Corrected Decision
This decision was amended to update typographical errors in paragraphs 33 and 34.

CONDOMINIUM AUTHORITY TRIBUNAL

DATE: October 31, 2024
CASE: 2024-00145R
Citation: Sakala v. York Condominium Corporation No. 344, 2024 ONCAT 162

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

Member: Michael Clifton, Vice-Chair

The Applicant,
Helene Sakala
Represented by Sally Harris, Counsel

The Respondent,
York Condominium Corporation No. 344
Represented by Bradley Chaplick, Counsel

Hearing: Written Online Hearing – May 2, 2024, to October 25, 2024

REASONS FOR DECISION

A. INTRODUCTION

[1] This application considers both a request for records by the Applicant, and the Applicant's allegations regarding the inadequacy of certain records of the Respondent.

[2] The Applicant is a meticulous, former financial analyst who appears to be concerned that her condominium (the Respondent) is well-run, particularly in regard to its fiscal management. As a result, she has taken what some would call a "fine tooth comb" approach when reviewing finance-related statements issued by the Respondent's board of directors. In the Respondent's view, she does this to excess.

[3] Having reviewed the evidence and submissions of the parties, I agree with the Respondent that the Applicant applies an excessively stringent standard with

respect to her estimation of the adequacy of the condominium's records. However, I also find that the Respondent has been somewhat lax or careless in the production of certain records such that it has caused confusion rather than providing clarity, which ought to be corrected. In short, the Respondent would benefit from applying some of the Applicant's level of attention to detail when creating its records that are intended to provide unit owners with clear, consistent, and accurate information.

[4] Regarding the Applicant's requests for records, I find that the Respondent has answered them fully and appropriately.

[5] The Applicant has requested the following orders in this case:

1. Delivery of draft reserve fund studies received by the Respondent's board of directors since April 21, 2023 – this request is denied;

2. That, "as soon as an error is found within the records of the corporation, the specific document must be corrected and resubmitted to the owners with an explanation within 30 days" – this request is also denied;

3. That the Respondent provide all unit owners with "a detailed report of the garage expenditures to date plus expected expenditures to completion of the garage project" – this order is granted as requested;

4. That a penalty be awarded against the Respondent pursuant to section 1.44(1)6 of the *Condominium Act, 1998* (the "Act") – there is no basis for awarding a penalty in this case.

[6] In my reasons below, I first address the Applicant's requests for records, including whether a penalty is warranted, and then I consider the issues of adequacy of the Respondent's records and costs.

B. ISSUES AND ANALYSIS

Issue No. 1: Request for Records

[7] The Applicant submitted two requests for records on the same date – on or about January 19, 2024 – seeking "all copies, versions and/or drafts" of the Respondent's reserve fund studies dated from April 21 to April 25, 2023, all of the Respondent's reserve fund studies made since April 23, 2023, and all of the Respondent's reserve fund studies made on or after the date of the request.

[8] The Respondent refused to provide anything other than the finalized version of the

relevant reserve fund study. They were correct to do so.

[9] First, it was not appropriate for the Applicant to request reserve fund studies that would only be made after the date of the request. A unit owner cannot request records of the corporation that have not yet come into existence.

[10] Even if such a proactive request seems reasonable to make, it seems at least equally reasonable for the corporation to refuse to provide a non-existent record. It likely was not the intention of the legislature that subsection 55(3) of the Act should require corporations to provide owners with any records that are not in existence at the time of the request. The applicable time constraints and procedures relating to record requests in the regulations under the Act support this conclusion.

[11] Second, it is well established that draft documents do not form records of a condominium corporation, as that term is used in section 55 of the Act and the related provisions of its regulations.

[12] In my reasoning on this issue, I rely on the principles and analysis of records set out in *McKay v. Waterloo North Condominium Corp. No. 23*,[1] (hereafter, "McKay") – arguably the seminal decision on this topic and appropriate to reference in this case. In McKay, the court noted that the records a corporation is required to keep under the Act fulfill two basic purposes: (1) to assist the corporation in fulfilling its duties and obligations, and (2) to provide insight or information for unit owners who wish to confirm that such duties and obligations have been duly fulfilled.

[13] A draft document is, by definition, a work in progress. Even if the draft in question is highly similar or identical to the final form of the document, the draft itself remains an unapproved, unfinished, and unauthoritative preliminary version of the document. With respect to an opinion or report in particular, it cannot be relied upon for certainty or to bind the provider of it since it remains open for correction or change. In this regard, a draft document does not serve either of the purposes described in McKay.

[14] To justify her position that the draft reserve fund studies should nevertheless be considered records of the Respondent in this case, the Applicant submits that the Respondent did rely on them in making certain of its financial decisions. The evidence does not clearly demonstrate that this was so, but even if it were, I do not believe this, in and of itself, would cause the documents in question to become records of the corporation.

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[1] *McKay v. Waterloo North Condominium Corp. No. 23*, 1992 CanLII 7501 (ON SC),

[15] In response, the Respondent raised the salient point that board members of condominiums may rely on virtually any sources of information that could influence their decision making. They may rely on any prior knowledge or experience. They could also rely on information found in materials presented in a condominium industry directors' training course, including the courses provided by the CAO. Such materials do not instantly become records of the corporation, simply because the board may have relied on or been influenced by them in some way in making their decisions.

[16] It seems that the Applicant wishes not just to know whether the Respondent's board has fulfilled their duties, but to look behind their decisions, into their thought processes and the influences that informed them. There is no inherent or statutory right to this information. As noted in McKay, "an owner has no right … to require further information and explanations" beyond obtaining and inspecting the records of the corporation. Just as minutes of a meeting would not ordinarily contain a verbatim transcript setting out the complete thought process engaged in to reach a decision, there is no requirement for a condominium corporation to keep as records every document or other source of information to which the board or owners might have referred in reaching a decision.

[17] Having said that, I do not wish either to conclude that there could never be a fact scenario in which a draft document is found to be a record of a condominium corporation – though I think that such a case would be exceedingly rare – or to advocate for vagueness or a lack of transparency in condominium record keeping. Condominium corporations should seek to provide owners with an "open book" allowing them to identify clearly whether the corporation is satisfactorily fulfilling its duties and obligations. However, I find that, in this case, the draft reserve fund studies received by the corporation were not required for this purpose and are not part of its records for the purposes of section 55 of the Act.

[18] Lastly, I note that even though it correctly believed it was not required to provide it based on the Applicant's premature request, the Respondent gave the Applicant its final reserve fund study in June 2024 (during these proceedings), shortly after the Respondent itself received it.

[19] I find that the Respondent has not at any time unreasonably refused to provide the Applicant with the requested records. As such, there is no basis for a penalty under section 1.44(1)6 of the Act.

Issue No. 2: Adequacy of Records

[20] In assessing the Applicant's submissions regarding the adequacy of the

Respondent's records, I again have in mind the analysis in McKay as well as in various decisions of this Tribunal. Together, these present two objective criteria for adequacy of condominium records, and certain principles that flow from them.

[21] The two objective criteria following the reasoning in McKay are as follows:

1. That the records of a corporation are adequate if they allow the corporation to perform and fulfill its duties and obligations under the Act, summed up as the duty to control, manage, and administer the common elements and the assets of the corporation, and the duty to effect compliance by owners with the Act and the governing documents.

2. That the records are adequate if they provide unit owners with sufficient information to identify or determine whether the condominium is fulfilling those duties and obligations.

[22] The principles and ideas that arise from application and analysis of those criteria in various cases of this Tribunal may be summarized as follows:

1. That adequacy is not dependent on whether an individual owner finds the records adequate for that owner's private purposes or meets the owner's particular standards but is dependent solely on whether the record satisfies the objective criteria defined in McKay.

2. That the word "adequate" itself indicates that condominium records are not to be held to a standard of perfection. Each record, provided it essentially satisfies the objective criteria, is subject to a degree of tolerance for deficiencies, which may include errors, omissions, lateness, improper process, incompleteness, or ineffectiveness. The degree of tolerance applied to one record will not necessarily be the same as for another, depending on the nature and purposes of the record in question.

3. That not every case where inadequacy is found will give rise to a remedial order from this Tribunal. This is particularly so if there was mere inadequacy, or if the inadequacy has no current impact on the operation of the condominium or the rights of its owners, or if the inadequacy is of a purely technical nature.

[23] The Applicant presented a lengthy and somewhat complex analysis of some of the Respondent's records, including board meeting minutes, reserve fund studies, periodic information certificates (PICs), financial statements, and notices of future funding of the reserve fund, to demonstrate that the Respondent has failed to keep

adequate records as required by subsection 55(1) of the Act. I do not set out the full details of her allegations, but I confirm that I have carefully read and considered the various examples of alleged errors that she presented, and reviewed both her analysis and the documents themselves.

[24] One reason I do not detail all of the Applicant's concerns about the Respondent's records, is that several of them are ultimately not about adequacy of records – which is within the Tribunal's jurisdiction – but adequacy of governance – which is not. This distinction might constitute a fourth principle to add to those summarized above, as it is not uncommon for cases to be brought to this Tribunal in which the allegation of inadequacy in the records turns out instead to mask a challenge to some aspect of the condominium's governance practices or decisions, which is not appropriate.

[25] For example, the Applicant's evidence shows the Respondent has made some important decisions about costly contracts that appear to never have been approved or ratified by resolution in a board meeting. The Applicant suggests that making decisions that are not minuted is evidence of inadequacy of the minutes; in fact, however, if decisions are being made outside of board meetings, the minutes themselves may be entirely accurate representations of the business conducted in the board meetings, but the decision-making practices of the board may be contrary to their duties under the Act. That would be a failure of governance, which the board must correct, but for which this Tribunal currently has no authority to assess or order a remedy.

[26] Another reason for not detailing every instance of alleged inadequacy raised by the Applicant is that some are of a minor or technical nature that do not rise to the level of inadequacy or require a remedy. In one interesting example, the Applicant appears to have wrongly identified an alleged error in the condominium budget, but on closer review the problem appears to be an actual but minor mistake in the board's minutes.

[27] In that instance, the Applicant believed the condominium's August 2023 budget failed to disclose a planned increase in expenses, with the result that owners would have been misled as to their expected contributions to the projected costs of operating the condominium in that year. What she noted is that the budget reflected "only one increase of 6%" in the year, while the minutes stated that "biannual" – i.e., twice in one year – 6% increases had been approved.

[28] Though neither party presented submissions in this regard, I take note that the word "biannual" can be ambiguous and gets applied in different ways, including referring to something occurring twice in one year, or once every two years. The

Applicant took it to have the first, arguably its most common, meaning; however, in view of all the facts presented in this case, I find that it is more plausible that the writer of the board minutes had neither of those meanings in mind and simply used the term incorrectly.

[29] I consider this to be the most likely explanation; first, because none of the evidence indicates that the board actually increased the budget twice in one year, and second, because other evidence provided by the parties relating to the condominium's finances supports a conclusion that the board's plan was, in fact, to make increases of 6% once each year for two consecutive years (i.e., annually, rather than bi-annually). Based on the evidence presented in this case, I conclude that this is most likely what the minute taker had intended to convey.

[30] While I appreciate that the Applicant wishes to ensure that the board presents fairly and accurately to owners what their common expense contributions are to be in a given year – which is a reasonable expectation and desire – the records are not, as noted above (and in the Respondent's submissions), required to meet a standard of perfection. Ultimately, what the Applicant perceived as a serious error in the budget, was likely just a relatively minor error in the wordsmithing of the minutes. That error does not result in a conclusion that the minutes are inadequate, although their correct interpretation requires reference to information not found within them. It is also questionable whether the alleged error in the budget (if that had been the case) should have deserved so much attention if, as it appears, no second 6% increase in the common expenses ever actually occurred.

[31] Where I find that the Applicant makes her most effective argument that the Respondent has, to a meaningful degree, failed to meet an appropriate standard of care in making and maintaining its records, is in relation to those records that are expected to provide unit owners with clear, accurate, and consistent information about the collection and use or projected use of its reserve fund. For records that have these purposes, the fact that they need not meet a standard of perfection does not excuse laxity or lack of diligence in striving to ensure they are as accurate as possible and are not misleading or confusing.

[32] The Applicant reviewed and cited various PICs, status certificates, and notices of future funding of the reserve fund, identifying that very often their stated reserve fund expenditures were inconsistent with their statements about the reserve fund funding plans. In some cases, where the list of expenditures left out projected costs or projects, the Applicant noted this made the finances of the corporation "look better [to the owners] than they actually were." In any event, inconsistency between the presentation of the funding plans and projected expenditures in the

various records confused the Applicant, as it reasonably would have confused any attentive reader.

[33] Although it seems possible that some of the records in question accurately reflected the overall financial condition of the corporation at the time, in so far as any of the Applicant's conclusions about the projected use or funding of the corporation's reserve fund have been inaccurate based on those records, the fault lies with the Respondent for not presenting the relevant information in a manner that would help ensure owners could accurately understand the condominium's financial position.

[34] A similar issue was cited by the Applicant about records relating more specifically to garage repairs that the Respondent contracted and, at least partly, paid for. The inability to discern from those records whether the funds relating to this work have been properly handled certainly supports a contention that the records are, in that regard, inadequate. Note, it is not the question of whether the handling of such funds has been appropriate that renders the records inadequate, but whether the records provide information in a manner that is sufficiently clear, consistent, and complete to afford owners the chance to determine that for themselves.

[35] I agree with the Applicant's statement of the general principle that, "unit owners are entitled to rely on honest and adequate records from the Board to gain a true understanding of their corporation's finances." Having reviewed the Respondent's records relating to disclosure of reserve fund plans and expenditures including the garage repairs, and the Applicant's submissions about them, I agree that such records do not appear to give owners the ability to acquire a complete and accurate understanding of what has been done or planned, and I find that they are therefore inadequate.

[36] I also find that the board fell short of its duty of care when it chose not to correct such errors or issues when made aware of them. While the board would be under no obligation to amend its records simply because an owner complains or alleges that they are erroneous, the board should not merely dismiss the concerns shared by even the most frustratingly nitpicky of owners if such concerns reflect actual possible inadequacy in the records or identify the reasons for confusion amongst the owners as to the information the board has sought to present.

[37] It is to be noted that my decision that the records of the Respondent are inadequate pertains only to the cited records relating to disclosure of reserve fund planning, and only to the extent that such records have that use and purpose. I do not find grounds for concluding that those records generally, or the Respondent's board meeting minutes, or any other records specified by the Applicant in this case

are inadequate.

[38] I also wish to be clear for the sake of the parties that my finding of inadequacy does not mean that I am upholding the Applicant's complaints relating to certain reserve fund expenditures and plans that were mentioned in her submissions in this case (such as the board's decision to accelerate the timing of lobby renovations). I have not detailed those complaints in these reasons, and, in fact, I make no finding about them at all (since where the Applicant's concerns were not about the state of the corporation's records, but about her disagreement with specific financial decisions made by the board), they are not within the Tribunal's jurisdiction. It is typically – perhaps always – inappropriate for a unit owner to use the Tribunal as a tool to challenge or change decisions their board has validly made but with which they simply disagree; for those issues, owners should instead consider using the democratic processes in the Act for pursuing changes to condominium governance or affairs.

[39] Having made a determination that certain records of the Respondent are inadequate, I now turn to the question of what remedy or order should be made.

[40] I note that although the Respondent has failed to ensure its impugned financial records presented consistent and accurate information for its owners, the evidence suggests this is more likely due to a lack of care in their preparation than a deliberate intention not to provide transparency. Although the Respondent was unwilling to correct its records when errors were identified by the Applicant, the evidence overall – including the Applicant's obvious access to many and varied records (which has allowed her to make a rather substantive analysis of the corporation's practices and financial position) – suggests the Respondent has regularly sought to provide its owners with records and information.

[41] I also note that since the Respondent has now obtained a new reserve fund study (as of June 2024) and provided all unit owners with a new notice of future funding, the issues of inadequacy of the older records become primarily historical in nature. As such, there seems to be no practical reason to make any order against the Respondent at this time in relation to the previous records. Instead, I encourage the Respondent to strive from this point onward to ensure records given to owners are not only clear but also accurate, consistent, and understandable, and that they should correct them when they are not.

[42] However, since the garage repairs appear to remain a current project or concern, I do grant the Applicant's request that the Respondent be ordered to provide all unit owners with "a detailed report of the garage expenditures to date plus expected expenditures to completion of the garage project." I expect that providing owners

with a reasonably detailed and accurate written explanation of past and future expenses relating to the garage repair project, the Respondent may demonstrate good faith and could acquire greater trust from the Applicant, who is in turn encouraged not to apply excessively stringent criteria when assessing this report nor to base her assessment of the record's adequacy on her agreement or disagreement with the board's decisions or decision-making processes.

Issue No. 3: Costs

[43] Both parties conducted themselves reasonably during this hearing and provided useful and comprehensive submissions. The bases for this application were not frivolous and I believe the application was not made in bad faith, despite being only partially successful. The Applicant has obtained only a finding that some records of the Respondent are inadequate and has been granted only one of the orders she sought. For the reasons set out below, I find there is no basis for an award of costs in this case.

[44] The Respondent sought a modest costs award of $2000 against the Applicant. This reasonable amount was intended, in part, to represent a portion of the Respondent's costs dealing with what they believe was the unnecessary initial activity in these Stage 3 – Tribunal Decision proceedings, in which the Applicant first sought to withdraw the case based on both her personal health concerns and a concern about my impartiality. Upon receiving my analysis of her concerns – which concluded that withdrawing the case with the issues between the parties unresolved would prejudice both parties in one way or another – the Applicant ultimately reversed her position, and the case continued. I do not find that the Applicant was behaving unreasonably or unfairly in raising her concerns, and while the Respondent was put to some additional work in relation to them, I do not think the circumstances justify a departure from the usual rule of the Tribunal not to award costs to the parties.

[45] The Respondent also submitted that the Applicant's case overall was unreasonable and improper, particularly given the well-established law pertaining to draft documents not forming records of the corporation. While I agree that the Applicant's positions in law were not all well-founded, and that she failed at times to distinguish correctly between her valid concerns relating to records and her personal disagreement with the board's governance practices or decisions, her frustration with both actual and apparent inadequacies in the Respondent's records was not unjustified. Further, simply being wrong about the law does not generally justify an essentially punitive award of costs. I also take note that the Applicant did not have the benefit of legal counsel up until these Stage 3 – Tribunal Decision proceedings.

[46] In that regard, I note that the Applicant advises she incurred substantial costs to obtain the assistance of legal counsel to present and conclude this case, which constituted a more significant burden on her than the condominium's burden of legal fees, in the payment of which the Applicant also inevitably shares through her contributions to the common expenses.

[47] Lastly, the submissions of both parties lead me to conclude that perhaps neither of them was sufficiently conciliatory in their positions or approaches and that, if they had been, there might have been a greater chance for an earlier settlement of this case, though each party is inclined to blame the other for their impasse.

[48] Taking all these things into account, I conclude that on balance there are not sufficient grounds to justify an award of costs against either party.

C. ORDER

[49] The Tribunal orders that:

1. The Respondent shall, within forty-five (45) days of the issuance of this order, prepare and provide to all its unit owners a detailed written report of its expenditures up to the date of the report relating to garage repairs and an explanation of all expected future expenditures to be incurred to achieve completion of the garage repair project; and

2. Each party shall be responsible for their own costs of these proceedings.

Michael Clifton
Vice-Chair, Condominium Authority Tribunal

Released on: October 31, 2024