

CONDOMINIUM AUTHORITY TRIBUNAL

DATE: June 6, 2023

CASE: 2023-00030R

Citation: Di Felice v. Wentworth Standard Condominium Corporation No. 379, 2023 ONCAT 77

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

Member: Dawn Wickett, Member

The Applicant,
Paula Di Felice
Self-Represented

The Respondent,
Wentworth Standard Condominium Corporation No. 379
Represented by Erik Savas, Counsel

Hearing: Written Online Hearing – April 10, 2023 to May 10, 2023

REASONS FOR DECISION

A. INTRODUCTION

[1] The Applicant is a unit owner in Wentworth Standard Condominium Corporation No. 379 (“WSCC 379”). On August 19, 2022, October 18, 2022, October 19, 2022, and November 17, 2022, the Applicant submitted requests for records to WSCC 379. In Stage 2-Mediation, most of the Applicant’s requests for records were resolved. The only outstanding records remaining in dispute for Stage 3-Adjudication are the following:

1. All legal invoices for the years 2017, 2018, 2019, 2020 and 2021
2. All legal invoices for the year 2022, up to and including October 19, 2022

[2] WSCC 379 denied the Applicant’s requests for the legal invoices citing an exemption under section 55 (4) (b) and (c) of the *Condominium Act, 1998* (“the Act”), and solicitor-client privilege.

[3] For the reasons set out below, I find the Applicant is entitled to redacted versions of WSCC 379’s legal invoices for the years 2017 to October 19, 2022. Further, I find WSCC 379 is entitled to charge a fee to provide these redacted records. As the Applicant was successful in her application, I find it appropriate that the Respondent reimburse her the cost for having filed this application. I also find it

appropriate to deny the Respondent's request for legal costs to participate in this proceeding, and that no penalty be ordered against the Respondent.

B. ISSUES & ANALYSIS

Applicant's Evidence

[4] It is the Applicant's position that, as a unit owner, she is entitled to have access to records which would provide a better understanding of WSCC 379's financial spending, specifically related to legal undertakings. The Applicant submits that WSCC 379's spending of unit owners' money should be based on "open book principle" and transparency, which should include the amount of money spent on legal services. The Applicant submits that while she may not be entitled to information that would jeopardize solicitor-client information, legal invoices providing dates and amount paid for legal services does not infringe on this principle.

[5] In support of her position, the Applicant relied on several decisions which speak to the issue in dispute. In particular, she relied on *Kore v. Niagara South Condominium Corporation No. 12*, 2022 ONCAT 19, paragraph 35 which reads as follow:

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.

[6] In addition, the Applicant cited *Anderson v. Niagara South Condominium Corporation No. 12*, 2022 ONCAT 28 ("Anderson"), paragraph 32 which reads as follow:

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.

[7] In her testimony, the Applicant also challenged the Respondent's position that the legal invoices are protected by 55 (4) (b) of the Act and its solicitor-client privilege because on numerous occasions, WSCC 379 and its counsel provided

communication to unit owners about the issues being litigated, specifically those involving the litigation against the insurance company. In support of her position on this issue, the Applicant provided several copies of communication from WSCC 379 which she believes demonstrate they waived their solicitor-client privilege by sharing information about the ongoing legal proceedings.

- [8] I questioned the Applicant as to whether she was seeking unredacted or redacted copies of the legal invoices. The Applicant testified that it was difficult for her answer this question as it is “contingent on the degree of redaction permitted by you as the Adjudicator,” however she was not seeking to examine confidential information about the corporation or unit owners. The Applicant stated that she would like enough information that would allow for “transparency” and “accountability.”
- [9] The Applicant has requested that WSCC 379 be ordered to reimburse her the Tribunal filing fee.
- [10] With respect to WSCC 379’s request for reasonable fees to redact the legal invoices if ordered to provide them to the Applicant, the Applicant did not make submissions on the amount. Rather, she stated that “any redaction costs can only be agreed to once the Member has decided on the matter and the criteria and scope of redaction, if any.”

Respondent’s Evidence

- [11] Counsel for the Respondent submitted that all the legal invoices are subject to solicitor-client privilege, particularly those from March 2020 to present as they are related to litigation against an insurance company which is presently ongoing. Counsel also relied on the exemptions under section 55 (4) (b) and (c), as the legal invoices relate to actual or contemplated litigation, or insurance investigation, and are records related to specific unit owners.
- [12] Counsel further submitted that if the Tribunal orders that the Applicant be provided with a copy of redacted legal invoices, the order should be consistent with the Tribunal’s “established practice” of ordering reasonable charges payable by the Applicant for the cost of redacting.
- [13] Mr. Darvin Puhl, testified on behalf of WSCC 379. He is the president of the Board and has personal knowledge of the issues in dispute.
- [14] Mr. Puhl testified that with respect to the Applicant’s request to examine legal invoices from 2017 to October 19, 2022, there are the following invoices contained in WSCC 379’s files:
1. 2017-three invoices from Shibley and Righton (“SR”) and one invoice for Simpson Wigle Law LLP (“SW”)
 2. 2018-two invoices for SW

3. 2019-two invoices for SW
4. 2020-six invoices for SW
5. 2021-two invoices for SW
6. 2022-two invoices for SW

- [15] Mr. Puhl's evidence is that the totals of the legal invoices for 2019 to 2021 are set out in the audited financial statements. Amounts incurred for legal services in 2017 and 2018 were paid by the corporation's insurer and do not appear in the audited financial statements. The corporation's 2022 audited financial statements are not yet completed, but the Respondent indicated the amounts of the 2022 legal invoices will be included in them. Mr. Puhl testified that the legal invoices for 2017 stem from a matter that was disputed before the Human Rights Tribunal of Ontario ("HRTO"). The invoices for 2018 stem from an insurance investigation. The 2019 invoices were for legal advice with respect to the insurance investigation. The 2020 to October 19, 2022, invoices are for litigation against the insurance company which remains ongoing as of the date of this hearing.
- [16] Mr. Puhl testified that in accordance with the Act, WSCC 379 notified owners of its intention to take legal action against the insurance company and provided them with periodic updates as the status of the proceedings. Mr. Puhl denied that any confidential or privileged information was provided to the unit owners during these communications.
- [17] It is Mr. Puhl's position that the legal invoices are protected by solicitor-client privilege. Further, WSCC 379 was not aware until this proceeding that the Applicant would be satisfied with receiving redacted copies of the legal invoices as up until now, she has insisted on receiving "full disclosure of their details relying on the 'open book' principle and her desire for transparency".
- [18] Mr. Puhl requested that if redacted copies of the legal invoices are ordered to be provided to the Applicant, WSCC 379 would like an order allowing them to charge the reasonable fee of \$125 an hour, plus HST, for the services of a student lawyer to complete the redactions. Mr. Puhl estimates that it will take approximately two to three hours for the student lawyer to go through and redact the legal invoices. Counsel for the Respondent submitted the amount requested for the fee is reasonable as the information to be redacted is confidential and requires someone in his law office to complete the work. In addition, Mr. Puhl has requested an order to cover the additional photocopying cost the corporation will incur at a rate of \$0.25 plus HST per page.
- [19] In support of Mr. Puhl's identified amount of reasonable costs for redaction, Counsel cited *Robert Remillard v. Frontenac Condominium Corporation No. 18*, ("Remillard"), where it was ordered the corporation could charge \$130 an hour for a student to redact the records. Counsel noted that WSCC 379's requested amount is lower than that allowed in Remillard.

- [20] Counsel submitted that WSCC 379 did not waive its solicitor-client privilege by disclosing the amount of the legal invoices in their audited financial statements, nor did they by keeping unit owners apprised with general information about the legal proceedings.
- [21] In support of the Respondent's position that if the Tribunal orders that the Applicant be provided with copies of the legal invoices, they should be redacted, Counsel relied on two previous Tribunal cases, *Jack Gale v Halton Condominium Corporation No. 61* and *Anderson*. In both these matters, the Tribunal found that the unit owners were entitled to redacted copies of the corporation's legal invoices. The redacted copies were subject to reasonable costs incurred by the corporations for having to redact and produce the records.
- [22] The Respondent has requested an order for the cost of their legal fees for their participation in this hearing. The amount requested is \$7,987.40. This amount reflects 15 hours of legal fees, disbursements, HST and associated levies.

Findings

Is the Applicant entitled to copies of the legal invoices?

- [23] Having considered the evidence before me, I am satisfied that the Applicant is entitled to receive redacted copies of the legal invoices for 2017 to October 19, 2022. In making my finding, I considered the previous Tribunal decisions on which both parties relied upon in support of their respective positions as to whether the legal invoices of WSCC 379 should be provided to the Applicant. The Tribunal has regularly found that unit owners are entitled to receive redacted copies of the corporation's legal invoices. Permitted redactions are to protect solicitor-client privilege while facilitating the relationship between unit owners and condominium corporations based on an "open book" policy. Further, section 55 (6) of the Act states a corporation is permitted to disclose records relating to actual or contemplated litigation.
- [24] I find WSCC 379 has successfully argued that legal invoices are subject to solicitor-client privilege. However, they have not demonstrated that the privileged information contained in the invoices cannot be protected by suitable redactions prior to giving the Applicant copies. Suitable redactions will ensure to protect privileged information, including identifying information related to another unit or owner.
- [25] Regarding the Applicant's position that the Respondent waived its right to solicitor-client privilege by sharing some information about legal matters and ongoing litigation, I disagree. I read the Applicant's documentary submissions in support of her position on this issue, and the information contained falls within general information and does not disclose details that would be considered privileged. As such, I agree with the Respondent, and find that WSCC 379 did not waive solicitor-client privilege, but rather fulfilled their obligation to provide general information to

unit owners about legal proceedings that impacts them and the financial well-being of the corporation.

- [26] When considering what redactions that should be made to the legal invoices prior to providing them to the Applicant, I agree with the Tribunal's conclusions about the appropriate scope of redaction as set out in Anderson, which at paragraph 24 reads as follows:

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.

- [27] I further direct that the redaction should ensure to redact any identifying information pertinent to the identity of an individual, or any type of communication and narrative descriptions. The invoices provided to the Applicant should only show the total amount billed to, and/or paid by WSCC 379. These redactions will respect the confines of solicitor-client privilege and section 55 (4) of the Act, while also respecting the premise of "open book" and transparency, which is of concern to the Applicant.

- [28] Having found that the Applicant is entitled to redacted copies of legal invoices, I must now decide whether the Respondent is entitled to charge a reasonable fee for providing the redacted copies.

What fees can WSCC 379 charge to the Applicant for providing copies of the redacted legal invoices?

- [29] The Act and Ontario Regulation 48/01 (the "Regulation") do not specify an amount a corporation is entitled to charge for the cost of labour to redact records being provided to a unit owner. However, the Regulation does set out factors that need to be considered when ordering fees. Subsections 13.3 (8) and 13.3 (9) state:

13.3 (8) The fee payable for the request shall be calculated in accordance with the manner set out in the board's response, subject to the following conditions:

7. The fee shall be a reasonable estimate of the amount required to reimburse the corporation for the actual labour and delivery costs that the corporation incurs for making the record requested available for examination or for delivering a copy of the record, which costs shall include the printing and photocopying charges established under paragraph 3 and the actual labour costs that the corporation incurs during the examination.
8. The fee shall be reasonable.
9. The board shall establish a charge of no more than 20 cents per page for printing or photocopying.

13.3 (9) Subject to subsection (8), the fee payable for the request may vary depending on the following factors:

...

10. Whether the corporation is required to redact the record requested to remove any part that it has determined that it will not allow the requester to examine or of which it will not allow the requester to obtain a copy.
11. The time that the board estimates spending on responding to the request.

- [30] Having considered the evidence before me on the issue of what is a reasonable fee, I find the Respondent is entitled to charge the Applicant \$125 an hour, plus HST, for redacting the legal invoices. This amount takes into consideration the fact that the review of the legal invoices for redaction is more than a clerical task.
- [31] The Respondent estimates that it will take two to three hours to redact all the legal invoices. I do not agree with this estimate given the redaction required should be relatively quick and easy. The Respondent essentially must redact everything except for the total amount of each invoice. As such, I find it reasonable to allow the Respondent to charge no more than 1.5 hours for the time to complete the redactions. This means that the fee charged to the Applicant cannot exceed \$187.50 (\$125 x 1.5 hours), plus HST.
- [32] With respect to the fee the Respondent can charge for photocopies, I find they can charge \$0.20 per page. This is in accordance with subsection 13.3 (8) of the Regulation as set out above in paragraph 29.

Are the parties entitled to costs?

- [33] Rule 48.1 of the Tribunal's Rules of Practice states that if a matter is not resolved by Settlement Agreement or Consent Order and the adjudicator makes a final decision, the unsuccessful party will be required to pay the successful party's Tribunal fees unless the adjudicator decides otherwise. In this matter, the Applicant was successful. As such, I find it appropriate to order the Respondent to reimburse the Applicant for the cost of filing this application.
- [34] The Respondent has requested an order that the Applicant reimburse the cost of their legal fees. The Tribunal's Rule 48.2 states:
- The CAT generally will not order one Party to reimburse another Party for legal fees or disbursements ("costs") incurred in the course of the proceeding. However, where appropriate, the CAT may order a Party to pay to another Party all or part of their costs, including costs that were directly related to a Party's behaviour that was unreasonable, undertaken for an improper purpose, or that caused a delay or additional expense.
- [35] In this matter, I find that both parties conducted themselves appropriately. No conduct or behaviour of either party gave rise to me considering a costs award. As such, I am denying the Respondent's request for an order requiring the Applicant

to reimburse their costs for legal fees.

Should a penalty be ordered against the Respondent?

[36] The question of whether a penalty pursuant to section 1.44 (1) 6 should be ordered against the Respondent was identified as an issue for the hearing. Though the parties made no submissions on the issue, for completeness, I will address this issue.

[37] Section 1.44 (1) 6 of the Act states:

An order directing a corporation that is a party to a proceeding with respect to a dispute under subsection 55 (3) to pay a penalty that the Tribunal considers appropriate to the person entitled to examine or obtain copies under that subsection if the Tribunal considers that the corporation has without reasonable excuse refused to permit the person to examine or obtain copies under that subsection.

[38] Here, the Respondent refused to provide the legal invoices to the Applicant pursuant to section 55 (4) of the Act, and up until this hearing, the Respondent appeared to understand that the Applicant was requesting the invoices in unredacted form. There may have been some misunderstanding or lack of communication between the parties that led to this understanding. However, based on the evidence before me, I do not find that the Respondent refused to provide the records without a reasonable excuse, and therefore no penalty is warranted.

C. ORDER

[39] The Tribunal Orders that:

1. As per s.13.3 (8) of the Regulation, the Respondent may charge a reasonable fee for the actual labour and delivery costs it incurs for providing these records to the Applicant. The hourly fee cannot exceed \$125, and the total fee billed to the Applicant cannot exceed \$187.50, plus HST. In addition, the Respondent may charge the Applicant the cost they incur for photocopying at rate not to exceed \$0.20 per page.
2. The Applicant must pay the estimated fees prior to being provided with the records.
3. Within thirty (30) days of receipt of payment from the Applicant, the Respondent shall provide her with redacted copies of all legal invoices for the years of 2017, 2018, 2019, 2020, 2021 and 2022 up to and including October 19, 2022.
4. The Respondent shall ensure they redact the following information from the legal invoices prior to providing them to the Applicant: the number of hours billed, the hourly rates, the description of service provided, the names and

the dates of invoice. The legal invoices provided to the Applicant must reveal the total amount billed to, and paid by the Respondent.

5. The Respondent shall, within thirty (30) days of this order, reimburse the Applicant \$200 for the cost of filing this application with the Tribunal.

Dawn Wickett
Member, Condominium Authority Tribunal

Released on: June 6, 2023