

REVISITING THE “OPEN BOOK”¹

A Response to “Condominium Records: Still an ‘Open Book’?”

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INTRODUCTION

I have had the pleasure of reading the article, “Condominium Records: Still an ‘Open Book’?” by Rob Mullin, which was recently published in CCI-Toronto Chapter’s *Condo Voice*. In fact, I probably enjoyed it more than most readers (as Mr. Mullin delightfully puts it, “*few topics may evoke less of an emotional response*”), particularly since it was, for me, the first gauntlet thrown down in a friendly joust between me and its author.

The idea for that article arose out of a matter in which Mr. Mullin and I represented opposing parties (he, the unit owner, and me, the condominium corporation) and in respect of which the interpretation of section 55(3) of the *Condominium Act, 1998* (the “Act”) was at issue – in particular, the meaning of the closing phrase,

...for all purposes reasonably related to the purposes of this Act,

which was not included in the comparable section of the previous legislation (the “old Act”). In that situation, Mr. Mullin asked, on behalf of his client, to examine a variety of records of the corporation. I, on behalf of the condominium board, asked why.

Our position, based of those closing words in section 55(3) of the Act, was that the board of directors of the condominium was not obliged to permit the examination of the corporation’s records unless the requesting party’s reasons “*reasonably related to the purposes of the Act.*” Mr. Mullin responded that his client should not be required to give any reasons for wanting to examine the records; that the owner simply had a right to see them regardless of the reasons.

Eventually our clients’ main issues were resolved despite this disagreement, but Mr. Mullin and I (who serve together as directors of the CCI Golden Horseshoe Chapter) then decided it would be of mutual interest and enjoyment to examine the issue in greater depth in some form of point-and-counterpoint set of articles, the first product of which was his said article and the second part of which is this one.

NOT SPEAKING PERSONALLY

Because of the necessity of referring back at times to Mr. Mullin’s article and the opinions and arguments he has set out in it, in order to respond to and rebut them (which is the purpose of

¹ This article expresses my opinions at this time on certain questions of law. It should not be relied upon or referred to by anybody as legal advice. Opinions are subject to change as information increases and circumstances change. Legal advice for a given situation is always suited to that case and may not accord perfectly with generally expressed or academic opinions. This does not mean I don’t believe what I write here is correct; however, it does mean that my opinions might change and, regardless, my advice to a client in any given situation might not always be exactly as set out herein.

² I would like to acknowledge the assistance of Nelson Amaral, a lawyer at our firm, for his review of and helpful comments on the first draft of this article.

this article), it is important to point out that this “argument” represents nothing personal between me and Mr. Mullin. Though seriously treated (because the law and the issues really do matter), the discussion itself is lightly meant.

I should also clarify that neither is the disagreement between us quite so deep as the issues and ideas discussed in these articles might make it appear. I believe that Mr. Mullin and I are, in fact, in complete agreement on the fundamental point that a unit owner should have essentially “open” access to the records of the corporation, and that condominium boards really ought to have nothing, *per se*, to hide.

The difference between us can likely be narrowed down to this: Mr. Mullin takes the position, grounded in what I believe is a correct and reasonable view of the ethical underpinnings of the Act, that the owners’ right of access to condominium records is unconditional; I take the position, also based upon the ethics and principles of the Act as well as a strict interpretation of its wording, that such right is subject to certain reasonable conditions and limitations. Why I believe so is set out in this article.

KEY ISSUE

Mr. Mullin’s statement of the key issue and position taken in his article reads as follows: Referring to the above-quoted concluding words of section 55(3), he writes,

...[this] new passage ... 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,

and then adds,

[I]t 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.

He concludes, relying in part on a statement by the Ontario courts that “*the corporation and its board of directors are an open book to the members of the corporation, the unit owners,*”³ that requiring unit owners to provide reasons for wanting to examine corporate records:

- a. improperly diminishes the “open book” approach to condominium records; and
- b. undermines the consumer protection intent and purposes of the Act.

NO MORE “OPEN BOOK”? ABSOLUTELY

As my initial comment suggest, I support the practice of condominium boards of directors requiring unit owners and others to provide reasons for wanting to examine the records of the corporation based on the wording of section 55(3). My view, in a nutshell, is that this practice is necessary in order to give complete relevance, meaning and effect to that part of the Act.

³ *McKay v Waterloo North Condominium Corporation No. 23* (1992) CarswellOnt 622, per Cavarzan J. It must be noted that this case pre-dates the current legislation.

I do not believe that practice is contrary to the fundamental and “consumer protection” purposes of the Act, nor does it unreasonably or improperly diminish the owners’ entitlement to examine the records of the condominium. I do believe it was likely the intention of the legislature, in crafting section 55 of the Act, to strike a balance that restricts the “open book” concept somewhat while reinforcing the ability of unit owners to take advantage of it.

Not a Closed Book

A first point to make is that in my view the requirement to provide valid reasons for examining records does not close the “open book”. Rather, it makes the corporate records more like books in a library, which remain freely accessible to everyone within the community despite the condition of first having to show your library card.

Clearly, that analogy is not perfect: providing reasons for wanting the records is not identical in form to obtaining and showing a library card, but the issues are substantially similar; access to the material is not “closed” simply because there is a condition attached to it.

Board Has the Right to Require Reasons

I anticipate one response to the foregoing might be to say that, even if it doesn’t close the book, although section 55(3) of the Act states that owners and others are to have valid reasons for examining records, the Act does not expressly state that the board can demand those reasons before releasing them. However, I believe this is not correct.

A condominium board of directors is required to comply with the Act and *has a clear right to require such compliance from others*. See sections 119(1) and 119(3) of the Act. Therefore, the board *does* have a fundamental right under the Act to require that unit owners comply with the Act. Necessarily, this includes the right to require that they have “*purposes reasonably related to the purposes of this Act*” in order to have access to the corporation’s records. The only way a board can exercise this right is to ask for the reasons.

Denying Board’s Right Ignores Clear Wording of the Act

Even if the right of the board to require reasons were not so clearly stated in the Act, it would, in my view, be wrong to deny it.

Such denial would render meaningless and ineffective the clear requirement in section 55(3) of the Act that persons wanting access to the condominium records must do so for the purposes reasonably related to the purposes of the Act. I think it highly unlikely that this is what the legislature intended. Rather, I presume that such words were added by them to the statute with the conscious intention that they should somehow be given both meaning and effect by persons interpreting and applying the Act.

It seems to me to be erroneous to suggest that there is a viable interpretation of section 55(3) of the Act that renders the requirement expressed in its closing words ineffective. In my view, such a position simply ignores, rather than interprets, such words.

Regardless of how much one favours the principle of unit owners’ liberal access to condominium records, one cannot simply ignore the clear wording of the Act because it is not convenient or does not match what one wants to be the case. In all cases, the obligation of unit

owners and boards of directors, as well as condominium lawyers, managers and other professionals, is to seek to understand and apply the law correctly and completely as it is actually written.

No Significant Expansion of Rights

In his article, Mr. Mullin summarizes the effects of section 55 of the Act as follows:

Section 55 marked a wholesale change to [the legislation]. 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.

Although factually accurate, I believe that this comment overstates the importance of section 55 in respect of the “open book” concept.

For the most part, it appears to me that the changes brought in by section 55 compared to the previous legislation primarily serve to clarify and entrench good corporate practices relating to condominium records. This has the effect of securing certain benefits for all stake holders of condominium corporations but does not, I think, expand upon the “open book” concept.

The change that most advances the “open book” is likely the entrenched right to copies of the records (upon payment of reasonable compensation to the condominium). This can ensure greater access to the records for those who might not be able to visit the corporation or management offices to examine the originals, which the previous legislation did not provide. However, they must be able to afford the cost of labour and copying charges.

Secondarily, the \$500 penalty might sometimes make some boards less likely to unreasonably refuse to provide records, but neither this penalty nor the Act generally prohibits *reasonable* refusals. Provided a board has a “reasonable excuse” not to provide access to its records, such penalty would not apply. (It is also the case that a board that wants to refuse records “without reasonable excuse” still can if, based on a cost-benefit analysis, it presumes to come out better in the end, although this is not very likely nor would it usually be advisable.) Therefore, this too is not a significant expansion of prior existing rights.

Closing the Book Somewhat

At the same time as it provides such minor improvements to the openness or availability of condominium records, with the other hand the legislature “taketh away.”

Thus, regardless of how much the rights to copies or compensation increases unit owners’ access to records, it can only increase their access to those records they are entitled to examine; and, in regard to what can be examined, it appears that the legislature, in its drafting of section 55, has clearly and definitively moved to *restrict*, not expand, owners’ rights.

In repealing the old Act and crafting section 55 of the new, it is fairly evident the legislature elected to limit the “open book” approach. This is particularly evident having regard to section 55(4) of the Act (which had no counterpart in the old Act):

(4) The right to examine records under subsection (3) does not apply to,

- (a) *records relating to employees of the corporation, except for contracts of employment between any of the employees and the corporation;*
- (b) *records relating to actual or pending litigation or insurance investigations involving the corporation; or*
- (c) *subject to subsection (5), records relating to specific units or owners.*

From these passages, it seems obvious that the legislature did not intend to give unit owners *carte blanche* access to the corporation's records.

Having said this, it must be noted that even these restrictions do not significantly diminish the "open book" approach. They simply, and reasonably, bring it into line with well understood and accepted concepts of privacy and privilege that are essential to the ethical maintenance of the records of the condominium. In my view, the effect of the closing phrase in section 55(3) is of like effect by helping to prevent unreasonable and unethical exercises of the right to access such records.

Even if it were not the case that such restrictions are reasonable and ethical, the foregoing indicates that it is simply not a sufficient argument against the interpretation given in this article of the closing words in section 55(3), to state that the corporation's records "ought" to be an "open book". Rather, it appears simply obvious that such unfettered access is *not* what the legislature intended when drafting section 55 of the Act to replace the provisions of the former law.

GOING FISHING

A positive effect of the restrictions set out in section 55 is illustrated by considering what the courts call "fishing expeditions".

In court-room parlance, going on a "fishing expedition" means asking questions (and insisting on answers), in order to find out something of which one knows nothing now, that might enable the questioner to make a case of which he has no knowledge at the present.⁴ In short, it is the tool of cranky plaintiffs who think there ought to be a case against someone but who have no knowledge of what it is or of any facts that would prove it.

The courts of Ontario do not look favourably upon fishing expeditions. The preference is that plaintiffs (a) only bring genuine cases to court and (b) use only the proper legal discovery process to obtain and refine their evidence.

As mentioned at the start of this article, in the matter that gave rise to it the unit owner had requested copies of a broad range of corporate records for no stated reason. Although no reason was given, it seemed apparent in the circumstances that the purpose of the request was to rifle through the records in order to find some basis on which to show that the then board of directors had behaved in some improper or unethical manner. That is, the unit owner was on a

⁴ This definition paraphrases a classic statement of the idea by Lord Esher (Master of the Rolls) in *Hennessy v. Wright (No. 2)* (1980), 24 Q.B.D. 445 at p. 448, as quoted in 2004 by the Hon. Mdm. Justice Heneghan in *Intel Corp. v. 3395383 Canada Inc.*, 2004 FC 218 (CanLII).

“fishing expedition”. When challenged on this point, such purpose was readily admitted. What was problematic was that it was also readily defended.

It is fair to say that the mere fact that fishing expeditions are objectionable in court proceedings does not make it immediately obvious that it is also wrong for a unit owner to want, and to obtain, unfettered access to condominium records for the sole purpose of finding evidence to create a case against the condominium or its board. However, in my view, section 55(3) of the Act, in combination with section 55(4)(b), imports at the very least strong discouragement of this sort of thing, if not a complete prohibition against it.

Absent this interpretation of these sections, the situation would arise that a unit owner or other person requesting records is not only able but is *entitled* to hide his or her intentions in order to “catch” the condominium or board by surprise or to cause them to actually, but unwittingly, assist in making the case against them. Such circumstances are clearly unethical and improper and contrary to the order of law and justice we strive to have in this province.

The view that the provisions of section 55 of the Act should help to avoid such things is supported by the decision of the Ontario Divisional Court on appeal in *Fisher v. Metropolitan Toronto Condominium Corp. No. 596*, [2004] O.J. No. 5758. In that case, the plaintiff unit owner was denied compensation under section 55 when a condominium refused to provide records despite several requests since it was apparent at the time that litigation was contemplated by the owner, even though no action or application had commenced at the time of such refusals. In effect, where the board sensed the owner’s only purpose was to look for things to litigate, or to find evidence to bolster its otherwise unfounded allegations, the court indicated it was not wrong to deny the owner access to the condominium’s records.

WHO IS PROTECTED?

The argument was made that the practice of requiring unit owners to provide reasons for examining records before providing access to them is contrary to the essential nature of the Act as “consumer protection” legislation. A flippant response to that position would be to say, “if that is true, take it up with the legislature, it was their decision!” However, a more correct response is to say, “That is simply not true.”

To characterize the dispute as being about “consumer protection” seems to foster a false dichotomy in which unit owners are haplessly on one side and the condominium corporation/board is on the other. In my experience and understanding, this is not the intent of the Act.

While there are bases for “protecting” the unit owners from certain actions of the board, and vice versa, and provisions of the Act that clearly do so, it appears that fundamentally under the Act the board of directors itself and all of the powers given to it are *part of* the “consumer protection” afforded by the Act. In particular, the board’s power to require compliance with the Act, declaration, by-laws and rules, is an essential component of such protection.

The unit owners themselves, having regard to both their personal and collective interests, are protected when the board of the condominium complies strictly with the Act and requires such compliance of all others within the scope of its authority. This is as true of compliance with section 55 of the Act as it is with respect to all other sections of the Act.

In my experience there are unit owners who seek to use their rights to access corporate records solely for petty, frivolous and improper purposes, such as agitating and bogging down the board or management company. Others try to discover some unknown reason to start or threaten litigation, often for spite or to obtain some benefit they would not ordinarily be entitled to receive (read: fishing expedition with extortion at heart).

Very often the basis for such essentially aggressive behaviour has been the enforcement of some valid restriction against such unit owner's misuse of common elements, disturbance of neighbours or non payment of condominium fees.

Boards and managers can become harassed by such requests as well as be stymied by the constant busy-ness of producing unnecessary loads of copies for improper uses of section 55. A recent request one of our clients received requires 9 years' worth of copies of virtually every kind of record the condominium keeps. The aggravation and disruption to ordinary operation of the corporation are evident.

By requiring owners to express valid reasons for wanting to examine records, the condominium board has an opportunity to try to strike a fair balance between the unit owners' right to fair disclosure and its interest in preventing possible abuse by unreasonable and aggressive owners. Such balance might help the condominium avoid some of the problems cited above and the costs (both fiscal and otherwise) of such owners' conduct.

Having said this, when looked at objectively, the board's right to require a reason for examination of records is really just a very small and paper-thin shield against such conduct. Nevertheless it is an example of how, overall, the provisions of section 55 of the Act seek to define rights as between the condominium corporation and its members, to help protect both against abuses of entitlements or authority, and thus *undergird*, rather than undermine, the "consumer protection" purposes of the Act. To eliminate it risks both favouring and encouraging abuses of the right to examine corporation records which is ultimately to the detriment of every owner (since they all pay the costs, whether social, administrative or fiscal).

It is also important to remember that section 55 provides to mortgagees and *purchasers* of units, and their respective agents, the same rights to examine corporation records as any owner has. It is probable that when such outside parties seek to exercise that right, those who decry the board's strictness with respect to unit owners' requests, will nevertheless want it applied doubly to ensure external parties do not frivolously harass or seek to interfere in the operation or activities of the condominium.

SCARE TACTIC

As a final word, it is necessary to address the apparent strong point of Mr. Mullin's analysis, which is his reliance on *Metropolitan Toronto Condominium Corporation No. 551 v. Mani Adam* (2006) CarswellOnt 7682.

Mr. Mullin notes that in this case, determined under the current legislation and not the old Act, the court held that "[t]he statute does not... require a person to disclose his reasons for requesting the information as a condition of obtaining it." He further observes that on account of "[a] variety of entitlements [that] were refused the unit owner," a \$32,000 cost award was made against the condominium corporation.

This case is relied upon in particular to show that under current case law, interpreting the current Act rather than the old one, the courts “*will not permit the intention of the record keeper to be demanded, opting rather for the ‘open book’ concept.*”

Mr. Mullin and I appear to disagree on how to read this case and in our analysis what it imports to boards of directors with respect to section 55 of the Act.

However, it is with no disrespect to Mr. Mullin that I title this section, “Scare Tactic”. That is not meant to be a description of his intentions in using this case. It is meant only to highlight the difference of opinion between us about it. If Mr. Mullin’s analysis of this case in his article is correct, then it is scary. It would appear to significantly undermine my position in this article, and the outcome for condominium boards that refuse access to records is something genuinely to be feared. However, if my analysis of the case is correct, then it does not impose the same worries and such fear is not warranted.

Costs Award Not Related to Refusing Records

There are two key matters to address in reviewing this case for my purposes: (1), the costs award, and (2) the interpretation of section 55 of the Act.

Addressing the costs issue first, the impression can be acquired that the condominium’s refusal to provide records in this case contributed substantially to the cost award of \$32,000 against the condominium. However, I do not think this is accurate. While the refusal to give records looms large in the judgment, I do not think that it figured significantly with respect to costs.

In its judgment, the court indicates that a separate application had been made in Small Claims Court in which the unit owner was seeking the \$500 compensation set out in section 55 of the Act. The judge states that such matter will be heard in that court rather than the Superior Court where this judgment was made.

When presenting its costs award in favour of the unit owner, the court notes that a large portion of the proceedings might have been avoided if the condominium corporation had early on accepted a “prompt” and “reasonable” settlement offer made by the unit owner. From the judgment it appears fairly certain that it was the corporation’s refusal to settle the matter, not its refusal of a “*variety of entitlements*” to the unit owner, that in large part contributed to the costs award against it.

In addition, the court refers several times in its judgment to the generally discourteous and unreasonable conduct of the condominium board, its deceptive or misleading acts, and its failure to apply common sense. These impressions of the board likely also influenced the court’s decision with respect to costs.

Therefore, in my view the lessons to be taken from this case do not include that the court might penalize a corporation when the board, for good reason, refuses to grant access to records, but that it might do so,

- (a) where the board or management conducts itself in a generally unreasonable and untrustworthy manner contrary to the Act and common sense, whether with respect to condominium records or any other matter, and/or

- (b) what is likely more to the point in this judgment, where in the course of litigation the tactics or strategy of a party are such that it prevents early and reasonable settlement of the case, thus unnecessarily increasing the costs and aggravation of all parties.

Judgment Not About Section 55

With respect to the interpretation of section 55 of the Act, it must be noted, as mentioned above, that the judgment indicates that there was a separate Small Claims Court hearing on the matter of whether access to condominium records had been denied under section 55 of the Act. The court states:

The denial of access is an issue to be decided in Mr. Adam's Small Claims Court application. If he is correct, there is a statutory remedy in the \$500 fine.

These statements not only indicate that the matter of access to records under section 55 likely did not figure in the court's costs award, but also that it did not really figure in the court's judgment of this matter at all. Rather, this court appears to defer the whole matter to the determination of the Small Claims Court where an application respecting that section was to be heard.

The question then arises: what should we do with the court's statement that "[t]he statute does not... require a person to disclose his reasons for requesting the information as a condition of obtaining it"? If the court was not dealing with the question of whether section 55 had been breached, then what in the world was it talking about? On careful reading of the judgment itself it becomes clear that at this point the court is not speaking of section 55 of the Act at all but is actually and expressly referring to section 77.

Section 77 of the Act states:

On the request of any person, the corporation shall, without fee, provide the names and address for service of the directors and officers of the corporation, the person responsible for the management of the property of the corporation and the person to whom the corporation has delegated the responsibility for providing status certificates.

The difference between this section and section 55 is immediately obvious. This section does not contain the phrase, "for all purposes reasonably related to the purposes of this Act." It is also limited to specific information about the corporation board and management, and is clearly intended to facilitate the ordering of status certificates (though other purposes are not excluded).

It appears, then, that this case can easily be distinguished from almost any application relating to section 55 of the Act, simply on the basis that it doesn't really deal with it. However, it would not be honest of me to state that this is where the story ends.

The fact is that the judge in this case also makes a more general statement in relation to the unit owner's many refused requests for records which do appear to have been made under section 55, though the court never cites that provision of the Act.

In respect of such refusals, the court states that the condominium manager was "in error" for requiring the owner to first give a reason for wanting to examine the corporation's records. This statement is one upon which someone arguing the position in Mr. Mullin's article could in all

good faith seek to rely. Nevertheless, in my view it is not actually a strong enough base to build a case upon. There are at least two reasons for this.

First, it is not clear from the judgment that in making this statement the court referred itself to the actual text of section 55 of the Act. Nor does it appear to have considered any of the issues or arguments like those raised in this article. Indeed, the impression is given that the court likely relied only on its reading of section 77 to interpret section 55 (if it is seeking to interpret section 55 at all) which, given the significantly different wording of the two sections, would render this part of the court's judgment erroneous.

Second, it is also not clear what was the basis for the courts assessment of the manager's "error". While the court states the manager was in error to require a statement of reasons from the owner, it is not explained whether this was due to, for example, an interpretation of the statute matching that in Mr. Mullin's article, or simply because the owner's reasons were in fact already stated or blatantly obvious in the circumstances. Anything stated now on this point, without certain knowledge of the evidence that was delivered in court, is purely speculative. The point simply remains that it is entirely unclear that the manager's error constituted a breach of section 55 of the Act. The court does not say anything about this.

These things considered, it appears likely that in this case the court had not turned its full attention to the correct interpretation of section 55. In all probability, this section of the Act was not examined in any depth during the trial, since the court and parties clearly expected the matter to be dealt with through the plaintiff's Small Claims Court application. Therefore it seems to me that the issue of the interpretation of section 55(3) is still left for another court, in a later application, to determine.

CONCLUSION

The end of all the foregoing is this: Notwithstanding a reasonable desire to protect the right of a unit owner to liberal access to condominium records (which in the majority of cases is still fully and completely to be respected under the Act), it is not appropriate in service of that cause to disregard those provisions of the Act that clearly and deliberately, and in my view reasonably, restrict the exercise of that right.

In a more general way, we can say that every right may only be exercised within its proper bounds, and, with respect to legal rights, it is the right and privilege of the legislature to define their limits, which I believe has clearly been done in section 55 of the Act with respect to so-called "open book" access to condominium records.

And, practically speaking, what are boards and managers to do with this information? In my opinion the field remains open. At some point, some court will come down more clearly and decisively on the issues discussed in this article and Mr. Mullin's. That judgment will likely indicate whether the court will go his direction or mine, and at that point the law might be more or less fixed. For now, I believe it is still fluid enough to permit any board or manager to do what he or she in good faith believes is right (subject to legal counsel) in any particular circumstance.