

## CONDOMINIUM AUTHORITY TRIBUNAL

**DATE:** May 26, 2020

**CASE:** 2019-00205R

**Citation:** Reva Landau v Metropolitan Condominium Corporation No. 757, 2020 ONCAT 19

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

**Adjudicator:** Laurie Sanford, Member

**The Applicant**

Reva Landau

Self-represented

**The Respondent**

Metropolitan Toronto Condominium Corporation No. 757

Natalia Polis, Counsel

**Hearing:** January 22, 2020 to May 6, 2020, in writing

### REASONS FOR DECISION

#### A. OVERVIEW

- [1] Ms. Reva Landau is a unit owner of Metropolitan Toronto Condominium Corporation No. 757 (“MTCC757”). She has requested records from MTCC757, specifically, a legal opinion letter or letters, most probably written between March and August, 2018 (the “2018 Legal Opinion”). The 2018 Legal Opinion relates to the authority of MTCC757 to add costs to the common expenses of individual unit owners for violations or alleged violations of specified Rules of MTCC757.
- [2] MTCC757 submits that the 2018 Legal Opinion is protected from production by the common law solicitor-client privilege. Alternatively, MTCC757 relies on the exemption from record production contained in sub-section 55(4)(b) of the *Condominium Act, 1998* (the “Act”) and in Ontario Regulation 48/01 to the Act (the “Regulation”). Subsection 55(4)(b) exempts from production “records relating to actual or contemplated litigation, as determined by the regulations . . .”.
- [3] Ms. Landau submits that solicitor-client privilege does not apply to record requests under section 55 of the Act. She is of the view that subsection 55(4)(b) sets out the only legal privilege that is available to MTCC757 in this case and that the section does not apply to her records request. Alternatively, Ms. Landau argues

that the solicitor-client privilege has been waived by the partial disclosure of the advice received.

- [4] For the reasons set out below, I find that Ms. Landau is not entitled to the 2018 Legal Opinion. The solicitor-client privilege continues to operate in the statutory framework governing records production and it protects MTCC757 from an obligation to produce the 2018 Legal Opinion. MTCC757 has not waived the privilege. Concerning the alternative position of MTCC757, that they are exempt producing the 2018 Legal Opinion on the basis of subsection 55(4)(b), I find, on the facts of this case, subsection 55(4)(b) does not apply.
- [5] Both parties claimed their costs but, in the circumstances of this case, no order for costs will issue.

## **B. ISSUES & ANALYSIS**

- [6] The parties agree that the record or records being sought are the 2018 Legal Opinion. Ms. Landau submits that the 2018 Legal Opinion was most probably produced sometime between March and August 2018 and may consist of one or more letters.
- [7] There were several issues that arise from the records request made by Ms. Landau, namely:
1. Is Ms. Landau entitled to the 2018 Legal Opinion? Specifically,
    - i. Is MTCC757 entitled to refuse access to the 2018 Legal Opinion on the basis of the rules of common law privilege?
    - ii. Is the 2018 Legal Opinion exempt from production under subsection 55(4)(b) of the Act?
  2. What fees, costs and penalties, if any, should apply and how should they be calculated?

### **Issue 1: Is Ms. Landau entitled to receive copies of the 2018 Legal Opinion?**

#### Does Solicitor-Client Privilege apply to the 2018 Legal Opinion

- [8] Both parties submitted extensive submissions on the legal questions arising in this matter, and I am grateful for their assistance.

- [9] MTCC757 relies on solicitor-client privilege as grounds for refusing to produce the 2018 Legal Opinion. Ms. Landau submits that the solicitor-client privilege is replaced by, or subsumed into, the statutory exemption expressed in subsection 55(4)(b) of the Act. Alternatively, Ms. Landau submits that the privilege has been waived in this case by a partial disclosure by MTCC757 of the advice it received.
- [10] Solicitor-client privilege protects communications between a solicitor and his or her client. The privilege exists to protect these communications on the theory that a client is entitled to consult a lawyer in confidence and without fear of any disclosure made by the client or any advice given by the lawyer becoming public. Courts have held that the solicitor-client privilege is fundamental to our notions of justice. The question in this case is whether the common law solicitor-client privilege survives the Act, in particular the exemption set out in subsection 55(4)(b). If so, the second question becomes whether it applies in this case.
- [11] Ms. Landau submits that it is possible to exclude or replace the common law solicitor-client privilege with statutory provisions. That is correct but the wording of the provision that excludes or replaces the privilege must be clear and unambiguous.
- [12] In the Federal Court of Appeal decision of *Blank v Canada (Minister of Justice)*, 2004 FCA 287 (CanLII), [2005] 1 FCR 403, the court considered the wording of the *Access to Information Act*, RSC, 1985, C. A-1. Subsection 46 of the Act stated at the time:

Despite any other Act of Parliament, any privilege under the law of evidence, solicitor-client privilege or the professional secrecy of advocates and notaries and litigation privilege, the Court may, in the course of any proceedings before it arising from an application under section 41 or 44, examine any record to which this Part applies that is under the control of a government institution, and no such record may be withheld from the Court on any grounds.

The Court accepted that this provision was sufficient to grant the Court the power to review (but not to reconstitute) the record, despite the solicitor-client privilege.

- [13] In the case of *Ontario (Support & Custody Orders Enforcement Director) v. Nabi* (1989), 71 O.R. (2d) 141, [1989] O.J. No. 2117, the Court stated, “The solicitor-client privilege is one of the cornerstones of our democratic tradition and any legislation which purports to interfere with it must be strictly construed.” In that case, the Court interpreted the wording of subsection 6(6) of the *Support and*

*Custody Orders Enforcement Act*, 1985, S.O. 1985, c. 6, as operating to subsume solicitor-client privilege. The subsection read, “This section applies despite any other Act or regulation and despite any common law rule of confidentiality.”

[14] By contrast, Subsection 55(3) of the Act sets out a general entitlement to records as follows:

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 or obtain copies of the records of the corporation in accordance with the regulations, except those records described in subsection 4.

[15] Subsection 55(4)(b) of the Act provides for the following exemption:

4) The right to examine or obtain copies of records under subsection (3) does not apply to, . . . .

(b) records relating to actual or contemplated litigation, as determined by the regulations, or insurance investigations involving the corporation;

[16] Regulation 48/01 to the Act (the “Regulation”) further defines the litigation exemption in subsection 55(4)(b). It defines “contemplated litigation as, “any matter that might reasonably be expected to become actual litigation based on information that is within a corporation’s knowledge or control.”

[17] The question is whether the wording of subsection 55(4)(b) is sufficiently specific to extinguish solicitor-client privilege for the purpose of record requests. I conclude that it is not. As can be seen in the *Blank* and *Nabi* cases cited above, the statutes being considered contained very specific wording that excluded common law privilege. These cases gave the framers of the Act precedents for the sort of wording that would be effective to extinguish, or subsume, the common law privilege had they wished to do so. They did not expressly exclude the solicitor-client privilege and I conclude that was by design.

[18] Ms. Landau argues that it was open to the legislature to expressly include the continuation of the solicitor-client privilege had it intended that result. However, this interpretation is not consistent with the finding in the *Nabi* case. In that case, the Unified Family Court made clear that it was exclusionary language that needed to be clear and specific. That is, it was up to the legislature to clearly exclude the privilege; not to clearly include it. Ms. Landau correctly notes that the purpose of

section 55 is to encourage transparency. But that purpose alone is not sufficient to read into the exemption in subsection 55(4)(b) language which is not there.

- [19] Ms. Landau referred to the case of *Fisher v. Metropolitan Toronto Condominium Corp. No. 596*, 2004 CarswellOnt 6242, [2004] O.J. No. 5758, 31 R.P.R. (4<sup>th</sup>) 273. In that case, the Ontario Superior Court of Justice (Divisional Court) was considering an earlier iteration of the subsection 55(4)(b) statutory exemption, which read:

The right to examine records under subsection (3) does not apply to, . . .

(b) records relating to actual or pending litigation or insurance investigations involving the corporation; . . .

The Condominium Corporation claimed that the exemption operated to exclude the records that Mr. Fisher wanted. The Superior Court held that the exemption did not apply because the records that were requested related to matters that occurred before the litigation was contemplated. The Divisional Court disagreed, saying:

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 [Metropolitan Toronto Corp. No. 596] 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.

- [20] Ms. Landau submits that this finding must be read as meaning that “only those aspects of solicitor-client privilege or litigation privilege that relate to actual or contemplated litigation have been incorporated into the *Condominium Act*.” However, my interpretation of the Court’s finding is that the Divisional Court concludes that section 55(4)(b) “maintains” the privilege, not that it replaces or supplants it for all purposes. It is not inconsistent to interpret subsection 55(4)(b) as maintaining solicitor-client privilege in the specific case of actual or contemplated litigation without concluding that it excludes the solicitor-client privilege from applying in any other context. This reading is more consistent with the wording of section 55 of the Act, and with the statement of the Court in *Fisher* than the interpretation Ms. Landau proposes. I conclude that the solicitor-client privilege continues to apply separate from the exemption in subsection 55(4)(b).

- [21] Ms. Landau submits that even if the solicitor-client privilege is not codified in subsection 55(4)(b), it has been waived by MTCC757. She cites an owners' meeting on August 7, 2018 where a lawyer for MTCC757 appeared and stated that that Board had the authority to pass the Rules that Ms. Landau contests. Ms. Landau acknowledges that the privilege resides in MTCC757 and can only be waived by the corporation. Her position is that because the lawyer was there on the authority of the Board of MTCC757, that disclosure amounts to a waiver by MTCC757, the client, of the solicitor-client privilege that exists between the condominium corporation and its lawyers. She also refers to a conversation, disputed by MTCC757, in which she alleges that the property manager of MTCC757 commented that because the lawyer had said that the contested provision was legal, it could be included in the Rules. Ms. Landau also relies on a statement by the Board of Directors, in introducing the revised Rules, in which the Board wrote: "The package has been vetted by the corporation's lawyers and is in compliance with the applicable law . . . ."
- [22] The question of whether the solicitor-client privilege has been waived must be considered on the facts of each case. Reviewing each of what Ms. Landau submits are instances of waiver, I conclude that the privilege has not been waived. Having a lawyer speak at a unit owners meeting is not a waiver of any advice MTCC757 received prior to the meeting. Among other reasons, it is not open to the lawyer to waive the privilege. Only the client may do so and inviting the lawyer to speak does not constitute a waiver of privilege for all communications between lawyer and client on the subject. As MTCC757 submits, the client in this case is the Board of MTCC757. Concerning the alleged comments of the Property Manager, unless he was an authorized officer of the condominium, and MTCC757 submits he was not, he cannot waive the privilege. The statement that the package of proposed Rules has been vetted by lawyers and found to be in compliance with the law is not specific enough to constitute a waiver of the privilege that protects any communications between MTCC757 and its lawyers, up to and including the 2018 Legal Opinion. I conclude that MTCC757 has not waived its privilege. Given that conclusion, I find that the solicitor-client privilege applies in this case to protect MTCC757 from having to disclose the 2018 Legal Opinion which it obtained from its lawyers.

Does the Exemption set out in subsection 55(4)(b) apply?

- [23] MTCC757 also argues that it is exempt from the obligation to provide the 2018 Legal Opinion because the exemption set out in subsection 55(4)(b) applies. Ms.

Landau submits that the exemption does not apply as the 2018 Legal Opinion was not prepared for actual or contemplated litigation. Given my finding that solicitor-client privilege applies in this case, it is not necessary for me to decide this point. However, for the sake of completeness, I have considered the issue. I conclude that the subsection 55(4)(b) exemption does not apply in this case because MTCC757 claimed it retroactively rather than at the appropriate time.

- [24] The chronology of events is relevant in this matter. According to Ms. Landau's testimony, which is not contested by MTCC757 as it relates to timing, in June 2018 she received a document from MTCC757 which contained proposed changes to the Rules of the condominium. Rules of condominiums are enacted by the Board of Directors and may govern a range of responsibilities and behaviours within the condominium community. Ms. Landau was concerned that the Rule changes were ambiguous. She was also concerned about the proposed provision which would permit MTCC757 to add costs to the common expenses of individual unit owners for the enforcement of these Rules. She found the cost provision unclear and she questioned the authority of MTCC757 to enact it. She advised MTCC757 that she was trying to obtain legal advice on the costs issue. Her position was that "putting in a provision that was legally questionable could lead to future problems".
- [25] In June 2018, Ms. Landau obtained a legal opinion which she sent to the management of MTCC757, asking the manager to forward it to the Board of Directors. Ms. Landau's understanding of this opinion was that the Board of MTCC757 did not have the authority to enact the cost provisions that were proposed. In an June 21<sup>st</sup> email, Ms. Landau wrote, "I do not know what opinion letter, if any, you have to the contrary but trying to put into effect a rule which you have been advised M.T.C.C. 757 does not have the authority to do is unwise and could possibly lead to expensive legal battles"
- [26] In the same month, Ms. Landau approached other condominium owners about her concerns and obtained the requisite number of signatures to call a meeting to discuss the matter. Requisitioning this meeting effectively blocked the enactment of the proposed Rules until after the meeting, which was scheduled for August. At the meeting, the proposed Rules were defeated. As a result, revised Rules were sent out by MTCC757 following the meeting. When the revised Rules were posted on MTCC757's website, Ms. Landau found the formatting made the Rules unclear about the scope of the cost provisions. While she was not affected personally, her testimony was that she was concerned about a lack of authority to enact the cost provision. Ms. Landau testified that she was concerned that enacting provisions where the legal authority was in doubt "appears to be just asking for problems".

She testified to her concern that lawsuits over these provisions could result in legal fees for which all unit owners would be responsible.

- [27] At some time between her June forwarding of her legal opinion to the MTCC757 management and the August requisitioned meeting, Ms. Landau became aware that MTCC757 had a legal opinion that apparently disagreed with the opinion Ms. Landau had obtained and shared with the MTCC757 Board. This legal opinion is the 2018 Legal Opinion and, on July 25, 2019, Ms. Landau filed a records request for it. In an undated reply, which Ms. Landau received on August 20<sup>th</sup>, MTCC757 denied to request, writing, “The legal opinion to the Corporation with respect to the charge-back provision is protected by solicitor-client privilege.”
- [28] On August 21<sup>st</sup>, Ms. Landau replied contesting the application of solicitor-client privilege and advising that if she did not receive the 2018 Legal Opinion, she would consider an application to the Condominium Authority Tribunal. Relations between Ms. Landau and MTCC757 appear to have deteriorated from that point. MTCC757 advised that if Ms. Landau proceeded to the Tribunal, MTCC757 would seek to recover its costs in the application. On September 9<sup>th</sup>, MTCC757 emailed Ms. Landau:

Legal opinions provided from MTCC 757’s legal counsel to its Board of Directors are protected by solicitor-client privilege and/or exempt from review pursuant to section 55(4) of the Act.

While most records of the Corporation are subject to review by owners, legal opinions and other correspondence between the corporation’s legal counsel and the Board are necessarily exempt from review. The Corporation would be unable to effectively govern if legal opinions were subject to review by owners.

Accordingly, MTCC 757 will not be providing you with copies of the legal opinions your [sic] requested.

- [29] MTCC757 submits that Ms. Landau had in the past threatened legal action against it and therefore, it was concerned about possible litigation at the time of its response to her records request. However, considering the wording of Ms. Landau’s communications with MTCC757 concerning the Rules and the conduct of an earlier Annual General Meeting, she refers to the possibility that the actions of the condominium corporation could lead to “expensive legal battles” or that by taking certain action, the corporation is “just asking for problems”. I do not interpret these and other like expressions to be threats of legal action to be taken by Ms. Landau against MTCC757. They appear to me to be, as she has testified,

concern that MTCC757 could become embroiled in litigation with third parties and that she, as a unit owner, would be liable to pay part of the legal costs. These expressions do not appear sufficiently explicit to give rise to a reasonable concern that Ms. Landau was contemplating litigation as defined in the Regulation, that is a “matter that might reasonably be expected to become actual litigation based on information that is within a corporation’s knowledge or control.” I am confirmed in this understanding by the fact that MTCC757, in their August 20<sup>th</sup> response to Ms. Landau, did not refer to the subsection 55(4)(b) exemption, relying only on solicitor-client privilege.

- [30] It was not until August 21<sup>st</sup>, the day after Ms. Landau had received MTCC757’s response to her records request, that Ms. Landau advised that she would consider an application to the CAT. At that point, MTCC757 might reasonably have expected the matter to become litigious. The question is, was it then too late for MTCC757 to claim the subsection 55(4)(b) exemption? I conclude that it was.
- [31] The exemption in subsection 55(4)(b) is in some respects broader in scope than is the common law litigation privilege. The common law privilege covers materials which were prepared for the main purpose of litigation. Subsection 55(4)(b) exempts from production any record “relating” to actual or contemplated litigation. There is no timeframe expressed in the exemption. It is accordingly unclear at what point the right to the exemption arises. Does it arise only when the record is prepared? It appears from the plain wording of the Act that the exemption may be claimed at some point after the record’s preparation; the qualification is that the record relates to litigation, not that it is prepared for that purpose.
- [32] However, the time to claim the exemption cannot be open-ended. If, for example, a condominium corporation could claim an exemption on the basis of actual litigation at any time, then it would be open to a corporation to claim the exemption after a records request application was made to the Tribunal. If that were the case, then a condominium corporation could thwart any records request by claiming that the record requested related to litigation, the litigation being the application for the record itself. Clearly, that cannot be what the legislature contemplated in establishing this exemption.
- [33] In this case, I conclude that the logical time for MTCC757 to have claimed the exemption was when it responded to Ms. Landau, around August 20, 2019. It is important to note that Ms. Landau’s records request and MTCC757’s response are formal documents on forms prescribed by the Regulation. Under the Regulation, MTCC757 was given 30 days to prepare its response. MTCC757 had ample

opportunity to consider the grounds for its refusal. Therefore, the failure to claim the subsection 55(4)(b) exemption cannot be dismissed as a mere oversight. When MTCC757 did claim the exemption in September, two events had intervened. First, the 30-day period for it to respond to Ms. Landau’s request had expired. Second, it was faced with the explicit possibility of a records application to the Tribunal. MTCC757 may not claim the benefits of hindsight in these circumstances. MTCC757 did not claim the subsection 55(4)(b) exemption at the time of its response to Ms. Landau’s record request. I conclude that it would be inconsistent with the records request provisions of the Act to permit it to claim the exemption retroactively. Therefore, the exemption would not apply in this case.

**Issue 2: What fees, costs and penalties, if any, should apply and how should they be calculated?**

[34] Both parties claimed costs. Ms. Landau claimed her filing costs in the amount of \$200. However, because her application is unsuccessful, she is not entitled to those costs.

[35] MTCC757 claims an unspecified amount for its legal costs on the grounds that it advised Ms. Landau “on numerous occasions, that [Ms. Landau] was not entitled to examine or obtain copies of the [2018 Legal Opinion] and reasons for same.” As Ms. Landau points out, this line of reasoning would oblige unit owners to accept MTCC757’s reasons for denying records claims without contesting them. Ms. Landau was within her rights to bring the application to the Tribunal.

[36] Rule 31.1 of the Condominium Authority Tribunal Rules of Practice (effective January 1, 2020) states;

The Tribunal will not order one User to pay another User any fees charged by that User’s lawyer or paralegal, unless there are exceptional reasons to do this.

I find that no exceptional reason exists in this case and, accordingly, no order for costs will issue.

[37] As no records have been produced there is no basis for a fee and as the records were correctly refused, there will be no penalty.

**C. ORDER**

[38] Ms. Landau is not entitled to the 2018 Legal Opinion under section 55 of the Act.

[39] The Tribunal makes no order for costs.

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Laurie Sanford  
Member, Condominium Authority Tribunal

RELEASED ON: May 26, 2020