

CONDOMINIUM AUTHORITY TRIBUNAL

DATE: April 6, 2022

CASE: 2021-00350R

Citation: Anderson v. Niagara South Condominium Corporation No. 12, 2022 ONCAT 28

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

Member: Keegan Ferreira, Vice-Chair

The Applicant,

Rachelle Anderson

Self-Represented

The Respondent,

Niagara South Condominium Corporation No. 12

Represented by Jamie Cockburn, Counsel

Hearing: Written Online Hearing – December 13, 2021, to March 8, 2022

REASONS FOR DECISION

A. INTRODUCTION

- [1] Rachelle Anderson (the “Applicant”) is the owner of a unit in Niagara South Condominium Corporation No. 12 (“NSCC 12” or the “Respondent”). The Applicant requested copies of the invoices for amounts paid by the Respondent to SmithValeriotte Law Firm LLP (SV Law) for twelve-month period preceding her request.
- [2] The Respondent denied the Applicant’s request for the SV Law invoices, citing solicitor-client privilege.
- [3] For the reasons set out below, I find that the Applicant is entitled to redacted versions of the SV Law invoices, and that NSCC 12 is entitled to charge a fee to produce these records. I also find that the Respondent is not liable to pay a penalty for refusing to provide the records as its reason for refusing was reasonable.

B. ISSUES & ANALYSIS

Issue No. 1: Is the Applicant entitled to the SV Law invoices?

- [4] On September 15, 2021, the Applicant submitted a Request for Records (the “Request”) seeking for the following records:
- List of Owners (current)
 - Current Plan for Future Funding of Reserve Fund
 - All SV Law invoices for the preceding 12 months
- [5] The Respondent provided the Applicant with its response on September 29, 2021, indicating that the List of Owners and Current Plan for Future Funding of Reserve Fund would be forwarded electronically. I understand that these records have since been provided. The response also indicated that “itemized invoices were not ready yet.” On October 6, 2021, the Respondent provided the Applicant with a subsequent response indicating that the Board was refusing to provide itemized invoices for SV Law citing solicitor-client privilege.
- [6] Solicitor-client privilege presumptively protects a party from being required to disclose confidential information and communications between them and their counsel. Solicitor-client privilege is a common law principle that is not specifically listed as a ground for refusing an owner’s request for records under s. 55 (4) of the *Condominium Act, 1998* (the “Act”).
- [7] Courts have held that solicitor-client privilege is fundamental to our notions of justice. The Tribunal has also previously affirmed, in *Reva Landau v Metropolitan Condominium Corporation No. 7571*, that although not specifically listed in the Act, solicitor-client privilege does apply in relationships between condominium corporations and their counsel, and that solicitor-client privilege can be a legitimate reason for refusing to provide an owner with records subject to that privilege.
- [8] The Applicant argues that they are entitled to copies of the SV Law invoices, either redacted or unredacted, citing the “open book” principle set out in the Act and in *McKay v. Waterloo North Condominium Corp. No. 232* (“McKay”). The Applicant also contends that the Respondent had waived solicitor-client privilege. The Applicant sought an order for the release of the records and for a penalty against the Respondent for refusing to provide the invoices without a reasonable excuse,

along with reimbursement of her CAT fees.

- [9] The Respondent argues that the Applicant is not entitled to any of the SV Law invoices, redacted or not, citing solicitor-client privilege. The Respondent also initially advised that some of the invoices relate to an ongoing legal proceeding before the Superior Court of Justice and consequently are not required to be provided per s. 55 (4) (b) of the Act. The Respondent subsequently advised that the litigation had concluded, and that they were no longer asserting that s. 55 (4) (b) applies.

Did NSCC 12 waive solicitor-client privilege?

- [10] The Applicant argues that the Respondent waived its privilege in three ways. First, the Applicant contends that the Respondent waived privilege when it included the total costs for legal fees in the corporation's audited financial statements, which were included in the 2021 annual general meeting package sent to owners. Second, the Applicant contends that the Respondent waived privilege when it sent a notice to the owners on August 25, 2021, which included the phrase: "Please note there will be further legal costs associated with holding this Owners Meeting." Third, the Applicant contends the Respondent waived privilege when the president of the board made a statement at the corporation's annual general meeting on October 19, 2021, that the Respondent had asked SV Law to respond to emails sent to the board by owners.
- [11] With respect to the Applicant's first argument, the Respondent submits that providing the owners with the aggregate sum of all legal fees for the fiscal year does not constitute a waiver of solicitor-client privilege for the individual invoices. The Respondent also notes that it is statutorily required to provide those amounts as part of the corporation's audited financial statements under the Act.
- [12] I agree with the Respondent that providing the aggregate sum for legal fees in its audited financial statements as required under the Act cannot be interpreted as a waiver of solicitor-client privilege for the individual invoices. If it did, every condominium corporation in the province that provided owners with audited financial statements as required by law could be found to have waived solicitor-client privilege with respect to every individual legal invoice.
- [13] In making her second argument, the Applicant cited *Jack Gale v Halton Condominium Corporation No. 613* ("Gale"), arguing that the notice the

Respondent provided is similar to the one the condominium corporation provided to owners in that case. In *Gale*, the Tribunal found that the notice did constitute a waiver of the privilege. That notice, however, contained specific details about the corporation's legal costs, including the fact that it had sought legal advice about 28 records requests which had come from a small group of condominium owners, that legal advice was sought about whether the requested information must be provided, and it also provided a specific figure for the corporation's related legal costs.

[14] The statement included in the August 25, 2021, notice sent to owners included no such specific information. It only generally advised that there will be costs associated with holding the meeting. I find that the statement in the notice is not specific enough to constitute a waiver of the privilege.

[15] With respect to the Applicant's third argument, the Respondent notes that the Applicant had not provided evidence that such a statement had been made at the meeting. The Respondent submits that regardless of whether such a statement had been made, it would not contain the requisite specificity to constitute waiver of solicitor-client privilege over any of the SV Law invoices.

[16] I agree with the Respondent that even if such a statement had been made, a general statement that the corporation has asked its counsel to respond to emails from owners is not specific enough to constitute a waiver of solicitor-client privilege for the related invoices.

Is the Applicant entitled to the invoices under the "open book" principle?

[17] The Applicant argues that they are entitled to the SV Law invoices, citing the "open book" principle articulated in *McKay* 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.

[18] The Act sets out the entitlement of owners to access records of the condominium corporation. While this entitlement is broad, it is not absolute. Condominium corporations may, for example, refuse to provide records to an owner if they meet

any of the exceptions set out in s. 55 (4) (e.g., if they relate to individual units or unit owners) or if the records are otherwise subject to recognized categories of privilege not specifically articulated in the Act (e.g., solicitor-client privilege).

- [19] Solicitor-client privilege presumptively protects condominium corporations from being required to provide owners with access to their legal accounts and communications. The “open book” principle does not, on its own, constitute sufficient grounds for rebutting the presumption that the records are subject to solicitor-client privilege.

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

- [20] The Applicant acknowledges that if she were to be provided with the SV Law invoices, some redactions may be necessary. She seeks an order requiring the Respondent to provide the SV Law invoices showing the dates, services provided, and amounts invoiced, while conceding that individual names and unit numbers and any legal advice given will need to be redacted. The Applicant submits that disclosing the amount of the fees paid does not directly or indirectly reveal information protected by solicitor-client privilege.
- [21] The Respondent argues that solicitor-client privilege applies to the invoices in their entirety, citing *Maranda v. Richter* [2003] 3 SCR 1934 (“Maranda”). In *Maranda*, the Supreme Court of Canada ruled that lawyer accounts, including the amount of fees paid, are presumptively protected by solicitor-client privilege. In that case, the court found that presumption is appropriate because it is “consistent with the aim of keeping impairments of solicitor-client privilege to a minimum.”
- [22] The Respondent also cited *Robert Remillard v. Frontenac Condominium Corporation No. 185* (“Remillard”), arguing that in that case, the Tribunal held that that solicitor-client privilege presumptively protects lawyer accounts, and the contents therein, from the mandatory record disclosure regime set out in the Act.
- [23] In *Remillard*, the Tribunal referenced *Maranda* to answer the question of whether legal billings are subject to solicitor-client privilege. The Tribunal in that case confirmed that legal invoices are presumptively privileged; it did not find, however, that *Maranda* established an irrefutable presumption. The Tribunal found that Mr. Remillard had not successfully rebutted the presumption of privilege, not that it

was impossible to rebut the presumption.

[24] To answer the question of whether the invoices should be provided, I must now consider what factors are relevant to determining whether the presumption of solicitor-client privilege has been rebutted.

[25] Maranda dealt with the application of solicitor-client privilege in a criminal context. I asked the parties to review a case which dealt with similar issues in a civil context: *Ontario (Ministry of the Attorney General) v. Ontario (Assistant Information and Privacy Commissioner)*⁶ (“Ontario (Ministry of the Attorney General)”).

[26] *Ontario (Ministry of the Attorney General)* is a decision from the Court of Appeal that relates to two orders under *Freedom of Information and Protection of Privacy Act, RSO 1990* (“FIPPA”). In the two orders under appeal, the Attorney General had been directed to disclose documents relating to the fees paid to lawyers.

[27] The Court of Appeal upheld the decision of the Divisional Court, noting that:

Maranda also clearly accepts that the presumption can be rebutted. The presumption will be rebutted if there is no reasonable possibility that disclosure of the amount of the fees paid will directly or 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.

[28] This decision provides a helpful framework for the type of considerations that might rebut the presumption of solicitor-client privilege. I invited the parties to make submissions about whether these considerations were relevant in this case, and whether the release of the invoices in this case would reveal information protected by solicitor-client privilege.

[29] The Applicant argues that the considerations are appropriate and that the release of the redacted invoices would not disclose any such information. The only information that would be available would be the total amounts paid, and no

reasonable inference could be made as to the services rendered or advice given.

[30] The Respondent argues that Ontario (Ministry of the Attorney General) is not applicable or relevant to this case because it takes place in a different legislative context and because the nature of the relationship between the parties is different. The Respondent notes that FIPPA applies in circumstances where a member of the public is requesting information from the government, which is distinct from the circumstances here, where the relevant legislation is the Act and in which an owner is requesting records from their condominium corporation (e.g., one private actor is requesting information from another). As a result, the Respondent submits that the “reasonable possibility/assiduous reader” test is not appropriate and should not be used in the condominium records context.

[31] The Tribunal recently addressed this argument in another recent decision, *Kore v. Niagara South Condominium Corporation No. 127* (“Kore”). In *Kore*, a unit owner requested legal invoices from the same Respondent as in this case, and the Respondent refused to provide them. I agree with Member Aylwin that nature of the relationship between owners and condominium corporations is a relevant and important consideration, and note her comments at paragraph 35 of the decision:

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.

[32] While I recognize the importance of solicitor-client privilege, I also recognize the important accountability and transparency objectives of the Act. The rights and interests of condominium corporations and owners must be balanced in a way that adequately protects both. In this circumstance, I conclude that the presumption of privilege may be rebutted if there is no reasonable possibility that disclosure of the amount of the fees paid will directly or indirectly reveal any communication protected by the privilege (e.g., the nature of any services provided, or the content

of any advice given). Accordingly, I find that the invoices ought to be provided, redacted as necessary to protect information that is appropriately the subject of privilege.

[33] The Respondent notes that the Applicant has intimate knowledge of the legal affairs of the condominium corporation. In order to ensure that the Applicant could not infer or otherwise determine any confidential information about the relationship or communications between the Respondent and its counsel, I conclude that any description of number of hours billed, the hourly rates, the services provided, the names of specific counsel who provided the services, and the dates of the invoices should all be redacted. I am satisfied that disclosing the total amount alone would not reveal any privileged solicitor-client communications.

[34] I find that the Respondent is required to provide the legal invoices to the Applicant, but that they are entitled to redact description of number of hours billed, the hourly rates, the services provided, the names of specific counsel who provided the services, and the dates of the invoices. The invoices must show the total amount for each. As per s.13.3(3)(8) of Ontario Regulation 48/01 (O. Reg 48/01) NSCC 12 is entitled to charge a fee for the actual labour and delivery costs it incurs for providing these records.

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?

[35] The Applicant argues that the Tribunal should conclude that the Respondent has refused to provide the requested SV Law invoices without a reasonable excuse and order a penalty in accordance with s. 1.44 (1) 6 of the Act. The Applicant argues that a penalty of \$5000 would be appropriate in order to change the Respondent's attitude and to prevent future attempts to abridge owners' access to the records.

[36] I find that there is no basis to impose a penalty on the Respondent. I conclude that the Respondent's refusal was reasonable as they were acting on the belief that the invoices in their entirety were protected by solicitor-client privilege. I also note that this case is one of the first in which this particular issue has been raised, and so it was not unreasonable for the Respondent to have responded as it did in October 2021.

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

[37] The Applicant requested that the Tribunal award her costs in the amount of \$200

to recover her Tribunal filing fees in this case.

[38] 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.

[39] 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.

[40] The Applicant was successful in this case as I have found she is entitled to the invoices with necessary redactions. Accordingly, I order the Respondent to reimburse the Applicant \$200 for her Tribunal fees within 30 days of this decision.

C. ORDER

[41] The Tribunal Orders that:

1. The Respondent provide the Applicant with the SV Law invoices for the twelve-month period preceding her request within 30 days of receipt of the payment for the associated costs. The Respondent may redact the number of hours billed, the hourly rates, the description of the services provided, the names of specific counsel who provided the services, and the dates of the invoices.
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 providing these records to the Applicant. Prior to undertaking this labour, but within 30 days of this decision, NSCC 12 will provide the Applicant with an estimated fee for providing the records.
3. The Applicant must pay the estimated fee prior to being provided the records.
4. The Respondent will provide the redacted records as described in paragraph 1 to the Applicant within 30 days of receiving payment. When the records are delivered, NSCC 12 must also provide the Applicant 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 in accordance with s.13.8(1)(c) of O. Reg 48/01. 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 the Applicant \$200 for her Tribunal fees within 30 days of this decision.

Keegan Ferreira
Vice-Chair, Condominium Authority Tribunal

Released on: April 6, 2022