CITATION: Carroll v. The Toronto-Dominion Bank et al., 2022 ONSC 2395
COURT FILE NO.: 08-011/20
DATE: 20220421

SUPERIOR COURT OF JUSTICE – ONTARIO
COMMERCIAL LIST

IN THE MATTER OF THE TD MUTUAL FUNDS TRUST and THE TD PRIVATE FUNDS TRUST

RE: MARRIAN L. CARROLL, Applicant

AND:

THE TORONTO-DOMINION BANK, c.o.b. TD BANK GROUP, TD WATERHOUSE PRIVATE INVESTMENT COUNSEL INC., TD ASSET MANAGEMENT INC. as TRUSTEE OF THE TD MUTUAL FUNDS TRUST and THE TD PRIVATE FUNDS TRUST, THE CANADA TRUST COMPANY as TRUSTEE OF THE TORONTO DOMINION BANK PENSION PLAN FOR FORMER EMPLOYEES OF THE CANADA TRUST GROUP OF COMPANIES, THE ONTARIO SECURITIES COMMISSION, THE OFFICE OF THE SUPERINTENDENT OF FINANCIAL INSTITUTIONS, and THE U.S. SECURITIES AND EXCHANGE COMMISSION, Respondents

BEFORE: L. A. Pattillo J.

COUNSEL: *David Sischy* and *Trevor Fairlee,* for the Applicant

*John McNeil***,** for the Applicant

Paul H. Le Vay and *Carlo Di Carlo*, for the TD Bank/Canada Trust Respondents

HEARD by Videoconference: May 17, 2021

ENDORSEMENT

Introduction

[1] In this application, the applicant, Marrian L. Carroll, seeks several orders, the primary one seeking this court's advice and direction regarding claims for privilege asserted by the respondents, the Toronto Dominion Bank (the "Bank") and its subsidiaries, over documents and information within Ms. Carroll's possession.

[2] The respondents, the Ontario Securities Commission ("OSC"), The Office of the Superintendent of Financial Institutions ("OSFI") and The U.S. Securities and Exchange Commission ("SEC") (collectively the "Regulators") have not filed any material in the application and have not appeared.

[3] For the reasons that follow, I am satisfied that the documents and information in Ms. Carroll's possession are subject to solicitor and client privilege and should be returned to the Bank and/or redacted in her draft letter and reports to the Regulators as requested by the Bank. In addition, the balance of the application is dismissed in its entirety.

Background

[4] Ms. Carroll was employed by the Bank as a Senior Manager, Compliance, beginning on August 8, 2011. In that position, she also held the position of Chief Compliance Officer ("CCO") of the respondent, TD Waterhouse Private Investment Counsel Inc. ("PIC") and the Canada Trust Company, subsidiaries of the Bank.

[5] In 2013, as part of her duties as CCO of PIC, Ms. Carroll commenced an investigation which primarily focused on issues related to PIC's use of Investor Series TD Mutual Funds and culminated in a report in the summer of 2013 which was provided to senior members of the Bank.

[6] From May to September 2014, PIC, TD Waterhouse, and TD Investment Services Inc. (the TD Entities") self-reported to the Staff of the OSC issues involving inadequacies in the TD Entities systems of controls and supervision which formed part of their compliance system, and which resulted in clients paying, directly or indirectly, excess fees that were not detected or corrected by the TD Entities in a timely manner.

[7] On October 20, 2014, the Bank terminated Ms. Carroll's employment.

[8] Following an investigation by the OSC Staff, during which the TD Entities cooperated fully, the Staff and the TD Entities entered into a settlement of the above issues on November 7, 2014, conditional on approval by the OSC (the "Settlement"). The Staff found no evidence of dishonest conduct by the TD Entities.

[9] The Settlement provided, among other things, that the TD Entities pay appropriate compensation to affected clients in excess of $13.5 million, together with a voluntary payment of $650,000 to the OSC which included costs of $50,000. In addition, the TD Entities were required to take additional corrective action including implementing additional controls and supervision.

[10] The Settlement was found to be in the public interest and approved by the OSC on November 13, 2014.

[11] On October 19, 2016, exactly two years less a day following her termination by the Bank, Ms. Carroll issued a Notice of Action against the Bank claiming wrongful dismissal. On November 17, 2016, Ms. Carroll delivered her Statement of Claim in which she alleged that her employment had been terminated "in retaliation for her persistence in investigating and addressing several serious regulatory requirements which resulted in many of [the Bank's] clients being charged excess fees."

[12] Following receipt of a Fresh as Amended Statement of Claim, on September 22, 2017, the Bank delivered its Statement of Defence. In response to Ms. Carroll's allegation as to the reason she was terminated, the Bank pleaded that her termination was the result of "significant job performance issues" which she failed to address despite the Bank's good faith efforts to work with her to resolve.

[13] Following an order removing Ms. Carroll's solicitors of record, on June 28, 2018, Groia & Company were appointed as her solicitors of record.

[14] On November 1, 2018, Ms. Carroll sent a letter to the Chair of the Audit Committee at the Bank setting out her allegations of maladministration by the Bank of the TD Mutual Funds Trust and the TD Private Funds Trust (the "TD Trusts"). Attached to the letter were internal Bank documents (the "whistleblower letter").

[15] On November 2, 2018, contemporaneous with the delivery of the whistleblower letter to the Bank, Mr. Groia sent a letter to the Bank's external counsel advising that he had not participated in the preparation of the whistleblower letter, nor had he reviewed any of the documents referred to therein or any other documents in her possession or received information from her that he believed might

be subject to a claim of privilege by the Bank. Rather, Ms. Carroll had retained separate counsel (John MacNeil) to review these materials that "might be privileged" and to advise her with respect to her whistleblower obligations.

[16] In his letter, Mr. Groia stated in part:

> When we first met with Ms. Carroll and discovered that much of her knowledge and many of her concerns came directly, or indirectly, from conversations or meetings at which lawyers were present, we decided to create a screening wall so that Mr. MacNeil would interview and advise Ms. Carroll about her Whistleblowing obligations based on a review of her oral evidence and material that might be privileged, while at the same time I would advise her about her civil claims, without having reviewed that same information, or having discussed it with Ms. Carroll or Mr. MacNeil. At a later stage we also took independent legal advice on these matters.

[17] In his letter, Mr. Groia set out several arguments why, in his view, privilege did not apply to the information and documents in Ms. Carroll's possession.

[18] On November 29, 2018, the Bank's counsel responded to Mr. Groia's letter. Counsel expressed concern that Ms. Carroll "wrongfully, and in breach of her legal obligations," took confidential documents belonging to the Bank when she left her employment. It asserted the Bank's privilege to the materials and information in her possession, rejected Mr. Groia's arguments as to why the privilege did not apply and required that Ms. Carroll: 1) provide all copies of privileged materials (electronic or hardcopy) to Mr. MacNeil; and 2) confirm that the solicitor-client privileged materials will not be disclosed to anyone without first providing notice to the Bank and allowing it the opportunity to defend the privilege before the appropriate court.

[19] Ms. Carroll accepted the Bank's terms, noting that any materials in respect of which "solicitor-client privilege might reasonably be claimed" would not be disclosed to anyone but Mr. MacNeil without first providing the Bank with an opportunity to protect that privilege.

[20] On April 23, 2019, the Bank responded to the Whistleblower Letter. It advised Ms. Carroll that it had completed a review of her allegations and found that none of her allegations were substantiated. As a result, the Bank would not be taking any further action in response to her letter.

[21] On August 1, 2019, Ms. Carroll sent the Bank a draft letter, enclosing draft whistleblower reports which she intended to send to the OSC and other Regulators

for the purpose of allowing the Bank to assert privilege over the reports and attached materials, if it wished to do so. The reports attached 53 documents.

[22] In reply, the Bank once again asserted solicitor-client privilege in respect of some of the material and raised questions as to how Ms. Carroll came into possession of certain emails where she was not shown as either a recipient of the email or otherwise copied. Further, while the Bank noted it was prepared to provide redactions, it was not to be understood as releasing Ms. Carroll from her obligations as a former employee or from any responsibility for any steps taken that impinge on the Bank's privilege.

[23] In the end, the Bank applied redactions to 16 of the 53 exhibits to the reports based on solicitor-client privilege. In certain instances, protecting the privilege required that the entire exhibit be redacted; in others, specific aspects in the document were redacted. On August 14, 2019, the Bank provided Ms. Carroll with a listing of the 16 documents and the basis upon which it claimed solicitor-client privilege in respect of each document.

[24] The Bank also identified aspects of the reports that contained privileged information and suggested that Ms. Carroll redraft the reports to avoid reference to the privileged material. In response, Ms. Carroll insisted those portions remain and that the Bank apply redactions, or she would submit the reports without redaction. As a result, the Bank applied the redactions.

[25] On September 5, 2019, Ms. Carroll submitted her reports including attachments (with the Bank's redactions) to the Regulators. There is no evidence that any of the Regulators responded to her or that the OSC or any other Regulator has initiated any proceedings against the Bank concerning her allegations.

[26] On January 24, 2020, Ms. Carroll commenced the application.

[27] In addition, Ms. Carroll also commenced an application for an order requiring the Bank to pass its accounts in respect of the TD Trusts. On March 17, 2020, Gilmore J. dismissed the application on the ground Ms. Carroll had no standing (2020 ONSC 1629). On January 21, 2021, the Court of Appeal dismissed Ms. Carroll's appeal from the Gilmore order (2021 ONCA 38).

Solicitor-Client Privilege

[28] In order to establish solicitor-client privilege, (a) there must be a communication between a solicitor and his or her client; (b) the communication must

be of a confidential character; and (c) the communication must entail the seeking or giving of legal advice. See: *R. v. Campbell*, [1999] 1 S.C.R. 565 at paras. 49-54; *Davies v. American Home*, [2002] O.J. No. 2696 (Div. Ct.) at paras. 19-21.

[29] As part of the relief requested, Ms. Carroll seeks an order that her litigation counsel be given permission to review the materials over which the Bank asserts privilege. Ms. Carroll submits because she is in the "privileged tent" and not a third party in respect of the disputed material, her counsel should be entitled to review the documents. To deny her otherwise, "strikes at the heart of her right to counsel."

[30] It is well established that where there is a dispute over a claim of solicitor-client privilege, disclosure of the materials at issue can only be made to opposing counsel where that counsel satisfies the court that such a review is an "absolute necessity" which is as restrictive a test as may be formulated short of an absolute prohibition in every case: *Goodis v. Ontario (Ministry of Correctional Services*), 2006 SCC 31, at para. 21.

[31] There is no evidence in the record which establishes that litigation counsel's review of the disputed material is an "absolute necessity". Nor has Ms. Carroll been denied her right to counsel, having retained Mr. MacNeil to advise her on regulatory matters. Ms. Carroll's request is denied.

[32] Ms. Carroll submits that the Bank cannot assert the privilege because it belongs to the beneficiaries of the TD Trusts, i.e., the fund unitholders. In that regard, she relies on the fact the Trusts paid for the legal advice.

[33] In this case, the privilege is being asserted by the respondent TD Asset Management Inc.("TDAM") in its role as Manager or Portfolio Adviser to the TD Trusts and not in its role as trustee. The copious evidence filed by Ms. Carroll in reply makes it clear TDAM's role as trustee is akin to that of a bare trustee. In exercising its duties as Manager of the TD Trusts, TDAM would need to receive legal advice, particularly regarding its obligations under securities law. In such circumstances, payment by the TD Trusts for such advice does not, in my view, give rise to an entitlement by the beneficiaries to the privilege which attaches to such advice.

[34] Further, the rights of the unitholders of the TD Trusts are expressly set out in their respective Declarations of Trust. Both declarations at issue specifically provide unitholders "have no rights other than those rights expressly provided for herein".

Neither declaration provides unitholders with a right to access privileged documents belonging to the TD Trusts.

[35] Finally, and even if unitholders of the TD Trusts were entitled to receive privileged information, Ms. Carroll holds no units in the TD Trusts and is not a beneficiary. She is a stranger to the Trusts and in no circumstances would it be appropriate to have the information privileged to the Bank delivered to her.

[36] Ms. Carroll seeks to invoke the court's inherent jurisdiction to supervise trusts to carry out a "robust" review of the Bank's privilege claim. For the reasons set out by Gilmore J. in the passing of accounts application at paras. 27-36 as well as the Court of Appeal reasons, such a request is neither necessary nor appropriate. The review shall be conducted based on established procedure.

[37] Ms. Carroll further submits that the Bank has filed no substantive evidence from anyone involved in the challenged communications and accordingly has failed to establish its claims for privilege. There is no obligation when claiming privilege to file an affidavit of anyone involved in the communications. See: *Xentel DM Inc. v. Schroder Ventures U.S. Fund L.P.*, [2008] O.J. No. 1788 (Ont. SCJ). What is required is reasonable evidence from which the court can infer a solicitor-client relationship and solicitor-client privilege.

[38] In that regard, the Bank submits that based on the record, there is no serious dispute that the documents at issue deal with information that is privileged to it such that the determination of privilege can be made by the court on the existing record and without requiring a review of the documents. Specifically, it points to Ms. Carroll's own evidence that her information and documents supporting her whistleblower reports came from discussions of legal advice with the Bank's in-house and external counsel as well as her lawyers' information to the same effect and the screening process they put in place in respect of the documents.

[39] Further, the Bank has asserted its claims for privilege and provided Ms. Carroll with the grounds for its claims in its letter of August 14, 2019.

[40] Based on the above, I am satisfied that the record does establish a reasonable basis to support the Bank's claim that the documents at issue are privileged.

[41] Both in her factum and at the hearing, Ms. Carroll urged the court to review the documents. Both sides agree that the court has the discretion to review the documents "if necessary to the inquiry". See: *M. (A.) v. Ryan*, [1997] 1 S.C.R. 157 at para. 39.

[42] Notwithstanding the Bank's submission, given the circumstances of this matter, I concluded it was necessary to review an unredacted copy of the Bank's letter of August 14, 2019, listing the 16 documents and the basis for the claim of solicitor-client privilege together with the unredacted documents themselves. Following the hearing, counsel provided me with a binder with the requested information.

[43] I have reviewed each of the 16 documents together with the Bank's grounds for asserting privilege. In my view, each of the redacted portions of the documents together with the redacted portions of the reports are privileged. They deal with communications to and from both internal and external legal counsel either seeking or receiving legal advice.

[44] Ms. Carroll submits, based on the future crimes and fraud exception, the privilege cannot apply. The future crimes and fraud exception applies where the communications between the solicitor and his or her client are criminal or else made with a view to obtaining legal advice to facilitate the commission of a crime. The exception can only apply where the client knowingly is pursuing a criminal purpose. See: *R. v. Campbell* at para. 55 and following.

[45] There is no evidence in the record to establish that the legal advice was sought or provided with a view to facilitation of a crime. Nor do the documents in issue give any indication of that purpose. Ms. Carroll's allegations of maladministration of the TD Trusts are just that, allegations. In the absence of corroboration, they cannot operate to set aside the privilege.

Conclusion

[46] For the above reasons, the redactions applied by the Bank to the whistleblower reports and the attached documents shall remain in place to protect its privilege. Ms. Carroll shall return all of the Bank's documents containing privileged information.

[47] Given the issue concerns solicitor-client privilege, all unredacted copies of the whistleblower complaint, the whistleblower reports and the attached documents shall be sealed.

[48] The application is otherwise dismissed.

[49] The Bank is entitled to its costs of the application.

[50] Both parties have filed Costs Outlines. Ms. Carroll seeks partial indemnity costs of $31,011.99 made up of fees of $30,235.41 and disbursements of $776.58. The Bank claims partial indemnity costs of $39,560.15 inclusive of HST made up of fees of $34,690.80 (plus HST) and $359.55 in disbursements.

[51] I am satisfied given the issues raised by Ms. Carroll that the time spent by the Bank's counsel is reasonable as are the hourly rates charged. The amounts claimed by both parties are reasonably similar. In all the circumstances, I am satisfied that the amount claimed by the Bank is both fair and reasonable.

[52] Costs to the Bank on a partial indemnity basis fixed at $39,000. Payable forthwith.

L.A. Pattillo J.

Released: April 21, 2022