

CONDOMINIUM AUTHORITY TRIBUNAL

DATE: January 26, 2024

CASE: 2023-00317R

Citation: Bogue v. Carleton Condominium Corporation No. 288, 2024 ONCAT 15

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

Member: Roger Bilodeau, Member

The Applicant,

Margaret Ann Bogue

Self-Represented

The Respondent,

Carleton Condominium Corporation No. 288

Represented by Nicole Monette, Agent

Hearing: Written Online Hearing – October 30, 2023 to January 13, 2024

REASONS FOR DECISION

A. INTRODUCTION

- [1] Margaret Ann Bogue (the “Applicant”) is a unit owner in Carleton Condominium Corporation No. 288 (“CCC 288”), the Respondent. The Applicant submitted two requests for records to the Respondent on March 24, 2023 (“Request 1” and “Request 2”). Request 1 relates to all audio\video recordings of the virtual annual general meeting of the Respondent held on July 22, 2022 (“2022 AGM”). Request 2 relates to all audio and\or video recordings of the virtual board meetings of the Respondent held between the dates of May 1st, 2022 and March 24, 2023.
- [2] The Respondent’s board answered Request 1 by stating that it does not and never has had a copy of any such audio\video recording and that it is therefore not part of its records. The Respondent’s board answered Request 2 by stating that any such recording(s) cannot be redacted of confidential matters and that as a result, they cannot be disclosed due to privacy concerns. At the start of this hearing, the Respondent further added that its sole recording of such meetings had been deleted due to technical issues.
- [3] The issues to be decided by me in this hearing are as follows:

1. Is the audio\video recording of the virtual 2022 AGM of the Respondent held on July 22, 2022 a record of the corporation?
2. Do the audio and\or video recordings of the board meetings of the Respondent held during the period of May 1st, 2022 to March 24, 2023 still exist? If so, do they require redaction and to what extent?
3. Should costs or a penalty, or both, be awarded to the Applicant?

B. RESULT

- [4] For the reasons set out below, I find that the Applicant is entitled to have access to the recordings described in Request 1. I also find that the Respondent has a reasonable excuse for not providing the recordings described in Request 2, notwithstanding the Respondent's less than adequate management of those recordings. In the circumstances, the Respondent is ordered to pay a penalty in the amount of \$250 and the Applicant is entitled to costs in the amount of \$200.

C. ISSUES & ANALYSIS

- [5] In this decision, I will not refer to all submissions before me and will only address the evidence and submissions relevant to my analysis and the issues to be decided by me.
- [6] Before I address the issues, the evidence shows that the Applicant is a former board member of the Respondent and I wish to remind both parties that the Tribunal has commented in previous decisions that board governance disputes are not within the Tribunal's jurisdiction, even if framed as a records dispute. I also note that at the outset of this hearing, the Respondent provided a very brief response in regard to issues 1 and 2 as described above and did not otherwise present any evidence nor make any submissions in writing, in spite of having been offered every opportunity to do so.

Issue 1: Is the audio\video recording of the virtual 2022 AGM of the Respondent held on July 22, 2022 a record of the corporation?

- [7] According to the draft minutes of that meeting, which were approved at the July 2023 AGM, the 2022 AGM was hosted by Davidson Houle Allen LLP (DHA), the law firm retained by the Respondent for that purpose. Nancy Houle of DHA acted as chairperson of the meeting and Carol Slack of the same firm acted as minute-taker. As well, Emily Deng of DHA acted as meeting host to assist with any technical issues. GetQuorum provided the virtual meeting and electronic voting platform.

[8] The Respondent's position is that the audio\video recording of the 2022 AGM is solely in the hands of the minute-taker, who is a staff member of DHA, and that even its legal counsel does not have a copy. The Respondent therefore maintains that it does not, and never has had, a copy of that recording.

[9] As a starting point on this issue and as noted by the Applicant, it is relevant to consider this Tribunal's jurisprudence in regard to the recordings of virtual online meetings of unit owners or of its board of directors. In *Kent v. Carleton Condominium Corporation No. 268*, 2022 ONCAT 128 ("Kent"), this Tribunal found that a recording of an owners' meeting, using a Zoom conferencing platform, was a record of the corporation which is subject to the right of owners to examine under subsection 55(3) of the *Condominium Act 1998* ("Act"). The salient paragraphs of that decision state as follows:

"[15] I do find it relevant to consider the Respondent's purpose in creating the recording. Based on the facts and arguments before me and the circumstances of this case, I conclude that the recording is a record of the corporation because it was created and maintained by the corporation, for a purpose that is related to the ongoing role of managing the corporation. While there is no requirement to create the recording, the corporation's choice to create and retain the recording has the effect of making it a record that is subject to the right of owners to access and examine the records as established in section 55(3) of the Act....;

[22] The COVID-19 pandemic caused condominium corporations to adapt how they conduct their meetings. The transition to online video meetings was rapid in response to the public health emergency. It is important that corporations are aware that the new technology provides an opportunity to create new and different forms of records. Fundamentally, this is also a question of fairness. If a record is created, corporations are expected to provide access to owners unless the record meets the exceptions as outlined in section 55(4) of the Act. When creating records, corporations should be mindful of the expectation that the corporation's records should be an open book. (My emphasis)

[10] The only notable difference between this case and the Kent decision is that in Kent, the recording was made and managed by the condominium corporation itself whereas in this case, the recording of the 2022 AGM was made and managed by DHA, the Respondent's law firm. It is reasonable to infer that DHA did so at the request and direction of the Respondent.

[11] In light of the above and as regards the management and hosting of the Respondent's virtual 2022 AGM and the recording of that virtual meeting, I find that DHA is an agent of the Respondent. I accordingly hold that recording to be a

record of the Respondent. In my view, it would be illogical to view this matter otherwise and to allow the Respondent to claim that it does not have a record which is in the hands of its law firm, especially given that the law firm was tasked with completing and managing this record for the Respondent's benefit, for a fee paid by the Respondent, i.e. all unit owners of the Respondent. This is not to say that all records or documents held by a condominium corporation's law firm are a record of the corporation. For example and barring any exceptions, a work product of the law firm would not be a corporation's record. Future cases will determine as needed if other particular types of records can be deemed to be a corporation's record even if it is held by its law firm.

[12] In this case, the record in question is not a work product of the law firm but is rather a record which was produced by the law firm as a service to the Respondent, for a fee, and which could have easily been created by the Respondent itself if it had chosen to do so. It would be contrary to the spirit of the Act and to the meaning of the Kent decision if a condominium corporation could prevent an owner from accessing a record by claiming that a record such as this one is in the hands of its law firm, especially where the record is the result of an event which is directed and held by the corporation itself, i.e. its annual meeting of unit owners.

[13] I therefore find that the Applicant is entitled to this record. The Respondent must therefore take steps to make it available to the Applicant.

Issue 2: Do the audio and/or video recordings of the board meetings of the Respondent held during the period of May 1st, 2022 to March 24, 2023 still exist? If so, do they require redaction and to what extent?

[14] The Respondent has provided two conflicting responses to this issue, by way of:

1. the Board's response to the Applicant's Request for Records on April 17, 2023, where the Board stated that "The recording cannot be redacted of confidential matters; therefore, this recording cannot be released due to privacy concerns"; and
2. its brief statement at the start of this hearing, where the Respondent's condominium manager wrote on November 11, 2023 that "There was only one Board Meeting Recorded on March 8, 2023, for minute-taking purposes; however, this recording was deleted in early April 2023 (exact date is unknown) due to technical issues, as the secretary could not open the file."

[15] In my view, these conflicting responses leave much to be desired and do not

reflect well on the Respondent and its board. In addition and as pointed out by the Applicant, it is very doubtful that there could be legitimate privacy concerns which go above and beyond the limitations on access to a record which are found in subsection 55(4) of the Act.

[16] Notwithstanding the above and in spite of the Respondent's very limited participation in this hearing, I conclude that there is no evidence of bad faith or the like on the part of the Respondent. I therefore accept the Respondent's excuse that the recording of the sole recorded board meeting of March 8, 2023 was inadvertently deleted.

[17] In the circumstances, there is no existing electronic record of that meeting or of any other board meeting during the period described above. The question of access to that recording is therefore moot and I leave to another day and to a future case for this Tribunal to determine if and how an owner can access the audio and/or video recording(s) of a condominium corporation's board meeting(s). The only consolation to be offered here is that the Respondent has confirmed the existence of minutes of the Respondent's board meetings held during the relevant period and that the Applicant is free to make a request for these records, as per the relevant provisions of the Act and its regulations.

Issue 3: Should costs or a penalty, or both, be awarded to the Applicant?

D. PENALTY

[18] As explained above, the Respondent did not have a reasonable excuse for withholding access to the audio/video recording of the 2022 AGM. I must therefore determine the amount of the penalty which should be imposed on the Respondent. As far as I can determine, this is one of the first cases to consider the issue of access to the recording of a virtual meeting which is being held by a condominium corporation's law firm. In light of those circumstances and the fact that there is no evidence of bad faith on the part of the Respondent, I will assess a penalty amount which is lower than what could have been the case in other circumstances. I therefore order the Respondent to pay a penalty in the amount of \$250, in accordance with subsection 1.44(1) 6 of the Act.

[19] In light of my further determination that the Respondent has a reasonable excuse, in this particular case, for refusing to provide the audio and/or video recording of the sole recorded board meeting of March 8, 2023, there is no penalty in that regard.

E. COSTS

[20] The Applicant is seeking reimbursement of her Tribunal fees of \$200. Under subsection 1.44(1)4 of the Act, the Tribunal can make an order directing a party to the proceeding to pay the costs of another party to the proceeding. The *CAT Rules of Practice* (“Rules”) and the *CAT Practice Direction: Approach to Ordering Costs* provide guidelines for the awarding of such costs. Under Rule 48.1 of the CAT Rules, 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.

[21] In this case, I find that the Applicant was successful in regard to Request 1. The Respondent’s own inadvertence or lack of attention have led me to conclude that the record in Request 2 could not be provided. Those circumstances were not the Applicant’s doing and I therefore exercise my discretion to award her the full costs of this application, in the amount of \$200.

F. CONCLUSION

[22] As noted in paragraph 24 of this Tribunal’s decision in *King v. York Region Condominium Corporation No. 692*, 2022 ONCAT 80, which also dealt with access to the audio recording of a condominium corporation’s annual general meeting:

“In the current environment of virtual meetings, it is not surprising that requests such as the Applicant’s will be made”.

[23] It is fair to say that virtual meetings are now the norm and will likely continue to expand in use and frequency. Condominium corporations should therefore be mindful of this fact and that recordings of virtual meetings are fast becoming a type of record which should be managed with care and attention for the benefit of all owners. Condominium corporations must take all possible steps to adequately preserve those records and make them available to owners, on the same footing as any other record as per the requirements of the Act and its regulations. Of course, the exceptions provided in the Act and regulations, such as in subsection 55(4) of the Act, continue to apply. In sum, technological advances should be used in such a way so as to make access to the records of condominium corporations easier and more beneficial for all concerned parties.

G. ORDER

[24] Under section 1.44 of the Act, the Tribunal orders that:

1. Within 30 days of this Order, the Respondent must take steps to make available to the Applicant the audio\video recording of its virtual 2022 AGM;

2. Within 30 days of the date of this Order, the Respondent will pay to the Applicant a penalty in the amount of \$250, as well as costs to the Applicant in the amount of \$200.

Roger Bilodeau
Member, Condominium Authority Tribunal

Released on: January 26, 2024