

TO 88334/09

**Superior Court of Justice
Toronto Small Claims Court**

BETWEEN:

Michael Lahrkamp

Plaintiff

and

Metropolitan Toronto Condominium Corp. No. 932
Defendant

Plaintiff in person

J. Fine, Solicitor for the Defendant

Judgment

The plaintiff in this action, pursuant to section 55 of the Condominium Act ("the Act") seeks damages of \$500.00 based upon the alleged failure of the defendant to provide certain records set out in the plaintiff's amended statement of claim. The plaintiff also seeks production of these records for examination. The defendant takes the position that the plaintiff is not entitled to the records

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because:

- (1) the Act inferentially requires the plaintiff to provide a reason for every requested record (see subsection 55(3));
- (2) the Act does not allow for the release of certain exempted documents (see subclauses 55 (4)(b) and 55(4)(c)); and
- (3) the Act permits refusal of records if a reasonable excuse exists for not providing the said records (see subsections 55(8) and 55(10)).

There appears to be no dispute that the plaintiff's requests for records were made in writing, and the plaintiff requested in writing the \$500.00 penalty provided by subsection 55(8) of the Act.

The plaintiff and defendant had widely divergent opinions as to how subsection 55(3) should be interpreted. The defendant felt that every request for records must be accompanied with a reason for the requested records, which reasonably relates to the purposes of the Act. The plaintiff opined that the records were an "open book" for the condominium owners.

I do not agree with the blanket proposal of the defendant that every request for documents must be accompanied by reasons for the request. While I agree with the defendant's position that the Board is charged with the duty of "balancing the private and communal interests of the unit



owners”, I do not believe that every request automatically requires a reason for the request. A reason reasonably related to the purposes of the Act for some requested documents may be self evident from the surrounding facts, or may be reasonably inferred from the nature of the record requested. The right of a corporation to refuse records may be appropriate where the actual motivation behind the request is being challenged, or the burden and expense to the corporation is in issue. To create a universal rule to apply to every conceivable request is impossible. It is necessary to look at the facts surrounding each request to determine whether the condominium corporation had a reasonable excuse in not providing the records for examination.

Each record requested by the plaintiff will be considered separately unless otherwise noted.

1. Front Lobby Expenditures, Letters of Representation and 2006

General Ledger

The request for the above noted items clearly involve a significant burden and expense to the defendant. The plaintiff refused to provide a reason for these documents claiming that the Act did not require him to provide one. Despite the fact that the defendant followed proper accounting practices as set out in the Act, the evidence at trial showed

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that the plaintiff wanted to satisfy himself beyond standard auditing procedures that everything was in order. From that perspective the plaintiff was on a pure "fishing expedition" without a shred of evidence to support his suspicion of impropriety in regard to the front lobby expenditures, any other audited expenditure, or the letters of representation. The weak basis for the requested records together with the burden on the defendant, both in time and money, allows me to conclude that the defendant had reasonable excuse not to provide the aforementioned named records.

2. Records Relating to Suite 1407 (the Plaintiff's residence)
from 2003

I find that the defendant had a reasonable excuse to deny these records on the basis that a general search would have been expensive and too time consuming for the defendant. The plaintiff again did not provide reasons to counter the defendant's position in denying the records.

3. Owner List

The request for the owner list was properly denied by the defendant. Subclause 55 (4) (c) as a general rule exempts the right to examine records relating to specific units or owners. The plaintiff's reason for wanting the list was described as a need to communicate with others.

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The reason provided was clearly too vague and infringes on the privacy rights of the communal owners.

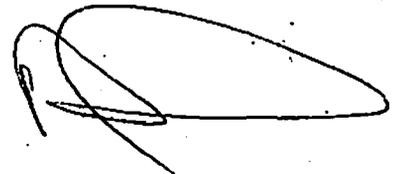
Before dealing with the remaining record requests, it is necessary for me to comment on the exception in subclause 55(4)(b) as discussed in the Divisional Court case of Fisher v. Metropolitan Toronto Condominium Corp. 596 2004 CarswellOnt 6242. The court in that case stated that the litigation privilege in subclause 55(4) (b) can be claimed if litigation was being contemplated by the party requesting the records, but that the privilege applied only to records that related to the contemplated litigation. The facts of that case are clearly distinguishable from the facts of this case. In Fisher, the court was satisfied on the facts that the requested records sought related to litigation that was being contemplated by the plaintiff at the time the request was made, and therefore were exempt under subclause 55(4)(b).

3. Proxies and Ballots used at the AGM of 2009 and 2010

I am unable to conclude on the evidence that the request for proxies and ballots are connected to the plaintiff's desire to commence litigation as alleged by the defendant. Although the defendant attempted to portray the plaintiff as a litigious person, I cannot

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conclude on a balance of probabilities that the examination of these records in itself is being done for the purpose of commencing litigation. The plaintiff made it clear in his e-mail of August 18th, 2009 that he wanted the proxies and ballots for "validation of election results" (see Exhibit 12, Tab 1, page 53). This statement alone does not allow me to conclude that litigation was likely to ensue. The reason provided was valid and inferentially applied to the plaintiff's request for the year 2010 as the plaintiff was an unsuccessful candidate for the Board in 2009 and 2010. The 2010 meeting had a significant number of proxies (75-80). The plaintiff's worry about the 2009 results stemmed partially from his concern over the April 17th, 2009 newsletter referencing the 2009 Annual General Meeting (AGM) where the plaintiff is described as somebody who if elected would be virtually impossible to work with. The defendant took the position that the plaintiff waived his right to complain regarding the proxies since he was given an opportunity to examine the said proxies but chose not to do so. The plaintiff claimed that his right to examine was subject to an improper condition, that being that he had to review the proxies in a separate room thus missing the AGM. I am not prepared to accept the evidence of the plaintiff that the defendant was

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given an unconditional choice to review the proxies and therefore the defendant cannot rely on the defence of waiver or estoppel.

Furthermore, I find that 'Rules of Order' as set out in 'Nathan's Company Meetings' "are guidelines only, and as such I am not convinced that the Rules of Order set out in that text have universal applicability to the facts at hand.

5. Notices of House Rules

Subsection 58(6) of the Act entitles owners to a notice of a made, amended or repealed house rule. Accordingly, the entitlement of the plaintiff to such a record is an example of a request where a reason should not initially have to accompany the request. The plaintiff's concern about the validity of the house rules was evident to the defendant, when the defendant was unable to satisfy the plaintiff of the existence of a documented house rule regarding the restriction on dogs, and the inability of the defendant to properly explain away the discrepancy in two differently worded rules concerning the number of cats allowed. The defendant was unable to provide me with a reasonable excuse for not providing records of the house rules to the plaintiff.

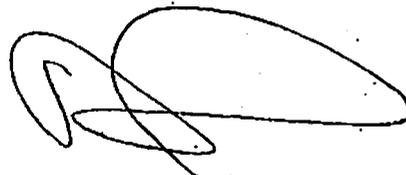
6. Board of Directors Meetings – December 4, 2007 to Present

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The availability of minutes of the Board meetings seems so fundamental to the rights of the individual unit owners, that I see no basis initially that a reason should be provided. If the corporation claims to have a reasonable excuse not to provide these records then they must establish a foundation to refuse the request (e.g. communal rights are being infringed, or a statutory exemption applies). The evidence does not disclose that the defendant had a reasonable excuse to refuse the plaintiff's request for the minutes in question.

The present action could have been avoided had the plaintiff and defendant been able to communicate with each other in a manner which would have allowed them to appreciate each others concerns, and the basis for the position they were taking. The legislation does not specifically require a reason for every request, nor a reason for every refusal of a record. Suffice it to say, that in order to avoid a judicial determination under subsections 55(8) and 55(10), each side must be prepared to have a rational, open and sympathetic dialogue of their respective potential competing interests. Without such a dialogue, avoidance of a court application is likely to be remote.

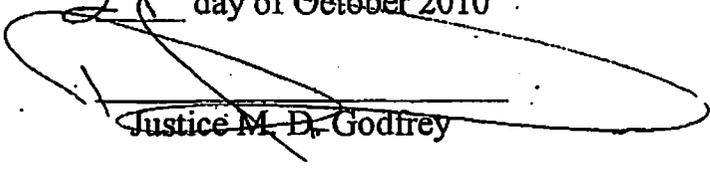
Based on the foregoing I order as follows:

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- (a) Judgment for the plaintiff for \$500.00 plus court costs of \$175.00 and prejudgment interest at court rate from September 1, 2009; and
- (b) The defendant to produce for examination the proxies and ballots used at the AGM of 2009 and 2010, the minutes of the board of directors meeting from December 4, 2007 to the present and all notices of house rules as provided in subsection 58(6) of the Act.
- All such records are subject to the orders made by Justice Backhouse dated April 28, 2008.

Dated at Toronto this


day of October 2010


Justice M. D. Godfrey

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