

Condominium Records: Still an “Open Book”?

A. Introduction

Few topics may evoke less of an emotional response than ‘condominium records’. The preservation of corporate minute books, financial ledgers, and employment contracts rarely ignite the imagination or captivate public attention. That said, condominium records often represent the physical ‘nerve-centre’ of any corporation. As superintendents retire, unit owners move, boards evolve, and professionals come and go, the net effect is that after a few short years, the only ‘institutional knowledge’ left in the building may lie in the records.

Although records serve as an important lamppost for any future board, they also provide a vital portal in the affairs of the corporation for the vast majority of those unit owners who never serve on the board. Between annual general meetings the *Condominium Act, 1998*, S.O. 1998, c.19, poses few demands on boards to communicate with unit owners. By accessing a corporation’s records, unit owners can gain valuable insight into the stewardship of their condominium. To that end, since the beginning of condominium legislation in 1967, unit owners have always been granted the liberal right to access such records.

Despite this, a new passage contained in the *Condominium Act, 1998*, S.O. 1998, c.19; (“the new Act”), has led some boards to now control or ‘gate-keep’ unit owners access to records. A growing number of unit owners have only been granted access to condominium records, once they have supplied their reason, intention or purpose behind their request.

For the reasons to follow, it is strongly believed that this interpretation is wrong, that it contradicts the overall pursuit and aim of the new Act, and ultimately spells trouble for a board of directors who embrace it.

B. Access to Records - The New Act

Section 55 of the new Act governs condominium record keeping and production. A completely reworked section, it demands that the corporation must keep ‘adequate’ records on a variety of matters, including; it’s finances, board minutes, reserve fund studies, policies of insurance, contracts, management agreements, leases, deeds and easements. Section 55(3) of the Act goes on to protect access to these documents by stating:

“Upon receiving a written request and reasonable notice, the corporation shall permit an owner, a purchaser or a mortgagee of a unit or an agent of one of them duly authorized in writing, to examine the records of the corporation, except those records described in subsection (4), at a reasonable time for all purposes reasonably related to the purposes of this Act.”

Subsection (4)'s exceptions are limited to employee documents, litigation or insurance investigation files, and records relating to specific units or owners.

The challenge is the exit passage of section 55(3), which states, "...for all purposes reasonably related to the purposes of this Act." This 'passage' has been interpreted by some condominium professionals to demand a party's intent or purpose behind their record request. Presumably, only once the board is satisfied that the request is reasonably related to the purposes of the new Act, will the records be produced. The seminal 2001 book "*Condominiums in Ontario*" by Harry Herskowitz and Mark F. Freedman (Toronto:LSUC & OBA), lends support to this interpretation. At page 161 it states:

"This caveat may permit the corporation, in certain circumstances, to refuse examination of non-exempt records if the intent of the examination is not legitimately related to the Act's purposes."

This interpretation, it is submitted, is challengeable for the following three reasons.

1. *The "Open Book" Cases*

A variety of Ontario court cases have interpreted the right to access records. In the 1992 case of *McKay v. Waterloo North Condominium Corp. No. 23* (1992) CarswellOnt 622, Justice Cavarzan gave direction on the purpose and importance of providing open access to records. He stated:

"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 the 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."

He went on to state that corporations impose a unique liability on unit owners, making them ultimately financial responsible for the affairs of the corporation. This liability, Justice Cavarzan held, was tempered with the protection that a corporation must keep adequate records, and "...the unqualified right in members to inspect the records...to enable an interested party to be fully informed and to assess his position."

This 'open book' analogy wove its way into later cases, and neatly dovetailed into the commonly held perception of condominium law being 'consumer protection legislation'. In the 2000 case of *Rohoman v. York Condominium Corp. No. 141* (2000) CarswellOnt 2144, Justice Chapnik revisited this concept, and furthered that it was actually an underlying policy of such legislation to make the affairs of a condominium corporation this 'open book.'

Demanding that a party furnish their purpose, reason or intent, diminishes this 'open book' concept. The counter argument is that these cases came before the new Act's section 55 passage. That said, a recent Ontario Superior Court of Justice case sheds new light on this debate.

2. *Metropolitan Toronto Condominium Corporation No. 551 v. Mani Adam* (2006) CarswellOnt 7682

In this 2006 case, Justice Low ruled on a variety of matters, including a unit owner's entitlement to access records. The court held that the condominium's property manager was in error by demanding that the unit owner disclose his motive or purpose in seeking to inspect the condominium corporation's records. Justice Low, interpreting the new Act, held that even though the unit owner's request for the mailing addresses of the board members to write them a letter was reasonable, "[t]he statute does not, however, require a person to disclose his reasons for requesting the information as a condition of obtaining it." In that case, a variety of entitlements were refused the unit owner, resulting in an ultimate cost award against the condominium corporation of \$32,000.00. As a result, it would conclusively appear that the courts will not permit the intention of the record seeker to be demanded, opting rather for the 'open book' concept.

3. *The Open Book - Expanded.*

Prior to the new Act, the records section of the previous Act was a short provision containing only:

"Section 21. The corporation shall keep adequate records, any owners or agent of an owner duly authorized in writing may inspect the records on reasonable notice and at any reasonable time."

Section 55 marked a wholesale change to this section. The list of required records was expanded, financial records were preserved for six years, the right to copy records was entrenched, and a corporation could be penalized up to \$500.00 for failing to provide records to a unit owner. These changes represented an expansion of the 'open book' concept, not a rollback. To interpret, "... for all purposes reasonably related to the purposes of this Act", as imposing tighter control on accessing condominium records appears to run contrary to the overall goals of section 55.

C. Conclusion

Many may wonder, if the passage is not intended to restrict access to records, why does it exist? If one interprets it in the overall light of;

- a) condominium law being consumer protection legislation;
- b) the courts 'open book' concept, and;
- c) the expanded record keeping section of the new Act;

it stands to reason that the caveat was included to expand record requests, to lower an already low threshold, and permit even a remotely related record request to shelter under the new Act. With that in mind and the cautionary words of Justice Low, boards who fail to treat their records as an open book may find themselves on the losing end of costly litigation, with everyone losing.