

## CONDOMINIUM AUTHORITY TRIBUNAL

**DATE:** September 26, 2023

**CASE:** 2023-00197R

**CITATION:** Pachai v. Metropolitan Toronto Condominium Corporation No. 850, 2023 ONCAT 137

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

**Member:** Celia Chandler, Member

**The Applicant,**  
Ansuya Pachai  
Self-Represented

**The Respondent,**  
Metropolitan Toronto Condominium Corporation No. 850  
Represented by Albert Ferranti, Agent

**Hearing:** Written Online Hearing – June 8, 2023 to August 27, 2023

### **DECISION AND ORDER**

#### **A. OVERVIEW**

[1] Ms. Ansuya Pachai is a unit owner of Metropolitan Toronto Condominium Corporation No. 850 (“MTCC850”). She requested the following records from MTCC850:

1. a Statement of Claim filed by MTCC580, Court File No.CV23006948740000 (the “Claim”);
2. three Statements of Defence filed in response to the Claim (the “Defences”);
3. a fourth Statement of Defence not yet filed in response to the Claim (the “Pending Defence”); and
4. any future Notices of Motion and Motion Records (the “Future Motion Materials”), and any future Court Orders (the “Future Orders”) related to the Claim.

[2] Ms. Pachai is of the view she is entitled to these records for a number of reasons including that: pre-litigation disclosures constitute a waiver and therefore the

principles in *Jack Gale v Halton Condominium Corporation No. 61*<sup>1</sup> (“Gale”), apply; the open book principle of the *Condominium Act, 1998* (the “Act”) supports disclosure, especially since these are public documents in the court system; and the litigation is covered by section 23 of the Act and therefore the litigation is on her behalf and she is entitled to the documents.

- [3] MTCC850 has denied Ms. Pachai access to the records for a number of reasons including, common law litigation or solicitor/client privilege and the discretion afforded MTCC850 in subsection 55 (4) of the Act.
- [4] In addition to requesting that I order disclosure of the documents listed in paragraph 1, Ms. Pachai has requested I order:
1. training or retraining for directors;
  2. distribution of my order to all unit owners;
  3. a penalty of \$5000; and
  4. payment of her \$200 CAT filing fees.
- [5] For the reasons set out below, I find Ms. Pachai is entitled to the Claim and the Defences.
- [6] I further find I cannot order disclosure of documents not in existence at the date of the Application, that is, the Pending Defence, Future Motion Materials, and Future Orders. Having said that, I encourage MTCC850 to act in accordance with the principles of this decision and provide them to Ms. Pachai and any other unit owner who might ask.
- [7] I do not find an order for training necessary in this case, although I encourage directors to revisit the training regularly to ensure they are making decisions in both the letter and the spirit of the Act.
- [8] I am not ordering the distribution of this decision among the owners but hope MTCC850 will see this order as a fresh start with respect to transparency with the owners and will share the decision without such an order.
- [9] Finally, I find MTCC850 is not liable to pay a penalty for its refusal to provide the records. MTCC850 will pay Ms. Pachai her filing fees of \$200.

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<sup>1</sup> *Gale v Halton Condominium Corporation No. 61* 2019 ONCAT 46 (CanLII) upheld by the Divisional Court in 2020 ONSC 5896 (CanLII)

## **B. BACKGROUND**

- [10] MTCC850 is located on The Esplanade in downtown Toronto.
- [11] The City of Toronto located a shelter for homeless people in a hotel next door to MTCC850 during the COVID19 pandemic.
- [12] MTCC850 spent an extra \$165,000 on security costs, necessary in the board's view to protect MTCC850 residents from the activities of the people living in the shelter.
- [13] In January 2023, the board of MTCC850 held a town hall meeting of owners during which Mr. Ferranti, on behalf of the board, explained the board's intention to sue the City of Toronto, the hotel operator (two corporations), and the non-profit shelter operator to recover its security costs.
- [14] After the meeting, MTCC850 sent a meeting summary to all owners. The town hall was referred in MTCC850's spring newsletter. Owners received a "General Notice of Legal Action" in February 2023 related to MTCC850's intention to take legal action (the "February Notice"). In June, owners were updated by Mr. Ferranti about the suit, including the fact MTCC850 had received three of the four defences and expected the fourth soon.
- [15] Ms. Pachai requested copies of the Claim and the Defences but was denied access by MTCC850.

## **C. ISSUES & ANALYSIS**

- [16] The role of the CAT is to decant and simplify the submissions of the parties. Accordingly, I will not set out all the parties' respective evidence or arguments in these reasons. However, I have considered them all.
- [17] Both parties made submissions about whether the Claim was made under subsection 23(1) of the Act. This section is not one for which the Tribunal has jurisdiction and is not relevant to the determination of entitlement to records under section 55. I do not consider these arguments in this case.
- [18] There are six issues in this application.
1. Do the common law litigation or solicitor/client privileges apply?

2. Does the open book principle in the Act weigh in favour of MTCC850 exercising discretion granted in section 55(4) of the Act and granting access to the Claim and the Defences, especially since the records at issue are public documents?
3. Should my ruling to disclose records existing at the date of the Request apply to documents not yet existing?
4. Should MTCC850 be required to pay a penalty?
5. Should MTCC850's board undergo further training or retraining, and be required to distribute the decision to the owners?
6. Should there be a costs award?

I will address each separately.

### **Issue 1: Do the common law litigation or solicitor/client privileges apply?**

[19] In common law – that is, the law not covered by statutes but that is made by judges – a person may avoid disclosing confidential information if either the communication or the relationship is protected by the law of privilege.

[20] Litigation privilege and solicitor/client privilege are common law principles to allow, in the first case, open communications between a solicitor and a client in the course of preparing for litigation to ensure an effective litigation process, and in the second, to ensure lawyers can communicate freely and candidly more generally with their clients.

[21] The records in this case are not communications between solicitors and their clients. Indeed, they are public documents in the court record. They are therefore not protected by either of these privileges.

[22] Since the records are not subject to privilege, I need not consider the effect of disclosure and principles in *Gale*.

### **Issue 2: Does the open book principle in the Act weigh in favour of MTCC850 exercising discretion granted in section 55(4) of the Act and granting access to the Claim and the Defences, especially since the records at issue are public?**

[23] It is settled law that “the underlying policy of the Act [is] that the affairs of the corporation are to be an open book to the owners.”<sup>2</sup> This open book approach was underscored in *Gale v Halton Condominium Corporation No. 61* in which Member

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<sup>2</sup> *McKay v Waterloo North Condominium Corp. No. 23* (page 7, 12)

Sandford says: “The records provisions of the Act are broadly worded and are intended to foster transparency between condominium unit owners and the condominium Corporation.”<sup>3</sup> This open book approach is also reflected in section 55 which grants owners access to records with some limited exceptions.

- [24] One of those exceptions, subsection 55(4)(b), includes records related to actual or contemplated litigation. Subsection 55(6), however, gives a condominium board discretion, despite subsection 55(4)(b), to grant access to such records.
- [25] A board’s exercise of discretion is protected from interference by a court or tribunal, provided it falls within a range of what is reasonable.
- [26] In this case, the records that were requested are neither privileged (as determined in issue 1) nor confidential. They are court records which, other than those in highly sensitive cases, are public documents, helping to ensure the accountability of the judicial system.
- [27] The openness of the Act and the fact the records at issue are public weigh in favour of MTCC850 exercising its discretion under section 55(6) to grant access to the records, absent any reason not to.
- [28] Release of the records creates no hardship for the condominium, nor any breach of its rights, privileges, or duties to provide them when requested by an owner.
- [29] The various disclosures related to the Claim referred to in paragraphs 13 and 14 above suggest that there has already been an attitude of openness with respect to such documents.
- [30] It is also not appropriate or reasonable for the board to rely on the exclusion under subsection 55(4)(b) without also paying attention to the discretion it is granted under subsection 55(6).
- [31] For these reasons, the board’s exercise of discretion to refuse to provide the Applicant with the requested records cannot be viewed as reasonable.

**Issue 3: Should my ruling to disclose records existing at the date of the Request apply to documents not yet existing?**

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<sup>3</sup> *Gale v Halton Condominium Corporation No. 61* 2019 ONCAT 46 (CanLII) (para 21) upheld by the Divisional Court in 2020 ONSC 5896 (CanLII)

- [32] Section 55(1) of the Act lists the records a condominium is required to keep. Section 13.1 of O.Reg 48/01 under the Act prescribes those records referred to in paragraph 11 of subsection 55 (1). Records related to actual or contemplated litigation are included in paragraph 5 of 13.1(1).
- [33] The process for requesting access to records is set out in the sections of O.Reg 48/01 that follow. There is no process for requesting records that do not exist at the time of the request.
- [34] Section 1.44 (1) 1 of the Act provides me with authority to make orders “to comply with anything for which a person may make an application to the Tribunal.”
- [35] I cannot therefore order MTCC850 to provide Ms. Pachai with the Pending Defence, the Future Motion Materials, and Future Orders she’s requested, given they did not exist at the time of her request.
- [36] I can and will, however, signal to MTCC850 to provide these future records to Ms. Pachai if she requests them once they exist to be consistent with my ruling in this decision.

#### **Issue 4: Should MTCC850 be required to pay a penalty?**

- [37] Subsection 1.44 (1) 6 of the Act gives the CAT jurisdiction to order a penalty be paid by MTCC850 if the CAT considers that MTCC850 refused to provide Ms. Pachai the records she requested without reasonable excuse.
- [38] Ms. Pachai has asked me to consider a penalty of \$5000.
- [39] While we determined in Issue 2 that the exercise of discretion to deny access was ultimately not a reasonable one, this records request raised issues not previously determined by this Tribunal. Therefore, I conclude the respondent had a sufficiently reasonable excuse to refuse the record and therefore I am not ordering a penalty.

#### **Issue 5: Should MTCC850 directors be required undergo further training or retraining, or distribute the decision to the owners?**

- [40] While subsection 1.44 (1) 2 and 7 would allow me to order both further remedies requested by the Applicant, namely (1) that the directors of MTCC850 to undergo further training or retraining and (2) that my decision be distributed to the owners, these are unusual orders and ones I am not prepared to make in these

circumstances. Regarding the first, the training provided by the Condominium Authority of Ontario does not address records requests in a way that would have prevented the condominium from making the decision it did regarding access. Regarding the distribution of this decision to the owners, CAT decisions are public documents and therefore accessible to any owner who is interested through the CAT website.

**Issue 6: Should there be a costs award?**

[41] Neither party has requested costs other than Ms. Pachai's request to have her application fees, \$200, reimbursed. I find this reasonable in these circumstances and in accordance with Rule 48.1 of the CAT Rules of Practice, given she was the successful party.

**ORDER**

[42] The Tribunal orders that:

1. Within 10 business days of the date of this decision MTCC850 provide, electronically, Ms. Pachai with copies of the Claim and the Defences.
2. MTCC reimburse Ms. Pachai her \$200 application fees within 10 business days of the date of this decision.

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Celia Chandler  
Member, Condominium Authority Tribunal

Released on: September 26, 2023