

## CONDOMINIUM AUTHORITY TRIBUNAL

**DATE:** December 22, 2022

**CASE:** 2022-00404R

**Citation:** Nicholls v. Niagara South Condominium Corporation No. 12. 2022 ONCAT 148

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

**Member:** Ian Darling, Chair

**The Applicant,**

Terry Nicholls  
Self-Represented

**The Respondent,**

Niagara South Condominium Corporation No. 12  
Represented by Christopher Mendes, Counsel

**Hearing:** Written Online Hearing – August 31, 2022 to November 24, 2022

### **REASONS FOR DECISION**

#### **A. INTRODUCTION**

[1] This decision explores the question of what makes a record adequate. In deciding the case, I examined the context for the records, their use, and if there are any specific requirements in the Act. I find that in some circumstances the records were inadequate.

[2] In deciding these issues, I have reviewed all the evidence and submissions provided to me by the parties. The Applicant, particularly, provided many examples from prior CAT cases to support their position. I only refer to submissions and evidence which are relevant and necessary to making my decision.

#### **B. BACKGROUND**

[3] The facts in this case are:

1. The Applicant requested the following records from the Respondent on May 16, 2022: (1) the most recently approved financial statements from May 1, 2021, to March 31, 2022; and (2) board of director minutes from May 1, 2021, to March 31, 2022.

2. The Parties agree that the Applicant has received all the records in existence at the time of the request.
  3. The issue for the Tribunal to decide is if the Respondent is keeping adequate records in accordance with the requirements of the Act.
- [4] The Applicant requested the Tribunal order the Respondent to change their financial practices and practices related to preparation and documentation contained in the board minutes. The Applicant also requested a correction to the previous two Periodic Information Certificates (PICs). Finally, the Applicant requested the Tribunal order the Respondent to pay a penalty.

### **Preliminary Issue – Request to Dismiss the case**

- [5] At the outset of the hearing, the Respondent requested the CAT dismiss the case under Rule 19 of the CAT Rules of Practice because the case had no reasonable prospect of success, because some of the issues were outside of the CAT's jurisdiction, and because the application was filed for improper purpose.
- [6] I denied the request because when responding to the motion the parties would need to address the substance of the dispute. For a dispute involving a single issue with no witnesses, it was more efficient to receive specific written submissions from both parties on the merits of the case. I therefore directed the parties to present these arguments in the context of their submissions.
- [7] After receiving submissions, I first considered if the case should be dismissed under Rule 19. I find that the case is within the Tribunal's jurisdiction because the issues to be decided are about adequacy of records, which falls under section 55 (1) of the Condominium Act, 1998 ("the Act"). Further, it was not readily apparent that the Applicant's case has no reasonable prospect of success.

### **Preliminary Issue - Jurisdiction**

- [8] The Respondent asserted that the Tribunal did not have the jurisdiction to consider the issues in this case because the Applicant cited other sections of the Act (specifically, sections 32, 45, 76, 93, and 95). The Respondent asserted that since the CAT's records jurisdiction is limited to s. 55 of the Act, all of the Applicant's submissions related to other sections of the Act are outside of the CAT's jurisdiction. I find that the Respondent's position on this issue is without merit.
- [9] Section 1.42 (1) of the Act stipulates that the Tribunal has exclusive jurisdiction to exercise the powers conferred on it under this Act and to determine all questions of fact or law that arise in any proceeding before it. The CAT's records jurisdiction relates to section 55. Section 55 (1) specifically states that "the Corporation shall keep adequate records"; however, the requirements to create and maintain records are established in other sections of the Act and Regulations. It is therefore necessary to consider the requirements as outlined in other sections of the Act when determining adequacy. For instance, using an example of a record that is not

in dispute in this case, I turn to the record of owners and mortgagees. The requirement to maintain the record, and what must be included are outlined in s. 46 (1). It is therefore both necessary and appropriate to refer to other sections of the Act in the context of a records dispute about adequacy.

[10] I deny the Respondent's motion to dismiss the case on this basis.

### **C. ISSUES & ANALYSIS**

#### **Is the Respondent keeping adequate records in accordance with the requirements of the Act?**

[11] The Applicant identified concerns with the records received. The concerns were with the content of minutes and Periodic Information Certificates, specifically:

1. Inadequate minutes related to a loan from the reserve fund.
2. Inadequate minutes related to an increase to contributions to common expenses
3. Inadequate minutes related to a reduction in the contributions to the reserve fund.
4. Minutes – Absence of decisions and directions related to other CAT cases
5. Adequacy of minutes related to a contract with DeKorte's Landscaping.
6. Confidential minutes.
7. Documentation of financial transactions
8. Periodic Information Certificates – Financial projections.
9. Periodic Information Certificates – Active CAT cases

[12] The Applicant asserted that records of the corporation are inadequate as a result of "a deliberate and coordinated attempt to deceive the owners of the true deteriorating financial situation of the corporation." The Applicant stated that in bringing the application to the Tribunal, they,

understand that a verbatim account of the discussion is not required, and we elected the Board to manage our resources responsibly, this must also be done with an open book philosophy between the board and the owners, whilst they maintain adequacy and accuracy of the records. Further it must also be done within the provisions of the Act and Regulations. The issue here is not about questioning the decisions being made by the Board, rather the lack of clarity in documentation and correct legal process to understand the decisions as well as have a clear understanding of the corporation's financial situation.

[13] The Respondent asserted that condominium records can be considered adequate where they permit a condominium to perform its functions and duties under the Act. They cited CAT decisions that found whether a record is "adequate" is not about whether the Applicant understands the records nor whether the records are suited for the Applicant's purpose, but that the Condominium is able to undertake its obligations, which are to manage and administer the common elements and

assets of the corporation.<sup>1</sup>

- [14] The Respondent raised a concern that the Applicant was interfering in the governance of the condominium. I accept the Applicant's intent in reviewing the minutes is directly related to his interest as an owner and find that these requests for records is to understand the board's decisions, rather than seeking to change them or interfere in the governance of the condominium.
- [15] In determining if the records are adequate, I note that prior Tribunal decisions have reviewed the concept of adequacy in the records context and have determined that accuracy is contextual; there can be a tolerance for imperfections. Minutes are adequate where they contain sufficient detail to know what is going on, how and when decisions were made and the basis for those decisions.<sup>2</sup> It is permissible for some of the records to have imperfections, but there is a limit where repeated imperfections may cast doubt on the adequacy of the records overall. Assessing the impact of these alleged imperfections in this requires reviewing them individually. The tribunal has further held that adequacy does not only relate to the records allowing the condominium to fulfil its purposes, but they should function as an "Open Book"<sup>3</sup> to allow the owners to understand how the corporation is operating.

#### **Absence of Minutes related to a loan from the reserve fund.**

- [16] Evidence indicates (and the parties agree) that the board directed funds from the reserve fund to be deposited in the operating fund of the corporation as a "loan" (i.e., to be repaid out of the operating fund). The Tribunal does not assess whether that was a correct or permissible use of the reserve fund.
- [17] The Applicant stated that the approved financial statements show a loan but there is no corresponding record in the minutes to record the decision to make the loan. The Respondent did not respond to the substance of the Applicant's concern – but restated their claim that this issue is not within the Tribunal's jurisdiction.
- [18] Section 93 of the Act establishes the requirement to create and maintain a reserve fund. Further, section 93 (2) establishes that the "reserve fund shall be used solely for the purpose of major repair and replacement of the common elements and assets of the corporation."
- [19] Should the decision to transfer funds be recorded in the minutes? We can find clear guidance in a leading court case, and subsequent CAT decisions on this matter. In *McKay v. Waterloo North Condominium Corp. No. 23, 1992 CanLII 7501 (ON SC)* where the court states:

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<sup>1</sup> *Ravells v. Metro Toronto C.C. No. 564, 2020 ONCAT 44* at paras 24–26

<sup>2</sup> *Mawji v. York C.C. No. 415, 2021 ONCAT 72* at para 27

<sup>3</sup> *McKay v. Waterloo North Condominium Corp. No. 23, 1992 CanLII 7501 (ON SC)*

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.

[20] The CAT provided further guidance in *Rahman v. Peel Standard Condominium Corporation No. 779*, (2021 ONCAT 32), stating:

In matters before the Tribunal, we see a wide variety of minutes in terms of form and detail. Issues about the adequacy of minutes arise frequently. It is well settled law at this point that the purpose of minutes is to document a board's business transactions and to show how the corporation's affairs are controlled, managed, and administered. There is an implied requirement that the minutes be accurate, but the Act does not impose a standard of perfection. Minutes are not required to be a verbatim account of a meeting.

I conclude that decisions to transfer money from the reserve fund to the operating fund should be included in minutes.

[21] The decision to transfer funds is a decision to transact business. Section. 32(1) says "the board of a corporation shall not transact any business of the corporation except at a meeting of directors at which a quorum of the board is present." Therefore, there should be a meeting, and minutes should exist. Section. 55(1) requires adequate minutes of board meetings be kept. Adequacy can be determined by considering the principles defining adequacy as set out in *McKay*, *Rahman* and *Mwaji*, which suggest that owners are entitled to know that, why, and how it was done. Since the minutes do not record the decision, or reasoning for the transfer, they are inadequate.

### **Increase to contributions to common expenses**

[22] The Applicant stated that the contributions to common expenses (referred to in the case as "common element fees") were increased, but the minutes do not provide justification to support the decision. The Applicant stated that he found out about the increase in a newsletter to the community several months after the budget was approved. The Applicant further stated that the newsletter announced the increase but did not justify the change.

[23] The Respondent acknowledged that the board meeting minutes, dated March 10, 2022, and April 14, 2022 ("Budget Meetings"), do not explicitly refer to a three percent increase in common expenses. They submitted that since common expenses are determined by the condominium's budget, and the minutes of the Budget Meetings contain express reference to deliberations regarding the budget and its approval, the minutes are adequate.

[24] I agree that the minutes in this case are sufficient to record the decisions of the board, the increase in the common expenses was approved in the context of the approval of the budget. Further, I find that the minutes are not required to provide the level of justification the Applicant desired.

#### **Reduction to the contributions to the reserve fund.**

[25] The Applicant stated that when reviewing the 2021-2022 budget they noted that the yearly financial transfer from the operating budget to the reserve fund was reduced by approximately \$21,000. The Applicant stated that this was contrary to the accepted and approved Reserve Fund Study. The Applicant states that the board minutes do not record the decision and do not explain the reasoning for the reduction in the reserve fund.

[26] The Respondent indicated that decisions about how the corporation manages the reserve fund are outside the jurisdiction of the CAT. Again, I agree that how the corporation manages its funds are outside the jurisdiction – however, the Respondent has not addressed the Applicant’s issue regarding the adequacy of the record.

[27] Consistent with my reasoning related to the loan, I conclude that decisions to reduce contributions to the reserve fund should be included in the minutes and should document how the corporation’s affairs are being managed, and in order to allow owners to understand what decisions have been made.

#### **Minutes - Decisions and directions related to other CAT cases**

[28] The Respondent was involved in other CAT cases (with different owners) during the time covered by the request for minutes. The Applicant stated that the minutes were inadequate because they did not explain what the cases were about, did not record board decisions, or specific directions to counsel on how to respond to the cases. The Respondent submitted that for the period covered in the record request both cases were ongoing. This meant that the details were confidential, subject to solicitor-client privilege, and subject to exclusion by section 55(4) of the Act.

[29] I concur with the Respondent’s reasoning and find that the minutes are adequate in this regard.

#### **Contract with DeKorte’s Landscaping.**

[30] According to the Applicant, the March 2022 board minutes approve a three-year contract for property maintenance to DeKorte’s Landscaping. The minutes read:

“A motion was presented by Bob Mark, seconded by Rick Lampman that we accept the DeKorte Landscaping quote for a three-year contract beginning this year (this was the best quote on this work).”

The Applicant asserts that this information is insufficient because he has questions

about the bid criteria, and the other bids.

- [31] The Applicant asserted that the minutes were therefore inadequate because they did not explain the decision, but only recorded it. I have reviewed the minutes. I accept that they do not provide the level of detail desired by the Applicant, but they are adequate for the purposes of the Act.

### **Confidential minutes.**

- [32] The Applicant expressed concern that the minutes contained “confidential” designation, and that the redactions were overly broad and without sufficient explanation. The Respondent submitted that the redactions were consistent with the exemptions outlined in s. 55 (4) of the Act.

- [33] I have reviewed the minutes. I have determined that the redactions are not overly expansive. However, the Respondent, when providing the minutes, does not appear to have complied with section 13.8(1) of Ontario Regulation 48/01 (the "Regulation") which requires a statement accompanying a redacted record that explains the basis for the redaction. The Regulation states:

Each copy of a record that the corporation makes available for examination or delivers under any of sections 13.4 to 13.7 shall be accompanied by ...

(a) a separate written document that is addressed to the requester and that clearly identifies the record that is being made available or delivered, as the case may be;

(b) if the board has determined that the corporation will redact the record to remove any part that the board has determined that the corporation will not allow the requester to examine or of which it will not allow the requester to obtain a copy, a written statement of the board's reason for its determination and an indication on which provision of section 55 of the Act or this Regulation the board bases its reason;

- [34] Without the accompanying statements it is not possible to understand why the minutes have been redacted. It is not sufficient to make a blanket statement in the hearing that all minutes have been redacted according to s. 55 (4) - the Regulation requires an explanation of redaction for each record.

- [35] I will order the Respondent to provide accompanying statements to explain the purpose of the redactions.

### **Documentation of transfer of funds**

- [36] On reviewing the financial ledgers for the corporation, the Applicant identified several entries indicating transfers were made from the reserve fund to the operating fund. The ledger entries show the dates, amounts, and a basic statement of purpose. The Applicant seeks more background information on these transfers. Specifically, the Applicant desires information to document, substantiate and explain the transfers. However, the level of detail sought by the Applicant is not required for this particular record. The financial ledger appears adequate for its

purposes.

### **Remedy to deal with inadequate minutes**

[37] I have found in some instances that the minutes are inadequate, so I must consider what is the appropriate remedy. It is not appropriate in these circumstances to order the existing minutes be amended retroactively because it would be relying on memories to reconstruct the minutes over a year after the case concluded.

[38] The Act establishes a requirement that the corporation maintain a record of its decisions. Therefore, I will follow the example of a recent case<sup>4</sup> where the CAT ordered a condominium to create a record of decisions that were made outside of board meetings, and not recorded in minutes. While the circumstances of that case are different because it involved several years of meetings with no records of the decisions, it is still necessary that the corporate records are a transcript of the authoritative actions and decisions of the corporation. Therefore, I will order consistent with powers subsection 1.44 (1) 7 of the Act that:

1. the Respondent shall make a concerted, honest, and good faith effort to generate a record that includes a list of all the dates on which its board of directors made decisions related to loans from the reserve fund, and reductions in contributions to the reserve fund.
2. this record shall be presented along with this decision to the unit owners within 120 days after the date of this decision;

[39] I recommend that the Respondent review and consider the findings in this decision, and ensure that they are acting in a manner consistent with the requirements of the Act.

### **Periodic Information Certificates – Financial projections.**

[40] The Applicant identified three concerns with the Periodic Information Certificates (PIC). They indicated that the PIC dated April 22, 2022 (for the period ending, February 28, 2022), indicated that a budget was projected to result in neither a deficit nor a surplus. The Applicant also asserted the PIC was inadequate because it did not list an open CAT case. Finally, the Applicant asserted that the PICs were inadequate because they did not list outstanding judgments from prior CAT cases.

[41] Regarding the projected budget surplus or deficit, the Applicant stated that the PIC indicated that the corporation was on target to meet its annual budget. They contend that the monthly financial statements showed that the corporation was operating at a loss, and the PIC is adequate as a result. The Respondent's position is that the Applicant has not provided any evidence from financial expert(s) that the

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<sup>4</sup> Sidhu v. Peel Condominium Corporation No. 426 2022 ONCAT 112



PICs of the condominium contain errors regarding its financial status. The Respondent further asserted that s. 55 of the Act does not provide a mechanism for disputes over the content of records.

- [42] The Respondent's assertion is incorrect. The question of adequacy cannot be a merely formal one - i.e., relating only to the form of the records; it must also refer to their substance; and substance cannot be assessed without consideration of a record's contents. This does not mean that every dispute relating to the contents of a record will be a valid issue before the Tribunal, but when assessing adequacy some consideration of the contents of the records is relevant and appropriate, and within the Tribunal's jurisdiction. In the context of this case, I find that the CAT has jurisdiction to address the alleged errors in the PIC, if the errors are so significant to render them inadequate per the requirements of s. 55 (1) of the Act.
- [43] Neither party has provided sufficient evidence to determine that with certainty. The Applicant's submissions show that contemporaneous monthly financial statements demonstrate an ongoing budget deficit, which by the end of February was over \$40 000. Prior CAT cases<sup>5</sup> have established that certain records require projections that are speculative, and do not require certainty. However, a plain reading of the financial statements demonstrate that the corporation was operating in a deficit position at the time that the PIC was issued. The Respondent's assertion that determining this issue requires analysis by an auditor or other financial expert is unreasonable and does not address the concern that the corporation misstated its financial position. The Respondent did not provide any submissions to indicate that the board had a clear plan for eliminating the deficit before the end of the year.
- [44] The intent of the PIC is to provide owners with information about the condominium at set points in the fiscal year. The challenge in assessing the adequacy of the PIC is that they are intended to capture information at a specific time, and involve forecasting the financial condition of the corporation. The fact of a persisting deficit at one point in a year, does not necessarily mean the corporation did not have a plan to correct it before the year end. They might have validly projected that the budget would be balanced -- even if that projection turns out to have been wrong.
- [45] In this circumstance, I cannot conclude that the PICs were inaccurate, or inadequate. The PICs are intended to reflect the information available at the time, and boards should ensure the financial projections are accurate. If the board did not have a clear plan to resolve the deficit before year-end, then they ought to have ensured the PIC gave owners the correct information, to which they are entitled. Subsequent records (like the audited financial statements) provide more detailed information than the PIC, so it is not necessary to provide any further remedy.

## **Periodic Information Certificates – Active CAT Cases**

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<sup>5</sup> Yeung v. Metropolitan Toronto Condominium Corporation No. 1136, 2020 ONCAT 33

[46] The Applicant asserted that the PICs were missing information about active CAT cases, and outstanding decisions. I accept the Respondent's explanation that although the Respondent was involved in several CAT cases in 2021-2, there were no active CAT cases at the time the PIC was issued. I further accept that although the Respondent had been subject to several orders from the CAT,<sup>6</sup> none were outstanding as of February 28, 2022.

#### **Should the Tribunal award a penalty?**

[47] The Applicant requested the Tribunal impose a penalty on the Respondent. Penalties are only appropriate if the CAT finds that a condominium has refused to provide a record without a reasonable excuse. It was established at the start of the hearing that all the records were provided, therefore, there is no basis to award a penalty.

#### **Should the Tribunal award and costs?**

[48] In deciding the question of costs, I am guided by the Tribunal Rules, and Practice Direction on Assessing Costs. The Applicant was partially successful in his application. Therefore, in accordance with the Tribunal Rules, I will order the Respondent to reimburse the Applicant \$200 for the Tribunal fees.

[49] The Respondent requested that the Tribunal award costs against the Applicant due to what they assert was the Applicant's improper purpose in bringing the case to the CAT. I have determined that the application was not improper. I have reviewed the Practice Direction on Costs and find that the factors outlined do not support a cost award in this case. Furthermore, given that I have found in favour of the applicant on several issues, it would not be fair under the circumstances to award any costs against the Applicant.

#### **D. ORDER**

[50] The Tribunal Orders that within 30 days of this decision:

1. The Respondent will provide the Applicant with accompanying statements required by section 13.8(1) of Ontario Regulation 48/01 relating to each of the redactions made in the records provided in response to the Applicant's request for records that is subject of this case; and
2. The Respondent will reimburse the Applicant \$200 for the Tribunal fees.

And, consistent with powers subsection 1.44 (1) 7 of the Act that:

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<sup>6</sup> Anderson v. Niagara South Condominium Corporation No. 12 - 2022 ONCAT 28; Niagara South Condominium Corporation No. 12 v. Spicer - 2022 ONCAT 21; Niagara South Condominium Corporation No. 12 v. Spicer - 2022 ONCAT 22; Kore v. Niagara South Condominium Corporation No. 12 - 2022 ONCAT 19.

3. The Respondent shall make a concerted, honest, and good faith effort to generate a record that includes a list of all the dates on which its board of directors made decisions related to loans from the reserve fund, and reductions in contributions to the reserve fund.
4. This record shall be presented along with this decision to the unit owners within 120 days after the date of this decision.

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Ian Darling  
Chair, Condominium Authority Tribunal

Released on: December 22, 2022