

ARE A CONDOMINIUM CORPORATION'S RECORDS AN "OPEN BOOK"?

1. Section 21 of the previous legislation (the "Old Act") provided as follows:

21. The corporation shall keep adequate records, and any owner or agent of an owner duly authorized in writing may inspect the records on reasonable notice and at any reasonable time.

2. In *McKay*¹, which was the leading case *under the previous legislation*, Justice Carvazan held that a condominium corporation's records were an open book subject to certain limitations to a unit owners right to inspect records:

Section 21 of the Condominium Act (Ont.) requires that a condominium corporation maintain adequate records, and that any owner or owner's agent is authorized to inspect such records on reasonable notice and at any reasonable time. The interpretation of the right provided in s. 21 must be viewed in the context of the entire Act. A condominium unit owner is entitled to inspect all of the records of a condominium corporation in which he or she owns a unit, subject only to legitimate claims of privilege or confidentiality. [Emphasis Added]

3. The right to inspect records relates to a unit owner's right to access those records. A right to inspect does *not* include the right to demand *explanations, responses or information* from the board to justify their actions. This issue was addressed succinctly by Kiteley J. in *York Condominium Corporation No. 60 v. Brown*², (which case was subsequently appealed, but not on this issue.)

¹ *McKay v. Waterloo North Condominium Corp. No. 23*, 1992 CarswellOnt 622

² *York Condominium Corp. No. 60 v. Brown*, 2001 CarswellOnt 3470
York Condominium Corp. No. 60 v. Brown, 2003 CarswellOnt 793

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 Smithers has demanded access to information (as opposed to access to records), she has exceeded any right under the Act, Declaration or rules. [Emphasis Added]

4. On May 5, 2001, the previous legislation was repealed and the *Condominium Act, 1998* (the "New Act") came into force. To give the Court an idea as to the extent of the sweeping changes, the Old *Act* contained 60 sections and the New *Act* contains 183 sections.
5. With respect to the inspection of records, s. 55 of the New *Act* replaced s. 21 of the Old *Act* and actually restricted the rights of unit owners to inspect a condominium corporation's records in the following manner:
 - a. there were specific exceptions to the right to require an inspection of the records (55(4))³;
 - b. the inspection must be for a purpose "reasonably related to the purposes of this *Act*"⁴; and,

³ 55(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

⁴ 55 (3) Upon receiving a written request and reasonable notice, the corporation shall permit an owner, a

- c. the *Act* permits a condominium corporation to refuse to produce records if it has a reasonable excuse.⁵ Even if the condominium corporation refuses to permit an owner to examine records, the Court still has a discretion as to whether it will make such an order.
6. In addition, additional unit owner protections were added to the New *Act* which served to balance the restricted rights of disgruntled/curious unit owners, e.g.;
- a. The New *Act* required that all condominium corporations appoint an auditor⁶ (except in certain circumstances⁷) whereas under the old *Act*, condominium corporations with less than 25 residential units were not required to appoint an auditor⁸;
 - b. additional provisions were added regarding auditors including:
 - i. the right of an owner to apply to court for an order appointing an auditor⁹;
 - ii. the duty of a condominium corporation to give notice to an auditor that is appointed¹⁰;
 - iii. qualifications of who can act as an auditor¹¹;

purchaser or a mortgagee of a unit or an agent of one of them duly authorized in writing, to examine the records of the corporation, except those records described in subsection (4), at a reasonable time for all purposes reasonably related to the purposes of this Act.

⁵ s. 55(10) of the *Condominium Act, 1998*

⁶ s. 60(1) of the *Condominium Act, 1998*

⁷ s. 60(5) of the *Condominium Act, 1998*

⁸ s. 34(11) of the *Condominium Act, 1990*

⁹ s. 60(3) of the *Condominium Act, 1998*

¹⁰ s. 60(4) of the *Condominium Act, 1998*

¹¹ s. 61 of the *Condominium Act, 1998*

- iv. detailed documentation that must be included as part of the financial statements¹²
 - c. amendments were made to clarify unit owner disclosure and voting re changes to the common elements and in the assets of the condominium corporation¹³;
 - d. provisions regarding the requirement for a reserve fund were expanded including the requirement for a periodic reserve fund study¹⁴, and restrictions on where reserve fund monies can be invested¹⁵;
 - e. a right for a unit owner to apply to court for the appointment of an administrator¹⁶;
 - f. expanded grounds to appoint an inspector¹⁷;
 - g. a right for a unit owner to apply for an oppression remedy order¹⁸; and,
 - h. an expanded offences section¹⁹.
7. In addition, the *New Act* contains the following protections regarding the audit process:
- a. the audited financial statements must be prepared in accordance with generally accepted accounting principles²⁰;

¹² s. 66(2) of the *Condominium Act, 1998*

¹³ s. 97 of the *Condominium Act, 1998*

¹⁴ s. 93, 94 and 95 of the *Condominium Act, 1998*

¹⁵ s. 115(5) – 115(8) of the *Condominium Act, 1998*

¹⁶ s. 131 of the *Condominium Act, 1998*

¹⁷ s. 130 of the *Condominium Act, 1998*

¹⁸ s. 135 of the *Condominium Act, 1998*

¹⁹ s. 137 of the *Condominium Act, 1998*

- b. the auditor is required to make such examinations as are necessary in order to make the required annual report²¹;
 - c. the board of directors is required to approve the audited financial statements²²;
 - d. the auditor has the right of access to all records of the condominium corporation without exception²³;
 - e. the auditor's report must contain such statements as the auditor deems necessary if the financial statements are not in accordance with the requirements of the *Act*²⁴;
 - f. the board of directors is required to place before every annual general meeting the financial statement and the auditor's report²⁵; and,
 - g. the auditor is required to answer questions of unit owners if he attends an owners meeting²⁶.
8. In this case, the condominium corporation has retained an auditor who has prepared audited financial statements in every year of the condominium corporation's existence. The financial statements have been presented to the unit owner's at the relevant annual general meeting. At the 2007 annual general meeting, Mr. Lahrkamp himself moved to accept the financial statements and to re-appoint the auditor.

²⁰ s. 66(1) and 67(3) of the *Condominium Act, 1998*

²¹ s. 67(1) of the *Condominium Act, 1998*

²² s. 66(3), (4) of the *Condominium Act, 1998*

²³ s. 67(2) of the *Condominium Act, 1998*

²⁴ s. 67(4) of the *Condominium Act, 1998*

²⁵ s. 69(1) of the *Condominium Act, 1998*

²⁶ s. 70(6) of the *Condominium Act, 1998*

9. A condominium corporation must also be wary of privacy rights and is obligated to ensure that it abides by the statutory requirements imposed on organizations that collect personal information. In one case, under the *Personal Information Protection and Electronic Documents Act 2000, c.5* (PIPEDA), a condominium corporation's property management company was required by office of the privacy commissioner to ensure compliance in relation to its privacy policy.

Office of the Privacy Commissioner of Canada, PIPEDA Case Summary
#2005-301. online: http://www.priv.gc.ca/cf-c/2005/301_20050322_e.cfm

For All Purposes Reasonably Related To The Purposes Of This Act

10. The important words of the statute are "*for all purposes reasonably related to the purposes of this Act*". These words were added in the 2001 amendment.
11. Pursuant to the rules of statutory interpretation, the words must have some meaning and hence a board of directors is obliged to make a determination as to the *purpose* of the inspection and then, once the purpose is ascertained, whether such *purpose is reasonably related to the purposes of the Act*.
12. The reason that a board of directors must make that enquiry is among other reasons, for the protection of the other unit owners who have the statutory right to expect that the condominium corporation will ensure compliance with the *Condominium Act, 1998*²⁷.

²⁷ s. 119(3) of the *Condominium Act, 1998*

13. A condominium board of directors must protect the rights of all owners, is required to comply with the *Act* and has a clear right, and indeed, an obligation, to require such compliance from others²⁸. 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.
14. The basic rules of statutory interpretation require all of the words of a statute to have meaning. In this case, the words "*for all purposes reasonably related to the purposes of this Act*" were added to the statute. This Court must determine the purpose and effect of such wording.
15. The requirement of requiring a person seeking to inspect a condominium corporation's records to state the purpose of such request is consistent with the Ontario Court of Appeal's statement in *Dvorchik* concerning the duty of the board of directors which is charged with the duty of "*balancing the private and communal interests of the unit owners*"²⁹:

In an application brought under s. 49(1), a court should not substitute its own opinion about the propriety of a rule enacted by a condominium board unless the rule is clearly unreasonable or contrary to the legislative scheme. In the absence of such unreasonableness, deference should be paid to rules deemed appropriate by a board charged with responsibility for balancing the private and communal interests of the unit owners

²⁸ See s. 119(1) and 119(3) of the *Act*.

²⁹ *York Condominium Corp. No. 382 v. Dvorchik*, 1997 CarswellOnt 219, (O. C. A.) at paragraph 5

16. More particularly, quite apart from the statutory requirement to request the purpose of the inspection, the only way that the board of directors can exercise its responsibility of balancing the “private and communal interests of the unit owners” is by making such request.
17. For example, the prevention of possible abuse by unreasonable and aggressive owner, and the avoidance of litigation costs, would be a legitimate reason for refusing a request to inspect a condominium corporation’s records.
18. If a unit owner refuses to state the purpose of the request to inspect, then the board of directors is *obliged* to refuse to permit such inspection.
19. There are many purposes which would *not* be reasonably related to the purposes of the *Act*, including:
 - a. “to communicate with owners”. Quite apart from privacy concerns, this is not something which is reasonably related to the purposes of the *Act*;
 - b. if there is already a statutory remedy available for his purposes. In this regard, there are many statutory remedies available to disgruntled unit owners;
 - c. if the unit owner was on a fishing expedition;
 - d. if the unit owner was attempting to circumvent the court process with respect to remedies contained in the *Act* that are available by application;
 - e. if the unit owner is usurping his position e.g. acting as a self-appointed watchdog over the board of directors, or attempting to go behind audited financial statements;

- f. if the purpose of the request is to circumvent the normal documentary discovery process in a proceeding, whether existing or contemplated;
 - g. if the purpose of the inspection is to attempt to fetter the discretion of the board of directors;
 - h. if the purpose of the inspection infringes the privacy rights of others.
20. It should be noted that in *Lahrkamp v. MTCC 932*, Small Claims Court Judge, Mr. Justice Godfrey held that a unit owner does not have to provide a purpose for the request in every instance because sometimes the purpose may be self-evident or inferred. It is our opinion that Justice Godfrey is not correct of this point, but in any event, the unit owner who does not provide the purpose for the request does so at his/her peril.

The Condominium Act, 1998 Contains Adequate Safeguards And Remedies

21. There are adequate safeguards and remedies in place to inform and protect a condominium unit owner including:
- a. a mandatory appointment of auditors and audit of financial affairs³⁰;

³⁰ **60. (1)** At their first meeting, the owners shall appoint one or more persons qualified to be auditors to hold office as auditors until the close of the next annual general meeting and, if the owners do not do so, the board shall make the necessary appointments as expeditiously as possible.

66. (1) A corporation shall have its financial statements prepared in the prescribed manner and in accordance with generally accepted accounting principles as are prescribed.

67. (1) The auditor shall, every year, make the examination that is necessary in order to make an annual report on the financial statements to the corporation on behalf of the owners.

69. (1) The board shall place before each annual general meeting,

- (a) the financial statements as approved by the board;
- (b) the auditor's report; and

- b. the right to inspect certain of the condominium corporation's records for certain purposes³¹;
- c. the right to requisition a meeting to consider stated business;
- d. the right to remove directors by a vote of owners³²;

(c) all further information respecting the financial position of the corporation that the by-laws of the corporation require.

s. 60, 66, 67, 69, *Condominium Act, 1998*

³¹ **55 (3)** Upon receiving a written request and reasonable notice, the corporation shall permit an owner, a purchaser or a mortgagee of a unit or an agent of one of them duly authorized in writing, to examine the records of the corporation, except those records described in subsection (4), at a reasonable time for all purposes reasonably related to the purposes of this Act.

55 (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.

Same

(5) Clause (4) (c) does not prevent,

- (a) an owner, a purchaser or a mortgagee of a unit or an agent of one of them from examining records under subsection (3) that relate to the unit of the owner, the unit being purchased or the unit that is subject to the mortgage, as the case may be; or
- (b) an owner of a unit or an agent of the owner from examining records under subsection (3) that relate to the owners.

s. 55(3)-(5), *Condominium Act, 1998*

³² **33. (1)** Subject to subsection 51 (8), a director, other than a director on the first board, may be removed before the expiration of the director's term of office by a vote of the owners at a meeting duly called for the purpose where the owners of more than 50 per cent of all of the units in the corporation vote in favour of removal.

s. 33(1), *Condominium Act, 1998*

- e. the right to commence proceedings to require compliance with a legal duty contained in the *Condominium Act, 1998*, the condominium corporation's declaration, by-laws or rules³³;
- f. the right to commence proceedings for an oppression remedy order³⁴;
- g. the right to apply for the appointment of an inspector or an administrator;
- h. a statutory standard of care on directors plus conflict of interest rules³⁵; and,
- i. the requirement that unit owner votes are required for certain actions³⁶.

³³ **134. (1)** Subject to subsection (2), an owner, an occupier of a proposed unit, a corporation, a declarant, a lessor of a leasehold condominium corporation or a mortgagee of a unit may make an application to the Ontario Court (General Division) for an order enforcing compliance with any provision of this Act, the declaration, the by-laws, the rules or an agreement between two or more corporations for the mutual use, provision or maintenance or the cost-sharing of facilities or services of any of the parties to the agreement.

s. 134(1), *Condominium Act, 1998*

³⁴ **135. (1)** An owner, a corporation, a declarant or a mortgagee of a unit may make an application to the Ontario Court (General Division) for an order under this section.

s. 135(1), (2), *Condominium Act, 1998*

³⁵ s. 37 and 38, *Condominium Act, 1998*

³⁶ **97 (2)** A corporation may, by resolution of the board and without notice to the owners, make an addition, alteration or improvement to the common elements, a change in the assets of the corporation or a change in a service that the corporation provides to the owners if,

(a) it is necessary to make the addition, alteration, improvement or change to comply with an agreement mentioned in section 113 or the requirements imposed by any general or special Act or regulations or by-laws made under that Act;

(b) in the opinion of the board, it is necessary to make the addition, alteration, improvement or change to ensure the safety or security of persons using the property or assets of the corporation or to prevent imminent damage to the property or assets; or

c) subject to the regulations made under this Act, the estimated cost, in any given month or other prescribed period, if any, of making the addition, alteration, improvement or change is no more than the greater of \$1,000 and 1 per cent of the annual budgeted common expenses for the current fiscal year.

Fishing Expedition

22. A board of directors is not only within its rights, but is *obliged* to deny an inspection of records, if it determines that a unit owner is on a “fishing expedition”. There are good reasons to discourage such conduct.

Changes made on notice

(3) A corporation may make an addition, alteration or improvement to the common elements, a change in the assets of the corporation or a change in a service that the corporation provides to the owners if,

- (a) the corporation has sent a notice to the owners that,
 - (i) describes the proposed addition, alteration, improvement or change,
 - (ii) contains a statement of the estimated cost of the proposed addition, alteration, improvement or change indicating the manner in which the corporation proposes to pay the cost,
 - (iii) specifies that the owners have the right, in accordance with section 46 and within 30 days of receiving the notice, to requisition a meeting of owners, and
 - (iv) contains a copy of section 46 and this section; and
- (b) one of the following conditions has been met:

1. The owners have not requisitioned a meeting in accordance with section 46 within 30 days of receiving a notice under clause (a).
2. The owners have requisitioned a meeting in accordance with section 46 within 30 days of receiving a notice under clause (a) but have not voted against the proposed addition, alteration, improvement or change at the meeting.

Approval of substantial change

(4) Despite subsection (3), the corporation shall not make a substantial addition, alteration, improvement to the common elements, a substantial change in the assets of the corporation or a substantial change in a service that the corporation provides to the owners unless the owners who own at least $\frac{66}{100}$ per cent of the units of the corporation vote in favour of approving it.

e.g. s. 97 (2), (3), (4), *Condominium Act, 1998*

23. Unit owners of a condominium corporation are personally liable for judgments against the condominium corporation³⁷. Therefore a board of directors must protect such interest.
24. The combination of sections 55(3) and 55(4)(b) of the *Act* suggest that fishing expeditions are a legitimate reason for refusing a request to inspect a condominium corporation's records.
25. A fishing expedition seeks to make an end run around legitimate statutory and procedural remedies. There are adequate safeguards in the legislation and procedurally which protect a person without the necessity of a fishing expedition.
26. There is no place in the statutory scheme for a self-appointed watch dog over the activities of a board of directors.
27. In the decision of the Ontario Divisional Court on appeal in *Fisher v. Metropolitan Toronto Condominium Corp. No. 596*³⁸, [2004] O.J. No. 5758, 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

³⁷ 23(6) A judgment for the payment of money against the corporation is also a judgment against each owner at the time of judgment for a portion of the judgment determined by the proportions specified in the declaration for sharing the common interests. – s.23(6), *Condominium Act, 1998*

³⁸ *Fisher v. Metropolitan Toronto Condominium Corp. No. 596*, [2004] O.J. No. 5758

allegations, the court indicated it was *not* wrong to deny the owner access to the condominium corporation's records:

16 With great respect, I am unable to accept the reasoning of the Deputy Judge with respect to his interpretation of section 55. It appears to me that the purpose of clause 55(iv)(b) is to maintain litigation privilege or solicitor/client privilege with respect to records of the condominium corporation that may relate to litigation or pending litigation between a unit owner and the corporation. It is clear from the evidence before this court that Fisher was making a claim against Condo Corp and contemplating litigation at the time that the requests for the records were made and accordingly, in my view, the exception in clause 55(iv)(b) is applicable. Such records would not have to be produced until they are producible in the course of documentary discovery if not subject to litigation privilege or solicitor/client privilege. Accordingly, I am of the view that the Deputy Judge erred in awarding the Plaintiff damages in the amount of \$500 representing the penalty payable under subsection 55 (8).

Shareholders Cannot Fetter The Discretion Of Board Of Directors

28. Shareholders cannot fetter the discretion of board of directors. The directors of a corporation are empowered to manage it. The shareholders have no authority to instruct directors concerning the management of the corporation, and are not allowed to interfere in matters assigned by law to the control of directors³⁹. The directors of a corporation are not subject to the direction of shareholders in managing the affairs of the corporation:

“The directors' power to manage the affairs of the company is complete. That is, a majority of shareholders, even if they pass a resolution at a general meeting, cannot dictate to the directors.”⁴⁰

³⁹*Canadian Encyclopedic Digest Business Corporations VIII.4(a) Ontario 672*

⁴⁰*Teck Corp. v. Millar*, 1972 CarswellBC 284 at para. 85

29. Similarly, unit owners of a condominium corporation delegate the management of the affairs of the condominium corporation to the elected board, subject only to the protections mentioned above which provide more than adequate protection for unit owners. There is no place in the administration of a condominium corporation for either a self-styled watchdog who “audits” the conduct of the board of directors, or for Mr. Lahrkamp’s urban guerrilla tactics⁴¹.
30. The directors of a corporation are not subject to the direction of shareholders in managing the affairs of the corporation. Referencing *Automated Self-Cleaning Filter Syndicate Co. Ltd. v. Cuminghame* and *Gramophone & Typewriter Ltd. v. Stanley*, Berger J. summarizes the powers of directors to manage a corporation:

“The directors’ power to manage the affairs of the company is complete. That is, a majority of shareholders, even if they pass a resolution at a general meeting, cannot dictate to the directors: *Automatic Self-Cleansing Filter Syndicate Co. Ltd. v. Cuninghame*, [1906] 2 Ch. 34. The directors are not the agents of the shareholders. Once given the power to manage the company, they can exercise the power according to their office: *Gramophone & Typewriter Ltd. v. Stanley*, [1908] 2 K.B. 89.”

Teck Corp. v. Millar, 1972 CarswellBC 284 at para. 85

31. 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

⁴¹s. 2(3), 5(1), 17, 27(1), 28(1), 32(1), 42(5), *Condominium Act, 1998*

want it applied doubly to ensure external parties do not frivolously harass or seek to interfere in the operation or activities of the condominium.

Inspection of Proxies

32. There are two issues with respect to the inspection of proxies, usually by a defeated election candidate:
 - a. the privacy of the other unit owners as to how they voted; and,
 - b. the purpose of the inspection.

33. In *MTCC 932 v. Lahrkamp*, Mr. Justice Godfrey (in Small Claims Court) held that the condominium corporation was permitted to redact the names and other personal information for privacy reasons, where the unit had stated that he wanted to review the proxies for the purpose of “validation of election results”. The Judge also refused to permit the unit owner to review the owner’s list which he wanted to see “to communicate with owners.” The Judge held that such request was vague and that there were privacy issues as well.