IN THE MATTER OF AN ARBITRATION

BETWEEN:

DURHAM REGIONAL POLICE ASSOCIATION

-AND-

DURHAM REGIONAL POLICE SERVICES BOARD

PRELIMINARY AWARD

Arbitrator:	Laura Trachuk
For Durham Regional Police Association:	Joshua S. Phillips Andrew Webb Randy Henning
Durham Regional Police Services Board:	David G. Cowling Nathaniel Marshall Tracy Lillie

The arbitration of this matter took place in Whitby on June 2, 2015 and in Toronto on June 23, 2015.

PRELIMINARY AWARD

The Durham Regional Police Association (the "Association") has filed a grievance alleging, among other things, that the Durham Regional Police Services Board (the "Board") has violated the collective agreement by failing to ensure that the Association's civilian members work in a harassment free environment.

The Association seeks to serve a subpoena *duces tecum* on Christine Thomlinson, the person who investigated the harassment allegations and prepared a report. It wants Ms. Thomlinson to provide the report and documents obtained and drafted by her in the course of her investigation. The Board has refused to disclose the report and objects to Ms. Thomlinson being subpoenaed to produce it and the related documents on the basis that that they are subject to litigation and solicitor/ client privilege. The Association denies that the documents it seeks are privileged but says that even if they are, the Board has waived it. This preliminary award deals with those production issues.

The subpoena *duces tecum* that the Association wishes to serve on Ms. Thomlinson includes production of the following documents:

- All contracts, correspondence, emails, and other documents that you received from the Durham Regional Police Service ("Service") or Durham Regional Police Services Board ("Board") arguably relevant to your instructions to investigate the allegations of harassment against Rob Wallington ("Wallington"), including documents addressing the scope of your assignment/retainer;

- All documents arguably relevant to the scope of the investigation that you conducted, including all notes taken during witnesses interviews, and all documents that you received from the Service/Board for the purpose of the investigation;

- All correspondence, emails, or other documents arguably relevant to any requests that you made to the Service or the Board for access to documents and witnesses during the scope of your investigation, and the Service/Board's response to such requests;

- All correspondence, emails, memoranda, and other communications between you and the Service/Board regarding the scope, progress, and result of your investigation;

- Your final report on the investigation, and any other documents arguably relevant to your methodology, conclusions, and recommendations; and

- All correspondence, emails, and other documents arguably relevant to the Service/Board's responses to your conclusions and recommendations.

FACTS

The facts relevant to the production issue are as follows. Two civilian members of the Association made complaints alleging harassment in or about March 2013. An investigation was conducted pursuant to Directive HR-02-11, the "Respect in the

Workplace (Anti-Harassment and Violence Policy)" [Brackets in original]. Durham Regional Police Service "Directives" are the written orders of the Chief of Police "for all sworn and civilian members outlining directions, instructions, roles, responsibilities, and processes to be followed". Directive HR-02-11 provides in part:

> 1.PURPOSE
>
> The Durham Regional Police Service (DRPS) is committed in providing and maintaining a working environment that is based on respect for the dignity and rights of everyone in the organization. It is the Service's goal to provide a healthy and safe work environment that is free of any form of harassment or violence (including customers, clients, employers, supervisors, workers, strangers, and domestic/intimate partners).
>
> Acts of harassment, discrimination and violence are a violation of the dignity and self-respect of the individual and shall not be tolerated. Any member who contravenes this directive and related legislation shall be subjected to discipline up to and including dismissal.
> …
>
> 7. PROCEDURES FOR RESOLVING AND INVESTIGATING COMPLAINTS
>
> (A) Complaints of Harassment
>
> iii) Investigative Procedure
>
> a. All members shall report the existence of any workplace violence or threat of workplace violence to their supervisor or Respect in the Workplace Committee.
> b. The Respect in the Workplace Committee shall commence an investigation as quickly as possible. The committee may choose to use either an internal or external investigator depending on the nature of the complaint.
> c. The result of an investigation undertaken by the Respect in the Workplace Committee shall be articulated in a final report and forwarded to the chief of police.
>
> iv) Corrective Action
>
> a. The chief of police determines what action is to be taken as a result of the investigation.
> b. Findings of harassment and/or violence shall result in the imposing of corrective measures, regardless of a respondent's seniority, rank or position with the Service.
> c. Corrective measures may include one or more of the following:
>
> 1. Discipline, such as a verbal or written warning; suspension from duty with or without pay.
> 2. Termination.
> 3. Referral for:
>   - counseling.

- sensitivity training.
- anger management training.
- supervisory skills training.
- Attendance at education programs on workplace respect.

4. Demotion.
5. Reassignment of duties or transfer.
6. Loss in time.
7. Any other disciplinary action deemed appropriate under the circumstances and in accordance with:
    - for sworn members, the Police Services Act.
    - for civilian members, Directive AO-09-004 "Civilian Discipline Process".

d) No corrective measures shall be taken where the evidence is unsubstantiated.

e) Regarding harassment complaints, the Respect in the Workplace Committee shall inform the complainant and respondent of the results of their investigation and what corrective measures, if any, were taken.

Tracy Lillie, the Manager, Employee and Labour Relations, and one of the Deputy Chiefs, Scott Burns, were assigned to act as the Respect in the Workplace Committee with respect to these complaints. They consulted with the Association about who should conduct the investigation contemplated in the policy. Together, they agreed that Christine Thomlinson should be the investigator. Ms. Thomlinson is a lawyer and is a member of a firm well known for conducting workplace investigations. The Board does not normally use the firm for its legal work. The retainer provided to Deputy Chief Burns, by Ms. Thomlinson stated:

> I would like to thank you for retaining our services to conduct an investigation on behalf of the Durham Regional Police Service ("DPRS"). We understand that you have retained us to conduct an investigation into complaints passed on by the Durham Regional Police Association (the "Association") from a number of employees in the Planning department in respect of their manager, Robert (Rob) Wallington.
>
> We have discussed the fact that we will proceed by interviewing the four individuals for whom statements have been provided by the Association. We will review the information we collect in these meetings for the purposes of preparing a list of particulars of allegations to be provided to Mr. Wallington in advance of our meeting with him to hear his response. Following a meeting with Mr. Wallington, we will likely need to meet with certain relevant witnesses and may require follow up interviews with some or all of the parties.
>
> Our current mandate is to investigate the complaints as communicated in the meetings with the individuals for whom statements have been received. However, we will look to confirm this mandate following our meetings with these individuals. In the execution of this mandate, to the extent that we make any findings of the behaviour alleged, we confirm that we are also being asked to make a determination as to whether any such findings constitute a violation of

either of the DRPS polices entitled, “Respect in the Workplace [Anti-Harassment and Violence Policy]” and “Code of Professional Conduct”.

Please note that our fees for our time engaged in connection with this investigation (including the preparation of a written report) are [details about fees and billings have been redacted from this award]

We further note that we similarly charge the above hourly rate for time incurred in the unlikely event that you might require us to re-attend to prepare for and/or participate in some future legal proceeding. We confirm that invoices will be sent to your attention (unless otherwise directed) and that either you and/or your client will arrange for the immediate payment thereof.

…
Our standard process is to render a written report at the conclusion of our investigation. If for some reason you do not require such a report, please advise us as soon as possible, since we often begin to prepare the report throughout the course of the investigation.

All documents which we generate in the course of the investigation, including without limitation, handwritten notes of interviews with the parties and witnesses, and any draft reports which are prepared, are the property of Rubin Thomlinson and will be retained as part of our file.

This letter contains contractual terms and pricing information which are both proprietary and financial and which we consider to be confidential. This information is not generally available to the public and is provided in confidence with the expectation that it will not be made public or subject to any freedom of information request or disclosure.

As a condition of our undertaking this investigation, you agree to indemnify Rubin Thomlinson LLP against any and all claims, demands, suits or other proceedings for costs, damages, losses, liabilities and expenses including reasonable legal fees that may be incurred by us defending any claims that may be made against us by any third party which might arise out of this agreement or investigation contemplated by this agreement, except where the costs, damages, losses, liabilities and expenses result directly from negligent, dishonest or fraudulent acts committed by Rubin Thomlinson LLP in the course of the investigation.

To assist in setting up this investigation, we normally ask that all parties be advised of the importance of participation in the investigation and candour with the investigator. They should also be advised that they must keep confidential the fact that this investigation is being conducted, and not discuss with anyone who might be a potential witness any facts or details relating to the subject matter of the investigation. Similarly, they should be advised that they are not to discuss with anyone the contents of the investigation interviews. The confidentiality cautions will be repeated in our interviews.

Throughout our investigations, we encourage the free flow of information regarding the process we are following. We will keep you regularly updated on our progress, and encourage you to draw questions or concerns about the

> investigative process to our attention as soon as possible. We will normally refrain from providing any information regarding the merits of the investigation before we have collected all of the evidence, as things often change throughout the course of the investigation.
>
> Should you have any questions regarding the contents of this letter, please advise me. Otherwise, if you are satisfied with the terms of this retainer, please sign below confirming your acceptance.
>
> We look forward to working with you.

Deputy Chief Burns signed the retainer letter.

Ms. Thomlinson conducted her investigation in May and June 2013. She interviewed members of the bargaining unit as well as Mr. Wallington. The Association's Vice President, Gary Foxwell, attended the interviews with the bargaining unit members. The Association also participated in the investigation by bringing concerns about it to management's attention and by discussing it directly with Ms. Thomlinson.

Ms. Thomlinson completed her investigation in June 2013 and provided her investigation report to Ms. Lillie and Deputy Chief Burns. On July 30, 2013 Ms. Lillie and Deputy Chief Burns met with the two bargaining unit members who had made the original complaints. Mr. Foxwell also attended. The complainants and Mr. Foxwell were advised that the complaints had been substantiated and that corrective action was being taken. Deputy Chief Burns emphasized that an objective third party investigation had been conducted. The complainants were provided with a letter that, apparently for the first time, advised them that the Board took the position that the investigation report was privileged. The letter to one of the complainant's stated:

> As you are aware the Service retained Christine Thomlinson of Rubin Thomlinson to conduct an independent investigation into the allegations laid by you against your manager, Mr. Robert Wallington. Having met with you on May 1st and June 17th, 2013 and thereafter with subsequent relevant members, Ms. Thomlinson has concluded her investigation and rendered her report of the findings to the writers. The report itself is privileged and confidential; this memo serves as disclosure of the results and corrective actions to be taken in accordance with the Respect in the Workplace Directive.
>
> The burden of proof applied in Respect in the Workplace matters is a "balance of probabilities", meaning the question "*is it more likely than not that an event has occurred*" is asked and responded to. Ms. Thomlinson applied such a test throughout her investigation into your allegations. Further, as noted in the Respect in the Workplace directive, it is not necessary to show intent in such matters, i.e. "*did the respondent intentionally set out to harm the complainant?*, but rather what the impact was. Accordingly, Ms. Thomlinson measured the impact of Mr. Wallington's actions had on you regardless of his intent.
>
> Based on the evidence gleaned from the investigation, your allegations of Mr. Wallington's conduct as it relates to you personally as well as other general allegations as supplied by you have been founded; specifically, workplace harassment has occurred. Chief Constable Ewles has been apprised of the

findings and has authorized corrective measures with the goal of restoring the work environment for all parties involved. Such corrective measures shall include:

1. Mr. Wallington's participation in an educational program(s) addressing Respect in the Workplace best practices including application of the provisions of the Ontario Human Rights Code and Bill 168; and;
2. Mr. Wallington's participation in an educational program(s) supporting his supervisory skills including best practices of performance management; and;
3. Disciplinary action against Mr. Wallington, in accordance with the Civilian Discipline Directive, in the form of a written warning.

In accordance with the Directive you are required to keep all matters relating to this complaint, including the investigation and outcome, confidential in order to protect the integrity of the process and all members involved. Please be reminded of the Service's position on reprisal/retaliation; all members involved in this process are to be free of reprisal. Should you experience retaliation as a result of your participation in this matter you are advised to contact us immediately.

No record of this complaint shall be placed in your divisional or personnel file. A copy of this document shall be placed in Human Resources in a secure file and shall only be referenced should you become involved in a future workplace complaint.

The letter to the other complainant was almost identical except for the dates on which she was interviewed. Ms. Lillie testified that she wrote the letter but that Ms. Thomlinson reviewed it. As noted in the letter, the complainants were advised that they were required to keep the information they received confidential and the Board refused to provide the report itself. Ms. Thomlinson has not provided her notes and other documents generated in the preparation of the report to the Board. It has only received the report itself.

Mr. Foxwell sent a letter to Deputy Chief Burns on October 16, 2013 in which he followed up on the investigation. The words "Without Prejudice" were written at the top of the letter but it was admitted into evidence on consent of the parties. It stated as follows:

Re: Workplace Complaint against Mr. Robert Wallington

On Tuesday, July 30th of this year, the findings of the investigation regarding workplace complaints against Mr. Wallington were made known to the individual complainants and the Association by you and Tracy Lillie, Manager-Employee & Labour Relations. The findings by the investigator deemed Mr. Wallington was responsible for "workplace harassment" and the following corrective measures were approved by the Chief in respect to Mr. Wallington:

1. Mr. Wallington's participation in an educational program(s) addressing Respect in the Workplace best practices including applications of the provisions of the Ontario Human Rights Code and Bill 168 and;

2. Mr. Wallington's participation in educational program(s) supporting his supervisory skills including best practices in performance management; and,

3. Disciplinary action against Mr. Wallington, in accordance with the Civilian Discipline Directive, in the form of a written warning.

In order to satisfy the member and the Association that all necessary measures to ensure a safe and harassment-free workplace have been taken, please confirm the following;

i) Proof of attendance and completion of Mr. Wallington's participation in educational program(s) addressing Respect in the Workplace best practices including application of the provisions of the Ontario Human Rights Code and Bill 168; and,
ii) Proof of attendance and completion of Mr. Wallington's participation in an education program supporting his supervisory skills including best practices of performance management; and
iii) A copy of the disciplinary letter that has been placed on his file as a "written warning".
iv) Completion of an investigation into allegations of other Members
v) That all Members who used sick days as a result of Mr. Wallington's conduct have been reimbursed those days and otherwise made whole in respect of the harassment they suffered.

As this matter has been outstanding for some time, we would be grateful for your early reply.

The Association filed this grievance on November 22, 2013. It stated:

The Association grieves a violation of Article 5 of the Civilian Collective Agreement, the Human Rights Code and the Occupational Health and Safety Act in that the DRPS has failed to ensure a safe and harassment-free work environment for employees under the Supervision of Rob Wallington in the Planning Unit.

Without limiting the generality of the grievance, the Association grieves that those subject to Mr. Wallington's supervision were subject to a long-term pattern of harassment, creating a hostile work environment by:

- Using crude and vulgar language
- Publicly and privately making disrespectful, insulting and demeaning comments about members in his unit regarding their work, personal lives, sexuality, appearance, disabilities, etc.
- Ignoring and isolating Members
- Making inappropriate work assignments
- Eavesdropping on conversation of Members
- Searching the work stations of Members
- Making unfair and inappropriate demands on Members to complete tasks while colleagues were forced to watch

- Withholding information on significant job changes from affected members
- Threatening members' jobs

The employer:

- Was aware or reasonably should have been aware of such harassment and failed to take reasonable steps to address it
- After receiving specific complaints, failed to adequately investigate the complaints
- Failed to provide the Association or affected Members with the investigative report
- After substantiating the complaint, failed to take adequate steps to ensure Members were protected from future harassment and bullying;
- Failed to compensate Members who suffered losses as a result of the harassment, including those who were compelled to deplete their sick banks.

As a remedy, the Association seeks:

- A declaration that members of the Planning Unit have been subject to bullying and harassment
- An order that Members who have been subjected to bullying and harassment not be supervised or work in the same facility as Mr. Wallington;
- An Order that the Association and affected Members be provided with a copy of the full investigation report received by the Service;
- An Order that Mr. Wallington and all persons who are managers or above, or Inspectors or higher rank, receive anti-bullying and anti-harassment training as approved by the Association or the Arbitrator
- An Order that all affected Members be made whole, including restoration of used sick bank, and damages of up to $50,000 per person in respect of loss of dignity and violation of rights

We look forward to your timely response.

Deputy Chief Burns sent a letter to Mr. Foxwell on November 26, 2013. It said "Without Prejudice" at the top but the parties agreed to introduce it into evidence. It provided:

> Thank you for your letter dated October 16, 2013 regarding the workplace complaint against Mr. Robert Wallington, which was investigated and resolved earlier this year. This complaint was investigated by the firm of Rubin Thomlinson, a firm identified as suitable by both parties.
>
> I can confirm that when we first received this complaint we immediately took measures to evaluate and ensure that there was a safe and harassment-free workplace for our members. Following the independent investigation, a course of remedial action was determined. As we have done in similar cases, the resolution was put in place to ensure that Mr. Wallington is successful in his role as the Manager of Strategic Planning.

> As with other members, our focus is on education and awareness and improved competence. This often takes several forms. Mr. Wallington has been registered for leadership training through a post-secondary university. He will participate in recognized feedback program(s) within his working group. Finally, he will benefit from specific training with RubinThomlinson.
>
> Mr. Wallington's letter has been sealed and placed in his Human Resources file, which of course is confidential. All allegations made in this complaint were investigated fully. We are not aware of any other complaints being filed.
>
> The request for reimbursement of time is an important issue, and is currently being reviewed by Tracy Lillie from Human Resources. You had mentioned that the matter was outstanding for some time; however I have not received any previous requests to provide information.

Roger Anderson, the Chair of the Board, responded to the Association's complaint about the investigation report not being produced on February 12, 2014,. His letter was addressed to the Association's President, Randy Henning, and provided:

> I am replying to your letter dated January 21, 2014 regarding the Association's grievance of harassment on behalf of members of the Planning Unit.
>
> The matter to which you refer has been fully investigated in a satisfactory manner and appropriate actions to restore the environment have been implemented. With respect to your request for the investigative report, the Board has directed the Service to have formal discussions with the Association aimed at amending the notification process to include vetted disclosure to the President and Vice President together with a confidentiality agreement. This amendment would apply to all respect in the workplace matters and is aimed at providing sufficient information to negate a grievance surrounding allegations of unfair process, inaccurate findings of fact or inappropriate methods of resolution. It is the Board's position that such a process would balance the importance of transparency while respecting the confidentiality of those involved in such investigations, either as a witness or a complainant. The full disclosure of reports would place involved members in a precarious position, having understood during the investigative stage that confidentiality would be maintained. On a go forward basis, the Service's efforts to prevent and mitigate the effects of workplace harassment would be seriously jeopardized as members may be reluctant to come forward as a complainant or a witness in the absence of confidentiality.

Discussions took place between the Association and the Board pursuant to the above letter. They signed a Memorandum of Agreement in September 2014 that provided:

> WHEREAS the Parties have a joint interest in maintaining a safe and harassment free workplace at the DRPS; and
>
> WHEREAS in furtherance of this objective the Chief has promulgated a Respect in the Workplace Directive HR-02-11 (the "Directive") which provides for the initiation and investigation of workplace complaints; and

WHEREAS the Association owes a duty of fair representation to its members, which includes representation with respect to safety, human rights and harassment matters; and

WHEREAS a grievance has been filed by the Association in relation to access to an investigation report relating to Member [The name has been deleted as it is not the grievance before me] ("the Grievance").

THE PARTIES HEREBY AGREE AS FOLLOWS:

1. Following the completion of an investigation under the Directive relating to a complaint filed by an Association member, the Board shall provide forthwith to the Association, a full copy of an investigator's report ("the Report"), which shall include but not be limited to all documents and other evidence (including notes or transcripts of witness interviews) considered as well as the conclusions of the investigator.

2. The Association shall use the Report only for the purpose of representing its member(s) on said issue and shall disclose the contents of the report solely for this purpose. This report will only be viewed by the President, Vice President and full time employees of the Association, including their legal counsel.

3. Where there are reasonable grounds to believe that disclosure of a Report to the Association may adversely impact Members' free and full participation in an investigation, the Parties may agree to disclosure of a redacted version of the Report, but such redaction shall only be to the extent necessary to reasonably protect the privacy of any affected member.

The Board takes the position that the above settlement does not apply to the report in issue in this grievance.

A "Will Say" was provided for Tracy Lillie, upon which she was cross-examined. The Will Say provided in part:

2. On various dates in March 2013, the DRPS received complaints from employees regarding Rob Wallington's conduct in the workplace.

3. The DRPS discussed retaining Ms. Christine Thomlinson of Rubin Thomlinson LLP to investigate these allegations, as it was reasonably anticipated that the DRPS would become involved in a legal proceeding in relation to the same.

4. On or around April 9, 2013 I, along with Deputy Chief Scott Burns, spoke to Christine Thomlinson via conference call about the nature of the complaints against Mr. Wallington.

5. During the conference call, we also discussed retaining her services to conduct an investigation in order to determine the facts upon which the allegations against Mr. Wallington were based. We requested that she provide an investigative report

containing an analysis of whether any of the factual findings constituted a breach of the DRPS policies entitled “Respect in the Workplace” and “Code of Conduct”.

6. Ms. Thomlinson provided the DRPS with a retainer letter on April 9, 2013. Deputy Chief Burns executed this letter on April 10, 2013.

7. On or around June 24, 2013 Ms. Thomlinson produced her findings to the DRPS.

8. Subsequent to the issuance of the report, on or around July 15, 2015, I met with Ms. Thomlinson at her office in Toronto. During this meeting I received her advice with respect to the recommendations that should be made as a result of her factual findings.

In her testimony, Ms. Lillie confirmed that Deputy Chief Burns emphasized to the Association and the complainants that Ms. Thomlinson had conducted an objective third party investigation when he met with them on July 30, 2013. She said that she did not know whether Mr. Wallington had started or completed any of the training or education that he was supposed to undertake.

Ms. Lillie acknowledged that the Board’s priority when it got the complaint was to ensure a safe and harassment free workplace. She said that it quickly retained Ms. Thomlinson and that one of the things discussed with her was the complainants’ safety during the investigation.

The Board has used outside investigators in the past but none of them were lawyers. The investigators were sometimes asked to determine whether there had been a violation of the Directives and to make recommendations with respect to restorative measures. The reports were always shared with the Association. Ms. Lillie testified that she sometimes made findings of fact herself as well as determinations as to whether the Directive had been violated and recommendations about restorative measures.

Ms. Lillie testified, further, that the Board received legal advice from Ms. Thomlinson about the process throughout the investigation. She said that Ms. Thomlinson advised on questions such as the disclosure that should be provided to the Association. Ms. Lillie said that she would not have talked to the other people the Board has used to do investigations about that.

Ms. Lillie testified that the Board decided to use a lawyer to do the investigation in this case because it was contentious from the beginning. She said that they expected that at the end of the day there would be a process like “this” either from the respondent or the complainants. Ms. Lillie said that they were confident that this matter would go beyond the harassment report and they wanted to best position themselves when they ended up in an “arena such as this”. She said that the Board decided to use a lawyer so they could ask advice all the way through. Ms. Lillie contended that the relationship with Ms. Thomlinson was different from the one that they had with other investigators because Ms. Thomlinson looked at documents that she had drafted. They also asked her if the information they were providing was appropriate and was being shared at the appropriate time. Ms. Lillie said that they also asked Ms. Thomlinson about the order of the interviews. Ms. Lillie testified that there was a comfort in being able to ask a lawyer if what they were doing would stand up in “case law”. She asserted that she would not usually take recommendations about a penalty to the Chief without getting legal advice

but it made sense to do so in this case because the person making the recommendations was a lawyer.

Ms. Lillie confimed that Ms. Thomlinson said that it was her practice to assure the people that she was interviewing that confidentiality would be maintained.

Ms. Lillie testified that the Board only intended for the settlement dated September 2014 to apply to future investigations and did not intend it to apply to Ms. Thomlinson's report.

OCCUPATIONAL HEALTH AND SAFETY ACT

The relevant provisions of the *Occupational Health and Safety Act* (OHSA) are as follows:

> 32.0.1 (1) An employer shall,
>
> (a) prepare a policy with respect to workplace violence;
>
> (b) prepare a policy with respect to workplace harassment; and
>
> (c) review the policies as often as is necessary, but at least annually.
>
> …
>
> 32.0.6 (1) An employer shall develop and maintain a program to implement the policy with respect to workplace harassment required under clause 32.0.1 (1) (b).
>
> (2) Without limiting the generality of subsection (1), the program shall,
>
> (a) include measures and procedures for workers to report incidents of workplace harassment to the employer or supervisor;
>
> (b) set out how the employer will investigate and deal with incidents and complaints of workplace harassment; and
>
> (c) include any prescribed elements.
>
> 32.0.7 An employer shall provide a worker with,
>
> (a) information and instruction that is appropriate for the worker on the contents of the policy and program with respect to workplace harassment; and
>
> (b) any other prescribed information.

THE BOARD'S SUBMISSIONS

The Board submits that the Investigation Report and related documents are covered by both solicitor/client and litigation privilege. It argues that its position is supported by the retainer letter and by Ms. Lillie's evidence that the investigation and report were intended for use in a proceeding like this arbitration. The Board says that litigation was contemplated at the time Ms. Thomlinson was retained even if it was not clear who the grievors or the plaintiff would be. It contends that the dominant purpose of the report was for use in litigation.

The Board also asserts that part of Ms. Thomlinson's role was to make a determination about whether the facts constituted a violation of the Service's policies. It maintains that that is fundamentally a legal exercise. The Board submits, further, that it obtained

recommendations from Ms. Thomlinson about how to deal with the findings in the report. It insists that she was, therefore, providing legal advice and was not just engaged in fact finding.

The Board argues that it advised the complainants that the report was privileged and confidential. It says that it never intended to waive that privilege and did not do so when it shared the recommendations with the complainants or when it signed the September 2014 settlement.

Should the arbitrator review the report to determine whether it is privileged?

The Board acknowledges that an arbitrator has the discretion to review a report in determining whether it is covered by solicitor/client or litigation privilege but argues that I should not do so because I will be determining the merits of the case. It submits this situation is different from that of a judge who is hearing a motion but will not be the ultimate trier of fact. The Board contends that an arbitrator should not review a document for which a claim of privilege has been made unless truly necessary because it would be too easy for a party to get privileged documents before an arbitrator just by challenging them. Thus, according to the Board, if privilege can be established short of reviewing the document, it should not be read. The Board says that it has provided actual evidence to support its claim of privilege and that it should not be necessary to review the document. However, the Board submits that if, after reviewing the evidence, I am of the view that I need to review the report to make a determination I should do so.

Legal Advice (Solicitor/Client) Privilege

The Board submits that solicitor/client privilege, which is also called “legal advice” privilege, is an important principle that is essential for the administration of justice. It says that the protection for legal advice privilege is close to absolute.

The Board contends that legal advice privilege protects all communications related to seeking, formulating or giving legal advice. It is not limited to explaining law to a client. The Board argues that legal advice privilege includes fact finding because that is linked to both determining whether there has been a breach of the policies and the recommendations. The Board submits that the client does not specifically need to ask advice as long as the document is part of the continuum in which advice is given.

The Board argues that Ms. Thomlinson’s retainer provides for the provision of legal advice. The Board contends that she was retained to make legal determinations and to engage in a legal analysis. It says that Ms. Thomlinson was asked to determine whether the facts supported a conclusion that there had been a violation of the Board’s policies. Ultimately, the Board also obtained her opinion with respect to how it should proceed with her findings of fact. Ms. Lillie testified that Ms. Thomlinson provided recommendations based on the facts in her report. The Board submits that those analyses and that advice were provided in Ms. Thomlinson’s capacity as a lawyer. It contends that Ms. Thomlinson’s recommendations and legal conclusions cannot be separated from the investigative process. It says that they are inextricably linked to the legal advice she was requested to give.

The Board submits that there is a four part test to establish legal advice privilege: one of the parties must be a client and the other a solicitor; legal advice must be sought or

offered; the advice must be intended to be confidential and; the advice must not be intended to further unlawful conduct. The Board says that it meets all four parts of the test. It asserts that the determination of whether a particular fact is relevant is fundamentally a legal exercise and, therefore, the fact finding component of the report cannot be severed from the rest.

The Board contends that it hired Ms. Thomlinson to investigate as well as to give legal advice and, therefore, all of the related documents are privileged. It submits that a lawyer often needs to investigate to give accurate legal advice. The Board says that it does not normally hire lawyers to do investigations but in this case it wanted to get legal advice about whether the facts demonstrated a violation of its policies.

Litigation Privilege

The Board submits that the report and related documents are also covered by litigation privilege. It asserts that it retained Ms. Thomlinson to investigate and prepare the report because it reasonably apprehended that there would be litigation. It did know how it would go or where the litigation would come from which is why it retained a lawyer. The Board insists that expected litigation was the dominant purpose of the investigation and report. It anticipated that the report would be provided to counsel involved in the litigation. The Board argues that investigation and litigation are not distinct because an employer needs to know the strengths and weaknesses of its case. A lawyer will, therefore, assess the factual underpinnings of the case. Any settlement will be based on those factual underpinnings.

The Board provided the following authorities: *Blank v. Canada (Minister of Justice)*, [2006] 2 S.C.R. 319; *Her Majesty the Queen v. Bruce Power Inc. et. al.*, 2009 ONCA 573; *Strong v. General Motors of Canada Ltd*., 1996 Canlii 8161; *Singh v. Edmonton*, 1994 ABCA 378; *Toronto Transit Commission v. Canadian Union of Public Employees, Local 5089*, [2014] O.L.A.A. No. 155 (Sheehan); *Smith v. Jones*, [1999] S.C.J. No. 15; *Samson Indian Band*, [1995] F.C.J. No. 734; *R. V. McLure*, [2001] S.C.J. No. 13; *Slansky v. Canada (Attorney General),* 2013 FCA 199; *Gower v. Tolko Manitoba Inc*., [2001] M.J. No. 39; *City of Fort St. John*, 2012 BCIPC No. 6; *Resort Municipality of Whistler*, 2014 BCIPC No. 32; *2000768 Ontario Inc. v. 514052 Ontario Limited and 1176847 Ontario Limited*, 2006 Canlii 37124; *True Construction Ltd. v. Kamloops (City),* 2014 BCSC 2125; *Kennedy v. McKenzie*, 2005 Canlii 18295; *Alberta (Provincial Treasurer) v. Pocklington Foods Inc*.; 1993 ABCA 69; *Stoddard v. Basualdo*, 2000 ABQB 325; *Quadrini v. Canada Revenue Agency and Hillier*, 2009 PSLRB 104; *Keefer Laundry Ltd. v. Pellerin Milnor*, 2006 BCSC 1180; *Electrical Contactors Association of New Brunswick Inc. v. International Brotherhood of Electrical Workers, Local 502*, 2013 Canlii 50390 (NB LEB*); Hillwood Holdings Ltd. v. Cangra Distribrution Inc*., 2013 NSSC 27; *Royal & Sun Alliance Insurance Co. of Canada v. Fiberglas Canada Inc.*, [2002] O.J. No. 3846; *Mamaco v. Coseco Insurance Company*, 2007 Canlii 9890 (ONSC); *Transamerica Life Insurance Co. of Canada v. Canada Life Assurance Co*., [1994] O.J. No. 3886; *Nova Aqua Salmon Ltd. Partnership (Receiver of) v. Non-marine Underwriters*, [1994] N.S.J. No. 418; *Power Consolidated (China) Pulp Inc. British Columbia Resources Development Corp*. (B.C.C.A.), [1988] B.C.J. 1960; *Chapelstone Developments Inc. Canada*, [2004] NBCA 96; *Celanese Canada Inc. v. Murray Demolition Corp*., [2006] SCJ No. 35; 316697 *Ontario Inc. (c.o.b. Hindhu Sabhu) v. Sharma*, 2009 Canlii 66148 (ONSC); *Nova Growth Corp. v. Kepinski*, [2001] O.J. No. 5993; *Appleton v. Hawes*, [1989] O.J. No. 1672; *Zetsa Engineering Ltd. v. Cloutier*, [2000] O.J. No. 1060; *Urquart*

v. Allen Estate, [1999] O.J. No. 4816; *Essa (Township) v. Guergis*, [1993] O.J. No. 5581; *Planned Insurance Portfolios Co. v. Crown Life Insurance Co.* (1989), 68 O.R. (2d) 271 (H.C.).

THE ASSOCIATION'S SUBMISSIONS

The Association asserts that the scope of the investigation was too limited. It alleges that there was widespread evidence of a poisoned work environment but that the investigation was confined to specific issues related to the two complainants. The Association says that it is also concerned that Mr. Wallington remained in his position during the investigation because that meant that he could monitor anyone who was interviewed. It contends that the Board's response was limited to what was recommended at the end of the investigation and that it was inadequate. The Association asserts that the report and related documents are arguably relevant to its case and it, therefore, wants to serve a subpoena *duces tecum* on Ms. Thomlinson for their production. The Association also contends that the Board will not be able to respond to the grievance without referring to the documents it seeks and that will constitute a waiver.

The Association submits that the Board has the onus of asserting privilege over each document that it seeks and it maintains that some documents in the report cannot be privileged. The Association says that, to the extent that the documents relate to the information gathering function of the investigation, they are not privileged. It argues that privilege does not extend to communications between lawyers and third parties such as witnesses. The Association maintains that Ms. Thomlinson was not the complainants' counsel so there could be no solicitor/client privilege over those documents related to them. It argues that,

- All correspondence, emails, or other documents arguably relevant to any requests that you made to the Service or the Board for access to documents and witnesses during the scope of your investigation, and the Service/Board's response to such requests;

is a request for information not related to providing legal advice and any documents that Ms. Thomlinson received cannot be privileged. The Association maintains that the best evidence that those documents were not intended to be privileged is that the Association Vice-President was present during the interviews. The Association says that since Mr. Foxwell was there it is entitled to any record that was created during or about those interviews. It insists that the fact that a lawyer gathered the information does not make it legal advice.

The Association argues that the Directive contemplates that fact finding, applying facts to the policy, making recommendations, and determining what disclosure to provide, will be done by non lawyers because all of those tasks can be done without applying the special expertise of a lawyer.

The Association asserts, further, that Ms. Thomlinson is not the Board's usual counsel. She was only retained to do the investigation. Furthermore, the Board refers to her as an "independent" investigator. The Association contends that she was not retained to protect the Board's interests and that is what gives the report its credibility.

The Association submits that Ms. Thomlinson was never asked any of the things one would expect a lawyer giving legal advice to be asked. She was not asked to do an analysis of the Board's potential liability, to develop potential defences to the allegations, or to advise on the legal forum that any litigation might play out in.

Should the arbitrator review the report to determine whether it is privileged?

The Association also argues that I should not review the report before making my decision. It acknowledges that an arbitrator has the discretion to review a document over which a party asserts privilege but that it should not exercise that discretion in the absence of any party asking it to do so. The Association says that is no longer making such a request. It contends that the Board had the opportunity to agree that the arbitrator should review the report before the parties' made their submissions but it refused to do so. It says that the Board should not get another chance to make its case by having the arbitrator look at the document *after* it has made its submission. The Association maintains that it is usually the party opposing the claim of privilege that urges the judge or adjudicator to review the document but it is not asking for that. The Association submits that it is incumbent on the party asserting privilege to prove it and if the Board has not done so it is not appropriate to provide it with another chance by now reviewing the document.

Solicitor/Client Privilege

The Association does not dispute that if there is any legal advice provided in a document the whole document, including any fact finding portions, are privileged. However, the Association maintains that the Board has failed to establish that any legal advice was provided in Ms. Thomlinson's report and, therefore, has not established privilege over it.

The Association acknowledges that Ms. Thomlinson is a lawyer but it notes that her firm is well known for doing workplace investigations. It says that she understands the privilege issue with respect to investigation reports but, nevertheless, does not state that she is being retained as a lawyer or that she is providing legal advice. The Association notes that the retainer letter says repeatedly that Ms. Thomlinson has been retained to conduct an investigation. She also confirms that she has been retained to determine whether the Service's polices have been violated. The Association points out that Ms. Thomlinson also quotes the rate she will charge if she is required to attend a legal proceeding as a witness. It submits that the retainer letter never says that her work will be subject to privilege. It contends that, to the extent that Ms. Thomlinson talks about specific tasks, they are all part of the investigative process, as distinct from providing legal advice.

The Association asserts that determining whether the Board's policies have been violated and providing advice on remedial measures is not providing legal advice. It maintains that all of the functions that Ms. Thomlinson says that she will undertake have previously been performed by other investigators without legal backgrounds. The Association maintains that the investigation and report did not require the unique skills of a lawyer. It was not legal advice because it could have been provided by a lay person.

The Association also denies that the advice Ms. Thomlinson provided to Ms. Lillie and Deputy Chief Burns with respect to penalty was legal advice. It says that Mr. Wallington is a civilian member of the Service and that there is a Directive in the Civilian Discipline

process that is regularly applied by the Service's human resource professionals. Thus, recommending penalties is not the provision of legal advice but something that human resource people do all the time. The Association says that demonstrates that it is not legal work but work that human resource professionals perform on a regular basis.

The Association submits that Mr. Foxwell attended all of the interviews that Ms. Thomlinson held with its members so he has heard whatever she has recorded in her notes. He also spoke to Ms. Thomlinson himself. The Association notes that, Deputy Chief Burns asked why Mr. Foxwell was communicating with Ms. Thomlinson but also said in an email to Ms. Lillie that they had no secrets. The Association states that is the antithesis of privilege.

The Association argues that certain findings of fact in the report were disclosed at the meeting with the complainants although it was not clear which aspects of the allegations were found and which were not. Deputy Chief Burns confirmed that the Directive had been violated and advised what corrective measures were being undertaken. The Association says that none of that is consistent with a claim of privilege.

Litigation Privilege

The Association argues that the evidence demonstrated that the Board's primary purpose in retaining Ms. Thomlinson was to quickly ensure a safe and harassment free workplace. It maintains that was the dominant purpose of the investigation and the report. The Association submits that at the time Ms. Thomlinson was retained, there was no evidence that the complainants or the respondent contemplated any litigation. The grievance was not filed for many months after the report was completed.

The Association contends that the facts do not support the Board's claim of litigation privilege. It says that anything that merits investigation could also give rise to some form of litigation but that does not mean that all investigations are subject to litigation privilege. It asserts that something more than suspicion of potential litigation is required. The Association submits that there was no evidence that the Association had threatened any kind of grievance or other litigation when the investigation began. Litigation was only contemplated after the Association sought information from Deputy Chief Burns in the fall of 2013 and none was forthcoming. No one said anything about litigation for seven months after the complaints were made,. The Association maintains that nothing had crystalized during that period. The Board had investigated and implemented some kind of response and the Association had followed up. The Association asserts that it was only when it determined that the response was inadequate that it filed a grievance.

The Association denies that the fact that the Board retained a lawyer for the investigation was evidence that litigation was contemplated. It notes that Ms. Thomlinson was deemed to be suitable to do the investigation by the Association. She was retained because both parties wanted a good investigator and the complaints were about a senior person in the Service. However, the Association contends that the Board would not ask for its approval about which legal counsel to retain.

The Association argues that the Board did not provide evidence as to when the report was actually provided to legal counsel even though that might demonstrate when litigation was contemplated. It claims that if the Board had the report prepared for that purpose it would have sent it immediately.

Waiver

The Association argues, in the alternative, that the Board has waived any privilege it can claim over the documents. It submits that the Board waived its privilege when it disclosed the content of the documents to the complainants and to the Association on July 30, 2013. The Association contends that the Board was aware that it was claiming privilege in the memo that it provided on July 30, 2013 but it disclosed information about what had been found in the investigation anyway. The Association insists that the Board waived any privilege by doing that. It says that, however, the only information disclosed was that the complaints had been founded and what the response was. No detail was provided and, thus, the response seems inadequate in light of the complaints about which the Association is aware. The Association says that without any information about what the findings of fact actually were, there is no way that it and the complainants can satisfy themselves that the complaints were adequately dealt with. The Association contends that a party can waive privilege even if it does not intend to where fairness and consistency require it. It maintains that, in this case, fairness requires that the report be disclosed. The Association asserts that there is no other way to determine whether what it and the complainants were told was a fair summary of what the investigator found. The Association says that is fundamentally unfair to expect them to simply take the Board's word for it.

The Association also submits that any privilege that the Board was entitled to claim was waived when it entered the September 2014 settlement and agreed to provide all workplace investigation reports. It maintains that the agreement was negotiated in connection with these circumstances and applies to the report that is the subject of the subpoena.

The Association provided the following authorities: *Williamson v. Canada (Attorney General)*, [2003] F.C.J. No. 1425; *Pritchard v. Ontario (Human Rights Commission*), [2004] S.C.J. No. 16; *Re Great Atlantic & Pacific Co. of Canada Ltd. and United Food & Commercial Workers International Union, Locals 175 & 633,* 1995 CarswellOnt 5669 (Samuels); *Slansky v. Canada* (supra); *Wilson v. Flavelle*, [1994] B.C.J. No. 1257; *North Bay General Hospital v. O.N.A*., 2011 CarwellOnt 11887 (Parmar); *S. & K. Processors Ltd. v. Campbell Ave. Herring Producers Ltd.*, [1983] B.C.J. No. 1499; *Ontario (Ministry of Correctional Services) v. O.P.S.E.U.*, 1994 CarswellOnt 6070 (Kirkwood); *Springsteel v. Brick Warehouse Corp*., [2003] A.J. No. 1402; *Peel District School Board v. O.S.S.T.F., District 19,* 2012 CarswellOnt 3304 (Slotnick); *Thunder Bay (City) Centre for the Developmentally Challenged, Thunder Bay and Service Employees International Union, Local 268*, 1997 CarswellOnt 5671 (Harris).

REPLY

The Board asserts that when a lawyer gives advice about discipline and penalty it is legal advice even though non lawyers may also do that. It contends that if the advice comes from a lawyer and is provided to a client, it is legal advice and is subject to solicitor and client privilege. The Board contends that that is exactly the kind of advice that labour lawyers commonly give. They advise on whether policies have been violated and the likely result if a matter goes before an arbitrator.

The Board asserts that the court held that an investigation report cannot be parsed from advice provided by counsel in *Gower v. Tolko Manitoba Inc.*(*supra*) and that earlier cases which held otherwise should not, therefore, be relied upon. It maintains that it is clear after *Gower* that the entirety of the investigation exercise is privileged if legal advice is given.

The Board contends that Ms. Thomlinson's notes of her interviews and the other documents sought are also subject to privilege due to the "work product rule" which is now considered part of litigation privilege.

Waiver

The Board denies that it waived its privilege by disclosing the results of the investigation. It maintains that partially waiving the contents of the report by advising that the complaint was founded does not lead to a waiver of the whole document because the partial waiver was not made in an attempt to mislead. The Board says that it had no intention of waiving its claim of privilege by providing that information and that such an intention must be clear and unequivocal. It denies that the complainants were prejudiced by being told that their complaints were founded and what was going to be done in response to that determination or that they were they the subject of any unfairness.

DECISION

The issue in this case is whether the subpoena *duces tecum* may be served upon Ms. Thomlinson or whether the documents the Association is seeking are subject to litigation and/or legal advice privilege.

The Association proposed that I review the investigation report prior to the hearing to determine whether it was privileged and the Board disagreed. As the parties did not consent I did not review the report prior to the hearing and no one is asking me to review it prior to making a decision. I do not, in any case, find it necessary to review the report to make a determination of this preliminary matter.

A review of the facts demonstrates that Ms. Thomlinson was retained to conduct an independent investigation into whether harassment occurred pursuant to the Board's obligation to ensure a harassment free workplace. She was not retained to conduct an investigation on the Board's behalf to assess its liability and provide legal advice. It appears, however, that after she conducted the investigation and rendered her report, the Board decided to seek some legal advice from her. Thus, the investigation report and related documents are not privileged but documents related to the advice and recommendations provided at the meeting between Ms. Thomlinson and Ms. Lillie on July 15, 2013 are.

Litigation Privilege

A document will be subject to litigation privilege if its dominant purpose is litigation (see *Blank v. Canada* paragraph 60). The dominant purpose of the report prepared by Ms. Thomlinson was not litigation. She was retained to conduct an investigation mandated by the Directive and to provide a report. The purpose of the investigation was to determine whether the complaints were substantiated because the Board is committed to a harassment free workplace. Furthermore, OHSA section 32.0.6 (1)(b) requires the

Board to have a policy that provides for investigation of harassment complaints. The purpose of this investigation was no different than the others that have been conducted after complaints of harassment have been made and this is the only report for which the Board has claimed litigation privilege. It is the only report for which it ever will make such a claim as a result of the September 2014 settlement.

If the Board were correct in its claim that this report is privileged, then the Directive's requirement to investigate a complaint would not be for the stated purpose of ensuring a harassment free workplace but to provide the Board with information it can use to protect itself from the fallout of not doing so. That would not be consistent with the language of the Directive.

Ms. Lillie testified that the Board retained Ms. Thomlinson because it anticipated that there would be some kind of litigation eventually. However, the evidence also disclosed that the Association participated in the decision to retain her. In any case, even if the fear that the Board might face litigation one day was part of the reason for retaining Ms. Thomlinson, it was not the reason that the investigation was conducted. The Board was required to conduct it whether or not the investigator was a lawyer.

The only litigation resulting from the complaints was this grievance and it was not filed for eight months after the complaints were made and four months after the Association was informed of the findings and recommendations. There was every possibility during that period that there would not be a grievance if the Association accepted the investigation findings and the Board's response. However, as the Board refused to provide the report, the Association was unable to determine whether the corrective measures were appropriate to the findings and, thus, it filed this grievance, which seeks the disclosure of the report as part of the remedy. Litigation was a mere possibility when the investigation was conducted and was not its dominant purpose.

Legal Advice (Solicitor/Client) Privilege

Solicitor/Client privilege is now more frequently referred to as "legal advice" privilege. The words "legal advice" reflect the nature of the privilege and there is no dispute that only documents produced by a lawyer related to the provision of legal advice are subject to it. In spite of a growing trend towards more open disclosure in general, the courts have maintained and arguably expanded, the fundamental protection for such documents and it is now understood to be a substantive right and not just a procedural matter. However, even the most expansive view of the right does not extend it to the report and related documents that the Association is seeking.

In *Paul Slansky and Attorney General of Canada and Canadian Judicial Council* (*supra*) the Federal Court of Appeal set out the test to be applied to determine if a document is subject to legal advice privilege as follows at paragraph 74:

> The four elements of the test for determining whether a communication qualifies for legal advice privilege are well established: (1) it must have been between a client and solicitor; (2) it must be one in which legal advice is sought or offered; (3) it must have been intended to be confidential; and (4) it must not have had the purpose of furthering unlawful conduct: see R. Solosky, [1980] 1 S.C.R. 821 at 835; Pritchard at para. 15.

If the first part of the test requires only that someone who is a solicitor have a relationship with the party claiming the privilege it has been met. Ms. Thomlinson is a lawyer and the retainer is with the Durham Regional Police Service.

The third part of the test is whether the document was intended to be confidential. The Directive itself contemplates the report going to the Chief and says that only the recommendations will be disclosed. However, complainants may not have faith in the recommendations if they cannot see the report and that is, presumably, why the Board had always disclosed reports in the past and committed to doing so in the future in the September 2014 settlement. Furthermore, the Association's representative attended Ms. Thomlinson's interviews with its members so the content of those interviews could not be confidential from the Association. Finally, the Directive does not speak to what may occur during the process of any litigation that occurs subsequent to an investigation but could not, in any case, shield arguably relevant documents from production in a legal proceeding.

The fourth part of the test is not applicable to these facts.

It is the second part of the test that is the crux of this matter and it has not been met. For the reasons that follow, I find that Ms. Thomlinson was not providing legal advice when she investigated the complaints and prepared the report.

Was Ms. Thomlinson providing legal advice?

Prior to these complaints, the Board had not used a lawyer to do investigations of harassment complaints by the Association's members and had always disclosed the resulting reports to the Association. In this case, the parties consulted about the investigator to be used and agreed on Ms. Thomlinson whose firm is experienced in such undertakings. Neither Ms. Thomlinson, nor anyone else in her firm is the Board's usual labour relations counsel. It is unlikely that the Board would consult with the Association about what lawyer it should retain to be its counsel with respect to the complaints. The fact that the Association was consulted about the selection of investigator supports that it was supposed to be an independent third party investigation and not an investigation to provide legal advice to the Board. Furthermore, no one told the Association that by choosing Ms. Thomlinson the Board intended to claim privilege over her investigation and that this time the report would not be disclosed. The emphasis in the retainer on the interviewees being urged to participate and be candid is consistent with an independent investigation and not consistent with Ms. Thomlinson acting as the Board's counsel and seeking information to provide it with legal advice. The Association was not advised that the Board was claiming the report was privileged until after it was completed.

The retainer letter provided by Ms. Thomlinson and signed by Deputy Chief Burns is not a retainer for the provision of legal advice. It does not use those words, or the word "privilege" anywhere. That distinguishes this case from almost every decision provided by the parties in which a court or tribunal has determined that an investigation and report conducted and prepared by a lawyer is subject to privilege. Lawyers know how to draft a retainer that establishes a solicitor and client relationship and there are several examples in the decisions provided by the Board. The retainer letter in this case did not establish such a relationship. Not only did it not refer to legal advice or privilege, it contemplates the "unlikely" possibility of preparation and/or participation in a legal

proceeding. In the context of the letter, that does not mean participation as counsel but as a witness since Ms. Thomlinson did the investigation and prepared the report. Furthermore, Ms. Thomlinson did not agree to provide legal advice when she agreed to advise the Board as to whether its policies were violated. As noted above, when a lawyer is retained to conduct an investigation in relation to providing legal advice the parties will be clear about that. In any case, merely advising whether an internal policy was violated is not necessarily legal advice. It might be legal advice if it is part of a discussion about liability and litigation strategy but this retainer does not contemplate that.

I also note that the retainer letter requires the Board to indemnify Ms. Thomlinson and her firm and it is unlikely that she would seek that if she were providing legal advice to the Board. That provision reflects the possibility that someone might try to bring an action against her because she was acting as an independent third party investigator.

The investigation itself was not conducted in a manner consistent with an investigation intended to provide legal advice. A union representative was present at all interviews with its members and, although they were told to keep the matter confidential, they were not told that Ms. Thomlinson was counsel to the Board and that the report would be privileged.

Perhaps most significantly, the evidence demonstrates that the investigation was supposed to be independent. The retainer letter said that and the Board relied upon that when Ms. Lillie and Deputy Chief Burns told the complainants the results. The independence of the investigation was supposed to provide reassurance to the complainants that the process was fair and the results just in both the meetings Deputy Chief Burns held with them and in his letter. Furthermore, Deputy Chief Burns refers to "her" investigation not "our" investigation in his letter thus highlighting Ms. Thomlinson's independent role. The letter to the union dated November 26, 2013 also says that it was an independent investigation and that both parties identified the firm that investigated as suitable. However, it would be misleading for the Board to tell everyone that the investigation was independent if the investigator was actually acting as its counsel. If Ms. Thomlinson had undertaken to provide legal advice that would not have been consistent with her claim to be conducting an independent investigation.

The Directive pursuant to which the investigation was conducted contemplates that the report will go to the Chief and remain confidential but that the complainants and respondent will be advised of the outcome and steps taken. Nevertheless, all prior reports generated pursuant to the Directive had been disclosed. It does not say that the report will go to the Board's counsel or that it will be privileged.

The Jurisprudence

The Board relied on *Gower* to support its argument that the report is subject to legal advice privilege. However, the facts in *Gower* were different in very significant respects from those before me. In *Gower*, the complainant and the employer did not consult on who would do the investigation. The employer did choose a lawyer from whom to seek advice and to conduct an investigation who was a specialist in sexual harassment complaints like Ms. Thomlinson. However, in *Gower* the employer also chose the lawyer because he had a historical relationship with her firm. The evidence in Gower showed that the employer instructed the lawyer doing the investigation to "gather the facts, and

based on those facts, make recommendations and provide advice in respect to the legal implications of any of those recommendations". There is no such evidence in this case. Furthermore, that finding of the court demonstrates that there is a difference between making recommendations and providing advice on the implications of those recommendations. The lawyer was also asked to "examine the possibility of litigation including a wrongful dismissal action; a grievance under the complainant's collective agreement or a human rights complaint and advise Tolko how to act to avoid, if possible, litigation and as well to advise if litigation did happen, what would be the possibilities of success." There is no such evidence before me. Most significantly, the retainer letter in *Gower* clearly stated that legal advice was to be provided. It stated, in part:

1. The Investigator will conduct an investigation as counsel on behalf of the Employer for the purpose of providing a fact finding report and giving legal advice based on the findings in the report.
2. The Investigator's notes, fact finding report and legal advice will be protected by solicitor/client privilege. The Investigator will advise all witnesses, including the Complainant and the Respondent, that she is conducting this investigation as legal counsel for the Employer.

…

5. The Investigator will prepare a report for the Area Manager stating her findings of fact and her conclusion as to whether the findings of fact constitute sexual harassment and a breach of the Employer's harassment policy and will provide legal advice based on those findings of fact and conclusions.

Thus, the parties in *Gower* acknowledged from the beginning that the investigation was for the purpose of providing legal advice. The employer did not claim or rely upon the investigation being "independent" in support of its claim that its response was justified. Everyone interviewed was advised that the investigator was acting as legal counsel for the employer.

Gower illustrates what a retainer letter looks like when a lawyer is retained to provide legal advice as well as conduct an investigation. If that were intended to be the relationship between Ms. Thomlinson and the Board, no doubt her retainer letter would have contained similar provisions. The stark absence of any reference to legal advice or privilege in that letter demonstrates that that was not the relationship contemplated.

Further, in *Gower*, the report produced to the employer included parts titled "Legal Analysis" and "Legal Advice". The report produced by Ms. Thomlinson did not even include recommendations although she apparently provided them later directly to Ms. Lillie. The court in *Gower* found that the investigation was conducted for the purpose of ascertaining facts upon which to base a legal opinion. Those are not the facts of this case.

The Board also relies upon *Her Majesty the Queen and Bruce Power et al*. (*supra*). However, that award is also distinguishable from the facts before me. In *Bruce Power*, the company contacted its counsel after an accident in the plant and he advised it to conduct an investigation for the purpose of litigation. The terms of reference for the investigation team said that it was in contemplation of litigation and that the report and related documents would be placed in the custody of the legal department where confidentiality would be maintained. The people interviewed in the course of the investigation were told that the information would be kept confidential for the use of legal

counsel in contemplation of charges under the *Occupational Health and Safety Act* and would not be provided to the Ministry of Labour or any other third party. In house counsel for the company even attended a meeting of the investigation committee to advise that the report was being prepared in contemplation of litigation and that privilege would attach to it. That is another example of the way that lawyers can ensure privilege if that is their intent. However no such facts are present in the case before me.

In *Toronto Transit Commission v. Canadian Union of Public Employees, Local 5089* (*supra*) a labour arbitration award referred to by the Board, the arbitrator found that the investigation report was subject to litigation privilege but the investigation was commenced *after* the grievance was filed. Furthermore, the retainer letter provided by the investigator specifically said that she would be giving legal advice.

In *Resort Municipality of Whistler* (*supra*) the Adjudicator for the Information and Privacy Commission in British Columbia found that the report prepared by a solicitor who was retained to investigate a sexual harassment complaint was subject to solicitor/client privilege under the statute. However, the script the lawyer used when she was interviewing people said that she was acting as legal counsel and that her report would be privileged and confidential. The adjudicator found that there was a clear mandate set out in the terms of reference to provide legal advice and that the solicitor provided legal advice to the Municipality. There are no similar facts in this case.

The Federal Court of Appeal decision in *Slansky* is also different from this case because the governing statute specified that a lawyer could be retained to assist the Council in the inquiry or investigation into a complaint of judicial misconduct. Thus, only a lawyer could be retained and his or her role was to assist the council not to conduct an independent investigation. Furthermore, on the actual facts of that case the investigator had to be a lawyer because he had to analyze documents and trial tapes, which required extensive knowledge of criminal law and trial processes. Furthermore, the lawyer investigator understood that he was providing legal advice and stamped his report “confidential” and “solicitor and client privilege”.

On the other hand, the facts of this case are similar to those in *North Bay General Hospital v. O.N.A.* (*supra*) in which the arbitrator found that an investigation report prepared by a lawyer conducting an independent investigation was not privileged.

Except for *Slansky*, all of the authorities referred to in which a report prepared by a lawyer/investigator was found to be subject to legal advice or solicitor/client privilege involved retainers that said that they were giving legal advice. The failure to include such language in the retainer between Ms. Thomlinson and the Board indicates that that was not the intent. The issue then is whether that changed and if so, whether that change made the report and related documents privileged.

In its letter to the complainants in July 2014, the Deputy Chief Burns says both that the investigation was independent and that the report is privileged. The use of the word “privilege” is not explained in the letter and to the extent that it is inconsistent with the role Ms. Thomlinson outlined in the retainer letter and with the information provided to the complainants and Association that she was conducting an independent investigation, it is not sufficient to demonstrate that her role had changed. A document must be created, at least partly, for the purpose of providing legal advice to be privileged. However, while the investigation and report were not privileged, by the time the Board

provided the letter to the complainants its relationship with Ms. Thomlinson had changed.

Ms. Thomlinson was retained to conduct an independent third party investigation and render a report. She did so and that report and those documents are not privileged because she was not retained to provide legal advice at that time and was not doing so. The report and related documents should, therefore, be produced to the Association. However, the evidence demonstrates that the relationship between Ms. Thomlinson and the Board changed after she provided her report because the Board did then seek legal advice. Ms. Lillie asked her to provide recommendations and she did so in the meeting of July 15.

Ms. Lillie also testified that Ms. Thomlinson was consulted about whether to move Mr. Wallington during the investigation and the Board argues that was also legal advice. However, that was a procedural matter related to the investigation and was something about which the Association consulted Ms. Thomlinson as well. However, when she was consulted about how the Board should respond to her findings that the complaints had been substantiated, she began to give legal advice and any documents related to those discussions are privileged. Ms. Lillie also testified that Ms. Thomlinson reviewed the letter that was provided to the complainants on July 30, 2014 which is consistent with the change in their relationship.

The Board says that the investigation and report were part of the continuum of legal advice and that the report and related documents are, therefore, privileged. That would be correct if Ms. Thomlinson had been retained to give legal advice from the outset even though she was conducting an investigation. However, the report was not created in that context. It was a third party investigation and report and the Board relied upon Ms. Thomlinson's independence in conducting and drafting it before, during and after it was completed. It did not turn into a non independent legal advice document just because she was later retained to give legal advice. The report did not become retroactively privileged. If it did, that would mean that an employer who asked a lawyer to conduct an independent and non privileged investigation and then did not like the result could shelter it from disclosure just by asking one legal question. That is not the test. The document has to be part of the continuum of legal advice but it cannot be part of the continuum if it were not created, at least partially, for the purpose of providing legal advice. The report in this case was not. The Board retained Ms. Thomlinson to conduct an independent third party investigation and she did so.

Waiver

It is unnecessary to determine whether the Board waived its privilege with respect to the report and related documents as I have found that privilege does not attach to them. However, I have found that any documents related to the advice Ms. Thomlinson subsequently gave about how the Board should respond are privileged.

The grievance contains the following allegations about the steps the Board failed to take to ensure a safe and harassment free workplace:

- After receiving specific complaints, failed to adequately investigate the complaints

- Failed to provide the Association or affected Members with the investigative report
- After substantiating the complaint, failed to take adequate steps to ensure Members were protected from future harassment and bullying;
- Failed to compensate Members who suffered losses as a result of the harassment, including those who were compelled to deplete their sick banks.

The parties did not provide opening statements on the merits of this case and, being a labour arbitration, no pleadings have been filed. However, if the Board is planning to rely upon the fact that it received advice from Ms. Thomlinson to justify its response to the determination that harassment had occurred it may find that it has to waive the privilege that attaches to that advice and related documents. However, I do not find that any privilege attaching to those recommendations has been waived at this time.

Conclusion

There is so little evidence that the Investigation Report was prepared for the purposes of providing legal advice or in contemplation of litigation that if I were to find that it was privileged it would effectively mean that any time a solicitor is used for an independent harassment investigation an employer could claim privilege over the resulting report and related documents. That is not consistent with the jurisprudence or with good labour relations.

The court in *Gower* explained the rationale for legal advice privilege as follows at paragraph 15:

> There are several rationales underlying the privilege. It promotes frank and full communications between solicitor and client where legal advice is being sought or given. By promoting and facilitating effective legal advice it thereby facilitates access to justice, and it affirms the efficacy of the adversarial process.

However, the rationale described above does not support keeping Ms. Thomlinson's report and related documents from disclosure. The purpose of the investigation was to determine whether harassment had taken place with the ultimate goal of ensuring a harassment free workplace not to provide Ms. Thomlinson or the Board's counsel with information they could use to the Board's advantage in an adversarial process. That would be the ultimate goal of legal advice in such a context.

For all of the above reasons, I find that the Board cannot claim privilege over the investigation report prepared by Ms. Tomlinson and documents related to the preparation of that report and that the Association may serve a subpoena *duces tecum* seeking those documents. However, it must remove from the subpoena any documents related to the advice provided by Ms. Thomlinson after the report was provided to the Board about what how it should respond to her findings.

I note that Ms. Thomlinson has not taken part in these proceedings since she would have no claim to litigation or legal advice privilege over the documents. However, this award does not make any determination with respect to any other arguments Ms. Thomlinson may make with respect to the disclosure of documents in her possession.

The parties flagged a number of other issues related to production of documents, particulars and notice to Mr. Wallington that they have undertaken to resolve prior to the commencement of the merits of this case. I remain available to discuss any of these if the parties are unable to agree.

Dated at Toronto, September 15, 2015

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Laura Trachuk
Arbitrator