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## Records Requests

# Early CAT Decisions Answer Big Questions

CAT Was Created to Enhance Condominium Unit Owners' Access to Records Within a Reasonable Time, and at a Reasonable Cost.



On November 1, 2017, a new legal process came into effect in Ontario whereby a condominium unit owner could apply to the Condominium Authority Tribunal (CAT) to compel his or her condominium corporation to provide records to the owner in accordance with section 55 of the Condominium Act, 1998.

The legislature's intent, at least in part, in creating CAT was to enhance condominium unit owners' access to records within a reasonable time, and at a reasonable cost.

One of the key features of CAT is that it publishes its case decisions online. Now finally, the first five CAT decisions have been posted online. They were definitely worth the wait.

These early decisions address some of the most interesting and important questions in this area of law.

This article discusses the highlights from four of the first five case decisions.

The fifth case is not discussed, as it dealt with whether a unit owner was entitled to bring an application to CAT in light of past court orders made against her.

### **Legal Invoices: Remillard v. Frontenac Condominium Corp. No. 18, 2018 ONCAT 1**

**Question #1:** *Is a condominium corporation entitled to "redact" its legal invoices before providing them to a requesting owner?*

Most legal invoices contain two types of information: (1) they set out the cost of the legal services provided for a particular matter; and, (2) they describe the legal services, often in the form of the lawyers' dockets (time entries).

Lawyers' dockets can be very detailed. They may record who is contacting the lawyer, what instructions are being given to the lawyer, and may even refer to legal strategy or advice.

With respect to the first type of information, the cost of professional services is a financial record of the corporation, which owners are entitled to examine.

The more difficult question, which arose in the present case, is whether a requesting owner is entitled to examine the invoice details, which may include the lawyers' dockets. In *Remillard*, the legal invoices being requested related to a Small Claims Court Action that had concluded.

The Tribunal determined that certain invoice details could be redacted (blacked out) by the condominium because of the "actual litigation" exemption to an own-



## In Mohamed, the condominium corporation refused the owner's request to examine the list of owners' and mortgagees' names and addresses for service on privacy grounds.

er's right to examine records, as set out in section 55(4)(b) in the Condominium Act, 1998.

The "actual litigation" exemption continued to apply even after the litigation was over. In this regard, the Tribunal relied on the case of *Fisher v. Metropolitan Toronto Condominium Corp. No. 596, 2004 CarswellOnt 6242*, which held that one of the purposes of the "actual litigation" exemption is to maintain solicitor/client privilege between a condominium corporation and its lawyer.

**Note:** *In the writer's view, a condominium corporation should be entitled to refuse any request to examine records that would contravene the corporation's common law legal right to solicitor/client privilege. In this regard, the scope of solicitor/client privilege is significantly broader than those circumstances involving actual or contemplated litigation. The extent to which a condominium corporation may assert solicitor/client privilege as a valid reason for refusing an owner's request for records where there is no underlying actual or contemplated litigation will likely be the subject of several future Tribunal decisions.*

**Question #2:** *Is the requesting owner required to pay for the cost of having the condominium corporation's lawyer redact legal invoice details?*

A condominium corporation is entitled to charge a requesting owner for the reasonable labour cost of responding to the owner's request for records.

In *Remillard*, where there was special legal knowledge required to redact the le-

gal invoices (i.e. to identify and remove the privileged invoice details), the Tribunal fixed the reasonable labour rate at \$130.00 per hour. This fee was based on the actual hourly rate of an articling student in the condominium corporation's lawyer's office.

**Note:** *In the writer's view, a junior lawyer's hourly rate might be justified if the condominium corporation's lawyer's office did not have an articling student. A higher hourly rate might also be warranted in larger urban areas in accordance with the market rates for legal services generally.*

### **Reserve Funds: Berman v. York Condominium Corp. No. 99, 2018 ONCAT 2**

**Question #3:** *Is a condominium corporation obligated to explain or provide additional detail in respect of its financial records to a requesting owner?*

In *Berman*, the requesting owner sought records (and information) relating to the financial impact of repairs to the property on the condominium corporation's reserve fund.

The Tribunal held that it was reasonable for the condominium corporation to reply to the owner's request that the financial effect of these expenditures would be set out in the corporation's next reserve fund study update (which was not due for another 18 months). This is because the nature of a reserve fund study is that it is updated periodically to account for past expenditures and changes in the physical condition of the property.

Thus, a condominium corporation is not

obligated under section 55 of the Condominium Act, 1998 to explain or provide additional detail in response to a requesting owner's concern that a particular financial record does not contain the specific information that the owner was hoping to ascertain.

**Note:** *The Berman decision appears to be in line with the case of York Condominium Corp. No. 60. v. Brown, 2001 CarswellOnt 3470, in which Justice Kitley held that:*

*"32. The unit owner is entitled to access to records. She is not entitled to engage in an investigation and demand responses from Directors, Officers or managers. The unit owner's rights do not include the right to make written interrogatories and then complain when answers are not provided or not provided in what the unit owner considers a timely manner. To the extent that [the unit owner] has demanded access to information (as opposed to access to records), she has exceeded any right under the Act, Declaration or rules."*

*In the writer's view, while there is no obligation to provide "information" as opposed to records to a requesting owner, if a condominium corporation does elect to provide "information" to an owner, then it is obligated to reasonably ensure that the information that it provides is accurate, and should consider including an appropriate disclaimer with respect to the information.*

### **The List of Owners: Mohamed v. York Condominium Corp. No. 414, 2018 ONCAT 3**

**Question #4:** *Is the list of owners' and mortgagees' names and addresses for service exempt for privacy reasons (i.e. because it contains the personal information of the other owners)?*

In *Mohamed*, the condominium corporation refused the owner's request to examine the list of owners' and mortgagees' names and addresses for service on privacy grounds.

In so doing, the condominium corporation may have been relying on past legal precedent, which held that owners did not have an automatic right to examine the list of owners' and mortgagees' names and addresses for service, and that a valid reason for the request was required to

outweigh the privacy interests of the other owners.

The problem for this condominium corporation was that the list of owners' and mortgagees' names and addresses for service is now a "core record" under the new legal regime. A requesting owner is entitled to examine and receive copies of core records under a more favourable set of rules (from the owner's perspective). The pre-November 1, 2017 legal provisions with respect to owners requiring a proper purpose for requesting a record have also been amended. In this regard, the Request for Records form now includes a standard-form statement from the owner that the request is being made for a proper purpose.

As a result, the old case law and related principles with respect to examining the list of owners is no longer applicable.

Under the new legal regime, a condominium corporation is required, upon receiving a Request for Records, to provide the requesting owner with the condominium corporation's list of owners' and mortgagees' names and addresses for service just as it would any other core record.

**Question #5:** *What is a reasonable hourly fee for the non-specialized labour associated with providing copies of records to a requesting owner?*

A condominium corporation is entitled to charge a requesting owner photocopying expenses of \$0.20 per page, as well as the labour cost associated with providing the copies.

In the Mohamed case, where there was no special knowledge required to redact the records for privacy or other legal reasons, the Tribunal fixed the reasonable labour rate at \$31.50 per hour inclusive of HST based on this amount being double the current minimum wage of \$14.00/hour plus HST. In other cases (such as the Remillard case), where specialized knowledge is required to review and redact the records, then the applicable labour rate may be higher.

The Tribunal also held that photocopying and labour costs are to be paid to the con-

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dominium corporation, not to the property manager.

**Question #6:** *If the Tribunal determines that a condominium corporation has failed to provide records to a requesting owner without a reasonable excuse, then will the condominium corporation be ordered to pay the maximum penalty of \$5,000.00?*

Under the old legal regime, the penalty for failing to provide records to a requesting owner was \$500.00. Under the new regime, the Tribunal determines the financial penalty to the condominium corporation for failing to comply, as may be appropriate, up to a maximum of \$5,000.00. Note that this penalty is paid by the condominium corporation to the requesting owner, not to CAT.

In Mohamed, the condominium corporation was determined to have willfully disregarded its legal requirement to provide records to the requesting owner, but was only ordered to pay a penalty to the owner of \$1,000.00, and to pay legal costs to the owner of \$125.00.

The maximum penalty will only be ordered against a condominium corporation for the "most egregious or improper conduct".

**Missing and Future Records: Micieli v. Toronto Standard Condominium Corp. No. 1753, 2018 ONCAT 5**

**Question #7:** *Is it a "reasonable excuse" (i.e. a valid legal defence) if a record cannot be provided to a requesting owner because*

*it has gone temporarily missing?*

In Micieli, the Tribunal held that the condominium corporation's failure to provide an owner with records that were temporarily missing because of a change in the property manager was a reasonable excuse, as long as the corporation was making a meaningful effort to locate the missing records.

**Question #8:** *Does a requesting owner have the right to examine the condominium corporation's audited financial statements before the statements are presented to all owners at the Annual General Meeting?*

The Tribunal held that the condominium corporation was not required to provide the requesting owner with the audited financial statements for the current fiscal year prior to the Annual General Meeting in which the statements were to be presented to all owners.

**Note:** *In the writer's view, the same legal principle may be applied to other records, such as unapproved meeting minutes (among others), that must eventually be distributed to all owners.*

### Conclusion

As can be seen from the above case summaries, these early decisions have provided an abundance of useful information for condominium managers, directors, and unit owners.

As the CAT case law continues to develop, our collective understanding of the new legal regime will increase, and responding to records requests will become easier and more familiar for all parties.