

"MY DOG ATE THE RECORDS: THE CAT TAKES A HARD LINE ON REASONABLE EXCUSES"

by Rachel Fielding

In one of the most recent decisions of the Condominium Authority Tribunal ("**CAT**" or the "**Tribunal**"), we can see that the CAT is taking a hard line on corporations and a "reasonable excuse" for the non-production of records. In *Surinder Mehta v Peel Condominium Corporation No. 389*, 2020 ONCAT 9, the Tribunal determined quite decisively that "they do not exist" is not a reasonable excuse for not producing required records, and corporations can expect to pay the maximum penalty in such situations.

The facts of the case are quite simple. The Applicant submitted a request for various records, all of which are listed under section 55(1) of the *Condominium Act, 1998* (the "**Act**"), and Reg 48/01, as records that the corporation are required to maintain. Additionally, none of the records fall under the exceptions listed in section 55(4) of the Act. As such, the Tribunal determined that the Applicant was entitled to copies of all of the requested records. Unfortunately, the Respondent could not produce many of the records as they "simply do not exist."

The issue therefore was, does the fact that the records do not exist qualify as a reasonable excuse for refusal as per section 1.44(1)6 of the Act? The answer was a resounding "no." It gained as much traction with the CAT as "the dog ate my homework" excuse did in high school.

The Respondent argued many reasons for lack of records and some of the key takeaways are summarized below:

- a. **No Audited Financial Statement:** Respondent did not have the most recent audited financial statement namely as the accountant that they regularly used was indisposed. The Tribunal stated that this was not a reasonable excuse as the corporation could have hired another accountant firm.
- b. **No Board Minutes or Annual General Meeting minutes:** The Respondent stated that they were self-managed, and as a result no formal Board meetings were held, nor had they held an annual general meeting ("**AGM**") since 2014. The directors of the corporation dealt with the affairs of the corporation every day, so no meetings were necessary. The CAT did not comment on the appropriateness of the Board's approach to the governance of the corporation, but stated that regardless, the requirement to keep Board minutes is not optional. There is no exception or exemption under the Act for corporations that are self-managed. Further, the CAT stated that it was a requirement under the Act for AGM's to be held every year. As the failure to hold an AGM for over five years is contrary to the Act, it cannot then be an excuse for not having and providing those minutes.



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There were additional records requested, and ordered to be provided.

An additional key takeaway was the fact that the CAT once again reinforced that an owner's behaviour, whether "good" or "bad" has little bearing on their entitlement to the records. The Respondent claimed that one of the reasons that they denied the Applicant from obtaining the records (in addition to the fact that the documents did not exist), was the fact that they alleged that the Applicant had displayed harassing and intimidating behaviour to other unit owners and the board of directors.

The CAT however confirmed that poor conduct is not a reasonable excuse for denying access to a record. This follows the CAT's prior decision in *Sohail Benjamin v Peel Standard Condominium Corporation No. 1008*, 2019 ONCAT 10, where the Tribunal stated, "*there is no provision in the Act that requires an owner to display non-disruptive or "good" conduct as a condition to obtaining records under subsection 55(3) of the Act*¹." In this case, the Tribunal went further declaring, "*whether or not the Board was unhappy with Mr. Mehta's behaviour, does not change the entitlement of the records under the Act*²."

In conclusion, the Respondent was not found to have any reasonable excuse for not possessing the required records and as a result, the CAT ordered that the Respondent pay the Applicant the maximum penalty, being \$5,000, in addition to costs of \$200. Further, the Applicant was not required to pay for obtaining any of the records, including the non-core records. This is the maximum penalty that can be awarded for failing to produce records without a reasonable excuse as per section 1.44(3) of the Act, which lends us to believe that the Tribunal is not afraid to reprimand corporations for not complying with their obligations.

Corporations should be mindful that the Tribunal will not have any patience for "dog ate my homework" excuses, and as a result, run the risk of being penalised.

If you have further questions on this or any other condominium-related issue, please do not hesitate to reach out to any one of our condominium lawyers at Fogler, Rubinoff LLP.

¹ *Surinder Mehta v Peel Condominium Corporation 389*, 2020 ONCAT 9, at para.1

² *Ibid*