

## CONDOMINIUM AUTHORITY TRIBUNAL

**DATE:** October 5, 2023

**CASE:** 2023-00076R

**Citation:** Smith v. Peterborough Condominium Corporation No. 38, 2023 ONCAT 144

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

**Member:** Patricia McQuaid, Vice-Chair

**The Applicant,**

Robert Smith

Self-Represented

**The Respondent,**

Peterborough Condominium Corporation No. 38

Represented by Margaret Rea, Agent

**Hearing:** Written Online Hearing – July 26, 2023 to September 29, 2023

### **REASONS FOR DECISION**

#### **A. INTRODUCTION**

- [1] In many records disputes that come before the Tribunal, the issue at the crux of the dispute is not access to a record, but distrust between an owner and a condominium board that devolves into acrimony and finger pointing. This is one of those cases.
- [2] Robert Smith is a unit owner in Peterborough Condominium Corporation No. 38 (“PCC 38”) which is an 11-unit condominium. Mr. Smith made three requests for records; in each request he sought one non-core record, though each record spanned a multi-year period. PCC 38 did respond to each request on the prescribed form and within the prescribed time, but for reasons set out below, Mr. Smith made three applications to the Tribunal. The three cases were combined into one by order of the Tribunal.
- [3] Mr. Smith is a former president of PCC 38, having served from May 2017 to November 2018. One can query why a current or past board member who likely had access to records in their role as board member subsequently decides that they require access to a document that pre-dates their tenure as a board member.

Their current or past role as a board member might not affect their entitlement to a record, and I note that in this instance, Mr. Smith's entitlement to the records was not disputed. However, such requests are more often than not an indication of a history of strife within the board.

- [4] PCC 38 provided a few of the records and for another provided a fee estimate for its production. It also provided reasons for not providing some of the historical records requested. A central issue for me to decide is whether there was a refusal to provide the records without a reasonable excuse which warrants a penalty under s. 1.44(1)6 of the *Condominium Act, 1998* (the "Act"). I will address each record request, deciding whether the request has been satisfied and if not, whether a penalty is appropriate in relation to each request. Costs claimed by Mr. Smith will be addressed at the end of this decision.
- [5] I have only considered the evidence and submissions relevant to my analysis and the issues to be decided by me. I wish to specifically note that I did not put any weight on the statements made by the PCC 38 witnesses about Mr. Smith which were of a personal nature. They were not relevant and were inappropriate in the context of this hearing.
- [6] For the reasons set out below, I find that the records requests have been satisfied and that there has been no refusal to provide records without a reasonable excuse. No penalty is awarded. Mr. Smith shall be reimbursed the fee of \$60 paid for the two contracts provided to him. Mr. Smith shall pay a fee of \$140 to PCC 38 for the examination of the minute book. PCC 38 shall reimburse Mr. Smith the amount of \$75 paid as Tribunal fees.

## **B. ISSUES & ANALYSIS**

### **Request for Records dated January 16, 2023**

- [7] Mr. Smith requested "all contracts between Babcock and Robinson since Babcock and Robinson became managers of the corporation". Babcock and Robinson ("BR") have been PCC 38's condominium management provider since 2000. Margaret Rea, PCC 38's agent in this proceeding is employed by BR and works with PCC 38. Mr. Smith requested these documents in electronic format. PCC 38, in its response, stated that they had previously provided the 2022 contract to Mr. Smith and that the only other contract, from 2004, had been destroyed. Subsequently, PCC 38 did provide Mr. Smith with the contracts for 2002 and 2003. They were only available in paper format and he was charged \$60 for those two contracts and though he appears to have questioned the rationale for this amount, he did pay it. He obtained a copy of the 2004 contract from another resident.

- [8] PCC 38 appeared to be confused about the required retention periods for records, as alluded to in their response, but this was clarified by PCC 38. It explained in evidence that the records were not destroyed because of a retention policy but that many of their historical documents in storage with BR were destroyed in a flood in downtown Peterborough in 2004.
- [9] Based on the evidence, there appear to be no other contracts between PCC 38 and BR although Mr. Smith asserted that there was no clause for automatic renewal in the contract until the 2022 version. BR was the condominium manager throughout. Whether or not there ought to have been contracts in place between 2005 and 2022 is not for me to decide. Mr. Smith is not asking that the Tribunal order documents to be produced that do not exist. He is asking that PCC 38 be ordered to provide a letter that the records do not exist and confirming that the contracts from 2002, 2003 and 2004 (which are identical in substance) continued in effect until a new contract was signed in 2022.
- [10] I will not so order. The circumstances do not suggest the necessity of a statement to that effect from PCC 38. It is clear on the evidence that these contracts do not exist. This request for records has been satisfied – the documents in existence have been provided.
- [11] Regarding a penalty, the evidence does not support a finding that there was a refusal to provide a record without a reasonable excuse. A penalty is not imposed on a condominium corporation for failing to provide a record; s. 1.44(1)6 of the Act clearly states that it is for a refusal to provide a record without a reasonable excuse. The PCC 38 board, including during the time that Mr. Smith was a member, appears to have made a decision not to execute written contracts with BR for many years. Whether or not that reflects good governance, is not for me to decide in this case.
- [12] Finally, as I noted above, Mr. Smith requested the contracts in electronic format. Two of the contracts were only available in paper form and PCC 38 requested that Mr. Smith pay a fee of \$30 per contract which he did. There is no evidence before me about the basis for that fee. Mr. Smith's evidence is that the contracts were eight pages long, which is consistent with the 2004 version submitted in evidence. These are non-core records for which PCC 38 may charge a fee, but there is no apparent basis for a \$60 fee for these two contracts. There appears to be no labour costs incurred for their production. At most, PCC 38 was entitled to charge \$0.20 per page - \$3.20 as per Ontario Regulation 48/01 (O. Reg 48/01). In the circumstances, I find that it is appropriate and fair that PCC 38 reimburse Mr. Smith the \$60 fee.

### **Request for Records dated February 6, 2023**

- [13] Mr. Smith requested the 'Canada Revenue Agency Form T2 for every year since BR became managers' of PCC 38, in electronic format. In their response, PCC 38 stated that they were unable to provide the T2s because they were "in the process of getting them done by an auditor".<sup>1</sup> Mr. Smith, and other owners, were told at the 2022 Annual General Meeting that the T2 forms had not been filed, but as Mr. Smith stated in submissions, "I wanted to see for myself (talk is cheap)," so he requested the records. In submissions, he noted that it was the responsibility of BR pursuant to their contract to ensure these tax filings are done. He also expressed concern about penalties that may accrue to PCC 38 as a result.
- [14] Mr. Smith's concerns may be valid, but in this hearing, the issue for me to decide is not whether the T2 forms ought to have been filed and whose responsibility it was to do so, but whether PCC 38 has responded correctly to Mr. Smith's request; and if they did not, whether it constitutes a refusal without a reasonable excuse. Again, as acknowledged by Mr. Smith, I cannot order that documents be provided when they do not exist. Though circumstances necessarily vary between cases, a records request may not be the best mechanism used by an owner to confirm that a document does not exist.
- [15] There was no refusal to provide a record without a reasonable excuse. No penalty is warranted.

### **Request for Records dated February 21, 2023**

- [16] Mr. Smith requested access to the minute book since PCC 38 was incorporated, which was in 1993. In looking at the request for records form, it may have caused some initial confusion between the parties. In one part of the form, the format was ticked as 'paper' and to be examined in person, but in an area below this the box for 'electronic' format was ticked.
- [17] In the board response form dated March 17, 2023, PCC 38 responded to what it assumed was a request for records by electronic delivery. They estimated there were 300 pages and the cost per page to be \$30 for a total charge of \$9000.<sup>2</sup> They quickly noted errors in their response and a second response form was sent to Mr. Smith on or about March 24. On that form they stated that the records would be

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<sup>1</sup> PCC 38 submitted in evidence a letter from an auditor, dated August 21, 2023 addressing the tax filing issues

<sup>2</sup> In this response, PCC 38 did note that the minutes for the last 12 months were core records and therefore there was no fee for those minutes.

available for examination and a location was specified. PCC 38 also indicated that some of the minutes were in electronic format and there would be a fee to make them available in paper format, estimated at \$140 - 100 pages at \$.20 per page photocopying charge and a labour fee of \$30 per hour for four hours. Mr. Smith filed his application with the Tribunal before receiving this second response.

[18] Based on the evidence before me, PCC 38 agreed to provide the minute book in the format requested by Mr. Smith, although the second response was a couple of days after the prescribed 30-day period. In some cases, the Tribunal has found that an estimate of many thousands of dollars may be tantamount to a refusal, but that is not the situation here. PCC 38 very quickly corrected its error and stated that the record would be made available to him. There was no refusal to provide the record.

[19] Two issues remain relating to this request. Is the \$140 fee appropriate? Assuming that there are 100 pages that need to be copied, then the fee for that (\$.20 per page) is \$20. Regarding the fee for labour, PCC 38 will need to review the entire minute book to determine whether redactions are necessary. The estimated time of four hours for review of 300 pages which comprises both the portions of the minute book that are in electronic and paper format is not unreasonable nor is the \$30/hour fee for labour. In order to ensure there is no dispute regarding actual costs incurred, PCC 38 shall comply with s. 13.8(1)(c) and (d) of O. Reg 48/01 and regarding redactions, PCC 38 must comply with s. 13.8(1)(b) of O. Reg 48/01.

[20] The second issue relates to the access – how and when Mr. Smith examines the minute book. Two of PCC 38's witnesses stated that he had to be strictly supervised as he could not be trusted. Those statements may be a reflection of the acrimony that has developed among owners, but it is understandable why, in reply, Mr. Smith took much umbrage with some of their statements. Mr. Smith has asked that the location be accessible as he is disabled. He has confirmed his understanding that he cannot remove or alter any of the documents. He simply wishes to read them. And while he wants no time restrictions for his examination, it is reasonable that he be given a limited time; a maximum of six hours is appropriate. In the event that PCC 38 decides to have someone present when Mr. Smith examines the minute book, he shall not be charged any fee related to their presence.

## **Costs**

[21] Mr. Smith is seeking his costs of filing his three applications with the Tribunal, a total of \$350 as well as costs incurred for postage. Rule 48.1 of the Tribunal's Rules of Practice provides that a successful party is entitled to a reimbursement of

the Tribunal fees unless the Tribunal orders otherwise.

[22] As I have noted, the fact that these three applications were filed with the Tribunal reflects a high level of animosity and distrust. Mr. Smith had his reasons for filing applications with the Tribunal, but these have not translated to success before me, unlike in the cases which he cited to me in support of his claim for costs where the applicants were substantially or entirely successful. However, I have determined that Mr. Smith is entitled to be reimbursed the fees paid for the two management contracts. I will therefore order that he be reimbursed his Tribunal fees of \$75 paid for Stage 1 and 2 in relation to that case.

### **C. CONCLUSION**

[23] As a final comment in this case, I urge the parties to make a concerted effort to de-escalate the tensions between them. It serves no one well. I urge the board and their condominium manager to better familiarize themselves with both s. 55 of the Act and s. 13.1 to 13.8 of O. Reg 48/01, and particularly, in relation to s. 13.3 of O. Reg 48/01, with what fees can and cannot be charged when an owner makes a records request. The exercise of a reasonable amount of patience by all parties is strongly encouraged. Communal living can be challenging enough without the deliberate actions taken and words spoken which intentionally foment conflict.

### **D. ORDER**

[24] The Tribunal Orders that:

1. Within 15 days of this decision, PCC 38 shall give notice by email to Robert Smith of an accessible location and time at which he may examine the minute book, which date shall be within 30 days of this decision. If that time is not convenient to him, the parties shall have a further 10 days to agree to a mutually convenient date and time. Mr. Smith shall have six hours to review the minute book. He is not permitted to remove the minute book from the location or to alter it in any way.
2. PCC 38 may charge Mr. Smith \$140 to prepare the minute book for examination. It shall comply with s. 13.8 of O. Reg 48/01 when preparing the fee estimate. The fee shall be paid by Mr. Smith prior to the examination of the minute book.
3. PCC 38 shall reimburse Mr. Smith \$60 paid for the two Babcock and Robinson contracts, pursuant to s. 1.44(1)7 of the Act.

4. Within 30 days of this decision, PCC 38 shall pay costs of \$75 to Mr. Smith, pursuant to s. 1.44(1)4 of the Act.

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Patricia McQuaid  
Vice-Chair, Condominium Authority Tribunal

Released on: October 5, 2023