CITATION: *Huang v. Bank of Montreal*, 2024 ONSC 5848
COURT FILE NO.: CV-20-00644385-0000
DATE: 20241024

SUPERIOR COURT OF JUSTICE – ONTARIO

RE: *Joyce Huang et al v. Bank of Montreal et al*

BEFORE: Associate Justice Rappos

COUNSEL: *Peter Danson*, for the Plaintiffs

Nicholas Fitz, for the Defendants

HEARD: April 4, 2024 (in person)

REASONS FOR DECISION

Introduction

[1] There are four Plaintiffs in this action. Joyce and Alexander Huang are married to one another. The remaining two Plaintiffs, Joanna and Miranda Huang, are their daughters.

[2] Joyce and Alexander have been customers of the Defendant, Bank of Montreal, since the 1990s. This action relates to safety deposit box # 619 (the "**Box**"), which the Plaintiffs started renting from the Bank in April 2017. A rental agreement was signed for the Box.

[3] The Plaintiffs claim that they stored five generations of family heirlooms and other valuable jewelry and precious metals in the Box.

[4] Joyce, Alexander, and Joanna attended at the Bank Branch on March 27, 2019. It was the first time they had been back to the Box since April 3, 2017. They discovered that the Box and its contents were gone and the lock to its compartment door had been drilled out.

[5] The Bank conducted an internal investigation, which revealed that there was no record of any unauthorized or forced entry into the Box during the rental period. The Bank has no record of anyone accessing the Box during the relevant time period. The Bank also says it has no knowledge or explanation for the disappearance of the Box and the drilling of the compartment door lock.

[6] The Plaintiffs sought compensation from the Bank for the goods that were stored in the Box. The Bank denied their request, relying on a limited liability clause in the rental agreement.

[7] The Plaintiffs commenced this action in July 2020 seeking $1.0 million in damages for breach of contract and negligence. The Bank has denied any liability, and again relies on the limited liability clause, which provides that the liability of the Bank is limited to the exercise of ordinary diligence to prevent the opening of the Box by any person other than its customers or the duly authorized representative of the Bank. The clause also provides that the Plaintiffs agree that the Bank shall not be liable for loss or damage occasioned by fire, theft, or any other cause.

[8] Daniel Lee, the Branch Manager, was examined for discovery on June 18, 2021.

[9] The parties agreed to focus on settlement discussions from August 27, 2021 to October 12, 2023. The parties were unable to settle the action.

[10] The Plaintiffs now bring a motion to compel the Bank to provide answers to 10 questions that were originally taken under advisement (and have since become refusals by operation of rule 31.07(1)(b)) and seven (7) refused questions.

Analysis

Investigation Report and Privilege

[11] The Bank has deemed to have refused to answer seven questions on the grounds that the Plaintiffs were seeking particulars about the Bank's investigation, over which the Bank maintains privilege.[1]

[12] The Bank's evidence comes through an affidavit from Philip Emery, the investigator from the Bank's Global Investigations group. Mr. Emery was not cross-examined by the Plaintiffs.

[13] He states the Global Investigations group is part of the Legal and Regulatory compliance group, and its purpose is to investigate claims or issues, and provide information in order to assess the Bank's potential legal or regulatory exposure.

[14] On or about April 5, 2019, Mr. Emery was asked to conduct an investigation, as the Bank understood that the Plaintiffs were advancing a claim to lost property. He says that the Bank "believed there was a strong likelihood of litigation if BMO did not provide the Plaintiffs with the contents they alleged were present, or else with compensation." Mr. Emery notified internal legal counsel about the investigation on April 11, 2019. He says that the Bank's legal department was engaged and consulted throughout the investigation.

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[1] UAs *#13 - To provide the list of persons interviewed in the course of the Corporate Security Investigation; #14 - To find out whether surveillance records were requested from the plaza/mall and whether any were obtained; #15 - To advise particulars of BMO's investigation into the matter; #24 - To provide all witness statements referenced on BMO's Schedule B; #28 - To advise of the reason for the gap in the investigation from BMO's Schedule B that has a gap of six weeks between May 23 – July; #29 - To advise of the reason for the two month break in the investigation and communications from BMO's Schedule B, break starts from July 18, email from Mr. Lee to Mr. Emery and then the next one in September 2019; and #33 - To advise of the reason for the delay in the investigation, there was a nine to ten month delay*.

[15] Mr. Emery finalized a report in February 2020. He says that he conducted the investigation with the intention that it and any resulting product would be privileged.

[16] The Bank sent a letter to the Plaintiffs dated March 2, 2020, which indicated that the Bank found that procedures were followed in relation to accessing the Box, and no evidence was uncovered that there was unauthorized or forced entry.

[17] The Plaintiffs argue that the Bank should be required to answer the questions relating to the investigation. The Bank's position is that the questions were properly refused, as they seek particulars about and records from the Bank's investigation, which the Bank believes are protected by litigation privilege.

[18] Litigation privilege extends to oral and written communication between a lawyer and a client, or between a lawyer and a third party made exclusively or for the dominant purpose of contemplated or pending litigation.[2] Its purpose is related to the needs of the adversarial trial process, and the need for a protected area, or "zone of privacy", to facilitate investigation and preparation of a case for trial.[3]

[19] The burden of showing that a document is subject to litigation privilege lies on the party asserting the privilege. The determination of whether litigation is reasonably contemplated and the dominant purpose of the document created is a fact-based inquiry and will depend on the circumstances of each case.[4]

[20] Simply showing that a document was derived from an internal investigation does not demonstrate that the document was created for the dominant purpose of litigation.[5] A claim of litigation privilege will not be made out simply because litigation support is one of the purposes of a document's preparation, even if it is a substantial purpose. Litigation must be the dominant purpose in order for litigation privilege to exist.[6]

[21] The Bank primarily relies on two decisions that they say stand for the proposition that an internal investigation such as the one it conducted is covered by litigation privilege.

[22] In *R v. Husky*, the Court held that an internal investigation conducted by Husky Energy after a significant oil spill had taken place was covered by litigation privilege.[7]

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[2] *Vecchio Longo Consulting Services Inc. v. Aphria Inc.*, 2023 ONSC 6336 ["***Vecchio***"], para. 55.
[3] *Blank v. Canada (Minister of Justice)*, 2006 SCC 39, paras. 28 and 33, citing R.J. Sharpe, Claiming Privilege in the Discovery Process", in *Special Lectures of the Law Society of Upper Canada* (1984), 163, at pp. 164-65.
[4] *Vecchio*, para. 56.
[5] *R. v Husky Energy Inc.*, 2017 SKQB 383 ["***Husky***"], para. 14.
[6] *Husky*, para. 22.
[7] *Husky*, para. 48.

[23] In *Vecchio Longo Consulting Services Inc. v. Aphria Inc.*, Justice Perell held that a report prepared by a law firm for a Special Committee was subject to both solicitor-client and litigation privilege.[8]

[24] I do not believe either of these decisions are particularly applicable to the case before me.

[25] In *Vecchio*, a Special Committee was established in response to short seller reports directed at certain transactions, and after law firms in the U.S. had announced the commencement of class actions.[9] The report was prepared by a law firm retained by the Special Committee. It contained legal advice, and was completed after certain class actions had been filed.[10] A proposed class action was commenced in Canada one week following the retention of the law firm.[11] Justice Perell noted that the law firm was hired to do legal work and not as a private investigator, and the work was done in a climate where class actions had started and were being started and there were serious allegations of impropriety under the *Securities Act*.[12] The report was being prepared at a time when the company's share value had declined by over a billion dollars. Justice Perell concluded that litigation was beyond being anticipated, it had occurred and was occurring.[13]

[26] In *Husky*, Husky's evidence was that it started the investigation in preparation to defend potential legal proceedings.[14] The internal investigation started on the day of the spill, which affected a major waterway. Justice Kalmakoff held that he could logically infer from the evidence that a company of Husky's stature in the oil industry employs experienced and knowledgeable persons in positions of importance, and those persons would be well aware that both civil litigation and regulatory prosecution would almost inevitably follow such an event.[15] In this case, Husky established an investigation charter in the immediate aftermath of the oil spill.[16]

[27] The factual circumstances of those two cases are wholly distinguishable from the facts before me.

[28] As noted above, the Bank's affiant provides a blanket statement that the Bank believed there was a strong likelihood of litigation if it did not provide the Plaintiffs with the contents they alleged were present, or else with compensation.

[29] The affiant relies on an email from the branch manager to Global Investigations on April 5, 2019 with a subject line of "customer escalation and dispute re: security deposit box". That subject line alone, without seeing the body of the email, does not, in my view, support that the dominant purpose of the investigation was to prepare for litigation.

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[8] *Vecchio*, para. 64.
[9] *Vecchio*, paras. 32-34.
[10] *Vecchio*, paras. 64-65, 69, 70, 71 and 72.
[11] *Vecchio*, para. 36.
[12] *Vecchio*, para. 65.
[13] *Vecchio*, para. 70.
[14] *Husky*, para. 8.
[15] *Husky*, para. 39.
[16] *Husky*, paras. 48 and 49.

[30] During the examination for discovery, the Branch Manager Mr. Lee noted that by November 2019, Miranda Huang had informed him that they would be wise to look for a lawyer if the matter was not resolved. A letter from Miranda dated November 20, 2019 requested a meeting with the Bank to discuss the theft and possible recovery, and to discuss resolution failing any recovery. These communications came six months after the investigation was started.

[31] In an answer to an undertaking, the Bank says that as early as May 16, 2019 the Plaintiffs had advised Mr. Lee that they were considering hiring a lawyer. There is no document produced in support of this statement. Mr. Lee did not testify to this during the examination, where he confirmed that he understood that the Plaintiffs' primary concern was getting their property back.

[32] The Bank also relies on the fact that Mr. Emery was not cross-examined, and says his statements should be taken as uncontradicted and uncontroverted. As the Plaintiffs noted in response, the onus is on the Bank to establish on a balance of probabilities that the report should be covered by litigation privilege.

[33] In my view, the Bank has failed to do establish that the dominant purpose of the investigation was to respond to potential litigation. The mere prospect of litigation at the time a document is created is not enough to trigger litigation privilege.[17] They have provided no evidence other than Mr. Emery's bald statement. No explanation as to the basis for the statement. No information or documentation has been provided to substantiate this statement. No correspondence from the Plaintiffs that references a potential lawsuit other than a single reference to the Plaintiffs potentially getting a lawyer six months after the loss was reported and the investigation had been commenced. No evidence from any Bank employee that spoke with the Plaintiffs concerning the Box. No affidavit from the Branch Manager or branch employees that originally investigated the situation when the loss was reported.

[34] As a result, in my view the Bank's investigative report is not covered by litigation privilege.

[35] The Bank also refers to the report being covered by solicitor-client privilege. Solicitor-client privilege concerns communications between a lawyer and his or her client. To qualify for solicitor-client privilege, a communication must be: (1) between a client and his or her lawyer who must be acting in a professional capacity as a lawyer; (2) given in the context of obtaining legal advice; and (3) intended to be confidential.[18]

[36] Mr. Emery says that internal Bank legal counsel was engaged and consulted throughout the investigation. There is nothing in his affidavit that indicates that answering the questions at issue would result in production of communication exchanged in the context of obtaining legal advice as part of the investigation. As a result, I do not see how solicitor-client privilege is applicable to the questions at issue.

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[17] *Husky*, para. 27.
[18] *Vecchio*, paras. 54-55.

[37] Accordingly, the Bank must answer the questions originally taken under advisement identified as #s 13, 14, 15, and 24.

Relevance

[38] In addition to the issue of privilege, BMO also refused to answer UA #s 28, 29 and 33 on the basis of relevance. Each of these questions deals with gaps of time that occurred during the course of the investigation.

[39] The Plaintiffs have alleged in their amended statement of claim that they have suffered damages due to the Bank's negligence, which they say includes the Bank failing to conduct an investigation of all employees who had or could have had knowledge of the unauthorized access to the Box, and failing to conduct a proper and thorough investigation into the disappearance of the Box and its contents.

[40] In my view, each of these questions are relevant and should be answered. They deal with how the Bank conducted its investigation into the removal of the Box from the Bank's vault. They are directly relevant to a determination of an issue that had been pled by the Plaintiff. As well, during the examination of Mr. Lee, the Bank's counsel confirmed its view that the Bank had an obligation to conduct itself in accordance with common law obligations of good faith and fair dealing, and was required to look into, in a reasonable way, what transpired with the Box.

[41] Two additional questions were refused on the basis of relevance.[19] In my view, both questions should be answered.

[42] The first question is with respect to the individual at the Bank who had "final sign off on the results of the investigation". As noted above, how the investigation was conducted is an issue in this litigation, and the Plaintiffs are entitled to know the name of the Bank representative who had final oversight on the results of the investigation.

[43] I interpret the second question as being a question about the Bank's position on a question of law (e.g. whether the Bank has an ongoing duty/obligation to conduct a fair and balance objective investigation). Questions of this nature are permissible on an examination for discovery.[20]

Proportionality

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[19] *UA #37 - To advise whether Dave Duval, Director of Regional Operations had the final sign off on results of the investigation; UA #39 - To advise whether there was an ongoing obligation to conduct a fair balanced objective investigation as to what occurred.*

[20] *Ontario v. Rothmans Inc.*, 2011 ONSC 2504, para. 129.

[44] BMO refused to answer two questions based on proportionality regarding documents listed on Schedule B of its Affidavit of Documents.[21]

[45] The Bank argues that it has delivered a particularized Schedule B.

[46] I have reviewed Scheduled B and considered the arguments made by the parties. Given my decision above concerning litigation privivlege, I believe that it is appropriate for the Bank to serve an amended Schedule B that takes into account my holding on litigation privilege, and clearly sets out which communications they say are covered by solicitor-client privilege.

[47] As a result, the Bank is directed to prepare and served an amended affidavit of documents with an updated Schedule B.

Remaining Refusals

REF #2 – To produce the communications with Corporate Security

[48] The Bank refused this request on the basis that it falls under litigation privilege and solicitor-client privilege.

[49] I have reviewed the transcript. This question was asked of Mr. Lee in the context of the statements he made to Corporate Security, which contained his findings regarding the Box. For the reasons set out above, I do not believe communication from the Branch manager to the Corporate Security branch made on April 5, 2019, less than 10 days following the discovery of the loss, is covered by litigation privilege.

[50] There is also nothing in the record that confirms that the communications that Mr. Lee had with Corporate Security were sent to the Bank's in-house counsel in the context of obtaining legal advice.[22]

[51] As a result, I direct the Bank to produce the communications that Mr. Lee had with Corporate Security.

REF #3 - To advise whether Mr. Lee has any suspicions who was responsible for accessing, forcibly opening 619

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[21] *UA #41 - To advise the basis of each Schedule B document, on what basis it was created for dominant purpose of litigation; REF #9 - To provide a description of the nature of each Schedule B document to enable to know what each document is.*

[22] *Vecchio*, para. 54.

[52] Bank refused to answer the question on the basis of relevance, and that this is an improper question for a fact witness.

[53] This question was properly refused. It is speculative and requires Mr. Lee to provide his personal opinion or suspicions, neither of which is relevant to the matters at issue in the litigation.

REF #4 - To provide documentation that reflect why the Safety Deposit Box cleanup was necessary at the circular at BMO_0000033.001 dated July 7, 2016 (second paragraph, under Background)

REF #5 - To provide documentation of the Safety Deposit Box cleanup that occurred in the branch per the circular at BMO_0000033.001 dated July 7, 2016 (second paragraph, under Background)

[54] Both questions relate to an apparent safety deposit box cleanup that occurred in the Branch. The documentation states that the cleanup occurred before the Plaintiffs entered into the rental agreement for the Box. The Bank refused both questions on the basis of relevancy, and that they were outside of the applicable time period for this litigation.

[55] The Bank argues that the questions regarding the "clean-up" of safety deposit boxes that occurred in 2016 are irrelevant and have no bearing on this action, as the clean-up occurred prior to the Plaintiffs entering into the rental agreement for the Box in April 2017.

[56] The Plaintiffs have sued for damages for breach of contract and negligence. The contract provides that the Bank's liability is limited "to the exercise of ordinary diligence to prevent the opening of the Box by person other than the Customer or the duly authorized representative of the Customer".

[57] In my view, these questions are relevant to the breach of contract issue, the exercise of diligence by the Bank in its procedures concerning safety deposit boxes, and whether the Bank was negligent in its actions.

REF #6 - To produce policies for investigating loss like this, whether it was by the branch or Corporate Security

[58] The Bank refused to produce the policies governing Corporate Security. They argue that any policies that may exist around its investigation of this type of loss are not relevant to the actual alleged loss.

[59] Again, in my view the questions should be answered, as they are relevant to how the Bank conducted the investigation, which the Plaintiffs claim was conducted negligently to their detriment.

Disposition and Costs

[60] For the reasons set out above, the Bank shall answer under advisement #s 13, 14, 15, 24, 28, 29, 33, 37, 39 and 41, and refused question #s 2, 4, 5, 6 and 9. The Bank is not required to provide an answer to refused question #3.

[61] With respect to costs, I strongly urge the parties to come to an agreement. If they are unable to do so, they may contact my Assistant Trial Coordinator to request my direction for the exchange of written cost submissions.

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Associate Justice Rappos

DATE: October 24, 2024