CONDOMINIUM AUTHORITY TRIBUNAL

DATE: August 23, 2022
CASE: 2022-00216R
Citation: Emerald PG Holdings Ltd. v. Toronto Standard Condominium Corporation No. 2519, 2022 ONCAT 89

Order under section 1.44 of the Condominium Act, 1998

Member: Ian Darling, Chair

The Applicant
Emerald PG Holdings Ltd.
Represented by Cameron Thomson, Agent

The Respondent
Toronto Standard Condominium Corporation No. 2519
Represented by David Barkin, Agent

Online Mediation: April 15, 2022 - May 29, 2022

Online Written Hearing: May 30, 2022 - July 29, 2022

DECISION AND ORDER

A. BACKGROUND

[1] The parties agreed to conduct the case as a Mediation/Adjudication (Med/Adj) under the authority of Rule 44 of the CAT's Rules of Practice. I acted as both a Mediator and Adjudicator. There is a difference between mediation and adjudication. Mediation is an informal negotiation process where a mediator helps facilitate discussions between the parties in the hopes of reaching a settlement. By contrast, Adjudication is the formal process of deciding a case. In Adjudication, each party presents their evidence and arguments to an impartial third person, called an adjudicator, who then analyzes the evidence and argument and decides the matter. The Parties agreed at the start of the mediation that if they could not reach a settlement, I would proceed to adjudicate the case.

[2] The parties resolved some issues during the Mediation and requested that I adjudicate the remaining issues. At the end of the mediation, the parties agreed that the final order for the case would include the following wording:

The parties agree that:

1. The Respondent will request that FirstService review their records to see if they have any of the records that were requested in the February 22, 2022, records request;

2. The Respondent will request that FirstService conduct a review of their records to see if there are any records related to Toronto Standard Condominium Corporation No. 2519 that have not been provided when the management changed;

3. After having made the request, the Respondent will inform the Applicant that it has been completed; and,

4. The Applicant acknowledges that the Respondent has fulfilled its duty with respect to records which were held by FirstService in their former capacity as condominium management services provider.

[3] The parties also agreed to a protocol should any of the records required a fee for their production.

[4] The parties confirmed that the revised Canlight management agreement was provided to the Applicant on May 17, 2022.

[5] The parties acknowledged that the Mediation did not resolve the following issues which would be decided by Adjudication:

1. How should the Response to Records form identify circumstances where the Respondent does not have records that may have been maintained by a former management provider?

    a. Did the Respondent comply with the records request process when the response form said "No" the Applicant may not access records? Should the Response have said "Yes" that the Applicant is entitled to the records, but the Applicant does not have them? Or, should the Applicant have contacted the former manager to enquire if they have the specific records requested?

2. Is the draft audit report a record of the corporation, and if so, is the Applicant entitled to it?

3. The Applicant requested counter-signed versions of contracts. The Respondent indicated that the Applicant should have counter-signed versions of the contracts, and if they did not have the record on hand, should have sought them out from the providers. The issue to be decided is whether the

records the Respondent has (and has provided) are adequate? If they are not, what is the appropriate remedy?

4. The Applicant requested emails received by, and sent from the Respondent's email address

   a. Are emails considered records of the corporation?

5. The hourly rate the Respondent is entitled to charge for the production of non-core records (if the Respondent is ordered to provide any non-core records associated with this case).

[6] When the case was approved by the CAT, it related to one request for records, dated February 22, 2022. The parties consented to expand it to include requests submitted on March 8, 2022, and March 24, 2022.

[7] In making this decision, I have reviewed all the submissions. I will not recite all the evidence or refer to every argument made by either party. This decision focuses on the evidence relevant to the issues to be decided in this case.

B. RESULT

[8] I have decided that the Respondent has complied with their responsibilities to maintain and provide access to records.

Issue 1: How should the Response to Records form identify circumstances where the Respondent does not have records that may have been maintained by a former management provider?

[9] The Applicant requested records that pre-dated the current condominium management provider's contract with the corporation. The former manager provided records to the Respondent following the transition. The Applicant has already requested and received these records. This request was for additional records, which the Applicant asserts the former manager should have provided. The Respondent indicated on the mandatory response form that the Applicant could not receive copies of the requested records because they did not have any additional records.

[10] The Applicant asserts that by responding that the Applicant could not review the records, the Respondent has not complied with the Act. The Applicant's position is that the response form is used to affirm or deny the requestor's statutory entitlement to the records. They state that:

"the form denies or affirms statutory entitlements by stating either that:

(a) "The Board has determined that you may not examine or obtain a copy of this record"; or

(b) "The Board has determined that you may examine or obtain a copy of this record."

[11] The Applicant asserts that the Respondent should have said that the Applicant "may examine" the record, then describe the process they would use to request the records from the former manager. The Applicant asserts that

"when completing the "Board's Response to Request for Records" form in respect of records that the current management provider does not have on hand, but which a requesting unit owner is entitled to examine (assuming they exist), and which a former management provider is presumed to maintain, the responding condominium corporation should:

(a) affirm the unit owner's statutory entitlement in the prescribed language of the "Board's Response to Request for Records" form, by stating that "[t]he Board has determined that you may examine or obtain a copy of this record";

(b) instruct the Applicant (in the words of the form) to "[s]ee below for information about how you may access the record and any applicable costs";

(c) add (e.g., by way of a note, cover letter, or addendum) that production of the records is conditional on:

i. confirmation from the former management provider that the records exist;

ii. reception by the current management provider of copies from the former management provider;

iii. other applicable conditions (e.g., fees for printing or redaction); and

(d) upon receiving confirmation from the requestor that they wish to proceed with their request (a fifth purpose to which the mandated response form may be put, by the requestor, to complete the records request process), contact the former management provider with a view to the above-mentioned enquiry and requests."

[12] The Respondent's position is that the prescribed Board's Response to Request for Records form does not contemplate the exact situation where a condominium corporation does not have records that may have been maintained by a former management provider. It is the Respondent's position that the question is one of a strictly technical nature as the result is the same - the record cannot be accessed by the Applicant because the Respondent cannot give what it does not have.

[13] The Respondent's response (i.e., that the records could not be examined) is accurate in this context. I find that the Respondent has complied with the records request process. They indicated that the record was not available and provided a reason for the unavailability. Ontario Regulation 48/01 ("O. Reg. 48/01") only provides that a Board's response shall state whether "the board has determined that the corporation will allow the request to examine or obtain a copy of the record[1]" I accept the Respondent's assertion that they responded to say that it could not allow the Applicant to examine or obtain a record it did not have in its possession.

[14] The Respondent submitted that they have an acrimonious relationship with its former manager and collaboration is non-existent. The relationship is the subject of ongoing litigation. The Respondent submitted that, the former manager transferred records at its termination and, if it did not turn over certain records, then under these circumstances, the Respondent is reasonably entitled to presume that they did not exist.

[15] The Respondent is required under section 55 (1) of the *Condominium Act, 1998* (the "Act") to keep adequate records. I am satisfied that they have taken reasonable steps to attain records from the former manager, and that the records they received have been provided to the Applicant following prior requests.

[16] The form does not have a box for these exact circumstances – however, the Respondent clearly indicated that the Applicant could not have access to the record, and provided a reasonable explanation for why they were unable to provide the records. The Applicant's description of their preferred approach overly complex, and fraught with further opportunities to allege technical breaches.

[17] The Respondent has complied with the records request and response process. No further action is required.

Issue 2: Is the draft audit report a record of the corporation, and if so, is the Applicant entitled to it?

[18] The Applicant requested "the most recent draft of TSCC No. 2519's annual financial statement for the period ending April 30, 2021, which was provided by the corporation's auditor to the board." After some discussion, it was agreed that the Applicant was seeking a draft of the audited financial statements that had been provided by the Respondent's auditor to its board of directors. The Respondent

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[1] at Section 13.3(7).

had refused to provide the draft audit because they assert that the draft is not a record of the corporation.

[19] Both parties referred me to *Harder* v. Metropolitan Toronto Condominium *Corporation No. 905,* 2022 ONCAT 18 (”Harder”). The Applicant asserted that Harder established that there was no statutory definition of “draft” financial statements, and therefore, these should be considered records of the corporation.

[20] Harder dealt with draft monthly financial statements, not the draft audit, which I find limits its relevance to this case. In Harder, the Tribunal determined that the monthly financial statements were not “work products” but were records that were created and used by the corporation for the purposes of ongoing and good governance. The Applicant asserts that a draft report from an auditor would have been used for the purposes of ongoing governance, and therefore should be considered a record.

[21] Both parties quoted Harder at paragraph 27. I will reproduce it here to ensure clarity.

> [27] I find that draft monthly financial documents, which are produced for the purposes of review by the board and relied upon in its ongoing governance duties, are records of the corporation but they are not core records. While the referencing of these drafts in the board minutes is an issue that deals more with the adequacy of minutes and is beyond the scope of this Application, I find that, in the circumstances of this case, it is untenable to hold a position that these draft financial documents are not records. The board clearly needs to rely on some draft financial documents for the purposes of ongoing and good governance. Documents also must be provided to auditors for review. It is unclear how a practice where financial drafts are not approved by the board and are not considered records would function on a long-term, productive basis. I further note that there is a distinction between work products, information, and interim financial statements. Documents, such as interim financial statements, become part of the accounting records of the corporation and are needed for the reference of the board, its treasurer and other individuals for accounting and auditing purposes. These documents are records of the corporation and are accessible under the Act. In contrast, work products are not in this same category.

[22] The Respondent asserts that the draft audit report is not a record of the corporation. They assert that it is the work product that is created and maintained by the auditor. Therefore, the Applicant is not entitled to it.

[23] I agree with the Respondent’s submission that the draft audit is not a record of the corporation, it is a work product of the auditor. It is a temporary document that is produced and maintained by the external auditor as part of the process to produce

the audit report (which is a record that the corporation is required to maintain). Therefore, I conclude that the draft audit report is not a record of the corporation that the Respondent is required to produce.

Issue 3: Are the contracts the Respondent has provided adequate? If they are not, what is the appropriate remedy?

[24] The Applicant received copies of the requested retainer agreements from the Respondent following a previous records request. In this request, the Applicant seeks counter-signed versions of retainer agreements. The Applicant asserts that the records that have been provided are inadequate because the agreements were not counter signed by the service provider. The Applicant asserts that the Respondent should have "perfected" the records by seeking out counter-signed copies from the service providers.

[25] The Applicant submits that the appropriate remedy would be for the Respondent to renew the retainer agreements, so they contain signatures for both the Respondent and the service provider.

[26] The Applicant's assertion that the record needs to be "perfected" is unreasonable. I am guided by McKay v. Waterloo North Condominium Corp. No. 23, 1992 CanLII 7501 (ON SC), ("McKay") on what constitutes an adequate record. McKay states:

> The Act obliges the corporation to keep adequate records. One is impelled to ask -- adequate for what? An examination of the Act provides some answers. The objects of the corporation are to manage the property and any assets of the corporation (s. 12 (1)). It has a duty to control, manage and administer the common elements and the assets of the corporation (s. 12(2)). It has a duty to effect compliance by the owners with the Act, the declaration, the by-laws and the rules (s. 12 (3)). Each owner enjoys the correlative right to the performance of any duty of the corporation specified by the Act, the declaration, the by-laws and the rules. The records of the corporation must be adequate, therefore, to permit it to fulfil its duties and obligations

[27] The Respondent summarized the Tribunal's findings in *Kim* v. *York Condominium Corporation No. 96*, 2021 ONCAT 124, where the Tribunal found that in order to be considered adequate, a contract must relay the critical information of:

1. What was done;
2. When it was done;
3. Who did it, and
4. How much it cost.

The Respondent stated that the records provided by the Respondent fulfil the

conditions outlined in the Kim decision.

[28] In this case, the Respondent has previously provided retainer agreements, and related invoices in response to prior requests. These records are adequate because the agreement and invoices allow owners to understand how the board is conducting the corporation's affairs.

[29] I find that the records are adequate. The Respondent is not required to take any additional steps to "perfect" the record.

Issue 4: Are emails considered records of the corporation?

[30] The Applicant requested emails from May 16, 2016, until the date the records are produced. They specifically requested copies of:

> (a) all emails sent and received via the "board" email address to and from:
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> > i. any employee of the Respondent's management services provider;
> >
> > ii. any person or company providing, or proposing to provide, services (other than legal or property management services) to the Respondent; and
> >
> > iii. the Respondent's counsel;
>
> (b) all emails sent to, or received by, a Director of the Respondent when they were acting in their capacity as a Director, via an email address other than (the board email address), which were sent by, or received from, any person or company providing, or proposing to provide, services to the Respondent (including legal services).

[31] The Applicant asserted that the emails are records because the board has created a specific email address for correspondence, and by doing so, have created a formal structure that requires email correspondence to and from that address to be considered records of the corporation.

[32] The Applicant indicated that they wanted the records because they assert that "the board does sometimes transact the Respondent's affairs by email." The emails were requested so the Applicant could review them to see if the Respondent is conducting business of the corporation outside of a duly constituted meeting.

[33] It is the Respondent's position that the request itself was improper – stating that:

> … based on the Applicant's previous six (6) CAT case, that the Applicant is not making this request for reasons solely related to its interest as an owner having regard to the purposes of the Act. Instead, it is clear that the Applicant is on a pure fishing expedition looking for any shred of evidence to support its alleged suspicions of impropriety or

mismanagement.

[34] In *Martynenko* v. *Peel Standard Condominium Corporation No.935*, 2021 ONCAT 125 (at paragraph 31), the Tribunal discussed the term “fishing expedition.” It is worth repeating in this context:

> The term “fishing expedition” is used in law to describe a search or investigation, including demands for records or information, undertaken for the purpose of discovering facts that might be disparaging to the other party or form the basis for some legal claim against them, that the seeker merely hopes or imagines exist. Most cases where the term is used appropriately involve a person casting a wide net, as it were – such as requesting records that cover a broad period of time and/or wide range of topics – in the hopes of acquiring some fact or detail that could satisfy what is essentially an unfocussed vindictiveness or dislike for the other party.

[35] The Applicant has requested six years’ of emails, with the explicit intent to identify if the corporation is conducting business outside of properly constituted meetings. I find, as in Martynenko that the request covers a broad time period and request wide ranging records. Casting a wide net is a characteristic of a “fishing expedition,” but is not the determinative characteristic. The Applicant has clearly articulated that the request is made with the intent of searching for alleged, and unsubstantiated apparent errors. I find that this request is overly broad, lacks specificity, is focussed on finding imagined wrong-doing, and meets the general definition of a “fishing expedition” as outlined above.

[36] Section 13.3 (1) of O. Reg 48/01 stipulates that a request for records must be “solely related to that person’s interests as an owner, a purchaser or a mortgagee of a unit, as the case may be, having regard to the purposes of the Act.” I take note of the contentious history between the Applicant and Respondent, which has already been described in several CAT decisions and orders[2].

[37] The basis of this request relates to alleged wrongdoing by the Respondent. Where there is genuine malfeasance by a board of directors, it is appropriate for owners to address it. The circumstances of this case lead me to conclude that the request is being made for an improper purpose. Having considered the time period for the requested records, the Applicant’s stated intent, and understanding the context of

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[2] Emerald PG Holdings Ltd. v. Toronto Standard Condominium Corporation No. 2519 - 2022 ONCAT 26
Emerald PG Holdings Ltd. v. Toronto Standard Condominium Corporation No. 2519 - 2022 ONCAT 15
Emerald PG Holdings Ltd. v. Toronto Standard Condominium Corporation No. 2519 - 2021 ONCAT 104
Ahmadi General Trading Inc. et al. v. Toronto Standard Condominium Corporation No. 2519 - 2021 ONCAT 27
Emerald PG Holdings Ltd. v Toronto Standard Co0ndominium Corporation No. 2519 - 2020 ONCAT 24 -
Emerald PG Holdings Ltd. v Metro Toronto Condominium Corporation No. 2519 - 2019 ONCAT 5

the acrimonious legal history between the parties, I conclude that the request is not consistent with the Applicant's interests as an owner. Therefore, this request is dismissed.

Issue 5: The hourly rate the Respondent is entitled to charge for the production of non-core records (if the Respondent is ordered to provide any non-core records associated with this case).

[38] The parties made submissions regarding this question, however, since I have decided that the Respondent is not required to produce any additional records, it is not necessary for me to answer this question.

Issue 6: Should the Tribunal award any costs?

[39] Rule 48.1 of the CAT's Rules deals with reimbursement of CAT fees. The rule states that "if a Case is not resolved by Settlement Agreement or Consent Order and a CAT Member makes a final Decision, the unsuccessful Party will be required to pay the successful Party's CAT fees unless the CAT member decides otherwise."

[40] The parties have resolved some issues on consent, and for other issues I have rendered a decision. On balance, the Applicant's requests have been unsuccessful. The Applicant has paid $25 to file the application, and $50 to bring the case to Stage 2 – Mediation. In this context it is not appropriate to order the Respondent reimburse the Applicant's fees.

[41] Each party will be responsible for their own costs.

C. CONCLUSION

[42] I commend both parties for their willingness to participate in the Mediation/Adjudication process. We were able to resolve some issues and simplify the issues that required adjudication. I will note, however, that the issues to be decided were less about entitlement to records, and more about the Applicant asserting that the corporation should be conducting its affairs differently. This has been a consistent theme across the multiple CAT cases involving these parties. Access to records, and the "open book principle" are fundamental to transparent condominium governance and the protection and promotion of owners' rights under the Act – however, the CAT should not be used to usurp the authority of the board to manage the affairs of the corporation. The CAT process should not be used to annoy, or frustrate - especially with trivial matters. The issues that had to be adjudicated were situations where the Applicant alleged technical breaches, or

demanded that records be "perfected." These claims have been found without merit. I caution the Applicant that the proper purpose of the CAT is to adjudicate disputes related to the requirement to maintain and provide access to adequate records – it is not to change how the corporation manages its affairs to suit the preferences of one owner.

D. ORDER

[43] The parties have agreed to incorporate the following settlement terms into a Consent Order. The Parties agreed, and is hereby ordered that:

1. the Respondent will request that FirstService review their records to see if they have any of the records that were requested in the February 22, 2022 records request;

2. the Respondent will request that FirstService conduct a review of their records to see if there are any records related to Toronto Standard Condominium Corporation No. 2519 that have not been provided when the management changed;

3. after having made the Request, the Respondent will inform the Applicant that it has been completed; and that,

4. the Applicant acknowledges that the Respondent has fulfilled its duty with respect to records which were held by FirstService in their former capacity as condominium management services provider."

[44] The Applicant is not entitled to any of the other records requested.

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Ian Darling
Chair, Condominium Authority Tribunal

Released: August 23, 2022