

CONDOMINIUM AUTHORITY TRIBUNAL

DATE: March 16, 2022

CASE: 2021-00344R

Citation: Kore v. Niagara South Condominium Corporation No. 12, 2022 ONCAT 19

Order under section 1.44 of the *Condominium Act, 1998*.

Member: Nicole Aylwin, Member

The Applicant,

John Kore

Self-Represented

The Respondent,

Niagara South Condominium Corporation No. 12

Represented by Jamie Cockburn, Counsel

Hearing: Written Online Hearing – November 25, 2021 to February 22, 2022

REASONS FOR DECISION

A. INTRODUCTION

- [1] The Applicant, John Kore, is a unit owner of the Respondent, Niagara South Condominium Corporation No. 12 (“NSCC 12”). Mr. Kore has requested from NSCC 12 copies of two legal invoices – redacted or unredacted – that pertain to the legal costs associated with the hosting of NSCC 12’s 2020 Annual General Meeting (“AGM”). He has also requested that this Tribunal impose the maximum penalty of \$5000 on NSCC 12 for refusing to provide a record without a reasonable excuse and has requested his costs for participating in this matter.
- [2] NSCC 12 maintains that it is exempt from providing the legal invoices to Mr. Kore because they are covered by solicitor-client privilege. No other exemptions have been claimed.
- [3] For the reasons set out below, I find that Mr. Kore is entitled to the records he has requested, subject to the right of NSCC 12 to redact certain information. I find that NSCC 12 is entitled to charge a reasonable fee for the production of the requested records. I further find that NSCC 12 is not liable to pay a penalty for its refusal to provide the records as the reasons provided for doing so were reasonable.

[4] While I have read all the submissions provided in this case, I refer only to those necessary to determine the questions in front of me.

B. ISSUES & ANALYSIS

Issue No. 1: Is Mr. Kore entitled to receive redacted or unredacted copies of two SmithValeriotte Law Firm LLP invoices related to the AGM meeting of 2020?

[5] On September 8, 2021, Mr. Kore submitted a request for records to NSCC 12 requesting an electronic copy of the “[t]otal cost of last year’s AGM (Zoom Meeting)”. In its response to this request, NSCC 12 refused to provide the records citing solicitor-client privilege. While no specific records were outlined in the request for records or the response, the parties agree on the four specific records that pertain to this request. These records are: two ShiftSuite invoices, ShiftSuite being the software company that provided services related to hosting the AGM online, and two SmithValeriotte Law Firm LLP invoices related to counsel’s involvement with, and attendance at, the AGM. Since the commencement of this case, the ShiftSuite invoices have been provided and are no longer at issue. This leaves me to determine if the legal invoices should be provided in either redacted or unredacted format.

[6] According to Mr. Kore, his request for the legal invoices stems from his desire to understand how much money was spent, in total, to host the 2020 AGM which was held virtually for the first time. He submits that as an owner who takes an active interest in the finances of the condominium, knowing the costs associated with hosting the AGM meeting would help owners determine if hosting other virtual meetings, such as owners meetings, is financially practical and what ways costs could be cut if necessary.

[7] While NSCC 12 has provided him with the annual audited financial statements that contain the total spent on legal expenses annually, Mr. Kore maintains that this is not an adequate substitute for his request. He argues that, like in other instances where owners may wish to see itemized breakdowns of services pertaining to specific spending categories, such as landscaping or pool maintenance, to understand how much they are paying for services such as cutting the grass or opening/closing the pool, they are also entitled to know how much was paid for the various services required to host the virtual AGM. He maintains that the annual summary of legal expenses does not allow owners to answer questions such as: how much did NSCC 12 pay to have the AGM chaired by legal counsel? What were the total legal costs associated with assisting NSCC 12 with creating the Harassment and Video Policy?

- [8] Both parties acknowledged that s. 55(3) of *the Condominium Act, 1998* (the “Act”) requires the condominium to permit owners to obtain records of the corporation including financial records. However, this entitlement is not absolute. While the Act outlines some specific exemptions in s. 55, in this case the exemption claimed is solicitor-client privilege, which is not expressly set out in the Act as it is a common law principle.
- [9] In common law, solicitor-client privilege allows a person to claim protection from having to disclose confidential information if either the relationship or the communication is protected by the law of privilege. Typically, communications between a client and their lawyer, including the advice given and the amount of the invoice for the services, are presumed to be privileged. The purpose of this privilege is to encourage open and honest communication between clients and their lawyer and to ensure the confidentiality of those communications.
- [10] Solicitor-client privilege is ‘presumptive’ meaning that the starting point is the assumption that the communications between the client and lawyer are privileged if the purpose of the communication is for seeking or giving legal advice and intended to be confidential by the parties. However, solicitor-client privilege is not absolute. The client may waive their privilege (either intentionally or unintentionally) and disclose the communication, or the privilege can be ‘rebutted’, meaning that someone can refute the assumption that the communications should be privileged.
- [11] Mr. Kore provides three reasons for why he believes that solicitor-client privilege should not apply in this case and for why he should be provided with the legal invoices. First, he asserts that NSCC 12 waived their right to privilege. Second, he submits that the ‘open book’ principle of the Act entitles him to the records. Third, Mr. Kore ‘rebutts’ the privilege, arguing that the invoices related to the meeting do not contain any privileged information and thus should be provided.
- [12] NSCC 12 argues that the legal invoices are exempt from examination, in their entirety, by solicitor-client privilege and that Mr. Kore has not provided evidence that NSCC 12 waived their privilege, nor has Mr. Kore successfully rebutted that privilege.

Did NSCC 12 waive its right to privilege?

- [13] Mr. Kore argues that NSCC 12 waived its right to claim solicitor-client privilege in two ways. First, he submits that in August of 2021, the board circulated a Notice of Owner’s Meeting (“the Notice”) to all owners to discuss the refurbishment of the condominium’s tennis court area. This Notice contained the statement that “there

will be further legal costs associated with holding this Owner's Meeting". Citing *Jack Gale v Halton Condominium Corporation No. 61*¹ ("Gale"), Mr. Kore argues that this Notice is similar to the notice that was provided to the owners in Mr. Gale's condominium, which concerned the legal expenses the condominium had incurred in relation to a specific matter. In Gale, the Tribunal found that this notice did constitute a waiver of solicitor-client privilege.

- [14] NSCC 12 takes the position that the Notice does not constitute a waiver of privilege since the Notice does not relate to the 2020 AGM, rather the Notice relates to a 2021 requisitioned meeting of owners. It further argues that even if the Notice did relate to the 2020 AGM it does not contain the required specificity to constitute a waiver of solicitor-client privilege.
- [15] I agree with NSCC 12. While the 2021 Notice may have prompted Mr. Kore to become curious about the cost of the 2020 AGM, it is not related and does not constitute a waiver of privilege for the legal invoices requested. Moreover, the Notice is very different than that provided in Gale. In Gale, the Tribunal found that the notice provided a "material disclosure" that spoke to the "substance of the record". That is not the case here. The Notice does not provide specific or substantive detail regarding any record at issue, it merely alludes to the potential of increased legal costs associated with holding the 2021 meeting.
- [16] Mr. Kore further argues that in providing the ShiftSuite invoices which contained information regarding the cost of hosting the meeting, NSCC 12 waived its right to claim solicitor-client privilege for all other remaining invoices associated with the cost of hosting the meeting.
- [17] NSCC 12 argues that providing the ShiftSuite invoices to Mr. Kore has no bearing on his entitlement to the legal invoices requested. It submits that the ShiftSuite invoices are very different documents than the legal invoices in so far as they do not contain communications between NSCC 12 and its solicitor.
- [18] I agree that providing the ShiftSuite invoices to Mr. Kore does not amount to a waiver of privilege in this case. As noted above, solicitor-client privilege exists to protect a very specific kind of communication. Just because NSCC 12 provided Mr. Kore with some invoices related to the AGM, does not automatically mean that they must share all the invoices regardless of the nature and type of information found of the invoice. In this case, privilege is not waived by virtue of providing

¹ 2019 ONCAT 46

associated invoices.

Does the principle of 'open book' entitle Mr. Kore to the requested invoices?

[19] Citing *McKay v. Waterloo North Condominium Corp. No. 23*² ("McKay"), Mr. Kore submits that one of the foundational principles of the Act is the principle of 'open book' which Cavarzan J. in McKay refers to as follows,

The Act embodies a legislative scheme of individual rights and mutual obligations whereby condominium units are separately owned and the common elements of the condominium complex are co-operatively owned, managed and financed. In the interest of administrative efficiency an elected board of directors is authorized to make decisions on behalf of the collectively organized as a condominium corporation, on condition that the affairs and dealings of the corporation and its board of directors are an open book to the members of the corporation, the unit owners.

[20] Based on the idea that the "affairs and dealings of the corporation and its board of directors are an open book to the members of the corporation, the unit owners", Mr. Kore, argues that there is no reason for NSCC 12 to withhold the information he has requested since it speaks to the affairs and dealings of the corporation and the board of directors.

[21] Here I wish to make a distinction between the request for the disclosure of information and the entitlement to records. The Act does not set out a framework for the entitlement of unit owners to information, rather it sets out the entitlement of unit owners to *records*. These two things are distinct. While Mr. Kore may very well be seeking to gather information about the total cost of the AGM for good reason, what I am to decide is whether he is entitled to the record that may or may not provide him with the information he seeks. This distinction is one example of the fact that, while "the affairs and dealings of the corporation and its board of directors are [to be] an open book", this concept has its necessary and appropriate limits.

[22] One such limitation is solicitor-client privilege, which as noted earlier, presumptively protects lawyers accounts and the contents of the accounts from the mandatory record disclosure as set out by the Act. Thus, alone, the principle of the condominium corporation affairs being an 'open book' is not sufficient for rebutting solicitor-client privilege in this case.

² 1992 CanLII 7501 (ON SC)

Would disclosing the invoices reveal confidential communications between NSCC 12 and its lawyer(s)?

[23] While Mr. Kore would prefer the invoices be unredacted, he has agreed that some redactions may be necessary. However, he argues that disclosing the total amount of the invoices would not divulge any solicitor-client communications. He argues that providing redacted invoices that show the total amount paid for services will only reveal how much was spent on legal costs for the meeting – it will not reveal anything confidential.

[24] NSCC 12 submits that Mr. Kore has not provided sufficient reasons to show that solicitor-client privilege does not apply to the legal invoices in their entirety. In making its arguments, NSCC 12 references Tribunal decisions including, *Reva Landau v Metropolitan Condominium Corporation No. 757* (“Landau”)³ where, the Tribunal found that the common law of solicitor-client privilege continues to apply separately from the other exemptions set out by the Act, namely s. 55(4)(b), and *Robert Remillard v. Frontenac Condominium Corporation No. 18* (“Remillard”)⁴ where the Tribunal found that the Applicant, Mr. Remillard, did not provide enough evidence to rebut the presumptive privilege afforded to lawyers’ accounts. In its submissions on Remillard, NSCC 12 pointed to the Tribunal’s reference to *Maranda v. Richter [2003] 3 SCR 193* (“Maranda”)⁵, a case which addressed the reasonableness of a search and seizure, in which at paragraph 33, the Court wrote:

Because of the difficulties inherent in determining the extent to which the information contained in lawyers’ bills of account is neutral information, and the importance of the constitutional values that disclosing it would endanger, recognizing a presumption that such information falls prima facie within the privileged category will better ensure that the objectives of this time-honoured privilege are achieved.

[25] NSCC 12 submits that Maranda, as applied in Remillard, establishes that solicitor-client privilege protects lawyers accounts from disclosure to unit owners.

[26] While NSCC 12 is correct that in Remillard the Tribunal referenced Maranda to address the question of whether legal billings are subject to solicitor-client privilege, it did so in the context of confirming the fact that legal invoices are presumptively privileged. It did not suggest that Maranda established an irrefutable

³ 2020 ONCAT 19

⁴ 2018 ONCAT 1

⁵ 2003 SCC 67 (CanLII)

blanket of protection. In fact, what the Tribunal noted was that Mr. Remillard had not successfully rebutted the privilege, not that he could not rebut the privilege. Moreover, Maranda itself recognizes that there is a possibility, that in some circumstances, records relating to lawyers' billing information may *not*, in fact, be privileged.

- [27] Thus, the question then becomes, what are the factors that will determine if solicitor-client privilege has been rebutted?
- [28] Aware that the Ontario Court of Appeal had considered the Maranda case and the question of rebutting solicitor-client privilege in the civil context in *Ontario (Ministry of the Attorney General) v. Ontario (Assistant Information and Privacy Commissioner)*⁶ ("Ontario (Ministry of the Attorney General)") I asked both parties to review this case and provide me with submissions on whether they believed this case applied and, if so, why.
- [29] Before providing the arguments made by the parties, some background on the Ontario (Ministry of the Attorney General) case is helpful.
- [30] Ontario (Ministry of the Attorney General) is a Court of Appeal decision that relates to two orders under *Freedom of Information and Protection of Privacy Act, RSO 1990* ("FIPPA"). The first order required the Attorney General to disclose documents that set out legal fees paid to two court appointed lawyers who had acted as intervenors in a criminal proceeding. The document that was ordered to be disclosed revealed only the total amount paid by the Attorney General and not the amount paid to each lawyer. The second order required the disclosure of payments made by the Attorney General to the four lawyers who had acted for an accused on the appeal from his murder convictions. This order required the disclosure of a document that revealed specific amounts paid and the dates of those payments but did not reveal amounts paid to specific lawyers. The Court of Appeal was asked to decide three questions, one of which was whether the information ordered disclosed was protected by solicitor-client privilege and, therefore, not disclosable pursuant to s. 19 of FIPPA? The Court of Appeal ultimately found that the Divisional Court "did not err in holding that the IPC correctly concluded that the information ordered disclosed was not subject to client/solicitor privilege." This conclusion was based on the reasoning that:

The presumption [of privilege] will be rebutted if there is no reasonable possibility that disclosure of the amount of the fees paid will directly or

⁶ 2005 CanLII 6045 (ON CA)

indirectly reveal any communication protected by the privilege...

... We see no reasonable possibility that any client/solicitor communication could be revealed to anyone by the information that the IPC ordered disclosed pursuant to the two requests in issue on this appeal. The only thing that the assiduous reader could glean from the information would be a rough estimate of the total number of hours spent by the solicitors on behalf of their clients. In some circumstances, this information might somehow reveal client/solicitor communications. We see no realistic possibility that it can do so in this case.

- [31] This reasoning provides a framework for considering what might, in any given case, 'rebut' the presumption of privilege, namely that there is no realistic possibility that the disclosure of the information provided will directly or indirectly reveal any communication protected by the privilege.
- [32] In his submissions, Mr. Kore argued that this reasoning applies in this case. He submits that "there is no reasonable possibility that the disclosure of the amount of the fees paid will directly or indirectly reveal any communication protected by the privilege". He also submits that the information provided by the invoices will be 'neutral' and that in this case there is no reasonable possibility that an "assiduous reader" aware of the background information about the case could use the information to determine communications that would otherwise be protected by privilege. He highlights the argument made in Ontario (Ministry of Attorney General) that there is no possibility that an educated guess as the number of hours spent by lawyers could reveal anything about the communication between the client and his lawyers and submits that that applies in this case as well. He states that knowing the total spent on legal services for the AGM will not tell him anything about confidential communications between the board and its lawyers.
- [33] NSCC 12 submits that the Ontario (Ministry of Attorney General) case takes place within the context of private actors seeking information from public entities and in the context of public information schemes which require decision makers to consider a different set of presumptions and conditions related to constitutional principles. Thus, it argues that there no relevance to this case, or the condominium community more widely, as the relationship between the parties in this case is one of private entities. NSCC 12 further argues that there is no express wording in the Act to indicate whether solicitor-client privilege applies to lawyer's accounts and argues that clear wording is necessary to "interfere" with this "time honoured privilege".
- [34] While the particular facts of the Ontario (Ministry of the Attorney General) are

unique, and the context specific, I am not convinced by the argument that because in this case the relationship is between two private parties, that it is not relevant. Here I do give some weight to Mr. Kore's argument that the principle of 'open book' is relevant to the entitlement to records. As was noted earlier, Cavarzan J. in MaKay highlights that,

The Act embodies a legislative scheme of individual rights and mutual obligations whereby condominium units are separately owned and the common elements of the condominium complex are co-operatively owned, managed, and financed.

- [35] Condominiums are communities. While it is true that unit owners and the corporation are both private entities, the relationship between them is not simply transactional. These private entities exist in a communal relationship that, consist of "individual rights" and "mutual obligations" where one entity, in this case an elected board of directors, is "authorized to make decisions on behalf of the collectivity organized". This authorization rests on the condition that "the affairs and dealing of the cooperation are an "open book." So, while the open book principle on its own does not mean that unit owners are entitled to every and all records without exception, it does suggest that accountability and transparency are important factors in the context of determining entitlement.
- [36] I am also not swayed by the argument that express wording in the Act is necessary to allow for the reasonable opportunity to rebut privilege. The Act does not need to specifically address solicitor-client privilege for it to be applied or, in this case, challenged.
- [37] Beyond these arguments, NSCC 12 submits that if Ontario (Ministry of Attorney General) is applied, the reasoning would not extend to matter or docket descriptions as those descriptions would reveal intimate details regarding the nature of the services rendered. It makes the same argument regarding itemized fees or total invoice amounts.
- [38] Given the circumstances and evidence before me, I agree with NSCC 12 that should the invoices be disclosed without the redaction of docket descriptions and itemized fees they could reveal information that should be kept confidential. Docket descriptions are likely to contain information about the work provided, who did the work, and the dates on which the work was completed. All this information, if revealed in whole or in part, could, in this case, allow an inquirer to put facts together to deduce the content of solicitor-client communications. Itemized fees may also allow for a keen inquirer to put their knowledge of the AGM and other facts together in a way that could reveal privileged communications.

[39] However, I also agree with Mr. Kore that disclosing the sum total amount of each invoice would not have the same effect. I agree that the total amount of each invoice, in this case, is neutral in so far as even an “assiduous reader” would not be able to determine confidential information. At most, the inquirer would know the total amount of the invoice and the date of the AGM. I am satisfied those two details alone would not reveal any privileged solicitor-client communications.

[40] Thus, I find that NSCC 12 must provide the two invoices to Mr. Kore, but they are entitled to redact the narrative descriptions of the services provided, the corresponding dates on which they were delivered, hours billed, hourly rates, the fees billed for each specific service, and the identity of the person who billed for those hours. They must not redact the total amount of each invoice. As per s.13.3(3)(8) of Ontario Regulation 48/01 (O. Reg 48/01) NSCC 12 is allowed to charge a fee for the actual labour and delivery costs it incurs for making the record available to Mr. Kore.

Issue No. 2: Should NSCC 12 be required to pay a penalty under s.1.44(1)6 of the Act for refusing to provide requested records without a reasonable excuse, and if so, in what amount?

[41] The Tribunal has the authority to order a penalty as set out in s.1.44(1)6 of the Act, if the Tribunal finds that the condominium corporation has without reasonable excuse refused to permit the person to examine or obtain copies of records under s.55(3) of the Act. Mr. Kore has asked that the Tribunal impose the maximum penalty on NSCC 12 for refusing to provide the record without a reasonable excuse.

[42] In this case, I find that there is no basis to impose a penalty on NSCC 12. NSCC 12 responded to Mr. Kore’s request within the timeframe prescribed by the Act, and although I have found that some parts of the invoices requested may be disclosed it was not unreasonable for NSCC 12 to refuse the records based on assumption that solicitor-client privilege applied. It was a reasonable position that, although disputed, ultimately did require a Tribunal decision to resolve. Therefore, no penalty is awarded in this case.

Issue No. 3: Should there be an award of costs in this case?

[43] Mr. Kore has requested that the Tribunal award him costs in the amount of \$200 to recover his Tribunal filing fees in this case.

[44] Under s.1.44(1)4 of the Act the Tribunal may make an order directing a party to the proceeding to pay the costs of another party to the proceeding. The CAT Rules of

Practice and the CAT Practice Direction: Approach to Ordering Costs provide guidelines for the awarding of such costs.

[45] Under CAT Rule 48.1, if a case is not resolved by Settlement Agreement or Consent Order and a CAT Member makes a final decision, the unsuccessful User may be required to pay the successful User's CAT fees and reasonable dispute-related expenses.

[46] In this case, Mr. Kore was successful insofar as I have found he is entitled to the invoices, albeit with some redaction. Thus, I order NSCC 12 to reimburse Mr. Kore \$200 for his Tribunal fees within 30 days of this decision.

C. ORDER

[47] The Tribunal Orders that:

1. NSCC 12 provide Mr. Kore with the two SmithValeriotte Law Firm LLP invoices related to the AGM meeting of 2020. NSCC 12 may redact the narrative descriptions of the services provided, the corresponding dates on which they were delivered, hours billed, hourly rates, the fees billed for each specific service, and the identity of the person who billed for those hours. They must not redact the total amount of each invoice.
2. As per s.13(3)(8) of O. Reg 48/01 NSCC 12 may charge a reasonable fee for the actual labour and delivery costs it incurs for making the record available to Mr. Kore. Prior to undertaking this labour, but within 30 days of this decision, NSCC 12 will provide Mr. Kore with an estimated fee for preparing the records for examination.
3. Mr. Kore must pay the estimated fee prior to being provided the records.
4. NSCC 12 will provide the redacted records as described in paragraph 1 to Mr. Kore within 30 days of receiving the Mr. Kore's payment. When the record is delivered, in accordance with s.13.8(1)(c) of O. Reg 48/01, NSCC 12 must also provide Mr. Kore with a separate written document that indicates the difference between the actual costs the corporation has incurred in preparing the record and the fee paid by the Applicant. If the actual cost is greater or less than the estimated fee that was paid, the parties will adjust in accordance with the directions set out in O. Reg 48/01.
5. NSCC 12 shall reimburse Mr. Kore \$200 for his Tribunal fees within 30 days of this decision.

Nicole Aylwin
Member, Condominium Authority Tribunal

Released on: March 16, 2022