

CONDOMINIUM AUTHORITY TRIBUNAL

DATE: June 19, 2023

CASE: 2022-00099R

Citation: Russell v. York Condominium Corporation No. 50, 2023 ONCAT 82

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

Member: Nicole Aylwin, Member

The Applicant,
Robert Russell
Self-Represented

The Respondent,
York Condominium Corporation No. 50
Represented by Matthew Varao, Paralegal

Hearing: Written Online Hearing – November 22, 2022 to May 24, 2023

REASONS FOR DECISION

A. INTRODUCTION

- [1] This case arises from two requests for records made by the Applicant, Robert Russell, who is a unit owner in the Respondent, York Condominium Corporation No. 50 (“YCC 50”). In these requests, Mr. Russell requested a variety of both core and non-core records. Although Mr. Russell received responses from YCC 50 and has received some records, he submits that some records are missing, and others were not provided according to the requirements of the *Condominium Act, 1998* (the “Act”) and Ontario Regulation 48/01 (“O.Reg 48/01”). He also asserts that YCC 50 is not keeping adequate records, that the redactions made to the records he has received are not in accordance with the Act and that the fees charged to him to produce the records were excessive. Mr. Russell is seeking a penalty to \$5000 plus legal costs for this proceeding. He has also asked the Tribunal to make several other orders pertaining to specific records and issues in this case. While I have carefully considered all the orders requested, in this decision I make only those that I have found to be within my power to make and appropriate based on the facts, evidence and findings.
- [2] YCC 50 takes the position that all the requested records have been provided and that they are adequate and accurate. They allege that Mr. Russell is on a “fishing

expedition” for records and is monopolizing the board and management’s time with his overlapping and repeated requests for requests.

- [3] For the reasons set out below I find that, YCC 50 is keeping adequate records and that, in some instances, it did have a reasonable excuse for refusing records. However, in other instances, YCC 50 has refused to provide Mr. Russell records without a reasonable excuse. I have also found that some of the records provided to Mr. Russell were not redacted in accordance with the Act and the fees charged to redact the records were not in accordance with the Act. I order YCC 50 to reimburse Mr. Russell for the \$150 incorrectly charged to him to produce records, pay a penalty of \$200, and Mr. Russell’s Tribunal filing fees of \$275. I award no other costs in this case.
- [4] This is not the first Tribunal case between these two parties, nor are these the first requests for records made by Mr. Russell. At least six requests for records were made by Mr. Russell between March 29, 2021, and the start the Stage 2 – Mediation process for this case in April 2022. Some of these requests were dealt with in a previous Tribunal decision: *Russell v. York Condominium Corporation No. 50, 2021 ONCAT 103*.
- [5] There is an extremely antagonistic history between these parties. As a result of this history, previous issues already adjudicated arose throughout the hearing. Mr. Russell also regularly alleged that YCC 50 was treating him differently than other owners and/or unfairly. This is not an issue, in and of itself, that the Tribunal can address as it is outside its current jurisdiction and the Tribunal will not re-adjudicate issues that have already been decided. Yet, despite making clear that the only requests and issues properly before me were those arising from the February 15, 2022, records request (“February request”) and the July 22, 2022, request (“July request”), these previously decided issues and other corollary issues often made their way into submissions and arguments. So, while I have read and considered all the submissions and evidence provided to me, I will only refer only to those necessary to determine the questions that are properly before me.

B. PRELIMINARY ISSUES

- [6] This hearing began before Tribunal Member Jennifer Webster. After dealing with some preliminary matters, Member Webster was unable to continue the hearing and I was assigned to adjudicate.
- [7] At the outset of the hearing, I sought to clarify with the parties the issues in dispute. In doing so, I raised a potential jurisdictional issue regarding a request to

have the Tribunal decide an issue related to the indemnification of legal costs for records requests pursuant to YCC 50's declaration and by-laws. I referred both parties to s.1(1) of Ontario Regulation 179/17 ("O.Reg 179/17") and asked both parties for submissions on this issue. I also raised a concern that some of the records at issue in this case had already been dealt with in a previous Tribunal decision: *Russell v. York Condominium Corporation No. 50, 2021 ONCAT 103* and asked the parties to provide submissions on whether these records should be included in this hearing. After reviewing the submissions, I decided that minutes for "in-camera" meetings up until March 29, 2021, had already been addressed by the Tribunal and would not be included in this case. I further indicated to the parties that after reading their submissions, I would reserve judgment on the jurisdictional issue to my final decision.

[8] I then identified the issues for this hearing as follows:

1. Has the Respondent failed or refused to provide minutes for board meetings that fall within the scope of the Applicant's February 15, 2022, Request for Records?
2. Has the Respondent failed or refused to provide the following "in-camera" minutes from his July 22, 2022, request:
 - i. March 31, 2021
 - ii. April 26, 2021
 - iii. June 3, 2021
 - iv. June 6, 2021
 - v. October 13, 2021
3. Has the Respondent inappropriately redacted some meeting minutes which it designates as "in-camera" minutes?
4. Has the Respondent charged unreasonable costs for the redactions of what it designates as "in-camera" minutes?
5. Has the Respondent failed to deliver redacted minutes within seven days of payment?
6. Has the Respondent failed to provide reasonable explanations for block redactions to board meeting minutes?

7. Has the Respondent conducted some business of the corporation at in-camera meetings where no minutes have been kept?
8. Has the Respondent failed to maintain adequate director disclosure forms?
9. Is the Applicant entitled to make requests for records, and is he exceeding his rights under the Act, by making repeat requests for records?
10. Should YCC 50 pay a penalty for refusing records without a reasonable excuse?
11. Pursuant to Article XIV of YCC 50's By-Law No. 5, should the Applicant pay YCC 50's costs of these proceedings, and the costs of addressing his requests for records.

[9] Generally, I maintained the issues as they were set out in the Stage 2 Summary and Order, although a few issues were modified after clarification about the scope of the hearing. It is important to note, however, that ultimately it is up to the adjudicator that hears the arguments and evidence to determine the issues that need to be decided. While clarifying the issues, Mr. Russell argued that I was bound to address all the issues raised in Stage 2 - Mediation and set out in the Stage 2 – Summary and Order (and other pre-hearing orders). This is not correct. While in many cases, the Stage 2 – Summary and Order does help to clarify issues that are likely to be addressed in Stage 3 – Tribunal Decision, they are not immutable. The Tribunal member who hears the evidence and arguments ultimately determines the issues to be decided.

[10] Parties were instructed to limit their evidence and submissions to the issues stated above.

C. ISSUES & ANALYSIS

[11] There is significant overlap in many of the issues in this case and the background, submissions and evidence related to them also overlap. For efficiency and clarity, where appropriate, I have addressed related issues together under a single heading.

Issue: Has YCC 50 refused to provide Mr. Russell with records he is entitled to without reasonable excuse?

[12] Three of the issues to be decided in this case (issues numbered 1,2 and 5 above) relate to whether YCC 50 refused to provide records to which Mr. Russell is entitled without a reasonable excuse. YCC 50 does not dispute that Mr. Russell is

entitled to the minutes requested, rather the dispute is over whether YCC 50 refused to provide the various sets of minutes without a reasonable excuse. Since this question applies differently to different sets of minutes, I discuss them under the various headings below.

Minutes of February 2021 – August 2021

- [13] In explaining its refusal to provide the minutes of February 2021 – August 2021, YCC 50 noted on the Board's Response to Request for Records form that these minutes had been the subject of a previous request and previously provided. Despite this initial refusal, these minutes were later (again) provided to Mr. Russell during Stage 2 – Mediation. YCC 50 submits that since these minutes had already been provided in response to a previous request, refusing them when requested a second time was a reasonable excuse and providing them in mediation does not amount to a delay or effective refusal.
- [14] I accept that in this case the refusal to provide Mr. Russell with the minutes that he had requested and received on previous occasions does constitute a reasonable excuse for refusal. There is no evidence before me that the minutes of February 2021 – August 2021 requested by Mr. Russell had changed since the last time they were provided and no evidence that he had reason to believe they had.

Minutes of January 28, 2022

- [15] The minutes of January 28, 2022 were refused by YCC 50 in its response to the February request because these records, at the time of the request, had not been approved by the board and thus did not yet form part of the corporation's records.
- [16] The evidence shows that while the January 28, 2022 minutes had not been approved by the date listed on the request form (February 22, 2022), the minutes had been approved and did form part of the corporation's records by the time YCC 50 sent its response form to Mr. Russell on March 16, 2022.
- [17] Once approved there was nothing that should have given YCC 50 pause in producing the records. These are records that Mr. Russell is clearly entitled to, had asked for, and were available by the time YCC 50 communicated with Mr. Russell about his request. Moreover, if YCC 50's refusal is followed to its logical result, in the face of a refusal, Mr. Russell would have had to make another request for records to get these minutes. One of the concerns consistently expressed by YCC 50 in its submissions is that Mr. Russell makes too many requests for records. Yet, in this instance, its own response would have led to a need for future request. To refuse these minutes, when they were obviously available and clearly records to

which Mr. Russell is entitled, was to encourage the very behaviour YCC 50 now chooses to admonish. I can appreciate Mr. Russell's frustration with YCC 50 in this regard.

- [18] In this case, to refuse a set of core records based strictly on the date of a request form, when the minutes were clearly approved and available by the time YCC 50 replied to the request and provided other records, is not a reasonable excuse in this case and I find YCC 50 did refuse these records without a reasonable excuse.

Redacted minutes of March 25, 2021, and September 2021 - December 2021.

- [19] The minutes of March 25, 2021, and September 2021 - December 2021 required redaction and YCC 50 requested a fee for the redaction (issues surrounding redaction are addressed in paragraphs 37-54). Mr. Russell argues that he submitted a cheque to YCC 50 for the records on the same day he wrote it on March 17, 2022, and thus the records should have been provided by March 24, 2022. He claims they were not delivered to him until Stage 2 – Mediation, and it was only in mediation that he was made aware of the fact that these records had been sent on March 28, 2022, contrary to the instructions on the request form, to Patrick Greco, a lawyer Mr. Russell had sought legal advice from on a different matter involving YCC 50.
- [20] Mr. Russell argues that YCC 50 failed to deliver him the records as required in two different ways. First, he argues that regardless of to whom the records were sent, they should have been sent by March 24, 2022. He argues that the fact that they were sent on March 28, 2022 means they were not delivered within the seven days required by the Act and this constitutes a refusal without a reasonable excuse. Second, he argues that since the records were delivered to Mr. Greco, contrary to the instructions on the form, this is also effectively a refusal without a reasonable excuse since it led to a significant delay in his receipt of the records.
- [21] Based on the evidence in front of me, I find that it is possible that the cheque was received by management on March 17, 2022 but not stamped as received until March 21, 2022. However, even if this is the case, this clerical error resulted only in a minor delay in the delivery of the records. This four-day delay, is not, based on the facts of this case, enough to conclude that there was a refusal without a reasonable excuse.
- [22] Regarding where the records were delivered. YCC 50 submits that the records were sent to Mr. Greco as it believed that Mr. Greco was acting as Mr. Russell's legal counsel. In elaborating on this, YCC 50 explained that its legal counsel at the time was handling the redaction of these minutes and it is likely that its counsel

sent the records directly to Mr. Greco because when two parties are represented, it is “common practice” for counsel to correspond directly with each other. YCC 50 further submits they were unaware that Mr. Greco had not forwarded the records to Mr. Russell and only become aware of this during mediation at which point they provided Mr. Russell the records. Mr. Russell disputes the assertion that Mr. Greco was acting as his counsel during this time.

[23] I accept YCC 50’s submissions that its legal counsel may have had the honest belief that Mr. Russell was being represented, but the Records Request form submitted by Mr. Russell clearly indicates the records should be sent to Mr. Russell at the email address he provided. No agent is listed on the form. To whom the records should be sent was again reiterated when Mr. Russell signed the Board’s Response to Request for Records form and paid the fee requested. There is no evidence in front of me to suggest that Mr. Russell provided any indication that the records should be delivered to anyone but him at an email address other than the one he provided (twice). To send the records to Mr. Greco rather than Mr. Russell was incorrect.

[24] However, there is no evidence that YCC 50 intentionally set out to delay or complicate the delivery of the records, or that they acted carelessly. Rather in good faith YCC 50 provided its counsel with instructions to do the redactions and send the records. While a mistake made by counsel that led to a delay in Mr. Russell receiving the records, I find, in this case, YCC 50’s excuse for the delay is reasonable and do not find that these records were refused without a reasonable excuse on these grounds.

In-camera minutes of March 31, 2021, April 26, 2021, June 3, 2021, June 6, 2021, October 13, 2021

[25] Regarding the alleged missing in-camera meeting minutes, YCC 50 asserts all the requested minutes have been provided and that the in-camera minutes that Mr. Russell is seeking do not exist. They submit that no in-camera minutes were taken on the dates in question.

[26] Some of the confusion over the existence of these ‘missing’ minutes may be a result of the way in which YCC 50 prepares its standard minutes. As part of the evidence in this case, numerous sets of minutes were entered into evidence. Most of the standard minutes contain a line that reads in part, “...it was resolved to approve the standard and in-camera minutes of the Board of Directors’ Meeting held on ...”. YCC 50 submits that this is a stock line that the professional minute taker uses to record the approval of past minutes. It submits that this sentence is used regardless of if there are any in-camera meeting minutes or not.

[27] Mr. Russell claims that this line is evidence that there are in-camera minutes for the dates of his request. I can understand his confusion. A plain reading of the standard minutes would seem to indicate that there are in-camera meeting minutes for the dates requested by Mr. Russell. Nonetheless, given the evidence before me, I cannot conclude that there were any in-camera discussions/meetings held on the dates of March 31, 2021, April 26, 2021, June 3, 2021, June 6, 2021, October 13, 2021, for which there should be minutes and I accept in camera minutes for these dates do not exist. I find YCC 50 had a reasonable excuse for refusing the minutes, i.e., that they do not exist.

[28] Despite this finding, I would strongly encourage YCC 50 to be more accurate in its recording of what minutes are approved and when – and only refer to in-camera minutes when they exist. A failure to do so is likely to continue to cause confusion for those seeking minutes and lead to further disputes over what minutes do, or ought to, exist.

Minute Book and Index of the Minute Book of the Corporation

[29] The final records to be addressed in this section are the “minute book” and the index of the minute book of the corporation. Mr. Russell claims these are records to which he is entitled and has never received. He has asked for an order directing YCC 50 to provide such records.

[30] In this case, Mr. Russell’s specific request, as recorded on the Request for Records form was not for the minute book of the corporation but for “All board minutes previously withheld and/or inappropriately redacted, from the entire “minute book” as described in s.55(1).2 of the Condominium Act” and then a date range is specified, “July 2020 – March 2022”. No index is mentioned.

[31] S. 55(1) of the Act reads:

The corporation shall keep adequate records, including the following records:

...

2. A minute book containing the minutes of owners’ meetings and the minutes of board meetings.

[32] YCC 50 argues that the records Mr. Russell specified he wanted from the minute book had already been requested and provided.

[33] Mr. Russell argues that his request should not be considered a duplicate request, as new minutes would be added to a minute book after each meeting. However,

Mr. Russell was not requesting new minutes. Rather, he asked for a specific set of minutes, for a specified period of time. Minutes from the same July request where he asked for the minutes between January 1, 2022 - July 22, 2022, and his February request, in which he requested the minutes for July 2020 - February 2022, are minutes he had already requested. Thus, I find this is a duplicate request and I do not find that YCC 50 refused to provide him the records he requested without a reasonable excuse.

[34] Mr. Russell further claims that YCC 50 refused to provide him with the “Index from the Minute Book of the Corporation.” The records request form submitted by Mr. Russell made no mention of a request for an index from the minute book. In fact, his request was specifically for minutes for a specific date range.

[35] The evidence does show that YCC 50 does keep an index of the various meeting minutes it has on file. So, while I find the index is a record to which Mr. Russell would be entitled to in this case, based on the wording of Mr. Russell’s request, I cannot conclude that YCC 50 should have known he was seeking the index, and thus I cannot conclude they refused him this record without a reasonable excuse.

[36] In any event, Mr. Russell now has a copy of the index, as it was uploaded into evidence. In the future should Mr. Russell be seeking this index – I would encourage him to be specific in his request for the index of the minutes as prepared and kept by YCC 50.

Issue: Has YCC 50 appropriately redacted meeting minutes as per the Act and has it charged a reasonable fee for doing so?

[37] Three of the issues to be decided in this case (issues numbered 3, 4 and 6) relate to redactions and the appropriate fees for redactions.

Did YCC 50 fail to provide reasonable explanations for its redactions?

[38] When YCC 50 provided Mr. Russell with the redacted minutes for March 25, 2021 and September – December 2021, they included a general statement accompanying the minutes which reads: “Redaction of information prohibited from release for review pursuant to, inter alia, Sections 55(4)(a-d) of the Condominium Act, 1998, and solicitor-client privilege.”

[39] Subsection 13.8 (1) of O.Reg 48/01 address accompanying statements (which provide the explanations for the redactions) it reads:

13.8 (1) 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) 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.

...

- [40] Mr. Russell contends that the blanket statement provided by YCC 50 fails to meet the criteria set out above. Here he directed me to *Robinson v. Durham Condominium Corporation No. 139, 2021 ONCAT 81* ("Robinson"), specifically the Tribunal's comment at paragraph 16, regarding accompanying statements that, "[t]he correct practice would be to provide a statement explaining each individual redaction."
- [41] Mr. Russell argues that YCC 50 was aware of this "correct practice" as it had been drawn to YCC 50's attention during a previous Tribunal case between the parties. He submits that it is only after he asked for further explanation regarding the reasons for the redactions in his July request that he was provided with more detailed references to the Act.
- [42] YCC 50 takes the position that its reasons for the redactions were transparent. It further argues that, as in *Gagnon v. Carleton Condominium Corporation No. 331, 2023 ONCAT 13* ("Gagnon"), the failure to provide an accompanying statement should not amount to a refusal without a reasonable excuse.
- [43] Having reviewed both the minutes as originally redacted and provided to Mr. Russell in response to his February request and a second version sent to him after his July request wherein, he asked for clarification of the redactions – there is a significant difference. It is an understatement to say that the original versions provided to Mr. Russell contain large portions of text redacted. For instance, in one set of minutes, other than the names of the directors in attendance – everything else is redacted. In another, only the section headings remain visible – all other text is blacked-out. Given how extensive the redactions are, the general statement provided at the outset is of little use since not enough text is left to make obvious exactly which part of s. 55(4) of the Act YCC 50 is relying on to make such

redactions.

[44] While YCC 50 did make an attempt to clarify their redactions when requested to do so by Mr. Russell in a subsequent request (i.e., the July request), I find that unlike in *Gagnon* and *Robinson*, the reasons for the redactions as originally provided to Mr. Russell are anything but transparent and YCC 50 did fail to provide adequate explanations as required by the Act. Nonetheless, I do not order YCC 50 to provide further explanations, as they have already done so.

Were the minutes redacted in accordance with the Act?

[45] Section 55(4) of the Act sets out the exceptions to the right to examine or obtain copies of records. It reads:

(4) The right to examine or obtain copies of records under subsection (3) does not apply to,

(a) records relating to employees of the corporation, except for contracts of employment between any of the employees and the corporation;

(b) records relating to actual or contemplated litigation, as determined by the regulations, or insurance investigations involving the corporation;

(c) subject to subsection (5), records relating to specific units or owners; or

(d) any prescribed records. 1998, c. 19, s. 55 (4); 2015, c. 28, Sched. 1, s. 51 (5-7).

[46] According to Mr. Russell, the in-camera minutes he received initially were overly redacted. I agree. When the minutes originally received by Mr. Russell are compared to the second version sent to him after his July request wherein, he asked for clarification of the redactions, it is clear many of the redactions originally made were not in line with the Act. For instance, in the initial copy, nearly all discussion items related to some unit repairs are blacked out – not just unit numbers or identifying information, which should be redacted under s.55(4)(c) of the Act. In the subsequent versions sent to Mr. Russell, the discussions the board had regarding these repairs were visible and only unit numbers were blacked out. Put simply, when pressed to explain their redactions by Mr. Russell, YCC 50 corrected its redactions to more properly align with the exceptions allowed by the Act.

[47] Despite these corrections, Mr. Russell maintains, that even the less redacted version of the minutes he subsequently received are not redacted properly. Here he points to the redaction of the condominium manager's name and the redaction

of board members names, neither of which he argues should be redacted.

- [48] The notations provided on these minutes cite s.55(4)(a) of the Act as its reason for redacting the condominium manager's name. It provides no direct reference to the Act to explain the redaction of board member's names.
- [49] Section 55 (4)(a) of the Act, allows for the redaction of records relating to employees of the corporation. In this case, the condominium manager is not an employee of the corporation, but rather an employee of the condominium management provider, Wilson Blanchard Management Inc., a company contracted by the corporation to manage the property. Thus, s. 55(4)(a) of the Act does not apply in this case, and there is no other evidence before me to suggest that the redacting of the condominium manager's name would fall under any other allowable exception. It is also worth noting that the exception that the Act does allow in regards to employees relates to records of the employee not the identity of the employee.
- [50] As no explanation has been provided as to why board members' names were redacted, I cannot conclude that these redactions were made in accordance with any allowable exceptions.
- [51] Therefore, based on all the above, I find that YCC 50 did not redact the in-camera minutes in accordance with the Act. I find the version of the minutes initially provided in response to Mr. Russell's February request were overly redacted. And, while YCC 50 corrected some of their mistakes in subsequent versions of the minutes (those sent to Mr. Russell after his July request) even in the corrected version – mistakes were made, although I find these mistakes more trivial as they do not significantly diminish the transparency of the record in the same way the initial redactions did.
- [52] Mr. Russell has argued that the failure to properly redact the records in this case amounts to a refusal of this record without a reasonable excuse. I agree. The redactions made to the minutes originally provided to Mr. Russell were so extensive that it would have been impossible for Mr. Russell to gain any meaningful information from those minutes, they might have well been refused altogether. It is only after another request from Mr. Russell, which included a specific request for explanations that YCC 50 amended its redactions to better align with the Act. Thus, in this case, I find YCC 50's failure to properly redact these records in accordance with the Act amounts to a refusal without a reasonable excuse.

Did YCC 50 charge an appropriate fee for the redactions?

[53] YCC 50 charged Mr. Russell a total \$150 to provide the records requested in his February request. According to YCC 50 this fee was charged as the in-camera minutes of March 25, 2021, and September to December 2021 required redaction and a fee of \$75/hour was paid to its legal counsel to do the redactions.

[54] YCC 50 erred in charging this fee. Minutes of meetings held within the 12 months prior to a request are considered core records. At the time of the request in February 2022, the minutes redacted by YCC 50 would have fallen within this 12-month period and thus no fees are to be charged for the production of these records. Thus, I will order that YCC 50 reimburse Mr. Russell the \$150 he paid to have YCC 50 produce these records.

Issue: Is YCC 50 keeping and maintaining adequate records?

[55] Two of the issues to be decided in this case (issues numbered 7 and 8) relate to the adequacy of records.

Has YCC 50 conducted some business of the corporation at in-camera meetings where no minutes have been kept?

[56] Mr. Russell alleges that the corporation has been conducting meetings where no records have been kept. Many of the arguments made by Mr. Russell on this issue relate to governance and the way in which the board is conducting its business. A determination of the appropriateness of the Board's approach to conducting its business, including issues of whether a specific meeting should/should not have been held, who is making decisions for the board, how the board organizes itself etc., are not issues properly within the jurisdiction of the Tribunal at this time.

[57] However, Mr. Russell submits that there was a meeting that took place between two YCC 50 directors and a vendor in May of 2021 which constituted a board meeting but was not minuted. He concludes that this is evidence that YCC 50 is failing to keep adequate records. The question before me is: Should YCC 50 have minutes for this meeting?

[58] The Act and Regulations do not provide an exhaustive list of what constitutes adequate records; they do establish a minimum standard. One of the records required to satisfy this minimum standard is "minutes of board meetings."

[59] During cross-examination Mr. Maharaj, president of the board, spoke to the substance of the meeting in question. He testified that the meeting was a short informal discussion with a vendor held at the vendor's request. He testified that no decisions were made, and no business conducted. He further testified that the

substance of this discussion was then relayed to the board at the next official meeting. I find his testimony credible.

[60] Based on the evidence before me, I find there is no basis to conclude there should be minutes of this meeting. It was not a board meeting, there was no quorum, and I accept that no business of the board was conducted.

[61] Given this finding I cannot conclude that YCC 50 has failed to keep adequate records in this instance.

Has YCC 50 failed to properly record items in its minutes?

[62] Mr. Russell argues that the improper recording of business in the in-camera minutes is evidence that the board is not keeping adequate minutes.

[63] In the in-camera minutes of April 29, 2021, YCC 50 recorded the resignation of two directors. Mr. Russell argues this business should not have been captured in the in-camera minutes, but in the standard minutes as this is regular business of the corporation.

[64] This is not an issue of adequacy. The way in which YCC 50 records its business, i.e., in which set of minutes, is outside the current jurisdiction of the Tribunal and I decline to make any finding or order relating to how YCC 50 should record its business in the minutes. I will note, however, that the concept of “in-camera” minutes is not contemplated by the Act and whether records are labeled “in-camera” or “standard” does not affect owners’ access to records. It is the Act that determines entitlement and the exceptions to entitlement, not how the minutes are recorded and/or labeled.

[65] Finally, Mr. Russell also takes issue with YCC 50’s “Policy with Respect to Access to Minutes of In-Camera and/or Special Meetings” which he argues is leading to inadequate minute keeping and contains provisions around records which are contrary to the Act. He asked for an order directing YCC 50 to amend this policy, particularly those provisions that relate to how YCC 50 takes minutes and how YCC 50 plans to recover fees related to records requests.

[66] If YCC 50 policies lead to specific actions that are contrary to the Act and within the jurisdiction of the Tribunal, the Tribunal can appropriately deal with those issues. However, the appropriateness of the way YCC 50 has chosen to govern, though its policies and the contents of those policies, are not issues properly before me in this case. They are not related to the two records requests at issue here. Thus, I will decline to grant any order regarding these policies. Nonetheless,

given the nature of the dispute between the parties, and the findings in this decision, I would strongly encourage YCC 50 to ensure any policy they enact that addresses records, including policies on how they record minutes or policies that communicate to owners information about the record request procedure, including any fees associated with requests and how requests are responded to, are in accordance with the Act. It is the Act that ultimately determines the responsibility of the corporation, not any individual condominium policy.

Has YCC 50 failed to keep adequate Candidate Disclosure forms?

[67] Candidate Disclosure Forms were provided to Mr. Russell in response to his February request. Upon reviewing these forms, Mr. Russell identified a single error on two of the forms: the form provided by the Secretary and President of the board, left one of the boxes on the form blank. He maintains that he notified the corporation of this omission on two occasions. It is Mr. Russell's position that these mistakes and the failure of YCC 50 to correct them amounts to a failure to keep adequate records.

[68] YCC 50 argues the corporation maintained the record it received from the director candidates and provided it to Mr. Russell as is required by the Act. It is not the responsibility of the corporation to complete these forms or modify them. It is the director candidate that completes them. I agree. The evidence before me shows that YCC 50 maintained the forms as received and provided them on request, which in this case is adequate. I make no comment as to what these omissions might mean with respect to the qualifications or status of those members.

Issue: Is the Applicant entitled to make requests for records, and is he exceeding his rights under the Act by making repeat requests for records?

[69] As noted, Mr. Russell has made several requests, for a variety of records, within a relatively short amount of time. Some of these requests contain duplicate requests (such as requests for minutes that were previously requested) while other requests are new requests.

[70] YCC 50 argues that in making these repeated requests Mr. Russell is exceeding his rights under the Act. While they acknowledge that Mr. Russell is entitled to request records, its position is that Mr. Russell is "fishing."

[71] YCC 50 referred me to *Martynenko v. Peel Standard Condominium Corporation No.935*, specifically paragraph 31, wherein the legal term "fishing expedition" is defined:

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 unfocused vindictiveness or dislike for the other party.

[72] The evidence in this case simply does not support the conclusion that Mr. Russell is on a fishing expedition. Both the February request and the July request, which are the subject of this hearing and the only requests properly before me, are specific and the date range for records requested – particularly for minutes are not unreasonable. The broadest request he made is for minutes from July 2020 and February 2022, which is not overly broad. Additionally, according to s. 13.3(1)(a) of O.Reg 48/01, the right to examine or obtain a copy of the record under s. 55(3) of the Act applies so long as the owner’s request is “solely related to that person’s interest as an owner.” There is no evidence before me to suggest that the requests made by Mr. Russell in this case do not meet this criterion. Therefore, I cannot conclude in this case, that Mr. Russell is fishing, and I do not find he has exceeded his rights to request records under the Act.

[73] What the evidence in this case does demonstrate is that the unhealthy relationship, poor communication, and the history between the parties has led both sides to approach the records request process in an extremely adversarial manner. There is significant amount of distrust and frustration on both sides, with neither party willing to grant the other any slack when it comes to records.

[74] Mr. Russell’s continued demand for perfection in YCC 50’s record keeping, his duplicate requests, and frequent requests for records that have been previously provided, has frustrated YCC 50 and has taken up a significant amount of YCC 50 resources. This has no doubt led to a feeling that Mr. Russell has gone out of his way to find fault. And, as this decision also shows, Mr. Russell has erred in some of his assessment of the records he is entitled to and what constitutes adequacy. However, what the evidence also demonstrates is that YCC 50 has not always met the standards as set out in the Act when it comes to maintaining and providing records. This is something YCC 50 is legally obligated to do. It has often only been in response to the pressure exerted by Mr. Russell that they have improved their record keeping. Mr. Russell is also frustrated and is not wrong to hold YCC 50 to account and is well within his rights to initiate Tribunal cases when he believes YCC 50 has not fulfilled their duties under the Act as they pertain to records. Until

the relationship between the parties improves, the time and effort spent by both parties making and fulfilling requests is likely to continue to be significant.

Issue: Should YCC 50 pay a penalty for refusing records without a reasonable excuse?

[75] Section 1.44(1)(6) of the Act allows for the Tribunal to make,

[a]n order directing a corporation that is a party to a proceeding with respect to a dispute under subsection 55 (3) to pay a penalty that the Tribunal considers appropriate to the person entitled to examine or obtain copies under that subsection if the Tribunal considers that the corporation has without reasonable excuse refused to permit the person to examine or obtain copies under that subsection.

[76] Mr. Russell seeks the maximum penalty of \$5000. It is his position that the maximum penalty is appropriate in this case as it is needed to deter unacceptable conduct, including the use of adversarial policies and escalated costs to deter owners from seeking records. He also argues that YCC 50 has not met its obligations with respect to its “communal relationship” as originally described in *Kore v. Niagara South Condominium Corporation No. 12 2022 ONCAT 19* (“Kore”) and cited in, *Anderson v. Niagara South Condominium Corporation No. 12, 2022 ONCAT 28* (“Anderson”). Kore, reads at paragraph 35:

Condominiums are communities. While it is true that unit owners and the corporation are both private entities, the relationship between them is not simply transactional. These private entities exist in a communal relationship that consist of “individual rights” and “mutual obligations” where one entity, in this case an elected board of directors, is “authorized to make decisions on behalf of the collectivity organized”. This authorization rests on the condition that “the affairs and dealing of the cooperation are an “open book.” So, while the open book principle on its own does not mean that unit owners are entitled to every and all records without exception, it does suggest that accountability and transparency are important factors in the context of determining entitlement.

[77] I do not find the facts of either Kore or Anderson be like this case. The records at in those cases were legal invoices, and the facts and issues around entitlement are very different than those here. Moreover, no penalty was awarded in either case. However, Mr. Russell appears to be relying less on the facts of those cases than the general argument that YCC 50, in refusing records, has not properly met its obligation to balance its decision-making authority as elected board members, with the factors of accountability and transparency as they relate to records

requests and entitlement.

[78] I do not find Mr. Russell's arguments regarding YCC 50's conduct persuasive. As I have detailed in this decision, both parties have approached the records process in an adversarial manner, and both parties have at various times erred in their positions on what is required by the Act. In some cases, YCC 50 did refuse records without a reasonable excuse, but in other cases I have accepted its excuses are reasonable. The evidence does not support a conclusion that YCC 50 is deliberately attempting to subvert the "open book" principle. YCC 50 did fail to ensure that those they hired to deal with parts of Mr. Russell's records request (i.e., its legal counsel) did so in accordance with the Act, and did make some incorrect decisions regarding redaction, likely based on the adversarial nature of the two party's relationship, however, the evidence also shows YCC 50 has demonstrated a willingness to improve its record keeping processes and correct its mistakes, when made aware of them.

[79] So, while I do not condone YCC 50's refusals, I do not find that they warrant the maximum penalty. In this case only a small number of records were refused without a reasonable excuse. I find a lesser penalty in the amount of \$200 is appropriate. While it is clear from Mr. Russell's arguments throughout the hearing that he would like to see YCC 50 sanctioned for its conduct towards him and the way in which they handle his requests generally, this is not the forum for such a dispute. Here, a penalty is only awarded for the refusal of records without a reasonable excuse.

Issue: Who is entitled to costs?

Costs associated with Mr. Russell's requests for records.

[80] One of the issues Mr. Russell asked me to determine at the outset of the hearing is whether YCC 50 is entitled to have Mr. Russell indemnify it for legal costs and other costs generally associated with addressing his records requests; costs beyond those that were listed in the Board's Response to Request for Records forms provided to him in response to his February and July requests, or costs associated with this specific Tribunal proceeding.

[81] This issue arose after YCC 50 served Mr. Russell with a Notice of Mediation in March of 2022, which was after Mr. Russell had filed an application with this Tribunal (this was the second time YCC 50 had served him with such a notice). In the Notice of Mediation, YCC 50 listed several issues they wanted to mediate with Mr. Russell, many of which related to records. I will not recount the details of the Notice of Mediation, or those issues contained within it. The Notice of Mediation

and the events surrounding it are detailed in an earlier Motion Order issued by the Tribunal: *Russell v. York Condominium Corporation No. 50, 2021 ONCAT 103*

- [82] As a result of this Motion Order, several issues from the Notice of Mediation were added to this case, including the question of whether YCC 50 can be indemnified for costs related to records requests and costs related to this proceeding.
- [83] At the heart of this issue is Mr. Russell's concern that YCC 50 will attempt to use the indemnification provisions in its governing documents along with policies it has enacted to "charge-back" to an owner, costs associated with providing records that exceed those allowed by the Act and are not transparently listed on the Response forms provided by the board. In this case, he is particularly concerned that YCC 50 may attempt to subvert the Tribunal's exclusive jurisdiction over records disputes by waiting until the close of this proceeding to charge back to him costs related to such things as the issuing of the Notice of Mediation and/or the costs associated with legal counsel's general involvement in handling/advising on Mr. Russell's requests and/or the costs associated with condominium manager's time in communicating and fulfilling Mr. Russell's requests.
- [84] Mr. Russell has asked the Tribunal for an order affirming the Tribunal's exclusive jurisdiction over costs and fees related to records requests and affirming that no costs related to a request from this case can be charged back to Mr. Russell other than those properly claimed in the Board's Response to Request for Records form. He also seeks an order directing YCC 50 to amend their "Records Request Policy" and "Debt Collection Procedure" to clarify that YCC 50 cannot charge fees or apply liens for records request costs under the governing documents of the corporation that exceed the fees established by the Act or ordered by the Tribunal. He further asks that YCC 50 provide a notice to all owners of this fact.
- [85] I cannot make an order based on a speculative future event (i.e., the possibility that YCC 50 may do something in the future). I can only decide those matters that are in front of me. In this case, the only fees charged to Mr. Russell are \$150 for the redaction of records and I have already found these fees to have been charged contrary to the Act.
- [86] However, I can appreciate Mr. Russell's concern and I will note that a declaration provision cannot supersede the Act but is subject to it (see s. 7(5) of the Act). By-laws and rules must also be consistent with the Act (see, s. 56(6) of the Act and s.58(2) of the Act). Therefore, an an indemnity provision in a declaration, or other governing document of a condominium is necessarily subject to a requirement that it be interpreted and applied in a manner that is consistent with the legislation, and to the extent it cannot be, may be void.

[87] The Act grants unit owners a clear right to request records. The condominium board has the right to seek legal counsel in relation to such a request, and as is the case here, can choose to have legal counsel handle aspects of a request. However, the Act provides that a condominium may only charge a unit owner its fees related for providing requested records, and these fees must accord with the regulations, which describe the circumstances when fees can be charged and some of the criteria (e.g., reasonableness) relating to such fees. Any costs associated with a records request that goes beyond those parameters may be contrary to the Act.

[88] So, while I decline to make the orders requested by Mr. Russell, I would strongly encourage YCC 50 to ensure they fully understand the provisions in the Act that relate to an owner's entitlement to request and obtain records, allowable costs and fees and the jurisdiction of the Tribunal as it relates to records requests. The Tribunal has issued a plethora of decisions that address such issues and can provide guidance on such matters.

Costs related to this proceeding.

[89] Mr. Russell is requesting the Tribunal order YCC 50 to pay \$1775.01 in "pre-CAT" legal costs, which he claims he incurred seeking legal advice on how to respond to the Notice of Mediation he received. He is also seeking reimbursement of his Tribunal filing fees which amount to \$225, since two cases filed by Mr. Russell were merged in the early stages of the Tribunal process.

[90] Section 1.44(1)4 of the Act states that the Tribunal may make "an order directing a party to the proceeding to pay the costs of another party to the proceeding." Section 1.44 (2) states that an order for costs "shall be determined...in accordance with the rules of the Tribunal."

[91] The cost-related rules of the Tribunal's Rules of Practice relevant to this case are:

48.1 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.

48.2 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.

- [92] In considering whether to award costs, I have considered these rules and the *CAT Practice Direction: Approach to Ordering Costs*.
- [93] Mr. Russell was successful in some of his claims and therefore, in accordance with Rule 48.1 of the Tribunal's Rules of Practice, I will order YCC 50 to pay \$225 in costs to reimburse Mr. Russell for his Tribunal fees.
- [94] With respect to the \$1775.01 in legal fees that Mr. Russell is requesting, I do not find that these costs have been incurred in the course of the proceeding and decline to award them.
- [95] YCC 50 has also requested costs in the amount of \$16 148.78 and it has asked that Mr. Russell be responsible for indemnifying YCC 50 on a full indemnify basis in accordance with its declaration and by-laws. YCC 50 argues that it was Mr. Russell who initiated this application and they had "no choice" but to involve legal counsel in this proceeding and that it would be unfair to other unit owners if YCC 50 were to bear the costs of this proceeding.
- [96] In this case YCC 50 was not the successful party. It was found that, in some instances, YCC 50 did not fully comply with its responsibilities under the Act. Additionally, despite YCC 50's claims to the contrary, there is no evidence that this application was filed by Mr. Russell for a frivolous or improper purpose. Nor was there any behaviour or conduct by Mr. Russell that was unreasonable, for an improper purpose, or directly caused or contributed to a delay or expense for other parties. In short, I find there is no evidence before me to suggest that YCC 50 is entitled to any legal costs related to this case and I award no costs to YCC 50.

D. ORDER

[97] The Tribunal Orders that:

1. Under s. 1.44 (1) (7) of the Act, YCC 50 pay Mr. Russell within 30 days of this decision \$150 to reimburse him for fees incorrectly charged to produce records for examination.
2. Under s. 1.44 (1) (4) of the Act, YCC 50 pay Mr. Russell within 30 days of this decision \$225 in Tribunal filing fees.
3. Under s. 1.44 (1) (6) of the Act, YCC 50 pay Mr. Russell within 30 days of this decision \$200 as a penalty for refusing to provide records without a reasonable excuse.

Nicole Aylwin
Member, Condominium Authority Tribunal

Released on: June 19, 2023