

CONDOMINIUM AUTHORITY TRIBUNAL

DATE: May 4, 2018

CASE: 2017-00051R

Citation: Robert Remillard v. Frontenac Condominium Corporation No. 18, 2018

ONCAT 1

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

Adjudicator: Mary Ann Spencer, Member

The Applicant

Robert Remillard

Self-Represented

The Respondent

Bill Barrett, Agent

Frontenac Condominium Corporation No. 18

120 Barrett Court, Office

Kingston (Ontario) K7L 5H6

Hearing: February 27, 2017 to March 21, 2017

Written electronic hearing, with telephone conference on March 19, 2018

REASONS FOR DECISION

A. OVERVIEW

- [1] Robert Remillard (the “Applicant”) is a unit owner of Frontenac Condominium Corporation No. 18 (the “Respondent”). He requests an Order from the Tribunal directing the Respondent to provide him with un-redacted copies of one set of records (the “Small Claims” invoices) and to provide a second set of partially un-redacted records (the “General Matters” invoices) at no cost. Each set of records comprises invoices issued by the Respondent’s legal counsel for the provision of legal services.
- [2] In response to a records request submitted by the Applicant before the amendments to the *Condominium Act, 1998* pertaining to requests for records came into force on November 1, 2017, the Respondent provided the Applicant with redacted copies of both sets of legal invoices at issue. On November 1, 2017, the Applicant requested copies of these records “un-redacted other than names of

individuals other than myself." The Respondent refused to remove the redactions in the Small Claims invoices on the basis that they relate to actual litigation and are exempt under s. 55(4)(b) of the Act. For the estimated fee of \$168.75, the Respondent agreed to remove redactions specific to the Applicant in the General Matters invoices and to provide him with electronic copies.

- [3] The Applicant's position is that the exemption set out in s.55(4)(b) does not apply to the Small Claims invoices. Because those actions have been settled, he submits that the records do not relate to actual litigation. With respect to the General Matters invoices, his position is that he has been provided with redacted records at no cost in the past and the estimated fee to revise redactions in these invoices is excessive.
- [4] The Respondent's position is that the Small Claims invoices do relate to actual litigation and the information which has been redacted is protected by solicitor-client privilege. With respect to the estimated cost of removing redactions from the General Matters invoices, the Respondent's position is that it requires the expertise of legal counsel to prepare the records and the estimated fee, which was calculated in accordance with s.13.3(8) of Ontario Regulation 48/01, is reasonable.
- [5] For the reasons set out below, with respect to the Small Claims invoices, I find that the exemption to an owner's right to examine or obtain records as set out in s. 55(4)(b) of the Act does apply and the Respondent is not required to provide un-redacted copies of these records to the Applicant. With respect to the General Matters invoices, I find that the fee estimated by the Respondent is not reasonable and order the Respondent to remove redactions which relate to the Applicant for a fee not to exceed \$84.50.

B. PRELIMINARY MATTERS

- [6] This hearing was held electronically with the exception of the testimony of the Applicant and the Respondent's agent which took place by teleconference on March 19, 2018.
- [7] The names of the witnesses the Users intended to call and the documents they intended to rely upon during the hearing were uploaded onto the Tribunal's Online Dispute Resolution system. Three of the five witnesses the Applicant proposed to call were challenged by the Respondent's agent. Similarly, some of the documents posted by both Users were challenged by the other User.
- [8] After the Users confirmed the issues in dispute, I asked them to explain the relevance of the proposed testimony of the witnesses and the documents and

provided each User the opportunity to respond to the other's submissions. The Applicant then withdrew a number of documents and three of his five proposed witnesses. One of the remaining witnesses was not available due to illness. I did not permit the fifth witness, identified as counsel for the Respondent, to testify, on the basis that the proposed questioning by the Applicant was not relevant to the issues to be decided. I advised the Users that I would determine the relevance and weight to be assigned to disputed documents in the context of the testimony.

C. ISSUES & ANALYSIS

Issue 1: Is the Applicant entitled to receive un-redacted legal invoices relating to his Small Claims court action?

Evidence

[9] The Applicant is requesting that the Tribunal order the Respondent to provide un-redacted copies of the following five invoices, collectively the Small Claims invoices:

From Nelligan, O'Brien, Payne LLP: #252614 dated December 31, 2016, and,

From Davidson Houle Allen LLP: #594 dated February 15, 2017; #855 dated March 17, 2017; #1955 dated May 17, 2017; and #2275 dated June 16, 2017.

[10] The Small Claims invoices were provided to the Applicant with redactions in October, 2017. On November 1, 2017, the Applicant submitted the prescribed Request for Records form to the Respondent and requested copies of legal invoices "un-redacted other than names of individuals other than myself." The Respondent's response was the invoices "relate to actual litigation and will not be "un-redacted" [Section 55(4)]."

[11] The Applicant testified that the invoices relate only to his own Small Claims court actions against the Respondent and highlighted that none of them are marked "confidential". Referring to invoice #855, he expressed his concern that what he described as "very heavy redaction" could be for services un-related to the business of the Respondent. He further highlighted that there is a complete redaction of a line under "Invoice Discount" on the document. He stated this line was a sub-total and suggested its unnecessary redaction indicated "malice" towards him by the Respondent.

[12] The Applicant testified that until October, 2017, the Respondent provided him with un-redacted copies of legal invoices at no cost. Referring to invoices #202607 dated February 21, 2014, #206211 dated April 29, 2014, #207484 dated May 26,

2014, #210452 dated July 23, 2014 and #211631 dated August 21, 2014, all of which were issued to the Respondent from Nelligan, O'Brien, Payne LLP, the Applicant explained that these invoices all related to litigation he was contemplating. He further explained that invoice #230534 dated September 22, 2015, which was also provided to him on an un-redacted basis, related to the issue which caused him to file a Small Claims court action.

- [13] In response to a question from the Tribunal, the Applicant stated that he wanted to receive un-redacted invoices because it is “entirely possible” that the redactions are concealing charges for legal services that are unrelated to the objects of the Respondent. Further, he stated that he wishes to set a precedent for the overall condominium community with respect to the transparency of corporation records.
- [14] The Respondent’s agent is the president of Frontenac Condominium Corporation No.18. He testified that until November 1, 2017, records requests were handled by the Respondent’s former property manager. The invoices provided to the Applicant in October, 2017 were redacted in a manner which would allow them to be given to any owner. Therefore, they were provided to the Applicant at no cost.
- [15] The Respondent’s agent testified that after November 1, 2017, when new legislation relating to requests for records came into effect, the Applicant’s request that the legal invoices be un-redacted was sent to him by the Respondent’s former property manager. The Respondent’s agent contacted counsel who explained that the legal invoices fell into two categories and that the Small Claims invoices were subject to the exemption set out in s. 55(4)(b) of the Act. He later obtained a written opinion to this effect dated February 27, 2018 from counsel, upon which the Respondent relies.
- [16] The Respondent’s agent testified that after the Respondent provided its response to the Applicant, the Applicant sent numerous e-mails to the Respondent’s Board of Directors and then advised the Board that he would be pursuing the matter with the Tribunal. He stated that the volunteer Board and the property manager of the condominium corporation spend a significant amount of time and have incurred significant expense dealing with the Applicant, who he suggested was on a “fishing expedition.”

Submissions

- [17] The Applicant submits that the exemption set out in s. 55(4)(b) does not apply to the Small Claims invoices because the words “actual litigation” refer only to current or ongoing litigation and the Small Claims court actions to which the invoices relate have settled. In this regard, he referred me to the definition set out in O. Reg.

48/01 which states “actual litigation’ means a legal action involving a corporation; (‘instance en cours’)” and indicated that the French translation makes it clear that the meaning of “actual litigation” is current or ongoing litigation.

- [18] The Applicant also submits that the Small Claims invoices, which are not marked “confidential,” are commercial documents which do not comprise legal advice and therefore are not subject to solicitor-client privilege. He referred me to a document published on the website of the Law Society of Upper Canada entitled “A Privilege Primer.” He highlighted that the document states that litigation privilege, that is communications between a lawyer and client exclusively for the purpose of contemplated or pending litigation, ends when the litigation or its contemplation ends. He also referred me to a set of “Frequently Asked Questions” published on the website of the Canadian Bar Association which states that solicitor-client privilege relates only to confidential communications and that litigation privilege ends when the litigation ends.
- [19] The Respondent submits that the Small Claims invoices do relate to actual litigation as it is defined in O. Reg 48/01; therefore, in accordance with s. 55(4)(b) of the Act, the Respondent is not required to provide the invoices to the Applicant.
- [20] The Respondent further submits that information set out in legal invoices has been held to be presumptively privileged unless it can be demonstrated that the information contained on the invoices is neutral. In this regard, the Respondent referred me to *Maranda v. Richer* [2003] 3 SCR 193, 2003 SCC 67 (CanLII).
- [21] The Respondent also referred me to *Limestone District School Board (Re)*, 2015 CanLII 68019 (ON IPC) a case in which the school board denied access to records requested under the *Freedom of Information and Protection of Privacy Act* on the basis of discretionary exemptions in the Act for solicitor-client communications and for advice and recommendations. At paragraph 44, the adjudicator wrote:

Having reviewed the invoices, I find that the service descriptors, dates, and amounts appearing in each of the five invoices is presumptively privileged information. Furthermore, I am not satisfied that the presumption of privilege which applies to the descriptors and dates has been rebutted. Each invoice contains detailed information about the nature of the advice sought, which is privileged information. I also accept the board’s submission that the dates themselves convey privileged information since, based on the timing of events, they may lead an observer to conclude, based on dates, that legal advice was sought related to a specific issue.

Analysis

[22] Section 55(1) of the Act requires a condominium corporation to keep adequate records and sets out a list of those records, which includes “the financial records of the corporation” and any records prescribed by regulation. Section 13(1)(5) of O. Reg. 48/01 requires the corporation to keep, “records that relate to actual or contemplated litigation and that the corporation creates or receives.”

[23] The right of an owner to examine or obtain copies of the corporation’s records is set out in Section 55(3) of the Act:

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).

[24] Exceptions to the right to obtain records are set out in s. 55(4) and include records related to actual or contemplated litigation, as determined by the regulations:

(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;

[25] “Actual or contemplated litigation” is defined in s.1.(2) of O. Reg 48/01:

1. (2) In the Act and this Regulation,

“actual litigation” means a legal action involving a corporation; (“instance en cours”)

“actual or contemplated litigation” means actual litigation or contemplated litigation; (“instance en cours ou envisagée”)

“contemplated litigation” means any matter that might reasonably be expected to become actual litigation based on information that is within a corporation’s knowledge or control; (“instance envisagée”)

[26] Based on the foregoing and having given due consideration to the submissions of the Users, I find that the Small Claims invoices are both financial records of the corporation and records relating to actual litigation as defined in O. Reg 48/01.

[27] The only distinction the definitions in O. Reg. 48/01 make is between “contemplated” litigation, that is litigation that “might reasonably be expected to

become actual litigation," and "actual" litigation. The definition of "actual litigation" makes no distinction between current and past litigation. Therefore, I find that actual litigation refers to any litigation, current or completed, that exists or did exist in fact. The Applicant submitted that the French translation "instance en cours" indicated that the definition refers only to current litigation. I reject this argument. The French version of O. Reg. 48/01 sets out the definition of "instance en cours" as "Action en justice concernant une association. («actual litigation»)," removing the words "en cours" which the Applicant relies upon.

[28] The interpretation of s.55(4)(b) of the previous version of the Act was addressed in *Fisher v. Metropolitan Toronto Condominium Corporation No. 596*, 2004 Carswell Ont 6242, where, at paragraph 16, the Court wrote:

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.

[29] The Applicant submits that the Small Claims invoices are not subject to privilege because they are not marked "confidential." However, the fact that the invoices are not marked "confidential" does not necessarily mean that they do not contain privileged information relating to litigation. The question of whether or not legal billings are subject to solicitor-client privilege was addressed in *Maranda v. Richter* [2003] 3 SCR 193, 2003 SCC 67 (CanLII), a case which addressed the reasonableness of a search and seizure. At paragraph 33, the Court wrote:

Because of the difficulties inherent in determining the extent to which the information contained in lawyers' bills of account is neutral information, and the importance of the constitutional values that disclosing it would endanger, recognizing a presumption that such information falls *prima facie* within the privileged category will better ensure that the objectives of this time-honoured privilege are achieved.

[30] The Applicant further submits that any privilege afforded to legal invoices ends when the litigation ends. As noted above, the Act does not distinguish between ongoing and completed litigation. Also, the statement of the Court in *Fisher*, quoted above, suggests that s. 55(4)(b) covers *both* "litigation privilege" which might end upon the completion of litigation, and "solicitor/client privilege," which does not end. The Applicant has not rebutted the presumption of privilege in the invoices in question. Further, neither the Act nor O. Reg 48/01 specifies the privileged nature of the records as the basis for the restriction set out in s. 55(4)(b). The Respondent does not need to assert privilege in order to maintain the confidentiality of the records.

[31] The only exception to the exemption set out in s. 55(4)(b) of the Act is contained in s. 55(6) of the Act which permits a corporation, at its discretion, to disclose records relating to contemplated or actual litigation. This exception enables the corporation to determine if and when any privileged or otherwise restricted information which may be contained in the records may be disclosed. In this case, the Respondent has exercised its discretion to provide the Applicant with redacted copies of the Small Claims invoices and is under no obligation to reverse the redaction.

[32] I place no weight on the evidence that the Respondent previously provided un-redacted legal invoices to the Applicant. I accept the explanation of the Respondent's agent that records requests were handled by the Respondent's property manager before amendments to both the Act and O. Reg 48/01 became effective on November 1, 2017, when the Respondent's Board of Directors assumed responsibility for these requests. Further, the fact that the corporation may have provided un-redacted records in the past does not bind this Tribunal.

[33] I note that in making its closing statement, the Respondent alleged that the Applicant's application to the Tribunal was "part of an ongoing and unsubstantiated fishing expedition." The motivation underlying the Applicant's request for records was not the focus of the evidence I heard and a determination of this allegation is not required to resolve this matter since the Applicant's application is resolved on other grounds.

Decision

[34] Based on the definition of "actual litigation" set out in O. Reg 48/01 and the exemption set out in s. 55(4)(b) of the Act, I find that the Applicant is not entitled to receive un-redacted copies of the Small Claims invoices.

Issue 2: Is the Respondent's cost to revise the redaction of certain legal invoices reasonable?

Evidence

[35] The second part of the Respondent's response to the Applicant's November 1, 2017 request for legal invoices "un-redacted other than names of individuals other than myself" was that the Respondent would revise the redaction on four invoices upon receipt of payment of the estimated fee of \$168.75. The Applicant refused to pay the fee.

[36] The four invoices at issue, collectively the "General Matters invoices" are:

From Nelligan, O'Brien, Payne LLP: invoices # 240680 dated April 21, 2016; #242278 dated May 27, 2016; #245167 dated July 31, 2016; and, #252613 dated December 31, 2016.

- [37] The Applicant testified that the Respondent has previously charged no fee for any of the records he has been provided and he questioned whether the Respondent paid any fee for the redactions that have already been done. He stated it is not necessary for the Respondent's legal counsel to revise the redactions; this could be done by the Respondent's new property manager. He also believes that the redactions in the copies of the General Matters invoices he received all relate to him and that the revision will result in no redactions.
- [38] The Respondent's agent testified that the General Matters invoices have been redacted in a manner such that they could be provided to any owner. They will require further review to remove any redactions relating to the Applicant. The Respondent has requested its counsel to perform the redaction and the fee has been estimated in accordance with the requirements set out in O. Reg. 48/01.

Analysis

- [39] Section 13.3(8) of O. Reg. 48/01 sets out the requirements for fees relating to records requests:

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:

1. 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.
2. The fee shall be reasonable.

- [40] I find that the Respondent did calculate the fee based on the labour and delivery costs it expected to incur. However, I find that the fee itself is not reasonable.

- [41] The Respondent's reply to the Applicant's request for records estimates that .6 hours of time is required "during the examination" and .15 hour of time is required for "labour for providing access to the records", for a total of .75 hours at \$225 per hour. It appears that the Respondent has filled this form out incorrectly. I believe that "examination of the records" is meant to reflect the time that would be required

during an examination of the records by the Applicant and not the time that the Respondent might require to examine the records before providing them.

- [42] The closing submission submitted by the Respondent includes a February 27, 2018 opinion provided to the Respondent by its counsel. This indicates that the estimated time to review the invoices is .65 hours, the total of .1 hour for each invoice and .25 hours “to report to the corporation.” The opinion notes that counsel’s hourly rate has increased to \$260.
- [43] The Respondent’s agent submitted that due to the litigious nature of the Applicant, the Respondent requires counsel to revise the redactions in the four invoices already provided to the Applicant. However, it is my view that this revision does not demand a level of judgment such that it requires counsel to perform it. While I recognize that it is possible that the existing redactions may contain some privileged information, this is not a first review and revision by an articling student would suffice to remove the redactions relating to the Applicant.

Decision

- [44] I calculate a reasonable fee for the redaction of the Legal invoices to be \$84.50. I accept that .65 hours, as estimated by the Respondent’s counsel, are required to perform the revision. I have calculated the fee using the hourly rate of \$130 for an articling student as set out in the information provided by the Respondent in its closing submission with respect to its request for costs. This fee shall be paid by the Applicant to the Respondent in advance and the Respondent shall provide the records to the Applicant within 30 days of its receipt.

D. COSTS

- [45] The award of costs is at the Tribunal’s discretion. Rule 30.1 of the Tribunal’s Rules of Practice (effective November 1, 2017) states that the Tribunal may order a User to pay any reasonable expenses related to the use of the Tribunal. Rule 31.1 states “The Tribunal will not order one User to pay to another User any fees charged by that User’s lawyer or paralegal, unless there are exceptional reasons to do this.”
- [46] Both the Applicant and the Respondent requested the Tribunal award costs in this matter if the decision were to be in their favour. The Applicant requested \$200, the total of the fees he filed with respect to his application to the Tribunal. The Respondent requested reimbursement of \$10,619.29, the legal costs it incurred. I note that the Respondent was not represented by counsel in this matter.

[47] The Respondent submitted that the Applicant brought “this action unnecessarily against the Corporation and needlessly complicated the proceedings with his allegations of bad faith and impropriety.” It further submitted that the Applicant unnecessarily complicated the proceedings throughout the three stages by raising issues that had been previously litigated or had no relevance to the application. And, it submitted that “The Corporation is entitled to its costs because it would be inequitable and unjust for the uninvolved unit owners to bear the Corporation’s cost in successfully defending this meritless application.”

[48] The Tribunal’s online dispute resolution system was developed to help people resolve disputes conveniently, quickly and affordably. The issues before me were not complex and therefore I question the quantum of the Respondent’s costs. I also do not find that the Applicant’s conduct complicated the proceedings, although, necessarily, I have no knowledge of what transpired during the first two stages.

[49] The Applicant submitted that his fees should be reimbursed on the basis that the Respondent corporation based its case on an incorrect interpretation of the Act.

[50] I have decided one of the two issues before me in this matter in favour of the Respondent and one in favour of the Applicant. In these circumstances, I award no costs in this matter.

E. ORDER

[51] Pursuant to the authority set out in section 1.44(1) of the Act, the Tribunal orders that:

1. Frontenac Condominium Corporation No. 18 provide to R.R. copies of invoices numbered 240680, 242278, 245167 and 252613 (the “records”) redacted only for information relating to owners other than R.R. or for information that is exempt under s. 55(4) of the Act.
2. The fee, payable by Robert Remillard in advance, for the redaction of the records shall not exceed \$84.50.
3. Frontenac Condominium Corporation No. 18 shall provide the records to Robert Remillard within 30 days of its receipt of the said fee.

Mary Ann Spencer
Member, Condominium Authority Tribunal

RELEASED ON: May 4, 2018