Revisiting the "Open Book"

A Response to "Condominium Records: Still an 'Open Book'?" [1]

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Introduction

It is likely that I enjoyed reading Rob Mullin's article, "Condominium Records: Still an 'Open Book'?" (*CondoVoice*, Fall 2007) more than most readers[3], since that article was the first gauntlet thrown down in a friendly joust between the two of us.

Mr. Mullin and I first met representing opposing parties in regard to a request by his client for copies of (my client) the condominium corporation's records. The issue came down to an interpretation of section 55(3) of the *Condominium Act, 1998* (the "Act") – 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").

My client's position was that the board of directors 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 was not required to give any reasons.

Eventually our clients' main issues were resolved despite this disagreement, but Mr. Mullin and I (who now serve together as directors of the CCI Golden Horseshoe Chapter) decided it would be of mutual interest and enjoyment to examine the issue in greater depth, resulting first in his article and now this response.

The initial version of this article is a lengthy essay that was handed out at a recent CCI Level 200 course in Kitchener along with a copy of Mr. Mullin's article. For publication, however, the article has been significantly reduced. The complete text can be found on our firm's website at *http://www.cklegal.ca/doc/Revisiting_the_Open_Book_Longversion.pdf*.

It might be important to point out that this argument is not a personal one between Mr. Mullin and me. Lawyers can disagree pretty vehemently on many points of law without consequence to personal or professional relationships. Neither is the disagreement between us quite so deep as these articles might make it appear. I believe Mr. Mullin and I agree, in fact, that unit owners should have essentially "open" access to the records of the corporation, and that condominium boards really ought to have nothing, *per se*, to hide. In my view, however, this does not invite us to disregard the limitations on such access that are clearly set out in the legislation.

Arguments and Conclusions

Our disagreement can be narrowed down to these points:

MULLIN: Mr. Mullin argues that the owners' right of access to condominium records is or ought to be unconditional. Therefore, he writes in his article,

> *[This] new passage [meaning, the closing words of section 55(3)]… 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…*
>
> *[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.*

Relying on a statement by an Ontario court that *"the corporation and its board of directors are an open book to the members of the corporation, the unit owners,"* [4] he concludes 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.

In addition, Mr. Mullin argues that in fact the legislature intended section 55 to expand the "open book" concept referenced in such earlier case law.

ME: I take the position that the owner's right of access to examine condominium records is subject to certain reasonable conditions and limitations that are set out in the Act; and that:

a) it was the intention of the legislature, in drafting section 55, to strike a balance that both reasonably restricts the "open book" and reinforces the ability of unit owners to take advantage of it;

b) it is necessary to require owners to give reasons for wanting to examine records in order to give relevance, meaning and proper effect to section 55 of the Act; and

c) such practice is not contrary to the "consumer protection" purposes of the Act and does not unreasonably diminish unit owners' entitlement to examine records of the condominium.

> I believe Mr. Mullin and I agree, in fact, that unit owners 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 bases for my views are summarized in the following points:

1. Board Has the Right to Require Reasons

- Although section 55 does not expressly state that the board can demand reasons before providing access to records, a condominium board 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).
- This necessarily includes the right to require compliance with section 55(3), including that owners 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.

2. Denying Board's Right Ignores Clear Wording of the Act

- A denial of this right renders meaningless and ineffective the closing words of section 55(3) of the Act.
- A proposed interpretation of section 55(3) that renders the requirement expressed in its closing words ineffective in my view only ignores, rather than interprets, such words.
- One cannot simply ignore the clear wording of legislation because it is not convenient or consistent with one's personal views. It should be presumed that those words were added to section 55(3) by the legislature with the intention that they should somehow be given both meaning and effect by persons interpreting and applying the Act.

3. No Significant Expansion of Rights

- The changes brought in by section 55 compared to the relevant provisions of the old Act serve to clarify and entrench good corporate practices relating to condominium records, but do not expand significantly the "open book" concept. They only marginally support it by:
  a) entrenching a right to copies of the records upon payment of reasonable compensation; (This provides greater access to the records for those unable to visit the corporation or management offices to examine the originals. However,

this is the minimum reasonable improvement since they must be able to afford the cost of labour and copying charges) and

b) charging a $500 penalty to boards that fail to provide access to records *"without reasonable excuse"*. (This might make some boards less likely to unreasonably refuse to provide records, but this does not prohibit *reasonable* refusals. Also, a board that wants to refuse records unreasonably still can if, based on a cost-benefit analysis, it presumes to come out better in the end, although this is not usually going to be advisable.)

4. Closing the Book Somewhat…

- In repealing the old Act and crafting section 55 of the new, it is evident the legislature elected to limit the "open book" approach.
- The restrictions in section 55 overall simply, and reasonably, ensure that unit owners' access to records is to be kept in line with well understood and accepted concepts of privacy and privilege that are essential to the ethical maintenance of such records.
- Particularly note section 55(4) of the Act, which had no counterpart in the old Act, specifically restricts access to three categories of document making it clear that the legislature did not intend to give unit owners carte blanche access to the corporation's records.
- Such restrictions are consistent with, and support, the well established principle of Ontario courts opposing "fishing expeditions" – the practice of 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.[5] This view 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.[6]

5. …But Not Entirely

- The requirement to provide valid reasons for examining records makes such records like books in a library: freely accessible to everyone on condition only of having to show your library card. The analogy is not perfect, but the point is substantially right: access to the records is not "closed" simply because there is a condition attached to it.
- Requiring a purpose to be stated that is consistent with the purposes of the Act is not an onerous demand.

6. Consumer Still Protected

- Requiring unit owners to provide reasons for examining records before providing access to them is not contrary to the "consumer protection" purposes of 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. 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 are best 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.
- Section 55 helps protect all owners from the costs and community disruptions created by unit owners who seek to use their rights to access corporate records solely for petty, frivolous and/or other improper purposes.

MTCC No. 551 v Mani Adam – Properly Understood

Mr. Mullin's analysis relies heavily on *Metropolitan Toronto Condominium Corporation No. 551 v. Mani Adam* (2006) Carswell Ont 7682 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."* In the case, a significant costs award was granted against a condominium corporation that had, amongst other things, refused access to condominium records by a unit owner when requested.

Mr. Mullin's argument centers upon the court's statement that, *"the statute does not… require a person to disclose his reasons for requesting the information as a condition of obtaining it."*

I disagree with Mr. Mullin's reading of this case and believe that it does not alter or affect my interpretation of section 55 of the Act.

First, in my view the condominium's refusal to provide records in this case did not contribute substantially to the cost award of $32,000 against the condominium. It appears fairly certain that it was the corporation's refusal to settle the matter when a reasonable settlement was possible that resulted in the court's significant costs award against it. In addition, the court refers to the generally discourteous and unreasonable conduct of the condominium board (including deceptive or misleading acts) which also appears to have influenced the court's decision on costs.

The court noted a separate application had been made in Small Claims Court in which the unit owner was seeking the statutory remedy of $500 compensation set out in section 55 of the Act. The judge states that such matter would be heard in that court and not decided by this one. Such statements indicate that not only did the matter of access to records under section 55 not figure in the court's assessment of costs in this case, but it also did not really figure in the judgment at all. In respect of section 55, the court expressly defers to the Small Claims Court where an application was already filed.

So, what was the court referring to when it stated in this judgment that, *"the statute does not…require a person to disclose his reasons for requesting the information as a condition of obtaining it"*? 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 differences between this section and section 55 are immediately obvious:

- This section does not contain the phrase, "for all purposes reasonably related to the purposes of this Act"; and
- This section deals with only narrow and specific items of information. It is clearly primarily 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 really doesn't deal with it.

Where the court speaks more generally about the unit owner's right to access records, it never cites section 55, and it appears that the court did not refer itself to the actual text of section and provides no analysis of it in this case. 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

Every right of any kind can only be properly exercised within certain bounds. With respect to legal rights, it is the right and privilege of the legislature to define their limits. I believe this has been done in section 55 of the Act with respect to so-called "open book" access to condominium records.

Therefore, notwithstanding a reasonable desire to protect the right of a unit owner to liberal access to condominium records, which I agree is consistent with the overall purposes of the Act, it is neither correct nor appropriate to disregard those provisions of the Act that clearly, deliberately, and, in my view, reasonably restrict the exercise of that right.

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[1] This article expresses my opinions on certain questions of law. It should not be relied upon or referred to by anyone 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 perfectly accord 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 when preparing the full-length version of this article.

[3] As Mr. Mullin delightfully put it, "few topics may evoke less of an emotional response."

[4] 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.

[5] 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).

[6] In this case, decided under the current legislation, the plaintiff unit owner was denied compensation under section 55 when a condominium refused to provide records despite several requests. The court's decision was in part based on the fact that it was apparent at the time of such requests 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 merely 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. ■