

## **CONDOMINIUM AUTHORITY TRIBUNAL**

**DATE:** May 24, 2022

**CASE:** 2022-00099R

**Citation:** Russell v. York Condominium Corporation No. 50, 2022 ONCAT 56

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

**Member:** Keegan Ferreira, Vice-Chair

**The Applicant,**

Rob Russell

Self-Represented

**The Respondent,**

York Condominium Corporation No. 50

Represented by Jennifer Trunk, Counsel and Michael Vargas, Counsel

### **MOTION ORDER**

- [1] Robert Russell (the Applicant) is the owner of a unit in York Condominium Corporation No. 50 (the Respondent). The Applicant submitted a request for records on February 15, 2022. Based on the problem description provided by the Applicant when he filed this case with the CAT, the Applicant asserts that the Respondent has refused to provide some of the requested records without a reasonable excuse. It appears that the Applicant acknowledges that he has received some of the records he requested, but that he has not received them all despite having paid the requested fee. He also states that some of the records he has received are inadequate, were inappropriately redacted, and that the Respondent charged an unreasonable fee to provide the records.
- [2] The Applicant submitted the request for records at issue in this case on February 15, 2022. This request is the fifth request for records that the Applicant has submitted since March 29, 2021. The four previous requests, which were submitted on March 29, 2021, July 29, 2021, September 24, 2021, and October 25, 2021, were the subject of a previous CAT Case, 2020-00396R.
- [3] I was assigned as the Mediator in this case in Stage 2 – Mediation on April 5, 2022. On that same day and before the mediation began, the Applicant submitted a motion for an order for the relief set out in paragraph 8 below.

[4] The Applicant advised that the Respondent had sent a Notice of Mediation prepared by Jennifer Trunk, counsel for the Respondent, to the Applicant's lawyer on March 30, 2022, as well as a letter. The letter stated as follows:

As you are aware, we had previously agreed to hold our client, YCC 50's, Notice of Mediation, initial served on October 25, 2021, in abeyance provided that your client, Mr. Robert Russell, cease from interfering with the efficient operations of YCC 50 by submitting repeated and duplicate requests for records. Further to our telephone discussions and as evidenced by the attached response to Mr. Russell's most recent request for records, your client has continued to request duplicate records of YCC 50. Consequently, you will find attached our previously served Notice of Mediation. YCC 50 had also agreed to hold its costs in abeyance. We will be forwarding our demand for costs pursuant to, *inter alia*, Article 14 of YCC 50's By-Law 5.

[5] The Notice of Mediation also indicated that the Applicant must respond in writing within 10 days by either agreeing to participate in mediation using the mediator proposed by the Respondent, or by proposing an alternative mediator. Failing such a response, the Notice of Mediation indicates that the Respondent will assume that the Applicant does not wish to participate in mediation and will submit the dispute to binding arbitration.

[6] Schedule A, attached to the Notice of Mediation, indicates that the issues proposed to be submitted to mediation are:

1. Whether the Respondent is entitled to submit duplicate requests for records, which YCC 50 has previously provided to him.
2. Whether the Respondent is exceeding his rights as an owner and/or unduly interfering with the efficient operations of YCC 50 by submitting repeated and duplicate requests for records.
3. That the Respondent should henceforth cease from interfering with the operations and governance of YCC 50.
4. Whether, pursuant to, *inter alia*, Article XIV of YCC 50's By-Law No. 5, the Respondent should pay YCC 50's costs of these proceedings, and the costs of addressing his requests for records.
5. Such other and further issues as may arise at the mediation.

[7] Schedule A also sets out what the Respondent refers to as its "Grounds for this Mediation," which are:

1. The Respondent has made numerous requests for records, which requests have previously been fulfilled or refused.
2. The Respondent's requests are vexatious, exceed his rights as an owner, and are interfering in the operations of YCC 50.
3. Article XIV of YCC 50's By-Law No. 5 provides, in part, as follows:

*14.01 Each owner shall indemnify and save the Corporation harmless from any loss, cost, damage, injury or liability ("losses"), in respect of the owner's unit, common elements or any other unit, which the Corporation may suffer or incur:*

*(a) which is not otherwise recoverable from insurance coverage;*

*and,*

*(b) which results from or is cause by an act or omission of:*

*(i) such owner*

*14.02 Without limiting the generality of the foregoing, the types of losses contemplated by this article to be indemnified include:*

*(a) any and all legal costs incurred by the condominium corporation including:*

*(i) by reason of a breach of the declaration, by-laws and/or rules of the Corporation in force from time to time;*

*(ii) any excess of legal costs incurred by the condominium corporation over and above costs awarded by a court;*

*(iii) the cost of any legal advice given to the condominium corporation;*

*(iv) the cost of any letters written by the condominium corporation and/or the Corporation's solicitors as a result of any such acts or omissions*

4. Pursuant to the aforementioned Article XIV, YCC 50 requires the Respondent to pay YCC 50's legal costs in obtaining his compliance, including the costs of this mediation.

[8] In his motion, the Applicant seeks the following relief:

1. An affirmation that this counter-claim from the Respondent falls within the jurisdiction of the CAT, and that adds this Notice of Mediation and the issues arising from it to the issues to be determined in the CAT Mediation and Hearing in this matter,

2. A reminder to the Respondent's representative that communications with a self-represented party during the proceedings of a CAT Case should be directed to that self-represented party and within the CAT-ODR,
3. An order directing the Respondent to refrain from further retaliatory actions while this Case is ongoing,
4. A determination that the Respondent has behaved in a vexatious or oppressive manner, in disregard to the Tribunal Powers and other CAT Rules of Practice.

[9] I asked the Respondent to make submissions responding to the Applicant's motion, and asked that its submission address the following points:

- The circumstances that led to YCC 50 sending the Notice of Mediation on October 25, 2021, and March 30, 2022.
- The applicability of section 132 of the *Condominium Act, 1998* (the "Act") to the issues described in those Notices.

I asked for this information specifically because under section 1.42 (1) of the Act, the Tribunal has exclusive jurisdiction to exercise the powers conferred on it and to determine all questions of fact or law that arise in any proceeding before it. The mandatory mediation and arbitration provisions of the Act set out in section 132 do not apply to any dispute that falls within the CAT's jurisdiction.

[10] In its submissions, the Respondent asserts that section 132 of the Act is the appropriate procedure to address the issues set out in its Notice of Mediation. The Respondent asserts that the Notice of Mediation is not about the Applicant's entitlement to the records or whether the Respondent may deny a request for records where the records have been previously provided. Instead, the issue is whether the Applicant is exceeding his rights under the Act to make requests for records.

[11] The Respondent also argues that the Applicant is acting vexatiously and that his requests for records are an abuse of process. The Respondent submits that it would arguably be entitled to seek relief under s. 134 or s. 135 of the Act through the Superior Court of Justice as it alleges that the Applicant has been acting in an oppressive manner. The Respondent submitted that they elected to send the Notice of Mediation rather than pursuing an application to the Court because it was hoping for an opportunity to address the Applicant's concerns "in a more holistic manner."

[12] As noted above, the first four requests for records were the subject of a previous

CAT case which resulted in a decision issued on November 4, 2021<sup>1</sup>. I need not recite all the details of that case, but some of the Tribunal's findings are summarized as follows:

- the Respondent had in several instances failed to respond to the Applicant's requests for records in a timely way;
- the Respondent had failed to meet its obligations to provide records (and meeting minutes in particular) on request;
- the Respondent had denied that certain meetings had taken place, and failed to acknowledge the existence of "in camera minutes" or to provide them;
- the Respondent had refused to provide requested records without a reasonable excuse;
- when the Respondent provided the Applicant with redacted records, the Respondent had failed to provide the required accompanying statements setting out the reasons for the redactions;
- the Respondent in several instances demonstrated "a startling lack of knowledge about its obligations to provide records to its owners";
- the Respondent attributed deficiencies with its practices of keeping and providing records to the previous management company and refused "to specify what steps it is taking to avoid these errors in the future."

[13] The Tribunal's decision also noted that the Respondent's attitude "can provide little comfort that the record keeping at YCC50 will improve materially". The Tribunal went on to state: "In the result, I cannot determine with certainty that, even now, Mr. Russell has received all of the minutes of board meetings he requested."

[14] It is against this backdrop that this new case has been submitted, that the Respondent has served the Applicant with its Notice of Mediation, and that the Applicant has submitted this motion.

[15] The issues to be decided on this motion can be summarized as follows:

1. Is the Applicant's request for records an abuse of process or vexatious?
2. Do the issues raised in the Notice of Mediation fall within the jurisdiction of the CAT?

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<sup>1</sup> 2021 ONCAT 103

3. Has the Respondent acted in a retaliatory, vexatious, or oppressive manner? If so, what remedy is appropriate?

**Issue 1: Is the Applicant's request for records an abuse of process or vexatious?**

[16] In its submissions, the Respondent alleges that the Applicant's request for records is an abuse of process and is vexatious. The Respondent suggests that the Applicant's request is an abuse of process because there ought to "be an end to litigation and that no one should be twice vexed by the same cause."<sup>2</sup> The Respondent also submits that vexatious proceedings include:

- bringing one or more actions to determine an issue which has already been determined,
- actions brought for an improper purpose, including the harassment and oppression of other parties other than the assertion of legitimate rights, and;
- grounds and actions rolled forward into subsequent actions and repeated and supplemented.<sup>3</sup>

[17] Aside from these general comments, the Respondent's submissions included no information to suggest that the issues in dispute in this case are the same as those raised in the previous case. In fact, as this motion was filed at the outset of Stage 2 – Mediation, we have not yet had an opportunity to identify or discuss the specific issues in dispute in this case.

[18] The Respondent's Notice of Mediation suggests that the Applicant is "interfering with the efficient operations of YCC 50 by submitting repeated and duplicate requests for records." Leaving aside for the moment the question of how this request for records could reasonably be seen to interfere with the operations of the Respondent, I note that the Applicant has made a total of five requests for records over the period of approximately twelve months. Four of those requests were dealt with in the previous CAT case, in which the Tribunal found significant deficiencies with the Respondent's approach to record keeping, responding to requests for records, and providing requested records.

[19] While there is some overlap in the period for some of the records identified in the Applicant's most recent request, both the request and the issues in dispute in this case appear to be different in several ways. For example, the Applicant's most recent request for records includes a request for Board meeting minutes from

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<sup>2</sup> The Respondent cites the Ontario Superior Court Practice, Annotated Rules and Legislation, 2021, the Honourable Todd L. Archibald and the Honourable P. Tamara Sugunasiri, page 1167

<sup>3</sup> Ibid, page 1169

“February 2021 – February 2022 (not incl. those previously adequately provided)” and a “record of smoking rule/bylaw exemption for my unit” – neither of which has previously been requested.

- [20] Identifying the specific issues in dispute is a component of the Stage 2 – Mediation process. While we have not yet confirmed the precise issues in dispute, the case on its face appears to deal with issues that have not previously been raised by the Applicant. For example, the Applicant appears to be contending that the Respondent has charged unreasonable fees to produce the requested records, and, that the Respondent has failed to provide records after he paid the requested fee on March 17, 2022.
- [21] Considering the Tribunals findings in the previous case, the absence of persuasive arguments from the Respondent, and the differences in the records requested and the related issues, I cannot conclude at this point in time that the Applicant’s request is either an abuse of process or is vexatious.
- [22] In the event that this case is not resolved in Stage 2 - Mediation, we will need to identify the issues for resolution in Stage 3 – Tribunal Decision. Insofar that any of the issues raised by the Applicant may have previously been decided, they will not be included in the issues in dispute for determination in Stage 3.

**Issue 2: Do the issues raised in the Notice of Mediation fall within the jurisdiction of the CAT?**

- [23] The Applicant submits that the issues listed in the Notice of Mediation fall within the jurisdiction of the CAT. The Applicant notes that the issues described therein relate solely to records requests, costs for access to records, and the Respondent’s efforts to apply the governing documents of the corporation to records disputes and access costs.
- [24] The Respondent acknowledges that the CAT has jurisdiction over disputes with respect to access to records but submits that the issues listed in the Notice of Mediation do not fall within the CAT’s jurisdiction because their objective is “to prevent Mr. Russell from continuing to make such requests in the first place.”
- [25] S. 55 (3) of the Act affords owners the right to examine or obtain records from their condominium corporation in accordance with the regulations. When an owner requests records from their condominium corporation, the corporation is required to provide the requester with a response, as set out in s. 13.3 (6) of Ontario Regulation 48/01 (O. Reg. 48/01).

[26] Per s. 13.3 (3) of O. Reg 48/01, owners, purchasers and mortgagees are entitled to examine or obtain copies of records *only if they have made a request to the condominium corporation*. In other words, the right to examine or obtain records derives from and depends upon that owner having requested them, and the right to examine or obtain a copy of a record under subsection 55 (3) of the Act does not apply if no request has been made. The right to submit a request for records and the right to examine or obtain them are therefore inextricably linked.

[27] The Respondent submits that a dispute about whether an owner is entitled to make requests in the first place is fundamentally different from a dispute about whether they are entitled to the records they seek. In light of the inherent interconnectedness of these issues, I find that both types of issues fall within the jurisdiction of the Tribunal.

[28] I therefore order that the issues raised in the Respondent's Notice of Motion be added to the issues in dispute in this case, as the Applicant has requested. I recognize that notwithstanding this order, the Respondent may choose to file an application with the Superior Court of Justice under s. 135 of the Act if it believes that the Applicant's behavior is oppressive.

[29] As I noted above, the Respondent submitted that it had sent the Notice of Mediation in the hopes of resolving the issues listed therein holistically. Having ordered that those issues be added to the scope of issues in dispute in this case, they now have ample opportunity to do so.

**Issue 3: Has the Respondent acted in a retaliatory, vexatious, or oppressive manner? If so, what remedy is appropriate?**

[30] The Applicant submits that in sending him the Notice of Mediation, the Respondent has acted in a retaliatory, vexatious and / or oppressive manner.

[31] As noted above, the Applicant made the request for records at issue in this case on February 15, 2022. The Respondent sent the Notice of Mediation to the Applicant on March 30, 2022, which is the same day on which the Respondent joined this case. The Respondent was therefore aware of this case when they elected to send the Notice of Mediation. In fact, the Notice of Mediation specifically cites the Applicant's most recent request for records as the reason it is seeking to pursue the proposed mediation.

[32] I also note that the Respondent only sent the Applicant the Notice of Mediation after the Respondent joined the CAT case, and not during the period between February 15 and March 29.



[33] I can certainly understand how the language of the Notice and the fact that it was sent on the same day the Respondent joined this case might appear retaliatory. However, based on the evidence before me, I cannot conclude that the Respondent was acting in a retaliatory, vexatious, or oppressive manner.

### **ORDER**

[34] The Tribunal orders that:

1. The issues of whether the Applicant is entitled to make requests for records and whether he is exceeding his rights under the Act in making this request be added to the issues in dispute in this case.
2. The Respondent shall use the CAT-ODR system exclusively to communicate with the Applicant about matters related to the issues in dispute in this case, as required by Rule 7.1 of the CAT's Rules of Practice.

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Keegan Ferreira  
Vice-Chair, Condominium Authority Tribunal

Released on: May 24, 2022