time estimated for the labour involved, as noted above, the Respondent indicated that the labour of preparing the proxies includes scanning of the proxies. Obviously, this step is not required for any of the proxies that are kept

electronically; but it is also not required for any of the proxies that are kept in paper form. According to section 13.7(2) of the Regulation, where an owner requests a copy of a non-core record in electronic format and the condominium keeps the record in paper format, the record shall be delivered in paper form. It is not reasonable to seek to charge the Applicant for the additional step of scanning paper proxies in order to provide them in electronic format, even though this is being done to accommodate what the Applicant had requested.

[29] Accordingly, whether or not the Respondent intends to scan as well as redact the proxies in order to provide them to the Applicant, it is clear the labour for which the Applicant should be responsible is less than the Respondent estimated. The fee to be paid by the Applicant should not, therefore, be based upon the whole eight-hour period anticipated by the Respondent. I order that the Respondent shall require a fee of only $160 for the provision of the redacted proxies. If the actual cost, based on a $30 per hour rate, is different than this, the parties shall comply with section 13.8 of the Regulation regarding the adjustment of the fee paid.

ISSUE 6: WHAT IS A REASONABLE FEE FOR PROVISION OF THE REQUESTED CONTRACTS AND BIDS?

[30] The remaining issue between the parties is the fee estimated by the Respondent for the provision of contracts and bids requested by the Applicant. As noted above, the Respondent's reply to the Applicant's request indicated a rate of $30 per hour for the labour involved in providing these records. For providing copies of contracts entered into by the corporation between January 1, 2015, and November 10, 2020, the Respondent estimated seven hours' labour; it estimated the same length of time for generating copies of all bids from the same period. The Applicant argues these fees are unreasonable because these records are requested in electronic form.

[31] The records in question are non-core records. Under section 13.7(1) of the Regulation, if a condominium has, in its Board's Response to Request for Records, estimated a fee for the provision of non-core records, the requester is required to pay that fee in order to obtain the records. As noted above, if the fee is inaccurate when compared to actual costs incurred, section 13.8 of the Regulation provides instructions for how to make an adjustment after the fact.

[32] I do not find the rate of $30 per hour to be unreasonable for the task of preparing and providing copies of the contracts and bids in question. I have no basis for concluding that the estimated hours are unreasonable either. The Applicant is required to pay the estimated fees to obtain copies of these records. The parties shall later adjust the fee, if necessary, in accordance with section 13.8 of the

Regulation.

ISSUE 7: SHOULD ANY AWARDS OF COSTS OR A PENALTY BE MADE IN THIS CASE?

[33] There is no basis for a penalty in this case.

[34] The Act provides that the Tribunal may impose a penalty on a condominium corporation that has "without reasonable excuse refused to permit" a requester of records to examine or obtain copies of those records. I have determined the Respondent did not refuse to provide a copy of the Section 46.1 Record despite its failure to provide an adequate version of it for quite some time. It was also not unreasonable for the corporation to refuse to provide copies of records for which its duly estimated fee remained unpaid. Though I have found the fee estimated for provision of proxies to be unreasonable, this was not the sole basis for dispute between the parties about the proxies. Further, it is not evident that the Respondent set its fee for the purpose of preventing the Applicant from obtaining them. Therefore, this also does not appear to me to constitute an effective refusal to provide the records.

[35] Regarding costs, it is usual at the Tribunal that a successful applicant will receive an award that reimburses their filing fees. In this case, the Applicant has been only partially successful. Although he has demonstrated that the Respondent did not keep the Section 46.1 Record adequately, and that the fee estimated for provision of proxies was unreasonable, he was not successful in arguing against the fees for the contracts and bids, nor did he succeed in arguing for receipt of unredacted proxies or to obtain a list of owners who agreed to electronic notices from the Respondent.

[36] I have considered whether, in the circumstances, the Applicant should therefore be entitled to only a portion of his filing fees as a costs award. However, this should only seem fair if I was certain that the issues dealt with in this hearing were resolvable by the parties without recourse to this stage in the CAT process. I may think this to be a possibility, but as I cannot conclude it with certainty, I cannot base the costs award upon it. Therefore, having required the Stage 3 – Hearing to obtain a positive result with respect to even some of his claims, the Applicant is entitled to a costs award of $200 to reimburse the full amount of his filing fees.

ORDER

[37] For the preceding reasons, I order as follows:

1. The Respondent shall, within thirty (30) days of receipt of payment of $160 from the Applicant, prepare and provide the Applicant with copies of the proxies used for the Respondent's November 2020 AGM, redacted by removal of the right-hand marginal section of the proxy form, with such proxies as are kept in paper form being provided in paper form and any proxies kept electronically being provided in electronic form;

2. The Respondent shall, within thirty (30) days of receipt of payment of $210 from the Applicant, prepare and provide the Applicant with copies of the records described in the Applicant's Request for Records as "all contracts signed by the corporation" from the period of January 1, 2015, to November 10, 2020, in electronic form;

3. The Respondent shall, within thirty (30) days of receipt of payment of $210 from the Applicant, prepare and provide the Applicant with copies of the records described in the Applicant's Request for Records as "all bids received by the corporation" from the period of January 1, 2015, to November 10, 2020, in electronic form;

4. The Respondent shall, upon delivery of each of the foregoing sets of records, provide the Applicant with a written statement as described in section 13.8(1)(c) of the Regulation, and the parties shall make whatever adjustment(s) to the applicable fee(s) paid that is (are) required by sections 13.8(1)(d) and 13.8(2) of the Regulation;

5. The Respondent shall, within thirty (30) days of the issuance of this decision, pay to the Applicant the amount of $200 as costs in accordance with section 1.44(1)4 of the Act.

Michael Clifton
Vice-Chair, Condominium Authority Tribunal

Released on: January 6, 2022