CONDOMINIUM AUTHORITY TRIBUNAL

DATE: March 21, 2023
CASE: 2022-00704R
Citation: Rahman v. Peel Standard Condominium Corporation No. 779, 2023 ONCAT 46

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

Member: Ian Darling, Chair

The Applicant,
Aqib Rahman
Self-Represented

The Respondent,
Peel Standard Condominium Corporation No. 779
Represented by Antoni Casalinuovo, Counsel

Hearing: Written Online Hearing – January 18, 2023 to March 8, 2023

REASONS FOR DECISION

A. INTRODUCTION

[1] Aqib Rahman ("the "Applicant") moved into a unit in Peel Standard Condominium Corporation 779 ("the Respondent") in April 2020. In October 2022, the Applicant submitted a records request. The request was for "all incident reports kept in record about Aqib Rahman" for the period of April 2020-October 2022. The Respondent refused to provide the records – citing the exemption for records related to contemplated litigation. The core issue to be decided in this case is whether the Respondent was justified in their refusal.

[2] The mere existence of actual or contemplated litigation is not sufficient to automatically deny an owner access to all records. The exemption is only justified if the records requested fall within the scope of the issues in the litigation. I have considered the issues raised in multiple legal disputes between the parties and determined that the records requested fall within the exemption for actual or contemplated litigation.

[3] The Applicant has been a member of the community of PSCC 779 for just under three years. The relationship can be characterized as highly conflictual. What started as a relatively minor issue, has grown into multiple inter-related court applications and tribunal cases. The conflict has expanded from a dispute between the Applicant and Respondent condominium corporation, to also include the

Respondent's counsel. This conflict has been stressful for all parties, with significant personal and monetary costs. In writing this decision, I am mindful that it will determine the issues in dispute in this case but will not resolve the underlying issues. I encourage the parties and counsel to move away from a cycle of outrage and blame, to seek different ways to de-escalate the conflict, and to recognize that cooperation is key to successful communal living.

B. PRELIMINARY ISSUES

[4] This case began with several preliminary motions. First, the Applicant requested an adjournment of the case. I gave an opportunity to make submissions on the issue and ultimately denied the requested adjournment.

[5] The Applicant also indicated that they wished to initiate a request to remove legal counsel but withdrew the motion.

[6] Once the Applicant's motions were concluded, the Respondent asked to submit a motion to dismiss the case. Since there were no witnesses, the issues in dispute were straight-forward, and there was the potential that the arguments to dismiss the application would overlap with the issues to be decided, I instructed the parties to provide written submissions on the preliminary issues and the substantive issues in one document.

[7] Ultimately, I have found no reasons that support either party's motions. I deal with each of these requests in order below.

Request to Adjourn

[8] On January 31, 2023, the Applicant requested an adjournment pending the resolution of a civil action filed by the Applicant against the Tribunal and the Condominium Authority of Ontario. The Applicant provided a draft Statement of Claim. When the Applicant requested the adjournment, I advised that the decision to grant an adjournment is not automatic, it would depend on a variety of factors, including:

1. the reason for the adjournment and position of the parties;
2. the issues in the application;
3. any prejudice that may result from granting or denying the request;
4. the history of the proceeding including other adjournments or rescheduling;
5. the CAT's obligation to adopt the most expeditious method of determining the questions arising in a proceeding that affords to all persons directly affected by the proceeding an adequate opportunity to know the issues and be heard on the matter the conduct of the parties.

[9] I invited the Applicant to provide reasons to support their request, but they did not provide any additional information. I reviewed the draft Statement of Claim. I also reviewed the Stage 2 Summary and Order, which identifies the issues to be decided.

[10] I concluded that the issues outlined in the Statement of Claim are related to the role of the Condominium Authority Tribunal, and the Condominium Authority of Ontario, as outlined in the Condominium Act, 1998 (the "Act"), and are not related to the scope of the issues in this case. The issues in this case can be decided independently of the issues in the Statement of Claim. If I were to allow the request to adjourn, it would be inconsistent with the CAT's obligation to adopt the most expeditious method of determining the issues before it. The request was denied.

Request to remove legal counsel.

[11] The Applicant stated that they wished to submit a motion to remove the Respondent's legal counsel from the case. When the request was submitted, the CAT was considering the same motion in two other CAT cases that were occurring at the same time. I determined that the most efficient process would be to delay hearing the motion until it was resolved in the other cases. The CAT issued two orders denying the motions[1]. After receiving the motion decisions, the Applicant withdrew the motion.

Request to Dismiss the Case.

[12] The Respondent requested that the CAT dismiss the case under Rule 19.1 of the Tribunal's Rules of Practice. Under this Rule, the Tribunal can dismiss an application or case at any time in certain situations, including:

> (a) Where a Case is about issues that are so minor that it would be unfair to make the Respondent(s) go through the CAT process to respond to the applicant(s)'s concerns;
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> (b) Where a case has no reasonable prospect of success;
>
> (c) Where a Case is about issues that the CAT has no legal power to hear or decide;
>
> (d) Where the Applicant(s) is using the CAT for an improper purpose (e.g., filing vexatious Applications).

[13] PSCC 779 asked the Tribunal to dismiss the case asserting that the CAT has no legal power to decide the issue, and because the Applicant is using the CAT for an improper purpose. I will deal with each of these grounds in order.

Rule 19.1 (c): does the Tribunal have the legal power to hear or decide this case?

[14] The Respondent requested the CAT dismiss the case under Rule 19.1 (c) of the Tribunal Rules of Practice. This rule gives the power to the Tribunal to dismiss cases when it is about issues that the CAT has no legal power to hear or decide. The Respondent submitted that "It is not disputed that requests with respect to

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[1] Rahman v. Peel Standard Condominium Corporation No. 779 - 2023 ONCAT 9 & Rahman v. Peel Condominium Corporation No. 779 - 2023 ONCAT 10

Section 55(4) of the Act are within the jurisdiction of this Tribunal. However, in the present case, the requested records relate to issues in actual litigation (in addition to pending litigation)."

[15] The Respondent submitted that the case should be dismissed because the records were refused under section 55 (4) (b) of the Act. This was the basis for its decision not to provide the record, but it does not support the Respondent's arguments that the CAT does not have the legal authority to decide the case. On the contrary, this clearly establishes that the dispute firmly falls within the jurisdiction of the Tribunal. The Respondent relied on an exception in section 55 to refuse to provide the record. The CAT has jurisdiction over disputes related to section 55 of the Act[2]. The Respondent refused to provide records after applying an exemption in section 55 (4) of the Act because they were related to actual or contemplated litigation.

[16] The Respondent further asserted that the Applicant's entitlement to the record was prohibited because the request was not related to the Applicant's interests as an owner. The Respondent asserted that the Applicant was requesting the records in connection with their role as a litigant, rather than as an owner having regard to the purposes of the Act. The Respondent was relying on Section 13.3 (1) of Ontario Regulation 48/01 states: (my emphasis added)

> (1) The right to examine or obtain a copy of a record under subsection 55 (3) of the Act does not apply unless,
>
> (a) an owner, a purchaser or a mortgagee of a unit requests to examine or obtain the copy and the request is 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**

[17] Again, the Respondent relied on grounds within the Tribunal's jurisdiction to argue that the CAT had no legal power to decide the case.

[18] The Respondent's motion was a request to dismiss the case because the CAT had no legal authority to decide the case. The Respondent appears to confuse their assertion that the Applicant is not legally entitled to the record with an assertion that the CAT does not have the legal authority to determine the matter. However, simply put, the Respondent's arguments for dismissal of the case actually reinforce that the case clearly falls within the Tribunal's jurisdiction. Since the CAT has the jurisdiction to determine the matter, the Respondent's motion is dismissed.

Should the CAT dismiss this Case, pursuant to Rules 4.2, 4.6 and 19.1(d) of the CAT's

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[2] Ontario Regulation 179/17.
1. (1) The prescribed disputes … are,
(a) a dispute with respect to subsection 55 (1), (2), (2.1), (3), (4), (5), (6) or (8) of the Act; …

Rules of Practice?

[19] The CAT's Rules of Practice empower it to close a case if the Applicant is using the CAT for an improper purpose. This can include claims brought for an improper purpose, including the harassment and oppression of other parties by proceedings brought for purposes other than the assertion of legitimate rights and claims that have no legal basis or merit.

[20] The Respondent submitted that the CAT should use its authority under its rules to dismiss the proceeding as an abuse of process. In reviewing the specific grounds for this application, I find that there are not sufficient grounds to determine that **this case** (my emphasis) was filed by the Applicant with improper intent. This case flows from a valid record request, and there is a real issue to be decided. Therefore, I deny the motion to dismiss the application.

[21] The Respondent further submitted that the CAT should require the Applicant to obtain permission to file any future cases or continue to participate in an active case. It may be appropriate at some point in the future for the CAT to consider the Applicant's behaviour across multiple cases, and whether the Applicant has vexatious Applications or has participated in CAT Cases in a vexatious manner, but that inquiry is not required in the context of the current case.

Respondent's request to adjourn.

[22] The Respondent also requested that in the alternative, if it was un successful in dismissing the case, that the case be adjourned pending the resolution of a Superior Court Case[3]. I denied this request to adjourn the case for the same reason as I provided to the Applicant. Additionally, I find that the records requested do not relate to that case, so delaying the case is unnecessary.

Fiduciary duty and constructive fraud

[23] A significant portion of the Applicant's submissions addressed what he characterized as the fiduciary duty of the condominium corporation's board of directors to protect his interest as an owner. He further expressed concerns about the Respondent's legal counsel, and allegations of constructive fraud related to how the Respondent has applied the indemnity provisions of their governing documents to designate the Respondent's legal costs as common expenses. These concerns are a significant issue for the Applicant and are an exacerbating factor in the underlying dispute. These issues, however, are beyond the scope of this hearing, and not within the Tribunal's records jurisdiction.

C. <u>ISSUES & ANALYSIS</u>

Is PSCC 779 correct in their interpretation of section 55(4)(b) of the Act that the

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[3] File No. CV-20-0003993

Applicant is not entitled to the records based on actual or contemplated litigation?

[24] In the parties' submissions it was clear that both parties accepted that the incident reports were records of the corporation to which an owner is entitled unless an exemption exists. They further agreed that the Applicant had followed the records request process.

[25] The Respondent refused to provide the records citing section 55 (4) (b) of the Act – which states that the right to examine or obtain copies of records does not apply to records relating to actual or contemplated litigation. The Respondent pointed to two current CAT cases, as well as an appeal of a CAT decision and a Notice of Arbitration to support its position that the requested records were related to actual or contemplated litigation.

[26] The two CAT cases were filed under the Tribunal's nuisance and governing documents jurisdiction, related to vapours and parking signage respectively. However, the Respondent was not able to demonstrate any connection between the records sought and the issues in dispute before the Tribunal in those cases. The mere existence of two CAT cases does not provide grounds for the refusal of the records based on section 55 (4) (b) of the Act. If the records in question do not relate to the actual or contemplated litigation in question, then section 55 (4) (b) does not apply.

[27] The Respondent also cited the ongoing appeal of *Rahman v. Peel Standard Condominium Corporation No. 779*, 2021 ONCAT 13[4]. Here too, I do not find this provides a proper ground for refusal. The Respondent has not established a connection between the issues in the appeal and the records requested.

[28] The Respondents also submitted that the arbitration also fell under the actual or contemplated litigation exemption. They referred to a Notice of Arbitration that was issued pursuant to the Arbitration Act, 1991, S.O. 1991, c.17, and the Act.

[29] The Tribunal considered the question of whether an arbitration may fall within the scope of the actual or contemplated litigation exemption in *Bossio v. Metro Toronto Condominium Corporation 965,* 2018 ONCAT 6 where the CAT found:

> What is the scope of "actual or contemplated litigation"? Section 13.1(1)5 of O. Reg. 48/01 provides that the condominium corporation keep, "Records that relate to actual or contemplated litigation and that the corporation creates or receives." "Actual or contemplated litigation" is defined in s.1.(2) of O. Reg 48/01 as:
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> "actual litigation" means a legal action involving a corporation; ("instance en cours")

[4] Peel Standard Condominium Corporation No. 779 v. Rahman, 2021 ONSC 7113 (CanLII)

> "actual or contemplated litigation" means actual litigation or contemplated litigation; ("instance en cours ou envisagée")
>
> "contemplated litigation" means any matter that might reasonably be expected to become actual litigation based on information that is within a corporation's knowledge or control; ("instance envisagée")
>
> Not all litigation nor every legal proceeding goes before a court. Redress may also be obtained before administrative tribunals, or through arbitration or mediation mandated by a particular piece of legislation, all of which are legal processes.

I follow the reasoning as outlined in Bossio – arbitration may fall under the umbrella of actual or contemplated litigation. The next question to consider is if the issues to be arbitrated are related to the requested records.

[30] In the Notice of Arbitration, PSCC 779 is seeking:

> (a) An Order that the Respondent immediately and permanently cease and desist from engaging in threatening, harassing, intimidating, inappropriate, disturbing, and/or illegal conduct against PSCC 779's residents, owners, visitors, directors, Property Management, superintendent, and/or other employees/staff on PSCC 779's property, including the common elements and/or within any unit;
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> (b) An Order that the Respondent immediately and permanently cease and desist from defaming PSCC 779's Board of Directors (the "Board"), Property Management, and legal counsel;
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> (c) An Order that the Respondent is prohibited from contacting or communicating with PSCC 779's Board members, property manager, employees, contractors, and other agents, verbally or in writing, directly or indirectly. The only exceptions to such prohibition are the Respondent's ability to communicate, if demonstrably necessary, as follows: (i) by email to and with PSCC 779's Property Manager, as to matters regarding the general affairs of PSCC 779; and ii) in the case of an emergency, by telephoning PSCC 779's emergency telephone number;

[31] This is not a complete list of the relief sought by the corporation; however, the issues to be arbitrated directly relate to the records requested. The Applicant has requested records related to security and incident reports. Reports and evidence of behaviour at issue in the Notice of Arbitration may be contained in the records requested by the Applicant. There is a direct connection between the records requested and the issues in the arbitration. I conclude that the records are related to **actual** litigation.

[32] I note that the Records Request and Response were completed in October 2022. The date on the Notice of Arbitration is February 8, 2023. While the records currently fall under the "actual" litigation exemption, since the request predates the Notice of Arbitration, I must also consider if the **contemplated** litigation exemption applied at the time of the request.

[33] The Respondent stated that in October 2022 they were contemplating litigation

which led to the current arbitration proceedings. The Respondent further stated that they started compiling records, including the requested incident reports, in 2020. They state this work commenced just months after the Applicant moved into the condominium, in reaction to what they describe as his threatening and harassing conduct.

[34] The Applicant questioned the appropriateness of the contemplated litigation exemption. He stated that the condominium corporation had a duty of care to him as an owner. He asserted that the act of contemplating litigation against an owner violates the fiduciary duty that the condominium board owes to him as an owner. The Applicant also submitted that the condominium corporation's legal counsel has inserted themselves into the relationship between the condominium board and himself as an owner. The Applicant asserted that the condominium's legal counsel had negatively influenced the relationship. The Applicant submitted that the Act requires that a condominium corporation must disclose any contemplated litigation to the owner.

[35] I find that the Applicant's characterization of the corporation's duty of care is inconsistent with the Act. Section 17 (1) establishes that the "objects of the corporation are to manage the property and the assets, if any, of the corporation on behalf of the owners." Section 17 (3) further stipulates that "the corporation has a duty to take all reasonable steps to ensure that the owners, the occupiers of units, the lessees of the common elements and the agents and employees of the corporation comply with this Act, the declaration, the by-laws and the rules." These sections are clear: the corporation's duty is not toward any one individual owner, but toward managing the property and assets on behalf of all owners. This duty includes carrying out enforcement action in relation to owners and defending the corporation in actions taken against it. The condominium cannot be said to have breached its duty by considering possible litigation that may be initiated by or against it, after a reasoned analysis, of a particular fact situation. Nor does the condominium have a duty under the statute to inform a unit owner in relation to whom litigation may be being contemplated, though the appropriateness of doing so may vary case to case depending on the application of the obligations for good faith, honesty, and due diligence.

[36] I further find that the Applicant's characterization of the relationship between corporations and owners is not consistent with the CAT decisions dealing with solicitor-client privilege and contemplated litigation[5].

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[5] Anderson v. Niagara South Condominium Corporation No. 12 - 2022 ONCAT 28
Reva Landau v Metropolitan Condominium Corporation No. 757 - 2020 ONCAT 19
Kore v. Niagara South Condominium Corporation No. 12 - 2022 ONCAT 19
Jack Gale v Halton Condominium Corporation No. 61 - 2019 ONCAT 46
Zamfir v. York Condominium Corporation No. 238 - 2021 ONCAT 118
Wei v. Toronto Standard Condominium Corporation No. 2297 - 2021 ONCAT 8

[37] I accept the Respondent's assertion that in October 2022 the security and incident reports might reasonably be expected to form the basis for litigation based on the history of the relationship between the parties. I further find that there is a direct relationship between the records requested (incident reports), and subject-matter of the Arbitration (the Applicant's alleged behaviour which would be included in the incident reports). Therefore, it was reasonable for the Respondent to apply the exemption and refuse to provide the requested records.

[38] The Applicant also submitted that he is entitled to the records he sought, despite the Respondent's reliance on section 55 (4) (b), because he has not been provided any disclosure for any of the active cases. If this is true, the remedy for nondisclosure is not within the mandate for the Tribunal, but it a matter within the jurisdiction of the relevant court or arbitrator.

If Tribunal finds the Applicant is entitled to receive the records, should the Tribunal order PSCC 779 pay a penalty pursuant to section 1.44 (1) (6) of the Act?

[39] I have found that the Respondent was justified in refusing to provide the records. The basis for a penalty only applies if the Respondent has been found to have refused to provide the record without a reasonable excuse. Therefore, there is no basis to award a penalty.

Should the Tribunal award any costs?

[40] The Respondent requested reimbursement, on a full indemnity basis, of its legal costs of $10,136.10 - highlighting what they described as the disruptive conduct of the Applicant. They also cited the principle that the costs of responding to the proceeding should not be borne by innocent unit owners who are paying for the costs of litigating through their common expenses.

[41] Rule 48.2 of the CAT Rules of practice states that:

> The CAT generally will not order one Party to reimburse another Party for legal fees or disbursements ("costs") incurred in the course of the proceeding. However, where appropriate, the CAT may order a Party to pay to another Party all or part of their costs, including costs that were directly related to a Party's behaviour that was unreasonable, undertaken for an improper purpose, or that caused a delay or additional expense.

[42] In deciding whether an award of costs is appropriate, I have considered the consumer protection intent of the Act, and the need to balance the rights of individual owners against the collective interests of the others in the condominium community. I have also applied the criteria in the CAT's Practice Direction on Assessing Costs.

Robert Remillard v. Frontenac Condominium Corporation No. 18 - 2018 ONCAT 1
Zhou v. Metropolitan Toronto Condominium Corporation No.1107 - 2021 ONCAT 126
Mara Bossio v Metro Toronto Condominium Corporation 965 - 2018 ONCAT 6

[43] During these proceedings, the Applicant has been disrespectful to the Tribunal by using inappropriate language, and not following my directions. He submitted multiple motions through the Request tab in the CAT-ODR system which were not genuine requests. The Applicant attempted to make submissions at inappropriate times. I had to remove permission to post messages in the online written hearing. While these actions were frustrating, they were disruptive to the Tribunal itself, and they did not delay the overall schedule for the hearing.

[44] Further, at the outset of the hearing, I instructed the Respondent only to respond to messages when I directed them to do so. This instruction was to ensure that the hearing proceeded quickly, and that the Respondent did not incur unnecessary costs in responding to messages from the Applicant that were not relevant to the issues to be decided by me.

[45] In assessing if I should award costs, I have also considered how the Respondent participated in the case. In my instructions to the parties, I assigned a 20 page maximum page limit for written submissions. The Respondents provided 20 pages of written submission on the issues to be decided and 150 pages of supporting material. This work is disproportionate to the issues that needed to be decided.

[46] I have also considered the Respondent's motion to dismiss the case under Rule 19. The Respondent's grounds to dismiss the case did not raise any legitimate jurisdictional issues, and ultimately demonstrated that the case was within the Tribunal's jurisdiction. Dealing with the Respondent's motions to dismiss the case delayed the hearing. It is not appropriate in this context to consider awarding costs to the Respondent for activity related to this motion.

[47] Further, in my introductory message at the commencement of this hearing, I acknowledged that the parties were engaged in two other active CAT cases. In instructions to the parties regarding the written hearing process, I instructed the parties only to refer to them in the context of the questions to be decided (if the records were related to the issues in the cases). The parties were not to refer to the arguments and submissions from those cases in the context of this case. Neither party followed this instruction. The Applicant occasionally referred to the other cases, particularly as the CAT members made procedural orders. The Respondent included details from the cases in their submissions in this hearing including the Stage 2 Summary and Order documents, written messages and the Applicant's submissions from the two hearings. The Respondent used these messages to try to establish the vexatious intent of the Applicant. If the Applicant was behaving inappropriately in the other cases, it is appropriate to raise the concern with the member in those cases – rather than as a collateral attack against the legitimacy of this case. I consider these actions contrary to the direct orders of the Tribunal to keep submissions focused on the issues to be decided in this case.

[48] Tribunal members understand that a self-represented party may need additional direction in order to ensure a fair process, and that they sometimes may not follow

those instructions. The Applicant has been before this Tribunal several times and knows how he ought to behave, so that is no excuse for him; however, it is particularly noteworthy when a party represented by legal counsel fails to follow the Tribunal's explicit instructions. This is even more so when that party, through its counsel, seeks legal costs on a full indemnity basis against the other party citing that party's poor conduct, but entirely - and, I can only believe, knowingly - disregarding their own. I have concluded that an award of costs to the Respondent is not appropriate.

[49] Each party will bear their own costs.

D. ORDER

[50] The Tribunal Orders the application dismissed.

Ian Darling
Chair, Condominium Authority Tribunal

Released on: March 21, 2023