

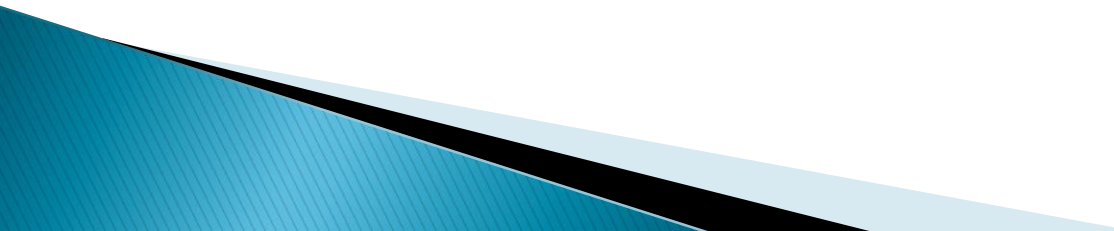
The Mysteries of the Condominium Authority Tribunal

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OVERVIEW

- In today's lunch and learn, we are going to focus on:
 - Section 55 of the *Condominium Act, 1998*
 - Accessing core and non-core records
 - Responding to records requests
 - Records retention
 - The CAT process
 - CAT costs, penalties and legal fees
 - CAT decisions to date
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SECTION 55 OF THE CONDO ACT

- The significant changes to the Act that came into force on November 1, 2017, included a new process for requesting records and providing copies or access to them
 - Section 55 of the Act and Section 13.1 – 13.12 of Regulation 48/01
 - Unfortunately, this new process is complicated and time-intensive as we are all experiencing on a first-hand basis
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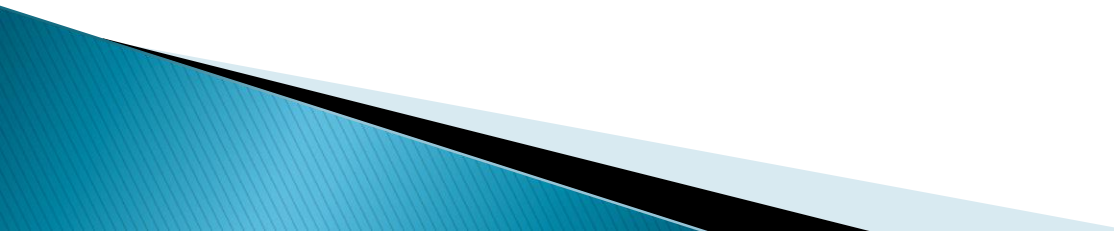
CORE RECORDS

- The type of record (core or non-core) is important for determining the timing for providing copies or access to records and the costs that may be charged
- What is a core record?
 - Declaration, by-laws, rules of the corporation
 - Current budget and all amendments, if any, made to that budget
 - Latest financial statements, auditor's report, reserve fund plan
 - Agreements for mutual use, maintenance, cost-sharing
 - Record of owners and mortgagees
 - All periodic information certificates in the last 12 months
 - Minutes of owners or board meetings (from the last 12 months) held after Nov. 1, 2017
 - Any other record specified by by-law as a core record

NON-CORE RECORDS

- A non-core record is any record that is NOT a core record

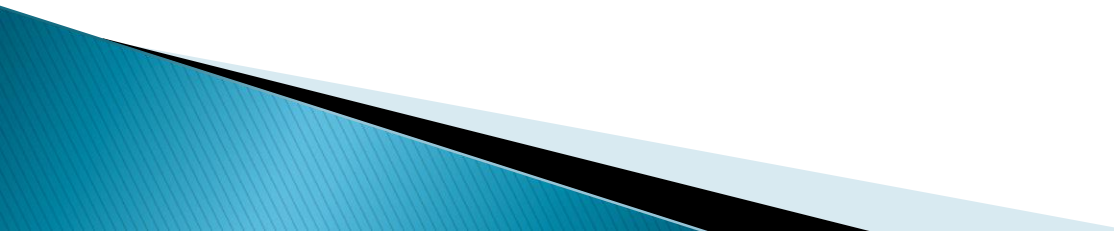
ACCESSING RECORDS

- A requester submits a standard form to request to access a record
 - Review mandatory form
 - Access can be requested to the record in paper or electronic format
 - The process is different depending on which format the requester requests
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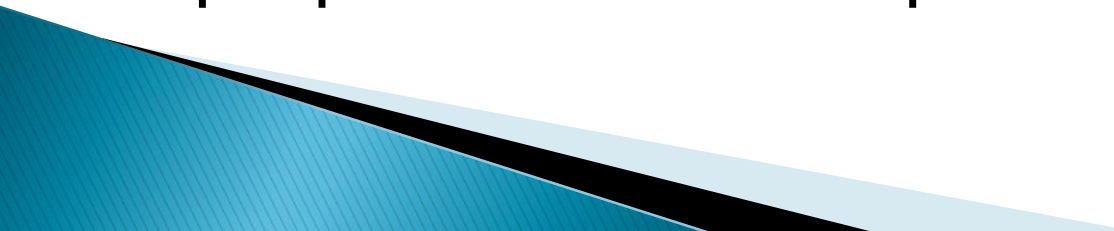
ACCESSING RECORDS CONT'D

- CAO Fast Facts: Accessing Core Records chart
- CAO Fast Facts: Accessing Non-Core Records chart

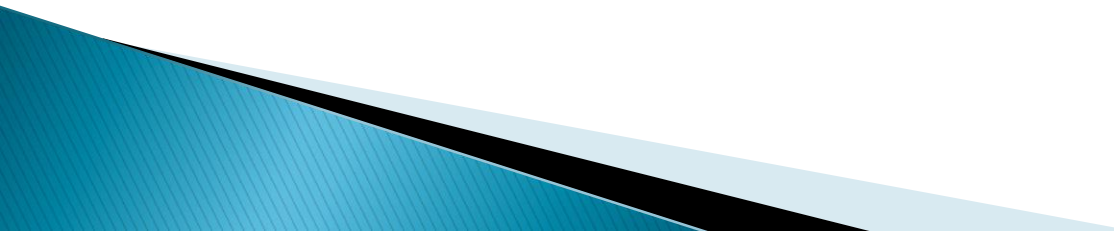
ACCESSING RECORDS CONT'D

- **FORMS:** Records requests, board responses and requester replies must be sent using the mandatory forms
 - **DELIVERY:** If a corporation keeps any records electronically, the board must pass a resolution to determine a method of electronic delivery
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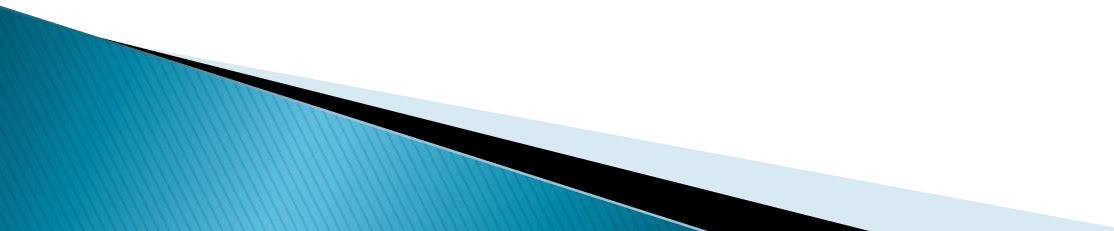
ACCESSING RECORDS CONT'D

- **REQUESTER:** Only owners, mortgagees, purchasers or their agents can request records from a condo corporation
 - **PURPOSE:** The request to access records must be solely related to the requesters interest as an owner, purchaser or mortgagee
 - **NOTE:** Requesters DO NOT have to identify a purpose for their request
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ACCESSING RECORDS CONT'D

- **FEES:** Fees must be reasonable and reflect the actual costs to the corporation. Copying/printing fees can't be more than 20 cents/page
 - **NOTE:** If a core record is delivered electronically, or if the request for records provides that the requester wants the core record in electronic format, no fee can be charged
 - **WAIVER:** Requesters and corporations can agree to skip steps in the process using a mandatory waiver form
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RESPONDING TO RECORDS REQUESTS

- Condo Corporations have 30 days to respond to a request for records
 - It is important for the condo to reply to requests quickly – the requester can file a complaint to the CAT and the penalty for failing to provide a record without a reasonable excuse has increased from \$500 to \$5,000!!!
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RESPONDING TO RECORDS REQUESTS CONT'D

- When responding, the corporation is required to use the mandatory form to send the response and it must include:
 - A description of each records requested
 - An indication of whether it is a core record
 - A decision on whether the requester will be provided access to, or copies of, each record requested
 - If the requested is not allowed access to a record, the specific provision of the Act that allows the Corporation to refuse access
 - A location where the record can be access if no copies requested

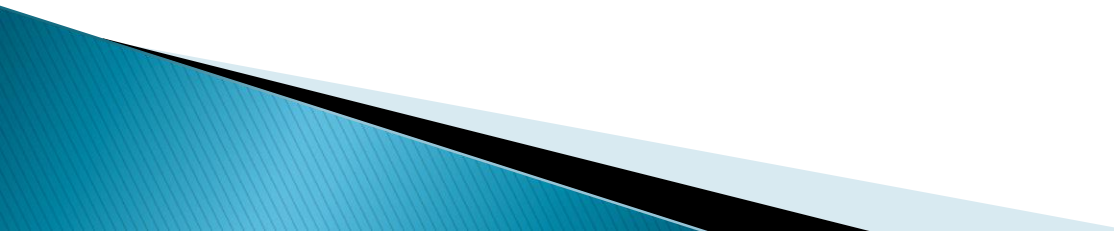
RESPONDING TO RECORDS REQUESTS CONT'D

- Exceptions to the production of records:
 - Subsection 55(4)–(6) of the Act
 - These exceptions include:
 - Records relating to employees of the corporation, except for contracts of employment between any of the employees and the corp
 - Records relating to actual or contemplated litigation, as determined by the regulations, or insurance investigations involving the corp
 - Records relating to specific units or owners
 - Any prescribed records (report or opinion from a lawyer or paralegal, any portion of a ballot or proxy form that identifies specific units, etc.)

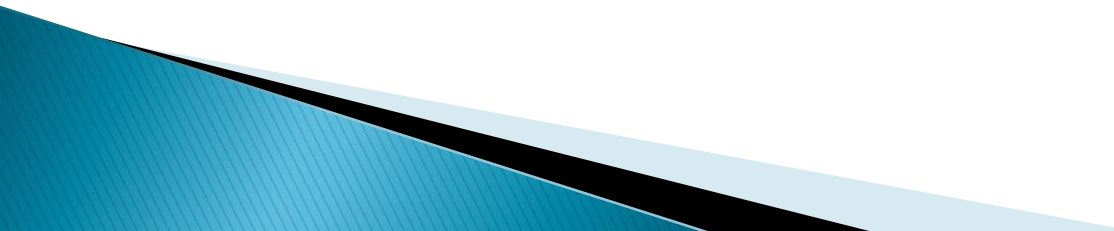
RESPONDING TO RECORDS REQUESTS CONT'D

- Subsection 13.3(1)(a) of Regulation 48/01
 - The request must also be solely related to the requester's interests as an owner, purchaser or mortgagee, having regard to the purposes of the Act
 - What this means will be elaborated through the CAT decisions as we move forward
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RESPONDING TO RECORDS REQUESTS CONT'D

- The records that a Corporation provides access or copies of MUST be accompanied by a written document that states:
 - If the Board has redacted or removed any part of the record and, if so, the reason why
 - The actual costs that were incurred to provide access or copies
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RESPONDING TO RECORDS REQUESTS CONT'D

- If the Corporation has provided a response to the request, a requester has 60 days to return the response and pay the fee. If they don't, they request will be considered abandoned
 - If the Corporation has NOT provided a response to the request, the request is considered abandoned if a requester has NOT filed a case with the CAT within 6 months
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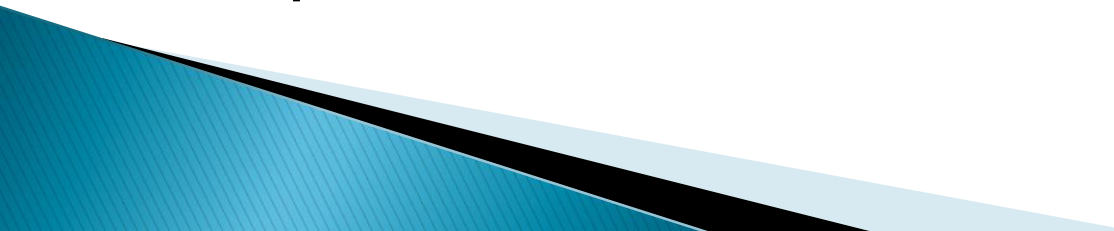
RECORDS RETENTION

- Condo corporations are required to keep certain types of records
 - With the changes to the Act, determining what constitutes corporate records and how long to retain them has become a very complex task
 - There are 3 main sources of corporate records:
 1. Section 55 of the *Condo Act*
 2. Section 13.1 of the general Regulation
 3. Possibly a Corporation's own by-laws
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Records Retention Cont'd

- There are generally three different retention periods:
 1. 90 days
 2. 7 years
 3. At all times
- Refer to Records Retention chart
- **NOTE:** If a record has been requested, you must extend the preservation period by 6 months. If litigation is started during that time frame, you must preserve the records as agreed or as ordered pending the litigation

CAT OVERVIEW

- As of November 1, 2017, anyone with a dispute about the records of a condominium corporation can file a case at the CAT
 - A requester can only file with the CAT if they made their request for records on or after November 1, 2017
 - A dispute about records must also have happened within the last 2 years if the requester wants to file a case with the CAT
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THE CAT PROCESS

- The CAT dispute resolution process has five main steps:
 1. Filing a case
 2. Joining a case
 3. Negotiation
 4. Mediation
 5. Tribunal Decision

- Depending on how your case is resolved, you may have different options if you are unhappy with the results

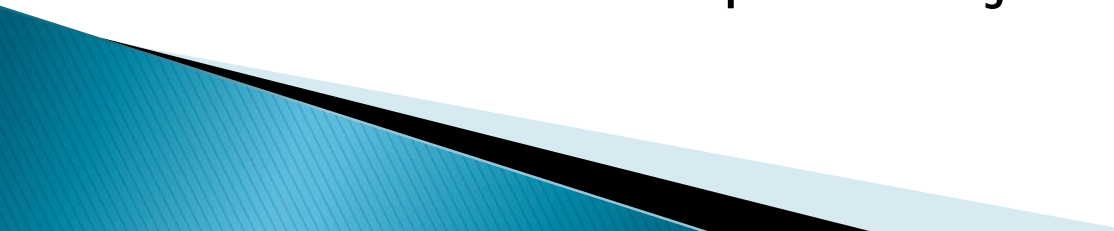
FILING A CASE

- Before filing a case, the following must be met:
 - ❑ The case must deal with condominium records
 - We will discuss limits to the CAT's jurisdiction, even when it comes to issues about records
 - ❑ The Requester has identified the right Respondent
 - ❑ The Requester has followed the mandatory records request process
 - Remember: only owners, mortgagees, purchasers or their agents can request records from a condo corporation can request records


JOINING A CASE

- The Respondent must be the condo corp, not an individual board member, condominium manager, or management company
- Unit owners do not require representation, but condominium corporations must be represented by either:
 - A member of the condominium board of directors
 - The condominium manager, or
 - A lawyer or paralegal licensed by the LSUC

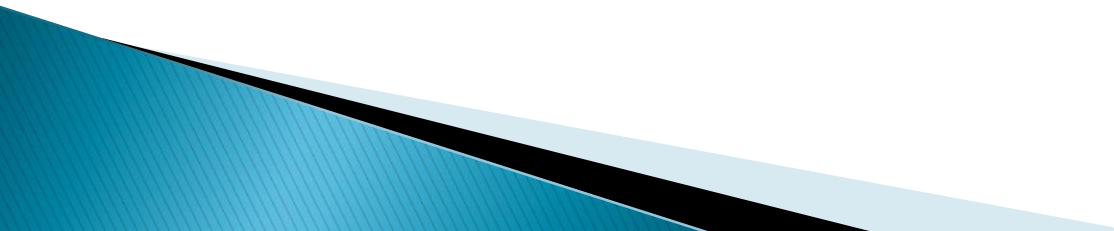
STAGE 1 – NEGOTIATION

- When the Applicant files their case, they also make their first settlement offer. When the Respondent joins the case, they will see the Applicant's first offer and will be asked to respond
 - When a User makes a settlement offer, the online system automatically sends it to the other User. That User can either accept that offer or make a counter-offer. There is no limit to the number of settlement offers that Users can make
 - The Applicant can refer the case to Mediation at any time after the Respondent joins the case
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STAGE 2 – MEDIATION

- In Mediation, the Mediator can also suggest a possible settlement to the Users
 - If both Users agree, the Mediator will write a CAT Consent Order that is legally binding and can be enforced through the courts
 - The Applicant can only move the case to Stage 3 after the Mediator has allowed them to do this
 - The Mediator will prepare a Stage 2 Summary and Order summarizing the issues and include any orders about procedures that must be followed in Stage 3
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STAGE 3 – TRIBUNAL DECISION

- At this stage, the CAT Member is conducting a hearing. This means the Member will receive each User's arguments and evidence (including witness evidence)
 - Most of the Tribunal Decision stage will be in writing using the CAT-ODR system. But, if needed, the Member can also schedule a telephone conference call, a videoconference, or other live proceedings
 - After the Users have had a reasonable chance to provide their evidence and arguments, the Member will make a decision based on the facts and the law
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THE CAT RULES OF PRACTICE

- Strongly encourage you to review the User Guides during any proceeding

COSTS, PENALTIES AND LEGAL FEES

- Costs to a User are limited to:
 - Filing fees
 - Reasonable expenses or other costs that were directly related to the other User's participation in the Case; and
 - The other User's or the CAT's expenses or other costs that were directly related to a User's behaviour during the Case that was unreasonable or for an improper purpose, or that caused an unreasonable delay
- CAT can order penalties of up to \$5,000
- However, the CAT will not order any legal fees charged by a lawyer or paralegal, unless there are exceptional reasons

CAT DECISIONS

- 14 decisions released by the CAT to date
- The CAT publishes:
 - All consent orders issued in either Stage 2 – Mediation or Stage 3 – Tribunal Decision
 - All decisions issued at the end of Stage 3 – Tribunal Decision
 - All orders dismissing cases (e.g., for lack of jurisdiction)
- The CAT does not publish:
 - Any settlement agreements
 - Procedural orders (unless that order addresses substantial issues raised in the case, if it may be of value to other Users, or in the interests of openness or transparency).

Remillard v. FCC No. 18

- 2018 ONCAT 1 (CANLII)
- Request for unredacted invoices issued by the Condo Corporation's legal counsel for the provision of legal services
- Must provide redacted invoices redacted only for information relating to owners other than R.R. or for information that is exempt under s. 55(4) of the Act (i.e. "actual litigation")
- Reasonable fee for redaction is based on articling student rate (\$130/hour x 0.65 hours)
- **LESSON:** Ensure that invoices are reviewed by lawyer to ensure that nothing subject to solicitor-client privilege is disclosed. The reasonable costs for the review/redaction will be allowed

Berman v. YCC No. 99

- 2018 ONCAT 2 (CANLII)
- Request for documents related to the Reserve Fund Study and Board Minutes
- JB questioned the sufficiency of the documents (i.e. are the Minutes the “full” minutes or merely a list of resolutions)
- CAT found JB has all the records which he requested and which condo corp was obliged to provide him
- **REMEMBER:** Minutes are not a verbatim transcript of the board meeting

Mohamed v. YCC No. 414

- 2018 ONCAT 3 (CANLII)
- SM is the president of the “Homeowners Committee” and requested both core and non-core records
- CAT determined the condo corp either failed or refused to participate in the Tribunal’s online dispute resolution process until the adjudication stage
- Condo corp was ordered to pay costs of \$125 for filing fees plus a penalty of \$1000
- **LESSON 1**: If you receive a records request, respond and keep proof of your response. If you receive an appeal to CAT, respond during Stage 1!
- Documents were ordered and condo corp’s labour fee of \$63/hour and copying charges of \$0.26/page were not reasonable
- CAT did allow an hourly rate of \$31.50. This was calculated at twice the minimum wage plus HST
- **LESSON 2**: Make sure you can justify your labour and copying charges

Sennek v. CCC No. 116

- 2018 ONCAT 4 (CANLII)
- MS was previously declared a vexatious litigant but allowed to file application at CAT
- Filed an appeal seeking an order from the Tribunal requiring the condo corp to pay a penalty to her for failure to maintain a record over a 91-month period, from 2010 to 2018
- Application is vexatious on the basis that it is an attempt by MS to continue a dispute already determined by the courts and is brought for an improper purpose
- **LESSON:** Vexatious litigant order DOES NOT prohibit filing at CAT

Micieli v. TSCC No. 1753

- 2018 ONCAT 5 (CANLII)
- JM sought audited financial statements; bank statements; information about new property manager
- At the hearing, JM has the records he requested that condo corp is obliged under the Act to provide, or will soon have access to those records based on the undertaking of the condo corp
- **LESSON**: This was a small board that had recently changed board members and property managers; boards are still obligated to meet requirements to provide records in a timely manner

Bossio v. MTCC No. 965

- 2018 ONCAT 6 (CANLII)
- MB wants the Records because they relate to a dispute with the Board
- CAT found purpose in obtaining the Records is to obtain evidence to support MB's claims against the condo corp. She did not present any other reason for requesting the Records that is related to the purposes of the Act
- Records are not required to be produced
- **LESSON**: Consider why the request is being made. It may be relevant at CAT

Cangiano v. MTCC No. 962

- 2018 ONCAT 7 (CANLII)
- Can an owner obtain unredacted copies of proxy forms submitted at the meeting? No
- **LESSON**: Owners are only entitled to redacted copies of the proxies

Bechlian v. TSCC No. 2418

- 2018 ONCAT 8 (CANLII)
- SB complained about a charity event happening in the party room, which was documented by the concierge in an incident report. SB requested the incident report
- Condo corp's lawyer provided a legal opinion that the incident report is not a "record" under the Act
- Condo corp required to provide incident report, redacted only for information relating to owners other than SB, their names and unit numbers
- **LESSON**: Even though the production was ordered, CAT found that the legal opinion was a reasonable excuse for the corp to withhold the record and did not order a penalty

Liu v. TSCC No. 2329

- 2018 ONCAT 9 (CANLII)
- YL requested financial records and records pertaining to a shared facilities agreement
- Prior to hearing, Condo corp provided records through CAT's Online Dispute Resolution System and the issues were resolved
- **LESSON**: No “costs” were ordered, but condo corp incurred costs that could have been avoided

Arrowsmith v. PCC No. 94

- 2018 ONCAT 10 (CANLII)
- TA requested paper copies of minutes; contracts and invoices related to mould removal
- Condo corp did not dispute that ML was entitled to the records but took position that ML did not properly fill out the mandatory forms
- Condo corp was ordered to provide records and to pay costs of \$500 and a penalty of \$500 because they had “no reasonable excuse” for not providing the records
- **LESSON:** You may be on the hook for costs and penalties if you do not have a “reasonable excuse” for failing to provide records

Barreto-Rivera v. MTCC No. 704

- 2018 ONCAT 11 (CANLII)
- RBR requested copies of minutes for an owners “information” meeting; Both parties acknowledged that no minutes were taken at the meeting
- Clearly, the record in question, does not exist. Does this equate to a refusal to provide the record, without reasonable excuse? YES
- Condo corp was required to pay a \$500 penalty and owner was given a credit for his proportionate share
- **LESSON:** You can be penalized for failing to create records without reasonable excuse

Lahrkamp v MTCC No. 932

- 2018 ONCAT 12 (CANLII)
- ML was previously declared a vexatious litigant but allowed to file application at CAT
- Application is vexatious on the basis that it is an attempt by ML to continue a dispute already determined by the courts and is brought for an improper purpose
- **LESSON**: The CAT confirmed that “it would require very clear wording in either the Court Order or the legislation to bar a person from access to the Tribunal”

Rogers v. NNCC No. 131

- 2018 ONCAT 13 (CANLII)
- CR requested supporting documentation in relation to most recent auditor's report for building maintenance
- Parties reached a Settlement Agreement during Stage 2 mediation; Issue is whether the condo corp complied with the Settlement Agreement
- Condo corp made best efforts to comply with the Settlement Agreement. The only invoices that were not provided by the deadline were the invoices in the possession individual who was on vacation at that time
- **LESSON:** When agreeing to a timetable, make sure it is achievable or you may set unrealistic expectations and incur additional costs

Ali Khan v. MTCC No. 581

- 2018 ONCAT 14 (CANLII)
- Mediation failed; parties have 30 days to file for arbitration by CAT; MAK sought to apply for arbitration on day 31
- CAT decided not to grant an extension to file an appeal
- **NOTE:** In denying the request, CAT noted that “The request to create a record, and the issue of whether the record which has been produced is accurate are matters that are outside the current mandate of the Tribunal to decide”