

**CITATION:** Pachai v. MTCC No. 850, 2024 ONSC 2001  
**TORONTO DIVISIONAL COURT FILE NO.:** DC-23-00000565-0000  
**DATE:** 20240408

**ONTARIO**  
**SUPERIOR COURT OF JUSTICE**  
**DIVISIONAL COURT**

**F.E. McWatt ACJ, H.E. Sachs and M. McKelvey JJ.**

<b>BETWEEN:</b>	)	
	)	
ANSUYA PACHAI	)	
	)	<i>Ansuya Pachai, In Person</i>
	)	
Applicant (Respondent in appeal)	)	
	)	
<b>– and –</b>	)	
	)	
METROPOLITAN TORONTO	)	
CONDOMINIUM CORPORATION NO.	)	<i>Albert Ferranti, Agent for the Respondent</i>
850	)	(Appellant), Member of the Condominium
	)	Corporation
Respondent (Appellant)	)	
	)	
	)	
	)	
	)	<b>HEARD at Toronto:</b> March 14, 2024

**REASONS FOR DECISION**

**MCKELVEY J.:**

**Introduction**

- [1] This is an appeal of a decision of the Condominium Authority Tribunal (the “Tribunal”) regarding an order requiring the Appellant to produce copies of the statement of claim and defences in a Superior Court of Justice action commenced by the Condominium Corporation. Ms. Pachai requested disclosure and production of a number of records from the Condominium Corporation. The Appellant denied her request on the basis of both solicitor-client privilege and litigation privilege and on the exemption regarding disclosure set out in s. 55(4)(b) of the *Condominium Act*, 1998, SO 1998, c 19.
  
- [2] The Tribunal found that Ms. Pachai was entitled to obtain copies of the statement of claim and statements of defence which have been delivered in the action.

- [3] Ms. Pachai is a unit owner of the Condominium Corporation which is located on the Esplanade in downtown Toronto. According to the Tribunal's decision, the City of Toronto located a shelter for homeless people in the hotel next door to the Condominium Corporation during the COVID-19 pandemic. The Condominium Corporation asserts that it spent an extra \$165,000 on security costs, necessary in the Board's view, to protect the condominium residents from the activities of the people living in the shelter.
- [4] In its decision, the Tribunal notes that the Condominium Board had 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 and the non-profit shelter operator to recover its security costs. Following the meeting, the Condominium Corporation sent a meeting summary to all owners. Owners also received a "General Notice of Legal Action" in February 2023 relating to the Appellant's intention to take legal action. In June, the owners were updated by Mr. Ferranti about the suit, including the fact that the Appellant had received three of the four defences and expected the fourth soon. After learning this, the Respondent requested, inter alia, copies of the statement of claim and statements of defence which had been exchanged in the action. The Condominium Corporation denied Ms. Pachai's request for these records. In the summer of 2023, Ms. Pachai applied to the Tribunal for a number of grounds of relief including a request for copies of the statement of claim and statements of defence which had been issued in the action.
- [5] In their decision, the Tribunal held that neither litigation privilege nor solicitor-client privilege attached to the records and ordered that the records be produced to Ms. Pachai. The Condominium Corporation has appealed this aspect of the decision to this Court.

### **The Issues Raised on this Appeal**

- [6] For purposes of this appeal, the Condominium Corporation has abandoned its claim that the documents are covered by solicitor-client privilege. It raises the following issues for consideration by this Court:
1. Did the Tribunal err in finding that the records in issue are not subject to litigation privilege?
  2. Did the Tribunal err in its analysis of s. 55(4)(b) and (6) of the *Condominium Act*?
  3. Was the Condominium Corporation denied procedural fairness on the application in that it did not and could not have known that litigation privilege and the records provisions of the *Condominium Act* were in issue?

- [7] For the reasons which follow, I have concluded that the within appeal should be dismissed.

### **Court's Jurisdiction**

- [8] This Court has jurisdiction under s. 1.46(2) of the *Condominium Act* which provides that,

- (a) A party to a proceeding before the Tribunal may appeal the order to the Divisional Court on a question of law in accordance with the rules of court.

**Did the Tribunal err in finding that the records in issue are not subject to litigation privilege?**

- [9] The Appellant argues that the Tribunal erred in failing to find that litigation privilege applied to the records in issue. In considering this question, it is helpful to make reference to s. 55(3) to 55(6) of the *Condominium Act* which provides as follows:

Examination of records

55(3) 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).

Regulation power

(3.1) Without limiting the generality of subsection (3), a regulation described in that subsection may,

- (a) specify processes that a person entitled to examine or obtain copies of records under that subsection must follow to do so;
- (b) specify processes that the corporation must follow to respond to requests for records;
- (c) specify fees that a corporation may charge for payment by a person who makes a request to the corporation to examine or obtain copies of records under that subsection, where the fees are for costs relating to the examination or copying of the requested records; and
- (d) prescribe forms for requests for records or responses to those requests.

Exception

- (4) The right to examine or obtain copies of records under subsection (3) does not apply to,
- (a) records relating to employees of the corporation, except for contracts of employment between any of the employees and the corporation;

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

(c) subject to subsection (5), records relating to specific units or owners; or

(d) any prescribed records.

(5) [Omitted.]

Waiver

(6) Despite subsections (3) and (4), a corporation may disclose a record described in clause (4) (b) but shall not disclose,

(a) a record described in clause (4) (a);

(b) subject to subsection (5), a record described in clause (4) (c); or

(c) subject to the regulations, a record described in clause (4) (d).

[10] In its decision, the Tribunal concluded that neither litigation privilege nor solicitor-client privilege protected the statement of claim and statements of defence from disclosure. At para. 20 of their decision, the Tribunal states,

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.

[11] While the Tribunal does not go into a lot of detail to support its view that litigation privilege does not apply in this case, I agree with their conclusion.

[12] Section 137 of the *Courts of Justice Act*, RSO 1990, c C.43, provides that, “a person is entitled to see any document filed in a civil proceeding in a court, unless an Act or an order of the court provides otherwise”. It is apparent that pleadings in an action are public documents and available for inspection upon request.

[13] In *Blank v. Canada (Minister of Justice)*, 2006 SCC 39 (CanLII), the Supreme Court notes that litigation privilege is designed to prevent premature disclosure of documents. At para. 27 of their decision, the Court states,

Litigation privilege, on the other hand, is not directed at, still less, restricted to, communications between solicitor and client. It contemplates, as well, communications between a solicitor and third parties or, in the

case of an unrepresented litigant, between the litigant and third parties. Its object is to ensure the efficacy of the adversarial process and not to promote the solicitor-client relationship. And to achieve this purpose, parties to litigation, represented or not, must be left to prepare their contending positions in private, without adversarial interference and without fear of premature disclosure. [Emphasis added.]

- [14] Thus, litigation privilege is designed to create a zone of privacy around documents held by a party in litigation. It would not extend to pleadings which are exchanged in an action. These are public documents. In this particular case, the statements of defence are not prepared by the Condominium Corporation but are simply received from the defendants in the action. A statement of claim is not meant to be a document held in private. In my view, exchanged pleadings do not attract any litigation privilege as a result.

**Did the Tribunal err in its analysis of s. 55(4)(b) and (6) of the *Condominium Act*?**

- [15] In the present case, the Tribunal notes that s. 55(4)(b) limits the right of a party to obtain records relating to actual or contemplated litigation. However, s. (6) provides that a corporation may disclose a record described in clause (4)(b). In concluding that the records were subject to production, the Tribunal noted that the records which were requested are neither privileged 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.

- [16] The fact that the documents are not privileged in my view seriously weakens the arguments that the documents should not be disclosed by virtue of s. 55(4)(b). In *Fisher v. Metropolitan Toronto Condominium Corp. No. 596*, [2004] O.J. No. 5758, the Divisional Court considered the exception contained in s. 55(4)(b) for records relating to actual or pending litigation. The Court concluded in that case that the purpose of s. 55(4)(b) is to maintain litigation privilege or solicitor-client privilege with respect to records of the Condominium Corporation which may relate to litigation or pending litigation between the unit owner and the Corporation. Given the purpose for this section, and the fact that no privilege applied to the records, there is little reason to deviate from the general s. 55(3) provision which notes that a condominium corporation shall permit an owner to obtain copies of records of the corporation. This provides a solid basis for the Tribunal to exercise its discretion to order production of the records under s. 55(6). This is reflected in para. 27 of the Tribunal's decision where it states,

The openness of the Act and the fact the records at issue are public weigh in favour of MTCC 850 exercising its discretion under s. 55(6) to grant access to the records, absent any reason not to.

- [17] I agree with this analysis of the Tribunal.

**Was the Condominium Corporation denied procedural fairness in that it did not and could not have known that litigation privilege and the records provisions of the *Condominium Act* were in issue?**

[18] The Appellant asserts that it was denied procedural fairness in that it did not and could not have known that litigation privilege and the records provisions of the *Condominium Act* were in issue.

[19] I am of the view that the Appellant was well aware of what was at issue on the application. The documentation before this Court suggests that the Appellant asserted privilege to prevent disclosure of the records. Both the Appellant and Respondent's submissions to the Tribunal contained arguments about litigation privilege. In addition, the Appellant addressed s. 55(6) of the *Condominium Act* in their reply submissions to the Tribunal. I have concluded in the circumstances that the Appellant was well aware of the issues and the legislation which would be addressed at the hearing. There is no basis to conclude that there was any procedural unfairness in dealing with the application.

**Costs**

[20] The parties agreed at the hearing that costs of \$7,000 inclusive of HST and disbursements would be a reasonable assessment of the costs in this action. The Appellant argued that this was a novel issue and if the Court agreed, there should be no costs of the application. I do not find that the issues in this case were novel. However, both parties are retired lawyers, but did not appear as legal counsel on the appeal. In this situation, in the absence of any evidence that the Respondent suffered any pecuniary loss, I am of the view that the appeal should be dismissed, but without costs. This is consistent with the principles set out in the Ontario Court of Appeal decision in *Fong v. Chan*, 1999 CanLII 2052, at para. 26. In the present case, the successful litigant has not presented any evidence that she has suffered any opportunity cost by forgoing any remunerative activity.

**Conclusion**

[21] For the above reasons, this appeal is dismissed without costs.

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**M. McKelvey, J.**

I agree 

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**F.E. McWatt, ACJ**

I agree \_\_\_\_\_  
**H.E. Sachs, J.**

**Released:** April 8, 2024

**CITATION:** Pachai v. MTCC No. 850, 2024 ONSC 2001

**ONTARIO**

**SUPERIOR COURT OF JUSTICE**

**BETWEEN:**

ANSUYA PACHAI

Applicant (Respondent in appeal)

– and –

METROPOLITAN TORONTO CONDOMINIUM  
CORPORATION NO. 850

Respondent (Appellant)

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**REASONS FOR DECISION**

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Justice M. McKelvey

**Released:** April 8, 2024