

CONDOMINIUM AUTHORITY TRIBUNAL

DATE: October 11, 2022

CASE: 2021-00397R

Citation: D'Onofrio v. Halton Condominium Corporation No. 363, 2022 ONCAT 106

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

Member: Michael Clifton, Vice-Chair

The Applicant,
Norma D'Onofrio
Self-Represented

The Respondent,
Halton Condominium Corporation No. 363
Marko Bakos, Agent

Hearing: Written Online Hearing – May 30, 2022 to September 23, 2022

REASONS FOR DECISION

A. INTRODUCTION

- [1] The Applicant is the former president of the Respondent condominium corporation. On October 8, 2021, she requested from the Respondent a copy of the minutes of the last board meeting in which she participated, which took place on November 17, 2020, immediately before the Respondent's annual general meeting (AGM). In this decision, I refer to this as the "Pre-AGM Meeting".
- [2] Both meetings were held virtually, with the corporation's solicitor acting as chair. A key purpose of the Pre-AGM Meeting, in addition to acting as a "rehearsal" in preparation for the online AGM, was to ratify the approval of a landscape contract, as the solicitor advised needed to be done, which had previously been discussed and approved by an exchange of emails amongst the board members.
- [3] The evidence of both parties consistently indicates, and I therefore find on a balance of probabilities, that the Pre-AGM Meeting did occur, and that the solicitor was expected to produce minutes of the meeting. The evidence from both parties further indicates that despite multiple requests to the solicitor to provide the minutes of Pre-AGM Meeting, the solicitor has not produced them.
- [4] The Tribunal has no jurisdiction over the business relationship between the

solicitor and the condominium. Although the Applicant wished to involve the solicitor in this case, I found this neither necessary nor appropriate.

- [5] At issue is solely whether the Respondent condominium corporation has properly answered the Applicant's request for records with respect to the minutes of the Pre-AGM Meeting. Based on the submissions and evidence of both parties, I find that the Respondent has not done so. Further, I find that its refusal to produce the minutes is, in the circumstances of this case, without reasonable excuse. Accordingly, I find that the Applicant is entitled to receive a copy of the minutes, which means that the Respondent must produce them. I also find that the Applicant is entitled to reimbursement of her filing fees for these proceedings and that a penalty be awarded against the Respondent, in the amount of \$300.

B. ISSUES AND ANALYSIS

- [6] A condominium owner's entitlement to receive minutes of board meetings, particularly of meetings that fall within the "core records" category, as the Pre-AGM Minutes did at the time the Applicant submitted her request for records, is not at issue. The only issues to be decided by me are whether the Respondent was justified in refusing to provide the minutes of the Pre-AGM Meeting, and, if it was not, what remedies or other consequences should follow.

Issue No. 1: Is the Respondent's refusal to provide the Pre-AGM Minutes justified?

- [7] Every condominium corporation is required under the Condominium Act, 1998 (the "Act") to maintain minutes of its board meetings. Given the critical place of board meeting minutes in the records of the corporation, lacking them is, by definition, a failure to keep adequate records. Since the Respondent itself affirms the Pre-AGM Meeting did occur, agrees as to the purpose and outcome of that meeting, and readily admits that it lacks minutes of the meeting, the Respondent is clearly in breach of subsection 55 (1) of the Act.
- [8] The Respondent's evidence did disclose that the current president of the Respondent, who was the treasurer at the time of the Pre-AGM Meeting, initially opposed the meeting when it took place, but he then wrote to the Respondent's solicitor less than a week later, on November 23, 2020, requesting the Pre-AGM Meeting minutes as follows:

I believe someone in your firm took Minutes for the Rehearsal Meeting and the HCC 363 vote that took place just before our November 17 AGM began. Would you please forward a copy of those minutes to our Secretary-Treasurer...

We have been receiving invoices associated with the pre-AGM vote and need the Minutes to provide payment documentation for our Property Management company.

It is evident that the president's initial objections to the Pre-AGM Meeting did not cause him to conclude either that the meeting was not a valid meeting of the Respondent's board or that minutes of the meeting were not required.

- [9] The evidence in this case showed that both parties sought to have the minutes of the Pre-AGM Meeting produced by the solicitor for the corporation. However, regardless of the expectation that the solicitor should prepare and produce the minutes, it is the corporation that bears the responsibility to ensure there are minutes of its meetings. Where an assigned minute taker fails to produce the minutes, the corporation remains responsible to ensure it has them.
- [10] This is not a case like some others that have been before this Tribunal in which minutes or other records of a condominium are missing because a prior manager has retained and not returned them, or they have otherwise been lost to time, circumstances, or memory. In this case, the Respondent's board was aware of its obligation to have minutes of the meeting, knew that it did not have them, and simply did not ensure they were made.
- [11] The evidence before me indicates that multiple individuals who were members of the board at the time of the Pre-AGM Meeting and were at the meeting, including the current president of the Respondent, have clear and consistent memories of what occurred at the meeting. In fact, the evidence indicates that both parties possess a consistent account of the key elements required for the production of adequate meeting minutes: when the meeting occurred; who attended the meeting; the business that was discussed at the meeting; and the outcome of the discussion. It is not reasonable to believe that the Respondent could not produce the minutes without waiting and relying on the solicitor to do so, nor is it reasonable that it has not already done so.
- [12] In some cases, the Tribunal has found that the non-existence of a record was not a justifiable excuse for not providing it, particularly in cases where the corporation has failed to keep records that a condominium is required to keep under the Act. Such failure may be determined to be an effective refusal. This is such a case. Accordingly, I find that there has been an effective refusal by the Respondent to provide the minutes of the Pre-AGM Meeting.

Issue No. 2: What consequences or remedies follow from the Respondent's refusal to provide the Pre-AGM Minutes?

[13] The Tribunal has a broad range of options with respect to what it can order in a case as relief, consequences, or remedies. These are set out in subsection 1.44 (1) of the Act as follows:

1. *An order directing one or more parties to the proceeding to comply with anything for which a person may make an application to the Tribunal.*
2. *An order prohibiting a party to the proceeding from taking a particular action or requiring a party to the proceeding to take a particular action.*
3. *An order directing a party to the proceeding to pay compensation for damages incurred by another party to the proceeding as a result of an act of non-compliance up to the greater of \$25,000 or the amount, if any, that is prescribed.*
4. *An order directing a party to the proceeding to pay the costs of another party to the proceeding.*
5. *An order directing a party to the proceeding to pay the costs of the Tribunal.*
6. *An order directing a corporation that is a party to a proceeding with respect to a dispute under subsection 55 (3) to pay a penalty that the Tribunal considers appropriate to the person entitled to examine or obtain copies under that subsection if the Tribunal considers that the corporation has without reasonable excuse refused to permit the person to examine or obtain copies under that subsection.*
7. *An order directing whatever other relief the Tribunal considers fair in the circumstances.*

[14] In this case, I find it appropriate to order as relief under subsection 1.44 (1) 7 of the Act, that the Respondent must prepare and produce the missing minutes of the Pre-AGM Meeting and provide the same to the Applicant. I also find that the Applicant is entitled to her costs under subsection 1.44 (1) 4. The Applicant also requested a punitive award which she described as compensation; I do not find the grounds for compensation under subsection 1.44 (1) 3 in this case, but a penalty under subsection 1.44 (1) 6 is justified.

Order under subsection 1.44 (1) 7

[15] Regarding the order that the Respondent prepare and produce minutes of the Pre-AGM Meeting, the evidence of both parties indicates that they both possess a consistent account of the key elements required for the production of adequate meeting minutes. Such evidence suggests that adequate minutes of the meeting

can be produced without relying on the Respondent's solicitor to do so, and as the Respondent is statutorily obliged to possess such minutes and the Applicant is statutorily entitled to receive a copy of them upon request, I find it fair in the circumstances of this case to order the Respondent to produce them and provide them to the Applicant within 30 days of the date that this order is issued.

- [16] To help the parties avoid further dispute over this matter, I remind the Applicant and the Respondent that the content and form of the minutes is the responsibility of the Respondent to determine, applying the principles of good faith, honesty, diligence, etc., as set out in section 37 of the Act. Minutes of a meeting are not required to be a verbatim account of what transpired at the meeting. Adequate minutes of a meeting will establish such plain and simple facts as when and where the meeting took place, the capacity, roles, and participation of the attendees at the meeting, what the topics of discussion were raised during the meeting, and what decisions were made in relation to them. Since the parties' evidence in this hearing was consistent on all these points, I fully expect that if the minutes are drafted by the Respondent with sufficient simplicity to represent these basic elements as they have been set out in the parties' respective evidentiary materials in this case, there should be no basis for dispute by the Applicant as to their adequacy.

Order under subsection 1.44 (1) 6

- [17] The critical considerations with respect to a penalty under subsection 1.44 (1) 6 of the Act, are whether there was a refusal to produce the requested records, and whether there is any reasonable excuse for that refusal. For reasons set out above, I find there was an effective refusal to produce the minutes.
- [18] As also noted above in this decision, the fact that the solicitor's office did not produce the requested minutes does not provide a reasonable excuse for the Respondent's failure to have them, and therefore is also not a reasonable excuse for refusing to provide them to the Applicant.
- [19] The Respondent further sought to excuse its refusal to provide the minutes by citing two significant changes in its management since the AGM occurred. First, there was a change in management provider. The company that managed the condominium at the time of the AGM and Pre-AGM Meeting is not the company that has been managing it since the Applicant has been requesting the minutes. Later, the manager who received and responded to the Applicant's request (allegedly asserting that there was no such meeting and therefore no minutes for it) retired, and the condominium now has a new manager, who was the Respondent's representative during Stage 3 of these proceedings. Neither the

current nor the retired manager attended or had personal knowledge of the Pre-AGM Meeting.

- [20] I do not find the changes in management of the condominium, or the knowledge of the current manager, reasonably excuses the refusal to produce the requested minutes. The condominium manager is the agent of the Respondent and the manager's lack of knowledge about the Pre-AGM Meeting and allegedly erroneous response to the Applicant's request for its minutes do not absolve the Respondent of responsibility for these records.
- [21] Finding no reasonable excuse for the Respondent's effective refusal to provide the Pre-AGM Meeting minutes, I find that a penalty under subsection 1.44 (1) 6 of the Act is justified. The next question is what amount of penalty is appropriate in this case.
- [22] The amounts of penalties imposed by this Tribunal have varied somewhat, reflecting case-by-case consideration of such factors as the nature of the records in question, the impact of the refusal on the requester of the records, the severity of the conduct relating to the refusal, and the length of time of the refusal.
- [23] A failure to keep a single set of minutes resulting in an effective refusal to provide them is not, in and of itself, necessarily a major issue. This is also the Respondent's first case before the Tribunal. There is no evidence that the Respondent does not understand or generally comply with its basic duties under the legislation relating to keeping and producing records. The evidence does not present a pattern of disregard, negligence, or abusive behaviour, or otherwise indicate that the Respondent requires a serious reprimand in order to modify its conduct to avoid this kind of situation in the future. These are all factors that mitigate against a substantial penalty.
- [24] However, this effective refusal has persisted for a long period of time and, as noted above, there simply is no reasonable basis for the Respondent not to have agreed to produce the minutes at a much earlier date.
- [25] Taking all these facts into consideration, I award a penalty of \$300.

Order for costs under subsection 1.44 (1) 4

- [26] Rule 48.1 of the Tribunal's Rules provides,

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.

[27] The Applicant has been entirely successful in this case, and I order that the Respondent pay the Applicant the \$200 Tribunal fees.

C. ORDER

[28] The Tribunal orders:

1. Under subsections 1.44 (1) 7, that the Respondent shall, within 30 days of the date on which this decision is issued, and having regard to the principles and directions set out in paragraphs 15 and 16 of this decision, prepare minutes of the board meeting that took place prior to its annual general meeting on November 17, 2020, and provide a copy of the same to the Applicant; and
2. That the Respondent shall, within 30 days of the date on which this decision is issued, pay to the Applicant the amount of \$200 as costs and \$300 as a penalty in accordance with subsections 1.44 (1) 4 and 1.44 (1) 6 of the Act, respectively, and the Rules of this Tribunal.

Michael Clifton
Vice-Chair, Condominium Authority Tribunal

Released on: October 11, 2022