CONDOMINIUM AUTHORITY TRIBUNAL

DATE: March 15, 2024
CASE: 2023-00375R
Citation: Akella v. Durham Condominium Corporation No. 27, 2024 ONCAT 40

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

Member: Patricia McQuaid, Vice-Chair

The Applicant,
Ravi Shankar Akella
Self-Represented

The Respondent,
Durham Condominium Corporation No. 27
Represented by Jordan Cowman, Counsel

Hearing: Written Online Hearing – December 22, 2023 to March 4, 2024

REASONS FOR DECISION

A. INTRODUCTION

[1] Ravi Shankar Akella (the "Applicant") is a unit owner in Durham Condominium Corporation No. 27 ("DCC 27"). The Applicant submitted a Request for Records (the "Request") to DCC 27 on July 14, 2023, in which he requested both core and non-core records. The Applicant alleges that DCC 27 did not provide its response within the prescribed time, did not provide all of the requested records, and that some of the records provided are not adequate. The Applicant seeks both a penalty under s. 1.44(1)6 of the *Condominium Act 1998* (the "Act") and costs. DCC 27 states that it responded in the prescribed time, that it has provided all the records it has responsive to the Request, and at no cost to the Applicant. It seeks its costs in this matter.

[2] This case reflects an all too common narrative - an applicant who is focussed on the minute detail within records and who seeks to hold their condominium board to strict compliance with what they perceive to be the obligations under the Act, and a board, and often a condominium manager, who in turn perceives that focus to be bothersome. Here, a review of board minutes in evidence before me suggests that is the case. That dynamic does not diminish an owner's entitlement to records

under the Act, but neither does it mean that every demand an owner makes in terms of records is justifiable.

[3] For the reasons set out below, I find that the Applicant has been provided with records to which he is entitled with one exception. I find that the record provided by DCC 27 relating to the records of leases under s. 83 of the Act is not adequate and will order that it provide this record in accordance with the Act. I do not find that the Respondent has refused to provide the records requested and therefore no penalty is warranted. I further find that no costs shall be payable by either party.

B. ISSUES AND ANALYSIS

[4] In the Stage 2 Summary and Order, the Member indicated that issues related to two records remained outstanding; however, broader issues of whether all records were received, adequacy of records, as well as penalty were also noted. The Applicant appeared inclined to expand the scope of the case to cover such issues. Therefore, at the outset of this hearing, I clarified the issues to provide the parties with direction in terms of their evidence and submissions. The issues were determined to be as follows:

1. Adequacy of records related to:
    a. absence of a written contract between DCC 27 and the service provider for landscaping and snow removal for the period of January 1, 2021 to current;
    b. notices of leases under s. 83 of the Act;
    c. notices of change related to director details, employment contracts, record of directors' completion of CAO training; and
    d. missing pages on proxy forms.

2. Whether the Periodic Information Certificates (the" PICs") requested have been provided.

3. Whether the Response and records were provided within the prescribed time period.

4. Whether there has been a refusal as per s. 1.44(1)6 of the Act and if so, whether a penalty is warranted.

5. Entitlement to costs.

[5] I will address the issue of whether the records were provided within the prescribed

time before addressing the other issues as it gives context for how this dispute developed and its escalation.

Issue: Did DCC 27 comply with the prescribed time periods when responding to the Request?

[6] The Request is dated July 14, 2023. The Applicant indicated on the form that for communications about the Request he preferred to be contacted by email. He delivered the Request to the physical location of DCC 27's mailbox on that date. July 14 was a Friday and though the Applicant states that he delivered the request during office hours, DCC 27 states that it was not "received" until Monday July 17. The Board's Response (the "Response") was sent by their counsel to the Applicant, by email, on August 17, 2023.

[7] In the hearing, the Applicant submitted that this Response was not received until August 24th, therefore beyond the prescribed time of 30 days and further that it was not a valid Response because DCC 27's By-law no.7 does not provide for email communications related to the delivery of documents. I do not accept either submission.

[8] Article 10.01 of By-law No. 7 states that, subject to the provisions of the Act, any notice or document required to be delivered by the corporation shall be sufficiently given if delivered personally or by mail to the address of the owner. The Request for Records form prescribed by the Act contemplates communication by email, and in this case, the Applicant indicated a preference that he be contacted by email. It is unreasonable for the Applicant to now assert that the Response is not valid because it was emailed. The by-law provision does not negate its validity.

[9] The Applicant also asserts that he did not receive the Response until August 24 after it was hand delivered to his mailbox by the building superintendent. The evidence indicates that the superintendent hand-delivered the Response because the Applicant was not acknowledging that he had received the Response by email on August 17. However, there is evidence before me of an email from counsel to the Applicant on August 17 attaching the Response and an email from the Applicant to counsel on the same day that confirms that the Applicant did indeed receive the Response on August 17. To assert that he did not 'properly' receive the documents is a disingenuous position by the Applicant.

[10] In its Response, DCC 27 agreed to provide all the records, except for one, and set out its fee for the non-core records. DCC 27 initially stated that the Applicant could not examine records of completion of the mandatory director training for all

directors from January 1, 2017 to July 14, 2023, because of the exception for prescribed records based on s. 55(4) (d) of the Act. It quickly corrected its position (given that a certificate of completion of the director training is not one of the prescribed records) and agreed to provide these records. Core records would be made available to him by August 25 and non-core by September 17.

[11] The Applicant did not complete the confirmation portion of the Response. On August 14 he filed an application with the Tribunal, on the basis that no response was received. The Applicant did not pick up the paper copies of the non-core records; these were delivered to him by the building superintendent on September 21. DCC 27 waived the fee for those records.

[12] Based on the evidence, I find that DCC 27 did meet the prescribed timelines. Indeed, it met the timelines stringently. Filing the application on August 14 was neither helpful nor reasonable; it was indicative of a distrustful and fractious relationship between the Applicant and DCC 27, and in particular, with its condominium manager. It was only after the Applicant reviewed the records received that this case became about adequacy of records. As the proceeding progressed, other concerns about the records surfaced. I will now address the issues relating to those records, in the order listed above. In addition, when addressing each record, I will discuss whether there has been a refusal without reasonable excuse for the purpose of determining whether a penalty is justified under s. 1.44(1) 6 of the Act.

Issue: Adequacy of the record provided relating to the contract between DCC 27 and the service provider for landscaping and snow removal for the period of January 1, 2021 to 'current'

[13] DCC 27 provided the Applicant with a contract between DCC 27 and Brett's Property Maintenance ('Brett's") dated April 1, 2019. The written contract term was for a year, to March 31, 2020. DCC 27 also provided a copy of a contract with Brett's for the year commencing September 1, 2023. In her evidence, Maureen McIlvenny, DCC 27's condominium manager, stated that DCC 27 continued to use Brett's under the exact terms of that contract until August 31, 2023, when the new written contract was entered into. Therefore, there is no further contract to be provided.

[14] Based on the Stage 2 Summary and Order, it appears that this information was made known to the Applicant, yet he continued to assert that what was provided was inadequate, not responsive to his request, and that the failure to provide a written contract for this period should be treated as a refusal to provide the

requested record. It is not a refusal. DCC 27 provided the written maintenance contracts that book-end the time period in question and provided a reasonable explanation for why there is no written contract for that period. It cannot provide a record that does not exist, a fact which the Applicant must accept. DCC 27 has provided an appropriate response to this particular record request.

Issue: Is the document provided in response to the record of notices under s. 83 of the Act adequate?

[15] DCC 27 provided a document "Unit Information – all Owners and Tenants" which it states shows the names of owners, their unit numbers and names and contact information of tenants, if any, with redactions. It states that it represents its complete available record. That may be, but I find that it is not adequate.

[16] Section 83 (1) (a) of the Act requires the owner of a unit to notify the corporation within 10 days of leasing or renewing a lease of their unit. Section 83 (3) of the Act requires the corporation to keep a record of the notices it receives. This is an ongoing obligation - the record is to be kept current. The Periodic Information Certificate ("PIC") dated July 12, 2023, provided by DCC 27 indicates that it has received notice under s.83 of the Act that 25 units were leased during the current fiscal year. The reasonable inference from that statement is that DCC 27 clearly does have a record of notices received; however, the document provided is not that list. It may indicate whether a unit is known to be tenanted versus owner occupied, but it does not indicate whether any notices required under s. 83 of the Act were received with respect to those units.

[17] On a plain reading of s. 83 (3) of the Act, the Applicant is entitled to a list of the units from which DCC 27 received notices under the Act, of which, on July 12, 2023, there were 25. The list of the 160 units - "Unit Information – all Owners and Tenants" is not that record. It is not an adequate record for the purposes of s. 83 (3) of the Act; however, I cannot find that this lack of adequacy equates to a refusal to provide the record; rather it may reflect a misunderstanding of the correct manner in which to keep the record. It does not appear, based on the evidence, to be a deliberate attempt to not disclose this record.

[18] While I will order that a list of the units from which DCC 27 received notices be provided I will not order that the date and type of notice of any unit from which such notice has ever been received be provided, which the Applicant submits as required based on a previous Tribunal case. [1] Not only is the relevance of the

[1] Chai v. Toronto Standard Condominium Corporation No. 2431 2022 ONCAT 142 (CanLii)

historical record of every notice received difficult to discern, a plain reading of s. 83 (3) of the Act leads me to conclude that to require the corporation to provide more than the list of the units from which it received notices under s. 83 (1) of the Act is too expansive an interpretation.

Issue: Adequacy of notices of change related to director details, employment contracts, and the record of directors' completion of CAO training

a. Notice of change forms filed with the Condominium Authority of Ontario (“CAO”)

[19] The Applicant requested Notice of Change forms from January 1, 2017. Based on the evidence before me, it appears that, five Notices of Change for director changes were provided to the Applicant in addition to five annual return forms. The Applicant has carefully scrutinized these various forms and in comparing them noted that it appears that notices were not provided for some of the director changes. DCC 27 submits that all Notices of Change that form a record of the corporation have been provided; there are no others.

[20] Section 55 (1) 3.1 of the Act states that returns and notices that a corporation has filed with the Registrar under Part II.1 of the Act are records that the corporation is required to keep. Section 9.3 (1) under that Part states that the corporation shall file a notice of change for every change in the directors elected or appointed to the board. Section 9.3 (2) of the Act states that it is not necessary to file a notice of change in respect of a director who is re-elected after an immediately preceding term of office.

[21] I accept DCC 27’s evidence that there are no other forms. Whether there ought to have been is not for me to decide. This is not a question of adequacy of the record, but rather, whether DCC 27 filed the required notices with the Registrar. That is not an inquiry for the Tribunal to undertake given its jurisdiction. I do not find that the absence of other notices amounts to a refusal to provide the records.

b. Employment contracts

[22] The Applicant requested employment contracts for DCC 27 staff hires from January 1, 2017. He was provided with the one contract – the superintendent contract from September 1, 2018, a contract which states it continues in full force and effect from time to time unless terminated. The Applicant submits that this was not adequate for two reasons: the contract provided was missing Schedule A which was mentioned in the document and no contract was provided relative to the 2017-2018 period. In response, DCC 27 states that there was never a Schedule A

appended to the contract, and that it had advised the Applicant of this fact. DCC 27 did locate a previous superintendent contract during this hearing, after it "spent hours digging through the Corporation's records". This contract, dated March 2017, was uploaded to the CAT portal.

[23] While I find that there was no refusal to provide the contract in question, and that the issue raised about a 'missing' Schedule A on the 2018 contract was moot, I do not accept DCC 27's submission that had it been aware that the Applicant was still seeking the 2017 contract it would have been provided to him more promptly. The Applicant may have changed or expanded his issues about records at various times during this application process which has made it challenging for DCC 27 to respond; however, the Request clearly stated that he was seeking contracts from 2017. While I do not find, based on the evidence, that this is an issue of inadequacy of the record or a refusal to provide the record, DCC 27 ought to have exercised more diligence in fully responding to this request in September 2023. I caution it to ensure that it do so going forward.

c. Records of directors' completion of mandatory CAO training

[24] The Applicant requested the record of completion of the mandatory director training of all directors from January 1, 2017. DCC 27 provided certificates of completion for the three current directors. Based on the evidence before me, one of the directors has been a director since approximately 2016 and a second has been a director since approximately 2020. The third director joined the board in 2023. DCC 27 states that there are no other training certificates.

[25] The Applicant states that there were many other directors on the board since 2017. The documents suggest that there may have been three other directors at various times since 2015 (at that time there was no training requirement)[2]. Directors are required to take the CAO director training course within six months of being elected or appointed to the board. Section 11.8 of Ontario Regulation 48/01 (O. Reg 48/01) states that within 14 days of completion of the course the person shall forward the evidence of completion, the certificate, to the corporation.

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[2] Section 11.9 (1) of Ontario Regulation 48/01 under the Act states: A director appointed or elected to a board before the day section 27 of Schedule 1 to the *Protecting Condominium Owners Act, 2015* comes into force is exempt from clauses 29 (1) (f) and 29 (2) (e) of the Act but ceases to be so exempt if the person is elected or appointed to the board at or after a turn-over meeting held under section 43 of the Act on or after that day.

[26] The onus is on the director to forward the record to the corporation. I have no evidence whether any of the other directors provided that record to the corporation. But, in any event, the Applicant was provided with the certificates of the current directors. I find that this is sufficient in this case. There is no refusal to provide this record.

d. Missing pages on proxy forms.

[27] The Applicant requested "all instruments appointing a proxy for a meeting of owners for the period of May 1, 2023 to July 14, 2023". DCC 27 delivered 40 sets of proxy forms, with redactions. Page 3 was missing from every set. DCC 27 submits that page 3 was left blank on each proxy that was returned to it because it did not pertain to the votes occurring at the meeting to which the proxies relate (the 2023 AGM) and therefore they were not kept. A copy of the blank page was subsequently provided to the Applicant. Based on the evidence, the fact that the page is missing is neither an indication of a lack of adequacy nor a refusal to provide the record in this case.

[28] Early in this hearing (not in his final submissions as alleged by DCC 27), the Applicant raised the issue of the extent of the redaction of the proxies. On this point, I note that s. 55(4) of the Act sets out exclusions to an owner's right to examine or obtain copies of records. One of those exclusions relates to prescribed records The records prescribed for purposes of s. 55(4) of the Act are listed in s.13.11(2) of O. Reg. 48/01:

> (2) The following are prescribed records for the purpose of clause 55(4)(d) of the Act:
>
> 4. Any portion of a ballot or proxy form that identifies specific units in a corporation or owners in a corporation, unless a by-law of the corporation provides otherwise.

The provisions of the Act and O. Reg 48/01 set out above are very clear. An owner is not entitled to receive the information contained on proxy forms which identifies specific units or owners unless a by-law of the corporation permits this. There is no evidence before me that the Respondent has such a by-law. Therefore, I find that the Applicant is not entitled to receive un-redacted copies of the proxy forms.

Issue: Were the PICs provided?

[29] The Applicant requested the PICs from the last 12 months. DCC 27's fiscal year end is December 31. Therefore, the Applicant pointed out that, as per the

requirements of the Act and O. Reg 48/01, DCC 27 ought to have provided P dated November 30, 2022, and May 31, 2023; i.e., within 60 days of the end of the close of the third quarter of 2022 and within 60 days of the first quarter of 2023. DCC 27 provided one PIC dated July 12, 2023, which does not align with either of those dates.

[30] While the parties in their testimony have conflicting accounts of why there was only one PIC within the 12-month period requested by the Applicant, the fact is there is but one. Ms. McIlvenny stated that “it may appear” that it is missing, but “that is due to an oversight”. That oversight was explained as miscommunication between Ms. McIlvenny and her head office (that of Baybrook, the condominium management company) as to who would be filling out and distributing the PIC. No other PIC exists because it was never produced by the company. I find that DCC 27 did provide the only PIC that it has. I will not order that a second PIC for the relevant time period be created.

[31] However, it is not an acceptable answer to the issue of the absence of a PIC to say that the creation and distribution was someone else’s responsibility. Section 26.3 of the Act is clear – a PIC shall be sent to owners at the prescribed times. At the June 27, 2023, AGM, when the Applicant suggested that management had failed in its duty to provide PICs to owners, Ms. McIlvenny, the management representative at the meeting responded as follows, as recorded in the AGM minutes:

> “Management advised that they had lost some staff and fell behind on some duties, but were in the process of catching up. She noted that it was very clear that Mr. Akella did not want her as Property Manager. Management explained the costs of mailing packages to 160 units. If other owners did not want to receive the Periodic reports they didn’t have to incur the costs. She noted that many Corporations did not do reports, however Baybrook was in the process of catching up on their documents.”

[32] Following from that last statement, a PIC was created, dated July 12, 2023. However, cause for some concern to owners perhaps, is the inference in that statement that PICs are optional for the corporation. They are not. In the context of this Request, the only PIC that did relate to the time period in question was provided and presumably, going forward PICs will be created in accordance with the Act. I may have been inclined to find that the failure to provide the two PICS was in effect a refusal to provide records without reasonable excuse. But based on the evidence, it appears there was no intention to withhold or refuse the PICs, though there was likely an error on the part of management in relation to the

mandatory requirement to produce a PIC. Furthermore, I take particular note of DCC 27's stated intention of corrective action on this issue going forward.

Issue: Whether there has been a refusal as per s. 1.44(1)6 of the Act and if so, whether a penalty is warranted.

[33] I have not found that there was a refusal to provide the requested records without reasonable excuse, therefore there is no basis upon which to award a penalty.

Issue: Costs

[34] Rule 48.1 of the Tribunal's Rules of Practice states that if a matter is not resolved by Settlement Agreement or Consent Order and the adjudicator makes a final decision, the unsuccessful party will be required to pay the successful party's Tribunal fees unless the adjudicator decides otherwise. Costs are discretionary. In this matter, the Applicant was successful on one issue – the record of notices under s. 83 of the Act.

[35] However, as set out in some detail at the beginning of this decision, this was an application that was commenced prematurely and then, when documents were provided within the prescribed time period, there seemed to be a strong motivation to find perceived gaps or flaws in what was provided. The Applicant submits that he "only had good intentions of ensuring best practices of governance by the defendant, in the interest of the owners". That may well be the case, but some reasonableness must also prevail. In the circumstances of this case, I will not order reimbursement of the Applicant's Tribunal filing fees.

[36] DCC 27 is seeking its legal costs on a partial indemnity scale in the amount of $16,182.17 ($26,970.28 being the full amount of costs incurred). DCC 27 submits that the Applicant made no attempt to cooperate with DCC 27 by raising concerns he might have had prior to bringing the application, that he appears to have had no intention to resolve the case in Stage 2 Mediation and in fact continuously "moved the goal post, seeking more and new records". DCC 27 submits that the Applicant showed "exceptional unreasonableness" throughout.

[37] The Rule relevant to DCC 27 claim for costs is 48.2 which states:

> 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.

The Tribunal has the discretion to award costs when behaviour is unreasonable. There is a distinction between an unreasonable position and unreasonable behaviour. In this hearing, the Applicant remained consistent in his assertion vis a vis the inadequacies of the records provided by DCC 27. He may have "changed the goalposts" during mediation by asking for more detail – the Stage 2 Summary and Order reflects that to some extent. His fervent pursuit of his case during the hearing, based on his strict reading of the Act, was a constant. Though the positions he advanced may have been unreasonable, his behavior was not. Based on the evidence before me, I cannot conclude that he asked for additional documents that were not originally requested. The oft repeated response of DCC 27 that there are no further records to produce or that what was provided is sufficient was also a position taken by DCC 27 which I have noted was not entirely reasonable either.

[38] As I noted at the beginning of this decision, the context of how this dispute developed is important. The meeting minutes in evidence before me reveal a level of acrimony between the Applicant and Ms. McIlvenny which played a role in this case. It is unfortunate that a consequence of this may have led to legal costs which the owners of DCC 27 will have to bear. This is the Applicant's first case before the Tribunal. It is not appropriate nor required that the Applicant "be made an example of by way of a costs award to the Corporation" as submitted by DCC 27. I am, in these circumstances exercising my discretion and will not award costs to DCC 27. In exercising that discretion, I will also not issue an order as requested by the Applicant that he be credited with his unit portion of these legal costs.

[39] In declining to make that order, I caution the Applicant that while his intention may be to hold his board to account, that does not mean that every slight departure from his strict reading of their obligations equates to poor governance. Further, regarding the obligations under s.55 of the Act, DCC 27 should be mindful that providing an owner with all the records they assert they have may not be sufficient, if the requirements to make and keep a record, such as a PIC, are not met.

C. ORDER

[40] The Tribunal Orders that:

1. Under s. 1.44 (1) 1 of the Act and within 30 days of the date of this decision, DCC 27 shall provide to the Applicant a list of the units from which it received notices under s. 83(1) of the Act.

2. No costs are payable to either party.

Patricia McQuaid
Vice-Chair, Condominium Authority Tribunal

Released on: March 15, 2024