

CONDOMINIUM AUTHORITY TRIBUNAL

DATE: February 16, 2022

CASE: 2021-00312R

Citation: Zugec v. Wentworth Standard Condominium Corporation No. 566, 2022 ONCAT 13

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

Member: Emile Ramlochan, Member

The Applicant,

Lynda Zugec
Self-Represented

The Respondent,

Wentworth Standard Condominium Corporation No. 566
Represented by John Morelli and by Sally Dooman, Agents

Hearing: Written Online Hearing – November 22, 2021, to December 24, 2021

REASONS FOR DECISION

A. OVERVIEW

- [1] This case is about a request for records in a residential condominium which shares facilities with commercial units owned by the Declarant, Royal Connaught Inc. Lynda Zugec (the “Applicant”) is an owner of a condominium unit in Wentworth Standard Condominium Corporation No. 566 (the “Respondent” or “WSCC No. 566”). Due to concerns about how management has handled the condominium finances and the relationship between it and commercial units owned by the Declarant (which are not part of WSCC No. 566), the Applicant submitted a Request for Records form on April 28, 2021.
- [2] During the Stage 3 hearing, a second records request was made by the Applicant, on November 14, 2021.
- [3] Upon entering Stage 3, through to the end of this hearing, the Applicant had not received a response to the second records request, nor received most of records requested in the first request.

- [4] The Respondent joined the case and was initially represented by the condominium manager John Morielli of Wilson Blanchard Management. When John Morielli failed to submit witness evidence in the time allocated to do so, I requested that Tribunal staff call the Respondent, which was done on December 15, 2021. At that time, the Tribunal was told that John Morielli was no longer representing the Respondent. He was replaced by Sally Dooman, also of Wilson Blanchard Management. I then gave the Respondent additional time to provide witness testimony, however, they elected not to provide any witness evidence.
- [5] Before turning to the issues to be decided in this case, I will address the submissions made by the Applicant about records requested that were not part of the April 28, 2021 Request for Records. Specifically, the Applicant raised an issue pertaining to the adequacy of a periodic information certificate (“PIC”) received by the Applicant on November 3, 2021, her access to board meeting minutes created after her Request for Records was submitted to the board, and her entitlement to records that are part of a subsequent Request for Records submitted to the board on November 14, 2021. These records were not included in the Request for Records of April 28, 2021, but were raised as issues for the first time during this hearing. As such, any issues pertaining to these records are not properly before me and therefore I will not be deciding these issues.
- [6] The parties may wish to address any disputes about these records independently, between themselves and outside of the Tribunal process.

B. RESULT

- [7] For the reasons set out below, I find that the Applicant is entitled to receive all records requested in the Request for Records dated April 28, 2021, properly redacted with accompanying written statements as per section 13.8 (1) (b) of Ontario Regulation 48/01 (“O. Reg. 48/01”).
- [8] The Respondent is ordered to pay a penalty in the amount of \$1000 for its refusal to provide the records without reasonable excuse.
- [9] Pursuant to section 1.44 (1) 4 of the Condominium Act, 1998 (the “Act”), I order costs of \$200 to the Applicant representing the fees paid to the Tribunal.

C. ISSUES AND ANALYSIS

[10] The issues to be decided are as follows:

1. Did the corporation comply with the statutory provisions of the request for records process?

2. Is the Applicant entitled to the requested records?
3. Did the corporation provide the Applicant with the requested mutual use agreements?
4. Did the corporation provide an explanation for the redaction of the board meeting minutes?
5. Should the Respondent be required to pay a penalty under s. 1.44(1)6 of the Act for refusing to provide the Applicant with the records requested without a reasonable excuse, and if so, in what amount?
6. Should the Applicant be awarded any costs?

ISSUE #1: Did the corporation comply with the statutory provisions of the request for records process?

- [11] The Applicant requested a series of condominium records which the Applicant alleges have been withheld. The Applicant also alleges that the board did not follow the mandatory statutory requirements of the Act when responding to the request and, specifically, sections 13.3 to 13.8 of O. Reg. 48/01. For reasons that follow, I find that the corporation did not comply with the statutory provisions of the Act.
- [12] The evidence submitted establishes that the Respondent breached multiple provisions of O. Reg. 48/01 when processing the Applicant's request.
- [13] First, the Request for Records form was submitted to the Board on April 28, 2021 and was not responded to using the mandatory Board's Response to the Request for Records form. Second, the mandatory response was not provided within the statutory 30-day period. Third, the board did not respond with an index of the records containing the required information. Fourth, of those records that were provided, they were not accompanied by a written document which clearly identified the records that were being sought, nor written statements citing those provisions of section 55 of the Act (or the Regulations) the board relied on when redactions were made. Fifth, the board did not provide a separate written document outlining the costs, if any, that were associated with processing the Applicant's request.
- [14] The evidence establishes that the Respondent did not comply with the statutory provisions of the Act when responding to the Applicant's April 28, 2021, Records Request and, specifically, sections 13.3 (6), 13.3 (7), 13.8 (1) (a) and (b), and section 13.8 (3) of O. Reg. 48/01.

ISSUE #2: Is the Applicant entitled to the requested records?

[15] The Act and O. Reg. 48/01 provide that an owner is entitled to access condominium records subject to certain statutory exceptions and compliance with mandatory procedures. The evidence supports a finding that the Applicant is entitled to the records requested on the April 28, 2021 Request for Records form.

[16] The Applicant sought the following records: (i) record of owners and mortgagees; (ii) record of notices relating to leases of units under s. 83 of the Act; (iii) periodic information certificates from the past 12 months (“PICs”); (iv) mutual use agreements (also known as shared facilities or reciprocal agreements) mentioned in section 113 and section 154 (5) of the Act; and (v) board meeting minutes of meetings held within the last 12 months.

[17] Entitlement to condominium records is best established by affirming that none of the exemptions found under section 55 (4) of the Act or the Regulations under the Act, apply. Essentially, entitlement to a record exists if the record exists and it can be proven that the exemptions do not apply to that record. The Respondent is not disputing the Applicant’s entitlement to obtain or examine these records although the majority of these records had not been provided to the Applicant. The Respondent believes that any delay in providing these records arose out of changes in condominium management, and the collective actions of both the Applicant and Respondent. The Applicant says that the Respondent was uncooperative and unwilling to comply with a request for which there is a statutory entitlement.

[18] I will order that the records, as set out in the Request for Records dated April 28, 2021, be provided to the Applicant within 30 days of this order. These records shall be provided electronically and at no cost to the Applicant.

[19] Although it was undisputed that the Applicant was entitled to the records requested, there was a dispute that arose during the hearing which focused on the requested mutual use agreements, which I turn to now.

ISSUE #3: Did the corporation provide the Applicant with the requested mutual use agreements?

[20] The parties disputed whether or not the requested mutual use agreements were provided to the Applicant. The Tribunal finds that all of the mutual use agreements were not provided to the Applicant.

[21] The Applicant stated that she is entitled to the following mutual use agreements,

(as described by the Applicant):

1. Alectra Utilities Agreement
2. Movie Shoot Agreement
3. Garbage Disposal/Recycling Agreement
4. Cleaning Agreement (for shared spaces)
5. 3rd Property Manager Agreement responsible for the shared facilities
6. Security Agreement

[22] The Respondent stated that it provided these to the Applicant on November 23, 2021, which was during the disclosure stage of this hearing. The Respondent provided no testimony about these documents, but in closing submissions, the Respondent stated that the by-laws contained the mutual use agreements responsive to the Applicant's request.

[23] By-laws 4, 5, and 6 contain records entitled "Shared Facilities Agreement" however, the Respondent did not present any evidence that indicates that these three records are the only agreements shared between the residential condominium corporation and the separate commercial properties owned by the Declarant, nor did they call any witness to clarify this uncertainty.

[24] Based on the evidence before me, I am not satisfied that the agreements sought by the Applicant are not in place or do not exist. Therefore, I will order the Respondent to undertake a search for these documents and, if they do not exist, to provide a written statement to that effect within 14 days of the date of this order.

ISSUE #4: Did the corporation provide an explanation for the redaction of the board meeting minutes?

[25] Section 13.8 (1) (b) of O. Reg. 48/01 states that, if a board has determined that it will redact a record or remove any part that it has determined the corporation will not allow a requester to examine (or obtain a copy of), it must furnish a written statement of the board's reason for its determination and indicate which provision of section 55 (4) of the Act this decision was based on.

[26] The Applicant described, and submitted into evidence, copies of board of directors meeting minutes for a meeting held on April 23, 2020, at 7:00 p.m. At the top of the third page of this record was a large section that was blacked out. The

Respondent did not provide any submissions on this issue, or evidence of a written statement explaining the board's reasons for this redaction, nor which provision of section 55 (4) of the Act it had based its decision on.

- [27] As elaborated upon in *Mellon v Halton Condominium Corporation No. 70* 2019 ONCAT 2 (CanLII), the Act allows and requires corporations to redact certain information from records. However, they are also required to provide an explanation for that redaction. The Respondent failed to do so and, therefore, was not in compliance with section 13.8 (1) (b) of O. Reg. 48/01.
- [28] As a remedy, I order the Respondent to provide accompanying statements as required under by section 13.8 (1) (b) of O. Reg. 48/01 that explain the reasons for each redaction and indicate which provision under section 55 (4) of the Act or the Regulation the board relied on when making their redactions.

ISSUE #5: Should the Respondent be required to pay a penalty under s. 1.44 (6) of the Act for refusing to provide the Applicant with the records requested without a reasonable excuse, and if so, in what amount?

- [29] The Applicant has requested an order for a penalty as the Respondent refused to produce the records without reasonable excuse. I find that there are grounds for a penalty to be awarded against the corporation.
- [30] Under section 1.44 (1) 6 of the Act, the Tribunal may order a corporation "to pay a penalty that the Tribunal considers appropriate to the person entitled to examine or obtain copies under subsection 55 (3) of the Act if the Tribunal considers that the corporation has, without reasonable excuse, refused to permit the person to examine or obtain copies under that section."
- [31] The purpose 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. Section 1.44 (3) of the Act states that the maximum penalty is \$5000, an amount which is generally only awarded in cases of wilful misconduct or behaviour that is highhanded, intransigent, or egregious.
- [32] The Applicant says that a penalty is warranted as the records request was for records to which there is a clear entitlement - a requester should not have to apply to the Tribunal to obtain records in such a circumstance. She submits that a penalty will serve to remind the Respondent of their responsibility to fulfil their obligations under the Act. A specific quantum of penalty was not identified by the Applicant.

- [33] The Respondent did not specifically reference the issue of a penalty in their closing submissions; however, they asserted that any delays and confusion resulted from the conduct of both parties – the Applicant and the Respondent.
- [34] The parties submitted numerous emails into evidence involving the Applicant, staff of the condominium service provider, Wilson Blanchard, and multiple board members. The Applicant also had two witnesses give evidence, both of whom are current board members: Kristina Schmuttermeier and Michael Stanley Andrec.
- [35] Based on this evidence, it appears that the current board members of WSCC No. 566 were not aware of the board's responsibility to maintain certain records and to provide them upon request to a unit owner and that the board relied on the condominium manager for these functions. It also appears that the board did not understand that they, not the condominium manager and condominium service provider, are ultimately responsible, and liable, for the corporation's obligations under the Act – the condominium manager is merely the agent acting on behalf of the corporation.
- [36] The Tribunal is also mindful that owners elected to the boards of condominiums are volunteers with varying levels of expertise; however, directors are required to undertake training and are expected to be aware of their responsibilities under the Act. The board is also responsible for overseeing their condominium managers. Ignorance of the law is no excuse. In this case, the board ought to have known what their responsibilities were under the Act after receipt the Applicant's record request.
- [37] In this case, the board failed to comply with sections 13.3 (6), 13.3 (7), 13.8 (1) (a) and (b) and section 13.8 (3) of the Act when there was a clear entitlement to the records, which is a fact that was undisputed throughout the hearing. There was no explanation, reasonable or otherwise, for the failure to provide the records. Although Sally Dooman stated that there was confusion on both sides, that does not, on these facts, excuse the failure to provide the records.
- [38] The Board's neglect in knowing and complying with their duties, including overseeing the work of the condominium manager and ensuring the Applicant's records request was duly and appropriately answered, despite mandatory training which should have made their duties clear to them, constitutes a degree of disregard that is tantamount to a refusal to comply with those duties, for which there is no reasonable excuse. Based on the facts, I conclude that the board's non-compliance with the Act and failure to provide the requested records when there is a clear entitlement amounts to a refusal without reasonable excuse that warrants a penalty.

[39] Considering past Tribunal decisions and awards in similar circumstance, I find a penalty of \$1000 is reasonable in the circumstances.

ISSUE #6: Should the Applicant be awarded any costs?

[40] Under section 1.44 (1) 5 of the Act, and Rules 45.1 and 45.2 of the Tribunal's Rules of Practice (that were in force at the time this matter was heard), the Tribunal may order a party to pay another party any reasonable expenses related to the use of the Tribunal, including any fees paid to the Tribunal. The Applicant has been successful in this proceeding and asked for the costs incurred throughout the hearing. As there were no specific expenses cited, I order that WSCC No. 566 shall pay the Tribunal fees of \$200 to the Applicant.

D. ORDER

[41] The Tribunal Orders that:

1. WSCC No. 566 shall provide to the Applicant the following records within 30 days of this Order:
 - a. record of owners and mortgagees
 - b. record of notices relating to leases of units under Section 83 of the Condominium Act, 1998
 - c. periodic information certificates from April 28, 2020, to April 28, 2021
2. The Respondent shall undertake a search for the following mutual use agreements to determine if they are in existence. In the absence of these agreements, the Respondent shall also provide a written statement to the Applicant declaring the same. The agreements, if they do not exist, written statements to that effect, shall be provided within 30 days of the date of this order:
 1. Alectra utilities agreement
 2. Movie shoot agreement(s)
 3. Garbage disposal/recycling agreement
 4. Cleaning agreement (for shared spaces)
 5. 3rd property manager agreement responsible for the shard facilities

6. Security agreement

3. WSCC No. 566 shall provide to the Applicant board meeting minutes held between April 28, 2020, and April 28, 2021.
4. The Respondent shall provide the Applicant with written statements required under section 13.8 (1) (b) of O. Reg. 48/01 relating to redactions made to the records to be provided.
5. The records or statements ordered in paragraphs 1, 2, 3, and 4, shall be provided no later than March 18, 2022.
6. The Respondent shall pay a penalty of \$1000 to the Applicant within 30 days of the date of this order, and no later than March 18, 2022.
7. The Respondent shall pay costs of \$200 to the Applicant within 30 days of the date of this order, and no later than March 18, 2022.
8. In the event that the penalty is not provided to the Applicant within 30 days of this Order, the Applicant will be entitled to set-off those amounts against the common expenses attributable to the Applicant's unit(s) in accordance with section 1.45 (3) of the Act.

Emile Ramlochan
Member, Condominium Authority Tribunal

Released on: February 16, 2022