Recent CAT Decisions: Key Takeaways

By Gareth Stackhouse

The Condominium Authority Tribunal ("CAT") has released some instructive decisions in the late summer/early fall of 2019 to further clarify records request matters and the CAT's own procedures.

Management Reports

In the case of Smith v. MTCC 773, Mr. Smith (a former director of the condo) sought copies of the management reports which MTCC 773's property manager prepared for its board of directors; he wanted to see *"what management recommended...that was not acted upon"*. The CAT reviewed the arguments made and concluded that the management reports themselves were "drafts or notes" and not records of the condo except for the parts of the reports which were incorporated into the minuted decisions of the board and became part of the minutes of the board meetings. The CAT has re-affirmed the "drafts or notes" status of management reports but the CAT member commented that "*It may be helpful going forward, for the board to append or fully include the agenda and other items approved by the board, as segments in the board minutes.*"

Business of a Board and "Informal Meetings"

Mr. Smith had sought notes of any "informal meetings" which the directors had held and which meeting notes were referred to in later board minutes. The board had resolved, in meeting minutes, to keep these notes in the condo's minute book. The condo's witness (a director) testified that all decisions were made at properly called and held board meetings, that no decisions were made during informal meetings, and the condo's lawyer argued that there was *"no obligation to maintain minutes of personal conversations between board members or staff...outside the owner's meetings and board meetings"* and that any notes were personal notes of the individual directors and not records of the condo. The CAT reviewed the evidence and arguments and found, that since the board had resolved to incorporate the notes into the minutes of the board, the notes referred to in the board resolutions were kept as records and must be produced. However, the CAT stated that, generally, notes are not a record.

In light of the decision on both board notes and management reports, boards must pay careful attention to what they have formally resolved to keep as a record and must be ready to produce any document that they have formally treated as a record. The CAT also affirmed (and reminded every condo) that the business of a board of directors can only be done in accordance with section 32 of the *Condominium Act*, 1998, at a properly called meeting where a quorum of the board is present.

Redacting Board Minutes

Mr. Smith also sought copies of the condo's in-camera board minutes, the minutes which address the "exempt" business described in subsection 55(4) of the Act, including matters dealing with specific units and owners. The condo argued that due to how small the condo is (42 units) and because Mr. Smith had a detailed knowledge of the happenings at the condo, redacting only names and unit numbers from the in-camera minutes would not be sufficient to protect the privacy expectations of unit owners. The CAT agreed with the assertion on the basis of the evidence, declined to order production of any in-camera minutes (redacted or otherwise), and stated that the way to protect unit owner privacy expectations was simply to withhold, in whole, the in-camera minutes.

This would suggest that boards must now consider what any redacted minutes they provide to a records requestor may reveal and boards may wish to consider withholding the complete in-camera minutes if they have similar concerns as in the Smith case. Finally, always remember that a unit owner must be given minutes which deal with them and/or their unit (subsection 55(5) of the Act).

Legal Costs

If you have been following the CAT, you know that parties will not be awarded their legal costs except in the rarest of circumstances. This is because the CAT's Rule 33.1 requires "exceptional circumstances" before it will award legal costs. In the Bossio v. MTCC 965 case the CAT defined "exceptional reasons" as evidence that a party *"had been grossly unreasonable, or had taken positions that unduly complicated or had acted in bad faith or with malice, or took some other step beyond being unsuccessful and unreasonable."* While the CAT defined these "exceptional circumstances" it had not yet found that they existed and had not awarded any legal costs.

This changed in August of 2019 as the CAT has found exceptional circumstances in the 1507451 Ontario Ltd. v. YRSCC 1302 case. The unit owner applied to the CAT to enforce the terms of Settlement Agreement (which it had reached with the condo during an earlier CAT phase) on the basis that the condo had breached the terms of the agreement. The CAT awarded the Applicant its legal costs ($5,600) as: 1) the Settlement Agreement between the parties required the condo to pay the unit owner's legal costs; and 2) breaching a Settlement Agreement **is an exceptional circumstance** for the purpose of Rules 32.1 and 33.1. What this means for condos is be cautious when agreeing to pay a unit owner any legal costs in any Settlement Agreement and always follow any Settlement Agreements!

In the Smith case, the CAT declined to award Smith the "legal" costs he sought (approximately $67,000 for his time at $400/hour) as there was "*no basis*" for Mr. Smith to "*have any expectation of compensation at the level he is claiming*" as 1) he was not a legal representative; and 2) there were not "exceptional circumstances" in this case as both parties were responsive to the CAT process. The CAT also termed his submission "*excessive and unsupportable*".

As any condo that has been involved in the CAT process knows, there is a significant time commitment for the condo's representative, especially where there is a need to log in and respond to every message (or additional request) in the CAT-ODR system; a condo's legal costs can quickly add up. This was discussed in Smith where the CAT declined to award the condo its legal costs of almost $15,000. The condo argued that, in this case, the volume of correspondence and records requests received from Mr. Smith ought to be "exceptional circumstances" which lead to the condo's lawyers needing a lot of time to review, process and respond to all the requests/correspondence. The CAT stated that volume of correspondence and extra time needed to respond was "*not a basis upon which to award costs under Rule 33. This Tribunal is designed for self-represented parties to file their applications and represent themselves as both applicants and respondents. That means that some extra time is granted while the hearing process is explained or unfolds.*"

Anonymous Decisions

The CAT has also weighed in on its procedures for "anonymizing" its decisions, that is removing names of the applicant and the condo from the public record of the decision. Under the provisions of section 1.48 of the Act and section 2 of the regulation to the Act regarding the CAT, the CAT is required to make any order it issues available to

the public without charge on the internet in a searchable database.

In the Aquilina v Middlesex SCC 823 decision (a follow-up to an earlier CAT decision) the Applicant unsuccessfully sought to have the earlier decision anonymized on the basis of the risk of violence and/or abusive behaviour. The CAT found that the grounds asserted are an important interest but that the apprehension of violence of abuse must be "*reasonable*". On the basis of the evidence presented, including that the applicant's address was not disclosed, this apprehension was not reasonable. Further, the CAT noted that the Applicant had not asked for anonymization at the outset of the earlier case and that the reasons to remove names from a published decision must outweigh the principle that the public should have full access to decisions of the Tribunal, including the names of the parties. In Smith, Mr. Smith also sought to have his decision anonymized for reasons of "*professional reputation and livelihood*" but the CAT found that he did not raise any safety or security issues that would give rise to the need to anonymize this decision. Thus, if any party wants an anonymous decision, they must follow the CAT's rules, ask at the first opportunity to do so, and have a convincing argument to re-but the presumption of open proceedings.

Amount of Penalty – Actions of Condo and Applicant

The Verjee v. York CC No. 43 decision (where my colleague Rachel Fielding ably represented the condo) looked at how the amount of a penalty the CAT imposed was reduced by the actions of both the condo and the unit owner. The CAT ultimately awarded the unit owner a significantly reduced or "nominal" penalty of only $75.00 for one instance of the condo's non-compliance with the Act. This amount is less than the filing fees the unit owner paid.

Indeed, the CAT stated that condo "quickly replied" to other records requests and, in the case of the "late" response, the condo provided the record voluntarily during the mediation stage. The CAT member also took the unit owner's actions into account stating that "*The large volume of record requests made by the Applicant could reasonably "backlog" the Respondent and delay it addressing certain requests. In light of the Respondent's provision of the [late record] at Stage 2 – Mediation and the actions of the Applicant contributing to the delayed response, I find that a nominal penalty is appropriate in this case.*"

The CAT gave regard to its own objective of promoting healthy condominium communities and the CAT has made a statement that "actions matter" in this objective and for all of the parties to a CAT proceeding: that condos should produce any records they are required to before the Tribunal stage and unit owners should be mindful of their conduct and the impact is has on their condo. ■

This article first appeared in the Fogler Rubinoff newsletter and has been updated by the author for inclusion in CM magazine.

Gareth Stackhouse is a member of Fogler, Rubinoff LLP's Condominium Law Group and he has a broad-based condominium law practice including all facets of the *Condominium Act*, 1998, corporate governance, real property matters, and commercial contracting. foglers.com