

CONDOMINIUM AUTHORITY TRIBUNAL

DATE: June 27, 2024

CASE: 2023-00679R

Citation: Verjee v. York Condominium Corporation No. 43, 2024 ONCAT 93

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

Member: Ian Darling, Chair

The Applicant,

Mariam Verjee

Self-Represented

The Respondents,

York Condominium Corporation No. 43

Represented by Angela Tracey, Counsel

Hearing: Written Online Hearing – December 22, 2023 to May 30, 2024

REASONS FOR DECISION

A. INTRODUCTION

- [1] This case is the result of an ongoing and escalating conflict about records. Over the past two years, the Applicant has filed 9 records cases with the CAT. The requests for records stem from concerns that the corporation is not properly managed or governed. The Applicant portrays inconsistencies and errors in records as evidence of mismanagement by both the corporation's directors and the condominium management provider. These parties have been before the Tribunal before, and despite warnings from the Tribunal that they both needed to examine their approaches, they appear here again.
- [2] The Applicant has exacting standards for records adequacy, and the corporation has a complex history of records cases before the Tribunal. Published Tribunal decisions and orders relating to the Respondent – involving not just this Applicant but other unit owners as well – demonstrate that the corporation's record keeping

practices need improvement.¹ None of the issues in this case are particularly complex from a legal perspective. This decision confirms the findings of the previous decisions involving this corporation.

- [3] While this decision characterizes the Applicant's approach to records as exacting, the cause is a corporation that has not given due care and attention to their obligations to create and maintain adequate records, and to their duty to respond in a prompt and thorough manner to records requests. I recognize that the corporation is making efforts to improve its practices, and that the requests for records that are at issue in this case predate these efforts.
- [4] Since the Respondent is working to improve their practices, I have included some recommendations in this decision. I recognize that this is not typical practice – but in these unique circumstances, I believe that it may benefit the parties in a way that specific orders may not.
- [5] At the outset of the hearing, the corporation provided all the requested records. The only issue to be determined was if the fees to produce the records were reasonable, and if the records were adequate. They were not: The fees were arbitrary, and the errors in the records were not explained.

B. BACKGROUND

- [6] In this case, the issues in dispute are clear. The facts of the case point to systemic issues with respect to the corporation's practices related to the creation and retention of records, the corporation's processes to respond to records requests, and how the corporation participates in and creates records related to the shared facilities committee.

¹ *Traicheff v. York Condominium Corporation No. 43*, 2024 ONCAT 1
Nurmi v. York Condominium Corporation No. 43, 2023 ONCAT 124
Majoo v. York Condominium Corporation No. 43, 2023 ONCAT 103
Verjee v. York Condominium Corporation No. 43, 2023 ONCAT 105
Nurmi v. York Condominium Corporation No. 43, 2023 ONCAT 99
Khamissa v. York Condominium Corporation No. 43, 2023 ONCAT 91
Verjee v. York Condominium Corporation No. 43, 2023 ONCAT 95
Wong v. York Condominium Corporation No. 43, 2023 ONCAT 85
Wong v. York Condominium Corporation No. 43, 2023 ONCAT 71
Nurmi v. York Condominium Corporation No. 43, 2023 ONCAT 59
Verjee v. York Condominium Corporation No. 43, 2023 ONCAT 45
Verjee v. York Condominium Corporation No. 43, 2023 ONCAT 19
Nurmi v. York Condominium Corporation No. 43, 2022 ONCAT 84
Mariam Verjee v. York Condominium Corporation No. 43, 2019 ONCAT 37

- [7] The Applicant's submissions referred to instances where different owners' requests were treated inconsistently by the corporation. I can only decide the issues in this case.
- [8] The Respondent's representative indicated that the corporation is working to improve its practices. This decision will only decide the issues in dispute; however, if the corporation is sincere in its desire to reduce or prevent subsequent cases, it should review this decision, and prior CAT decisions involving it, with an eye toward further improving its practices.
- [9] While this decision finds that the corporation's practices are inadequate, I also caution the Applicant that the standard for adequacy is not determined by each requester's subjective views about what constitutes proper record keeping, but by an objective standard that considers whether the standard to which records are kept allows the corporation to fulfill its duties.
- [10] Further, the Tribunal's records jurisdiction is to resolve and decide disputes related to Section 55 of the *Condominium Act, 1998* (the "Act"). The Tribunal is not intended to replace the democratic governance of the corporation. The underlying issues in this case (and others involving the same Respondent) relate to how the corporation is managed and governed. The CAT can make orders to address the records issues, but questions of governance are left to the community to resolve.

C. PRELIMINARY ISSUE

Merged cases

- [11] This decision deals with multiple records requests and cases which have been merged into this adjudication. The case started as a default proceeding (for 2023-00679R) because the Respondent did not respond to the notices of the case (despite having other active CAT cases at the same time). The Respondent did not provide a reasonable explanation for why they did not respond to the notice of this case. Since the adjudication started as a default proceeding (which had no mediation or negotiation stages), I allowed the Respondent an opportunity to provide any outstanding records before determining the issues to be decided and commencing the hearing process. The Respondent provided all the outstanding records. This prolonged the hearing, because it required time to provide and review the records, but it simplified the issues to be decided. However, it should be noted that the purpose of the adjudication stage is to decide issues related to access to records – not to supervise the records request and response process.
- [12] After the hearing was underway, the Parties agreed to merge this case with

application 2023-00221R. The parties agreed to merge the cases to ensure a more efficient hearing to resolve all the issues in dispute. Case 2023-00221R had previously been merged with 2023-00319R in Mediation. This decision concludes three cases, and three separate records requests including:

1. 2023-00221R based on a records request submitted January 19, 2023.
2. 2023-00319R based on a record request submitted March 11, 2023.
3. 2023-00679R based on a record request submitted June 27, 2023.

[13] In cases 2023-00221R and 2023-00319R, the Respondent provided all the requested records. The only issues to be determined at the end of Stage 2 - Mediation related to compliance with the records response process and the adequacy of records.

[14] This decision deals with a number of questions about the records response process, and the accuracy or adequacy of specific records. Rather than deal with each record and their contents, this decision responds to specific themes in order to establish adequacy of the records and corporation's responsibilities.

D. ISSUES & ANALYSIS

Issue 1: The Respondent's approach to Records Requests

[15] This case has demonstrated that the corporation did not take sufficient care and attention in responding to records requests. The corporation did not respond to the Applicant's June 27, 2023 records request. Further, they did not respond to the notice of the case when the Applicant filed a case with the CAT about that request, and did not join the case until it moved to Stage 3 – Tribunal Decision as a default proceeding. The Respondent finally provided their response to the June 27 request on January 18, 2024.

[16] The Tribunal takes note of the fact that the Respondent had other CAT cases at the time and was not unfamiliar with the Tribunal. When the Respondent joined, they did provide all the records, but this added unnecessary time and complexity to the process.

[17] The Respondent has relied on counsel to fulfil basic administrative functions (like responding to the records request and acting as an intermediary between the Applicant and the Respondent's directors or condominium manager). None of the records in these cases are particularly unique, nor do they require complex legal analysis. The Respondent may wish to consider the cost implications to the

community of having legal counsel respond to basic administrative that typically are considered day-to-day costs of managing the corporation.

Issue 2: Fees to produce records

Inconsistent fee estimates

- [18] The Applicant raised concerns with the consistency of fees proposed to produce records. The Applicant demonstrated that the estimated time to produce a record and the hourly rate to complete the work were inconsistent across different record requests. Some of the inconsistencies were in responses to the same owner; others were instances where the corporation proposed and charged different fees to other owners for the same record.
- [19] The Respondent listed the following factors that could affect an estimate:
1. The complexity of the record and any required redactions
 2. The expertise of the reviewer
 3. Whether the record was previously reviewed and redacted.
- [20] I accept that these factors may be relevant to the cost to produce a record. The Respondent did not however demonstrate that these factors were relevant to the different estimates provided in this case. For example: The Respondent proposed to charge \$30.00 per hour for some records and \$31.50 per hour for other records but did not provide any justification for this beyond asserting that the Tribunal had determined that these hourly rates were reasonable in prior cases. The Respondent's list appears to be a general recitation of factors to provide a retroactive justification of possible reasons that the estimates are different.
- [21] I accept that the CAT has, in previous decisions, found those rates reasonable; however, it is not reasonable to arbitrarily pick an hourly rate. The intent of the regulation is to establish a process where fees charged to requesters relate to the actual cost to produce the records. It is not reasonable to assign different hourly rates for the same work without reasonable explanation. There may be reasons why the hourly rate may differ; however, the Respondent has not justified the difference.
- [22] Further, the submissions also demonstrate that the estimated times to produce the records appear arbitrary. In one example, the Applicant demonstrated that the Respondent estimated that it would take one hour to produce a two-page record. The Respondent was not able to explain why a full hour's work was required.

[23] The records response process requires condominium corporations to provide an estimate of the work to be performed, and upon production of the records, they are required to also provide an account of the actual costs in order to determine if a refund is appropriate. The estimate does not need to be exact; however, it should be reasonable, which includes that it should be justifiable by reference to real and relevant factors pertaining to the records requested and method or requirements for their production and review. In this case, the variations in the Respondent's hourly rate are not reasonable because they have not justified the variation in rates.

Records not provided after payment

[24] In one instance, the Applicant sent a cheque to pay the amount proposed for the record. The corporation never produced the record. The Applicant stopped payment on the cheque. The record was eventually produced at no cost during the hearing. The Applicant received a \$25.00 charge from the bank for the stopped payment. During the hearing, the Respondent confirmed that they were willing to reimburse this cost. This will be incorporated into the order at the end of this decision.

[25] By the time the case arrived to me in Stage 3, the records had been provided at no cost to the Applicant. I do not, therefore, have to establish a reasonable rate for the production of each record. The decision can establish that the estimated fees were not consistent or transparent.

[26] I recommend that the board develop a policy governing the manner in which it estimates fees for the production of records and share that policy, in writing, with the Applicant (and maybe all owners), passing a resolution to consistently apply that policy in response to all future record requests.

Issue 3: Inconsistencies and errors related to record production and retention

[27] The Applicant identified errors and omissions in the records that were provided. The Respondent characterized the errors as "de minimus" or the result of administrative or human errors. Examples include:

1. Errors in redactions;
2. Failing to include an expenditure table in the reserve plan;
3. Errors in the PICs and ICUs;
4. Failing to produce legal invoices after the Applicant paid a fee to produce the records;

5. Failing to respond to a records request within the 30-day timeline; and
6. Being unaware that the corporation had financial statements related to the shared facilities committee in its records.

[28] I would be willing to accept that any one of the errors is minor if it was an isolated incident. However, the Respondent used this excuse to explain every error, and is overly reliant on this excuse. The evidence before me clearly shows that the Respondent did not respond to records requests, and when they did, provided records that contained errors and omissions. The public record of prior CAT decisions involving York Condominium Corporation No. 43 demonstrate that this is not an isolated incident. It is not a series of isolated errors, what is evident is a major problem with consistently careless disregard for details and duties relating to record requests, which is clearly contrary to the basic statutory obligation of condominium directors to apply care, diligence, and skill to the performance of their duties. but the consequence of the Respondent not taking seriously their responsibilities to create, maintain and provide access to records in a manner consistent with the Act.

[29] The Applicant applied to the CAT first in attempt to procure records that the Respondent had failed or refused to provide. However, once provided, the cases morphed into an analysis of the accuracy and adequacy of the records with the intent to prove that the corporation was not governed correctly.

Issue 4: Timely production of records

[30] Several issues in this case related to delays in providing minutes because they had not been approved at the date of the request. I accept that there may be a delay between a meeting, and when they are approved at a subsequent meeting; however, the delays should be minimal. In February 2023, the Applicant requested minutes from November 2022-January 2023. The records were not provided because the minutes had not been approved. The Applicant eventually received the records in April 2023. The Respondent did not satisfactorily explain why it took five months for board meeting minutes to be approved.

Issue 5: Shared facilities records

[31] Several of the records at issue in this case were shared facilities records. The Linkwood Village Recreation Centre (“LVRC”) is a shared facility. It is governed by a six-member committee comprised of two members from each of the three condominium corporations that share the facility.

[32] In response to records requests for LVRC records, the Respondent initially refused

to provide the records and referred the Applicant to the shared facilities manager. The Respondent stated that the requested records were not records of the corporation. The Respondent eventually provided some LVRC financial records which they found amongst their own records.

- [33] The Respondent characterized the relationship with the committee as if the corporation was an external stakeholder, rather than as a directing party that makes up one-third of the guiding mind of the LVRC. There is no evidence before me that the LVRC is a separate legal entity, the corporation's directors participate in the direction of the facility and, in so doing, are acting on behalf of the interests of the corporation and owners in accordance with their duties as directors. The LVRC committee is, essentially, a sub-committee of each of the participating condominium corporations tasked to help the respective boards cooperatively manage the facility on behalf of the owners in all three condominium corporations.
- [34] The LVRC was delegated responsibility by the boards on behalf of whom the members were participating – and it was ultimately the duty of each of the three condo corporations (whose directors comprised the committee) to ensure that the records were being created, were adequate, and were being maintained properly.
- [35] The Respondent should ensure that it is adequately creating and maintaining records related to the shared facilities.

Issue 6: PIC Adequacy

- [36] The Tribunal received submissions regarding adequacy of the September 2022 PIC. The Respondent acknowledges that the financial statement was for the wrong time period (a discrepancy of 2 months, since the PIC stated the balance on July 31, 2022 instead of September 30, 2022). The Respondent indicated that this was a minor error. It is not.
- [37] The Regulation establishes specific requirements for when the information certificates should be issued and for the information they are required to contain. The Respondent characterized the issue as minor, but on its face the certificate is inadequate, as the information it contains does not meet the requirements under the Act.
- [38] The Applicant stated that it was inadequate because it did not include a list of open CAT cases and information about a claim against Crossbridge.
- [39] The Respondent acknowledged that the Crossbridge claim was inadvertently excluded. Since there is no dispute about the Crossbridge claim, I do not need to

address this. The parties agree that it should have been included.

- [40] The Respondent submitted that the CAT cases did not need to be included because they were in Stages 1 & 2 (Negotiation and Mediation, respectively) and were therefore not legal proceedings.
- [41] Regarding the CAT cases, the Applicant is correct. A CAT proceeding is a “legal proceeding”. The CAT is a statutory tribunal with exclusive jurisdiction to resolve specific condominium disputes. The CAT owes its existence to the Act – its jurisdiction, powers and authorities are all set out in legislation.
- [42] CAT cases are filed under either Sections 1.36 or 1.47 of the Act. Per Section 1.42 of the Act, the CAT has “exclusive jurisdiction to exercise the powers conferred on it under this Act and to determine all questions of fact or law that arise in any proceeding before it.”
- [43] The Tribunal has previously² held that mediation commenced under the Act constituted a legal proceeding. I adopt the same reasoning here. There is no difference in the legal status of an application depending on the stage in process at the time of consideration. Once the CAT accepts an application, it is a legal proceeding for the purposes of the PIC.
- [44] I will not order the PIC to be reissued. It was from September 2022 and, I am aware that the corporation has advised owners of the CAT cases.³ I decline to order the PIC be changed. However, the corporation should note this decision in the preparation of future certificates.
- [45] The specifications for PIC contents and timing are outlined in Ontario Regulation 48/01. The corporation should review the requirements for PICs set out in regulation, and previous CAT decisions involving this corporation, for guidance to help it ensure future PICs are adequate.

Issue 7: Crossbridge Claim in the minutes

- [46] The Parties also provided submissions on whether information regarding the Crossbridge claim should have been included in the minutes. The Respondent submitted that the minutes could not contain any information about the case since it was covered by solicitor-client privilege and exemptions under Section 55 (4) of

² *Mara Bossio v. Metro Toronto Condominium Corporation 965*, 2018 ONCAT 6

³ *Nurmi v. York Condominium Corporation No. 43*, 2024 ONCAT 73

the Act.

[47] I accept that the exemptions under Section 55 (4) would allow for information to be redacted from minutes provided to owners; however, I do not accept that the information should not be included in the minutes while a claim is ongoing. Decisions should be recorded in the minutes since they are the institutional memory of the corporation. Information that is subject to the exemptions in Section 55 (4) can be redacted from the minutes – but the information should not be excluded by default.

Issue 8: What does this case tell us about Adequacy?

[48] Most of the submissions related to whether the records were adequate. The Tribunal has adopted the standard established in *McKay v. Waterloo North Condominium Corp. No. 23*, 1992 CanLII 7501 (ON SC), (“McKay”) which found that:

The Act obliges the corporation to keep adequate records. One is impelled to ask -- adequate for what? An examination of the Act provides some answers. The objects of the corporation are to manage the property and any assets of the corporation (s. 12 (1)). It has a duty to control, manage and administer the common elements and the assets of the corporation (s. 12(2)). It has a duty to effect compliance by the owners with the Act, the declaration, the by-laws and the rules (s. 12 (3)). Each owner enjoys the correlative right to the performance of any duty of the corporation specified by the Act, the declaration, the by-laws and the rules. The records of the corporation must be adequate, therefore, to permit it to fulfil its duties and obligations. [...]

[49] The Applicant has demonstrated that there are errors and omissions in many of the corporation’s records. Do those errors and omissions render them inadequate? Applying the test in McKay, one is compelled to ask: Is the corporation able to manage and administer the common elements of the corporation? The answer depends on the specific context, and the nature of the errors and omissions.

[50] Assessing adequacy in this case is like looking at a mosaic. Each tile has an individual colour, but when one steps back to view all the tiles, a different image is revealed. Most of the errors that the Respondent has made in its record keeping are errors in form, about which the Applicant seems overly exacting. These errors do not all render the individual records inadequate, because they might, individually, still meet the basic standard in McKay. However, when looking at the totality of the records and the regularity of carelessness and errors, it gives a clear indication that the corporation has not taken appropriate care in fulfilling its duties. In making these comments, I also take note of the prior decisions of this Tribunal

involving this Respondent.

[51] The Applicant requested the Tribunal order changes to the records to rectify the errors and omissions. I decline to do so, as the errors do not render the individual records inadequate per the standard in McKay. Furthermore, the errors and omissions demonstrate the governance practices in the corporation during the time in question. I further decline to order changes to individual records because it will not address the cause of the issues. It is incumbent on the corporation and owners to work together to get its affairs in order. I am hopeful that the Respondent's commitment to change its practices are genuine and bring about material change.

E. COSTS

[52] The Respondent agreed to reimburse \$25 to the Applicant for the costs incurred in cancelling the cheque for records that were not produced until the CAT case.

[53] Under Rule 48.1 of the Tribunal's Rules of Practice, the CAT typically orders reimbursement of Tribunal fees to the Applicant if their case is successful, unless the Member orders otherwise. The Applicant paid a total of \$425 Tribunal fees, consisting of \$200 for 2023-00221R; \$75.00 for 2023-00319R (which was merged with 2023-00221R in Stage 2) and \$150.00 for case 2023-00679R (\$25 in Tribunal application fee, and \$125 to move to Stage 3 after the Respondent failed to join the case).

[54] I have decided that it would be appropriate for the Respondent to reimburse \$300 in fees. For case 2023-00221R, the Applicant received all the requested records during the mediation, and the only issue to be decided were questions of adequacy where similar issues had been considered and decided – or where similar issues were before the CAT in other cases between the parties. The Applicant chose to bring the case forward to Stage 3, even though she had received the records, and similar issues were already before the Tribunal.

F. CONCLUSION

[55] The directors and condominium management provider should read this decision. They should read the other decisions involving this Respondent. They should create and maintain records according to the Act. The records should be accurate. The corporation must take record requests seriously. They should review and respond to them with care. Fee estimates should be reasonable, and consistent.

G. ORDER

[56] The Tribunal Orders that

1. Pursuant to Rule 48.1 of the Tribunal's Rules of Practice, the Respondent shall reimburse the Applicant the Tribunal fees in the amount of \$300 by no later than 30 days of the date of this Order.
2. Under Section 1.44 (1) 3 of the Act, within 30 days of the date of this Order, the Respondent pay compensation of \$25 to the Applicant.

Ian Darling
Chair, Condominium Authority Tribunal

Released on: June 27, 2024