

CONDOMINIUM AUTHORITY TRIBUNAL

DATE: January 7, 2022

CASE: 2021-00330R

Citation: Jasper Developments Corp. v. York Condominium Corporation No. 82, 2022 ONCAT 4

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

Member: Mary Ann Spencer, Member

The Applicant,

Jasper Developments Corp.

Represented by Victor Yee, Counsel

The Respondent,

York Condominium Corporation No. 82

Represented by Bert Berger, Agent

Hearing: Written Online Hearing – November 8, 2021 to December 23, 2021

REASONS FOR DECISION

A. INTRODUCTION

- [1] Jasper Developments Corp. (“the Applicant”) alleges that York Condominium Corporation No. 82 (the “Respondent”) did not respond to its September 3, 2021 Request for Records in the prescribed time and manner and has failed, without reasonable excuse, to provide all of the requested records which it is entitled to receive. It also alleges that the Respondent is not keeping adequate records as required by the *Condominium Act, 1998* (the “Act”). The Applicant requests that the Tribunal assess a penalty to the Respondent for unreasonably refusing to provide records. It also requests its costs in this matter.
- [2] The Respondent’s position is that it responded within the prescribed time to the Applicant’s request and that it provided all of the requested records in its possession after making all reasonable efforts to locate them.
- [3] I find that the Respondent refused to provide records without reasonable excuse and order it to provide the minutes of board meetings held between September 4, 2020, and September 3, 2021, to the Applicant. I also order the Respondent to pay the Applicant a penalty of \$2,500 and \$200 in costs.

B. BACKGROUND

- [4] York Condominium Corporation No. 82 is a 321-unit residential condominium. The Applicant is the owner of three units.
- [5] On September 3, 2021, acting as agent for the Applicant, Victor Yee, the Applicant's counsel, submitted a Request for Records in which the Applicant requested electronic copies of the following core records:
- The corporation's rules
 - The record of owners and mortgagees
 - The record of notices of leases
 - The Periodic Information Certificates from the past 12 months
 - Budget for the current fiscal year
 - The most recent approved financial statements
 - The most recent auditor's report
 - The current plan for future funding of the reserve fund
 - The minutes of board meetings held within the last 12 months
- [6] Bert Berger is president of City Towers Property Management Inc. ("City Towers"), the firm which took over management of the Respondent on May 1, 2021. His role at the Respondent is senior manager. City Towers and Mr. Berger also managed the Respondent from 2011 to 2013, and Mr. Berger was the Respondent's condominium manager from approximately 1992 to 2005 while he was employed by another firm.
- [7] Mr. Berger replied to Mr. Yee by e-mail on October 5, 2021 and attached some of the requested records. However, he indicated the corporation had "no leases provided to record" and, with respect to the requested financial statements and minutes of board meetings, wrote there were "no records matching this item at this time." The Board's Response to Request for Records form, which s.13.3(6) of Ontario Regulation 48/01 requires a corporation to send to a requester, was not included in the response.
- [8] While this matter was before me, there was a dispute between the parties before the Superior Court of Justice with respect to the Respondent's alleged failure to properly call a meeting of owners after it had received a requisition from the Applicant. In August 2021, the Respondent levied a special assessment totalling \$11,235,000. The purpose of the requested owners' meeting was to vote on the removal and replacement of the Respondent's board of directors. The specific details of the dispute are not relevant to the decision I must make on the records-

related issues before me. However, the issues underlying that dispute provide the context for the Applicant's submission of its Request for Records to the Respondent.

C. ISSUES & ANALYSIS

[9] The parties confirmed the issues to be decided in this matter were those set out in the Tribunal's Stage 2 Summary and Order:

1. Is the provided budget for the corporation's current fiscal year, including any amendments, an inadequate record?
2. Has the Respondent failed to provide the following records without a reasonable excuse?
 - a. Record of notices relating to leases of units
 - b. Periodic Information Certificates from the past 12 months
 - c. Minutes of meetings held within the last 12 months
3. Did the Respondent provide the following records within the mandatory required timelines?
 - a. Condominium Corporation Rules
 - b. Record of owners and mortgagees
 - c. Budget for the corporation's current fiscal year
 - d. Most recent approved financial statements
 - e. Most recent auditor's report
 - f. The current plan for future funding of the reserve fund
4. Should the Tribunal assess a penalty?
5. Should the Tribunal award costs?

[10] In this decision, I address issues 2 and 4 together. For consistency with the Stage 2 Summary and Order and the parties' submissions, I have used the issue numbers set out above.

Issue No. 1: Is the provided budget for the corporation's current fiscal year, including any amendments, an inadequate record?

- [11] Mr. Berger testified that his firm, City Towers, entered into a contract for the management of the Respondent on May 1, 2021, but that he did not access the Respondent's office until mid-month. He found the corporation's records were missing. Because he had to issue a budget for the 2021/2022 year at the end of May, the end of the Respondent's fiscal year, he re-issued the 2020/2021 budget without any change. He testified he could not justify either increases or decreases due to the lack of records. The budget package provided to the Applicant indicates that the line items in the 2021/2022 budget sent to owners on June 25, 2021, are identical to those in the 2020/2021 budget.
- [12] Counsel for the Applicant submitted that the financial records of a corporation should reveal its financial position and the 2021/22 budget is not adequate because it fails to set out the accurate financial position of the Respondent: "the Budget's hiding of the true state of the Respondent's dire financial condition is to such a significant degree that the record is rendered inadequate under s. 55(1) of the Act." He noted that the June 25, 2021, letter accompanying the budget signed by "the Board and Management of YCC 82" states "the financial position is stable" although in a status certificate issued in January 2021, the Respondent indicated it had knowledge of a potential special assessment which "may be issued in the near future." I note that this status certificate was not disclosed during the hearing in this matter but was attached as an appendix to Counsel's closing submission. However, the Respondent's representative did not challenge its inclusion but responded to the Applicant's submission and therefore I am allowing its admission as evidence.
- [13] Mr. Berger submitted that a budget "is not supposed to be an accurate reflection of the Respondent's financial state of affairs" but rather is issued to establish expected expenses and the resulting required common expense assessment to owners. He submitted that a special assessment does not form part of the annual budget and stated that when the budget was issued in May 2021, no special assessment was contemplated. Rather, it was at an August 2021 board meeting that the decision was made to issue the special assessment. He further submitted that it is the financial statements that reflect the financial position of the corporation. Finally, he stated that the reference in the January 2021 status certificate to a potential special assessment did not bind the board to either consider or to issue one.
- [14] In *McKay v. Waterloo North Condominium Corp. No. 23*, 1992 CanLII 7501 (ON SC) ("McKay"), a case which addressed the entitlement of owners to access corporation records, Cavarzan J. set out the principle that the affairs of a condominium corporation are an "open book":

The Act embodies a legislative scheme of individual rights and mutual obligations whereby condominium units are separately owned and the common elements of the condominium complex are co-operatively owned, managed and financed. In the interest of administrative efficiency an elected board of directors is authorized to make decisions on behalf of the collectively organized as a condominium corporation, on condition that the affairs and dealings of the corporation and its board of directors are an open book to the members of the corporation, the unit owners.

- [15] I agree with Counsel for the Applicant that, consistent with the “open book” principle, the corporation’s records should accurately set out its financial position for its owners. However, a budget is only one of a corporation’s financial records and, unlike the requirements for audited financial statements set out in sections 66 and 67 of the Act, there is no requirement in the Act for a corporation to produce a budget; s. 83.1, which addresses the requirements for a corporation to prepare and deliver a budget, has yet to be proclaimed.

- [16] The overall financial position of a corporation would be set out in its audited financial statements, as required by the Act, and not in its annual budget. Condominiums are not-for-profit corporations. They prepare budgets in order to calculate the common expense assessment to owners, that is the revenue needed to fund their forecast annual expenditures. As the Respondent’s does, a budget sets out those operating expenditures and the annual contribution to the reserve fund which, after conducting the reserve fund study required by the Act, a board has set out in its plan for future funding of the reserve.

- [17] I do agree with the observation of Counsel for the Applicant that the June 25, 2021, letter from the board of directors sent to owners with the Respondent’s budget is incorrect in stating the budget is “zero-based” as Mr. Berger’s testimony that the previous year’s budget was simply re-issued clearly indicates it was not. Counsel suggested that if the budget had been zero-based, it would have included the deficit identified in the financial statements for the year ended May 31, 2020. However, this is not necessarily the case.

- [18] Given the purpose of a condominium budget is to determine the common expense assessment for the fiscal year, a corporation does not have to include either operating surpluses or deficits in it. For example, operating surpluses can be transferred to a corporation’s reserve fund rather than being used to reduce future common expense assessments. Similarly, deficits can be addressed through means other than increasing the monthly common expense assessments such as borrowing, or, as the Respondent apparently decided, levying a special assessment. As its name implies, a special assessment is separate from the

regular assessment represented in the budget; it is generally levied when there are unexpected major expenditures but can also be required when regular assessments have been kept artificially low and there are insufficient funds to finance needed repairs or other expenses of the condominium. This may well be the case with the Respondent: Mr. Berger testified that when his firm took over in May 2021, the Respondent's reserve fund balance was \$1.75, and the Respondent has since received a report which indicates it needs approximately \$18,000,000 in repairs.

- [19] The 2021/2022 budget was sent to owners on June 25, 2021, with both the letter from the board of directors and one from Mr. Berger. Both letters address only the regular common expense assessment and indicate that there will be no increases in monthly fees. The board's letter states, "after careful review of the financial needs of the corporation, the board and management have determined that its financial position is stable and there is currently no need to increase the fees". Owners who relied on the two letters may well have been surprised when they were informed of a significant special assessment approximately two months later. Lina Kazakova, a director of the Applicant, testified that when she received the budget, she believed that there would be no increases in the assessments to the Applicant's units.
- [20] The audited financial statements for the year ended May 31, 2020, indicate that there are substantial deficits in both the Respondent's operating and reserve funds, and the auditor noted that there was "significant doubt" about the corporation's ability to continue as a going concern. It would have behooved the Respondent's board to address how they determined the Respondent's financial position was stable only one year after the auditor expressed that opinion. However, the way in which a board decides to manage its finances and how it communicates with its owners are issues over which this Tribunal has no jurisdiction at this time. While the "no increase to fees" letters can be construed as misleading in light of a subsequent significant special assessment, this does not mean the record the Respondent is keeping of the budget, which established the monthly fees, is not adequate.
- [21] Section 55(1) of the Act states, "the corporation shall keep adequate records" and sets out a list of the records which must be kept. The word "adequate" is not defined in the Act. Cavarzan J. provided some guidance in *McKay*:

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.

In its decision in *Yeung v. Metropolitan Toronto Condominium Corporation No. 1136*, 2020 ONCAT 33, the Tribunal determined that accuracy is also a component of adequacy.

- [22] I find that corporation is keeping an adequate budget record. The budget provided in response to the Applicant's Request for Records set out the information required to determine the Respondent's annual common expense assessment. While the 2021/2022 budget is a duplicate of the previous year's, there is no evidence to suggest it inaccurately forecasts the corporation's expected operating expenses. I note this finding is based on the budget document sent to owners on June 25, 2021; notwithstanding the wording of the issue agreed to by the parties, no amended budget document was submitted as evidence in this matter.

Issue No. 3: Did the Respondent provide the following records within the mandatory required timelines?

- a) **Condominium Corporation Rules**
- b) **Record of owners and mortgagees**
- c) **Budget for the corporation's current fiscal year**
- d) **Most recent approved financial statements**
- e) **Most recent auditor's report**
- f) **The current plan for future funding of the reserve fund**

- [23] This issue is about when the Applicant's Request for Records was received by the Respondent and whether the Respondent delivered the above noted records within the prescribed time frame.
- [24] Section 13.3 (6) of O. Reg. 48/01 states that when the corporation receives a request, it shall respond to the requester within 30 days on the prescribed Board's Response to Request for Records form. Section 13.3 (4) of O. Reg. 48/01 sets out the requirements for delivery of a Request for Records to a corporation. Those relevant to this case are that a request is considered to be sufficiently delivered if it is sent by prepaid mail to the address for service of the corporation (s. 13.3(4)(a)) or if it is sent by electronic mail if the board has, by resolution, decided that it is a method for receiving delivery (s.13.3(4)(d)).

- [25] The evidence is that on September 3, 2021, the Applicant's Request for Records was both mailed to the Respondent's address for service and e-mailed to the Respondent's counsel with a copy to the Respondent's office e-mail address. Mr. Berger responded by e-mail on October 5, 2021 and enclosed some of the requested records.
- [26] Counsel for the Applicant submitted that the Respondent should have replied to the e-mailed request by no later than October 3, 2021. He noted that the Tribunal has previously decided that even a day's delay is problematic and referred me to the Tribunal's decision in *Russell v. York Condominium Corporation No. 50*, 2021 ONCAT 103, in which the Tribunal noted that "the purpose of these deadlines is to assist owners in obtaining the records to which they are entitled in a timely way. The persistent failure to meet these requirements is another source of concern about YCC50's record keeping practices." Counsel noted that the concern about a delayed response in this case was heightened in the context of the requisition to hold an owner's meeting and the need to inform owners before a vote to potentially remove the Respondent's board of directors.
- [27] I note that if the Request for Records was in fact sufficiently delivered by e-mail, the Respondent's response was due on October 4, 2021, and not on October 3rd, as Counsel for the Applicant asserts. October 3, 2021 was a Sunday which s. 88(2) of the *Legislation Act, 2006* states is a holiday. Section 89(1) states that "time limits that would otherwise expire on a holiday are extended to include the next day that is not a holiday".
- [28] Mr. Berger submitted that the Respondent's response to the Request for Records was sent within the required 30 days. He testified that he received the mailed request on September 8, 2021, noting that September 6, 2021, was a statutory holiday.
- [29] I find that the Respondent's response was provided within the required 30 days. While Counsel for the Applicant noted that the e-mail address to which he sent a copy of his e-mail to the Respondent's counsel is the one set out in the Periodic Information Certificate dated September 30, 2021, this certificate was not in his possession when the Request for Records was sent. There is no evidence before me that the Respondent had previously indicated this e-mail address was to be used to deliver Requests for Records. Further, Counsel's covering letter to the Request for Records clearly states "By Regular Mail"; this was a mailed request with a follow-up e-mail, not an e-mailed request with a notation that a hard copy would follow.
- [30] I do note that Mr. Berger appears to have been misinformed about the need to

complete the required Board's Response to Request for Records form. When he replied to the Request for Records by e-mail on October 5, 2021, he did not attach the form; rather, he listed the requested records in his e-mail and noted beside each whether the record was attached or the reason it was not. He testified that he did not include the prescribed form because he was providing the records. Notwithstanding that his e-mail contained the information that would have been set out on the form, the form should have been sent. In his closing submission, Mr. Berger acknowledged that he now understands the form is required when responding to requests for core records.

Issue No. 2: Has the Respondent failed to provide the following records without a reasonable excuse?

- a) **Record of notices relating to leases of units**
- b) **Periodic Information Certificates from the past 12 months**
- c) **Minutes of meetings held within the last 12 months**

Issue No. 4: Should the Tribunal assess a penalty?

- [31] Section 1.44 (1) 6 of the Act provides that the Tribunal may order a penalty to be paid if it finds that a corporation has, without reasonable excuse, refused to permit a person to examine or obtain records. The maximum penalty is \$5000.
- [32] Counsel for the Applicant submitted that the Respondent failed to provide the above-noted records requested in its September 3, 2021 Request for Records without reasonable excuse and that the Tribunal should order the maximum penalty.
- [33] Mr. Berger submitted that the Respondent did not refuse to provide any of the requested records but responded to the Applicant's request in good faith and provided those records which it could locate. A thorough search of electronic records was conducted and "YCC 82 performed its best efforts, engaging its Corporate Counsel in getting the records turned over, without success." He further submitted that no penalty should be assessed: "the Corporation does not need to be impressed upon to meet its obligations, it needs help in getting its records from those who were tasked to keep them and who refused to provide them."

The Record of Notices of Leases

- [34] Section 83(1) of the Act requires an owner who leases their unit to notify the corporation that it is leased and to provide the corporation with the lessee's name and certain other information. Section 83(3) of the Act requires the corporation to

maintain a record of the notices it receives. Section 13(2) 2 of O. Reg. 48/01 requires that the record be retained “at all times”.

- [35] Mr. Berger’s October 5, 2021, e-mail response to the Applicant’s September 3, 2021 Request for Records states “no leases provided to record”. Counsel for the Applicant submitted that it was unlikely there had been no leased units since the corporation’s registration in 1972 and that all owners had failed to comply with their obligation to notify the corporation. Mr. Berger submitted that the Respondent did not refuse to provide the record of notices of leases to the Applicant; it has no such record. He noted that it is the responsibility of owners to submit notices of leases to the corporation.
- [36] Ms. Kazakova testified that the Applicant has leased units but has not submitted the required notices to the Respondent because the corporation had never requested this information. Asked if she was aware of any other unit owners who had submitted lease notifications, she indicated she was not. Mr. Berger testified that the Respondent has asked people for lease information, and they have refused to provide it.
- [37] I find that the Respondent did not refuse to provide the record of notices of leases. A corporation cannot force owners to meet their obligation under s. 83 of the Act and, if owners have failed to meet this obligation, it cannot produce a list of notices. However, while it is not the responsibility of a corporation to request notices of leased units, it would be a best practice for the Respondent to remind owners of their legal obligation and to attempt again to collect the information.

Periodic Information Certificates

- [38] Section 26.3 and s. 11 of O. Reg. 48/01 set out the requirements for a corporation to provide periodic information certificates (“PICs”) to owners. The certificates are to be sent within 60 days of the end of the first and third quarters of a corporation’s fiscal years. With a fiscal year end of May 31, the Respondent is required to provide PICs by the end of October and April each year.
- [39] The evidence is that only an Information Certificate Update (ICU) updating the names of the Respondent’s board of directors was sent to the Applicant in the Respondent’s October 5th response to the Request for Records. Ms. Kazakova testified that the Applicant had been sent no PICs during the September 4, 2020, to September 3, 2021, period covered by the Request. I note that the Applicant has now been provided with a PIC dated September 30, 2021. Ms. Kazakova further testified that this had not been sent to the Applicant but had been received only through the Tribunal’s process.

- [40] Mr. Berger testified that the ICU sent to the Applicant was the only record the corporation had on file and stated that when the previous management company was terminated, it did not turn its records over to the corporation. He stated that records dating back to 1972 were available when he previously managed the corporation. However, when he assumed management in May, 2021, there were no records from the two previous management companies, which he submitted were responsible for the PICs which should have been issued between September 2020 and September 2021. He stated that he opened drawers in the office and found they were empty and indicated that either a previous board or a previous management company “absconded with the records”.
- [41] In the Respondent’s closing submission, Mr. Berger wrote “it is the position of the corporation that PICs are the responsibility of the management companies”. This is incorrect. Section 26(3) of the Act sets out that it is the corporation’s responsibility to send PICs to its owners. In this case, it is unclear that the required PICs were ever produced. Ms. Kazakova’s testimony that they were not sent to owners, which Mr. Berger did not refute, persuades me they were not.
- [42] I accept Mr. Berger’s testimony that records were searched for but not found. The Respondent had three condominium management firms during the period to which the Applicant’s Request for Records applies. He also testified that assisting in managing records forms part of his firm’s contract with the Respondent. While the significant lack of continuity in management provides some explanation for the state of the Respondent’s records, it also suggests that the Respondent’s board of directors should have taken steps to oversee the transitions between firms to ensure its records were not compromised. Notwithstanding what may be in its management contracts, in accordance with s 55.1 of the Act, the maintenance of the corporation’s records is the responsibility of the Respondent and not of its condominium management firm.
- [43] Counsel for the Applicant submits that the Respondent’s failure to provide the PICs, even if they do not exist, amounts to a refusal to provide the record without reasonable excuse and should give rise to a penalty. In this regard, he referred me to the Tribunal’s decision *Sohail Benjamin v Peel Standard Condominium Corporation No. 1008*, 2019 ONCAT 10, a case with similar facts. In *Benjamin*, the respondent corporation did not provide a PIC and indicated it had relied on a previous condominium management firm to create and distribute one. A search by the corporation’s current manager could not locate any record. At paragraph 49, the Tribunal wrote:

The Respondent’s failure to create or, if created, to maintain the PIC constitutes an unreasonable basis for its refusal to provide the record to the

Applicant. The non-existence of the record is due solely to a failure to comply with a clear and unequivocal legal obligation; there is no reasonable excuse for the refusal on these facts. Therefore, a penalty in this case is justified.

- [44] I find that the failure of the Respondent to provide the PICs in response to the Request for Records is an effective refusal to provide records without reasonable excuse and that a penalty is warranted. Unlike the record of notices of leases, where provision of the notices to the corporation in the first instance is the responsibility of owners, the production and dissemination to owners of PICs is the sole responsibility of the Respondent. As the Tribunal noted at paragraph 34 in *Benjamin* “the explanation provided by the Respondent does not excuse it from its obligation to create, distribute and maintain the PIC. The Respondent cannot avoid its responsibility by delegating it to a property management company.” I will address the amount of penalty below.

Minutes of Meetings held within the last 12 months

- [45] The evidence is that the Respondent provided no records in response to the Applicant’s September 3, 2021, request for the minutes of board meetings held within the past 12 months.
- [46] Ms. Kazakova testified that a previous condominium manager told her that the Respondent maintained a minute book in its office. She further testified that a previous member of the Respondent’s board advised her that he had attended meetings held during the period to which the Applicant’s Request for Records applies.
- [47] Mr. Berger testified that the Respondent’s board did hold meetings during the relevant time period although he was unable to say how many took place. He stated that he found no minutes of the meetings in the corporation’s records and, as set out above, indicated the Respondent’s previous management companies had not turned the records over to the corporation. He further testified that he has now found some of the records which the board approved at a November 2021 meeting. He indicated that the Respondent is prepared to provide these to the Applicant, and I will order the Respondent to do so.
- [48] In his reply to Mr. Berger’s closing submission, Counsel for the Applicant refuted Mr. Berger’s testimony about the availability of minutes. Counsel attached excerpts from the Respondent’s Responding Application Record dated November 15, 2021 filed in the Superior Court of Justice. I will not consider these documents as evidence; unlike the status certificate which Counsel attached to his closing submission, the Respondent had no opportunity to reply. Further, I note that

Counsel had the opportunity to enter these documents as evidence; disclosure in this matter did not end until November 25, 2021. Therefore, my finding on this issue is based on the documents disclosed by that date and on the witness testimony.

- [49] Section 55(1) of the Act states that “a minute book containing the minutes of owners’ meetings and the minutes of board meetings” are among the records a corporation must keep. As set out above at paragraph 14, the “open book” principle is that owners are entitled to know the decisions a board is making on their behalf. Counsel for the Applicant noted that the Tribunal has affirmed the fundamental importance of board minutes in previous decisions. This is well summarized at paragraph 24 of the Tribunal’s decision in *Surinder Mehta v Peel Condominium Corporation 389*, 2020 ONCAT 9:

...the keeping of board meeting minutes and providing them to owners upon request (subject to appropriate redactions) is a fundamental factor in providing the openness, transparency and accountability to which owners are entitled. It is also an expression of the board's good faith, care and diligence in regard to corporate record keeping.

- [50] While I have accepted Mr. Berger’s testimony that PIC records were searched for and not found, I find it less credible with respect to all of the minutes of board meetings. Other firms were managing the Respondent when the PICs should have been produced; however, the contract with Mr. Berger’s firm began on May 1, 2021, some four months before the Applicant submitted its Request for Records. The records of any board meetings held after May 1, 2021, should have been readily available to provide to the Applicant.
- [51] Section 32 (1) of the Act states “the board of a corporation shall not transact any business of the corporation except at a meeting of directors at which a quorum of the board is present”. As set out above at paragraph 19, the June 25, 2021, budget letter indicates the budget was prepared after the board’s “careful review” of the financial position of the corporation. Mr. Berger testified that he attended a meeting in August 2021 at which the board decided to levy the special assessment. I acknowledge that the minutes of the August meeting may not have been approved and therefore may not have formed a record of the corporation when the Applicant’s Request for Records was submitted on September 3, 2021. However, minutes of a meeting at which the board approved the budget should have been available.
- [52] In accordance with section 55 (1) of the Act, it is the corporation, and not its condominium management provider, which is responsible for the maintenance of

its records. While it is unclear how many board meetings were actually held during the relevant period, or if some of the Respondent's business was transacted outside of board meetings (an issue over which this Tribunal has no jurisdiction), the evidence is that the board made significant financial decisions which should have been properly minuted. Therefore, I find that the Respondent's failure to produce and keep the minutes of its board meetings to be an effective refusal to provide records without reasonable excuse and a penalty is warranted.

Penalty

- [53] I have found that the failure of the Respondent to provide PICs and the minutes of board meetings held within the last 12 months to be an effective refusal to provide records without reasonable excuse and that a penalty is warranted.
- [54] Counsel for the Applicant has requested the Tribunal order the maximum penalty of \$5,000. I have reviewed the cases to which Counsel referred me. I note that, while the Tribunal may refer to its previous decisions for guidance, each case before it is decided on its own facts.
- [55] A maximum penalty is not warranted in this case because the Respondent did not overtly refuse to provide records and in fact did provide many of the core records the Applicant requested within the prescribed time frame. Mr. Berger described the state of the Respondent as "abysmal" when his firm took over; it is the Respondent's board of directors which must be held responsible for this. That a condominium management provider did not turn over records does not abrogate a corporation's responsibility to both create and maintain records in accordance with its obligations under the Act. The Respondent should have taken steps to ensure the records were both created, which is unclear in the case of both the PIC's and the minutes of board meetings, and that the records were properly turned over during the transitions between management companies. In these circumstances, I have determined that a penalty of \$2,500 is appropriate.

Issue No. 5: Should the Tribunal award costs?

- [56] The Tribunal's Rules of Practice dated September 21, 2020, were in effect when this matter was heard. Rule 45.1 of the Rules states that the Tribunal may order a User to pay to another User or the CAT any reasonable expenses or other costs related to the use of the CAT. Rule 45.2 states that if a case is not resolved by Settlement Agreement or Consent Order and a CAT Member makes a final Decision, the unsuccessful User will be required to pay the successful User's CAT fees and reasonable dispute-related expenses, unless the CAT member decides otherwise.

[57] The Applicant requested costs of \$200 representing its Tribunal fees. The Respondent requested no costs. The Applicant was largely successful in this matter and therefore, in accordance with Rule 45.2, I award costs of \$200 in respect of the fees it paid to the Tribunal.

D. ORDER

[58] The Tribunal Orders that:

1. Within seven (7) days of the date of this Order, the Respondent shall provide the Applicant with electronic copies of the minutes of board meetings held between September 4, 2020, and September 3, 2021.
2. Within thirty (30) days of the date of this decision, the Respondent shall pay a penalty of \$2,500 to the Applicant.
3. Within thirty (30) days of the date of this decision, the Respondent shall pay costs of \$200 to the Applicant.
4. To ensure the Applicant does not pay any portion of the costs or penalty awards, the Applicant shall be given a credit towards the common expenses attributable to his unit in the amount equivalent to its three units' proportionate share of the above costs and penalty.

Mary Ann Spencer
Member, Condominium Authority Tribunal

Released on: January 7, 2022