

**In the Matter of an Arbitration
Under the *Labour Relations Act, 1995***

BETWEEN:

Ontario Secondary School Teachers' Federation

(The "Federation")

AND

Greater Essex County District School Board

(The "Board")

(Grievances of Sandy Eansor)

Before: Adam Beatty

Appearances

Ontario Secondary School Teachers' Federation

Alex Stromdahl – Counsel
Lisa MacMaster
Jennifer Newman
Jacques Aharonian
Sandy Eansor

Greater Essex County District School Board

Daniel Fogel – Counsel
Matthew Wronko – Counsel
Vicki Houston

I. Introduction

1. There are ten grievances before me involving the Grievor, Ms. Sandy Eansor and the Greater Essex County District School Board (the "Board" or the "Employer"). Three of the grievances are disciplinary. One of the disciplinary grievances relates to the termination of the Grievor's employment. Many of the other grievances allege an abuse of management rights and that the Grievor was harassed by the Board.

2. In addition to the ten grievances, the Grievor filed two harassment complaints with the Board. The first complaint was filed in 2022. The second was filed in 2025. Broadly speaking, the complaints alleged that the Grievor's supervisor, Marc Crundwell, and others at the Board, were harassing her. One of the other individuals named in the 2022 complaint was Amie MacKinnon, the Board's Human Resources Co-Ordinator. The Board engaged two independent investigators to investigate the Grievor's allegations.

3. The Board has brought a motion seeking to have a portion of Ms. MacKinnon's response to the 2022 complaint struck from the record on the grounds that it is protected by solicitor-client privilege. In the alternative, if it is not protected by solicitor-client privilege, the Employer argued that the portion of the investigation report at issue is inadmissible because it amounts to hearsay, is highly prejudicial and is not relevant to the issues before me.

4. In order to understand the Employer's motion a little background is necessary. After signing a confidentiality statement, the investigator provided the individuals named by the Grievor in her harassment complaint with particulars of the complaint and invited a response. As part of the

investigation process, the investigator then provided those responses to the Grievor and invited her comments.

5. There is a passage in Ms. MacKinnon's response where she indicates that she spoke with legal counsel and was given advice on how to proceed. The response summarizes, at a high level, what that advice was. The passage constitutes one paragraph in a three page document. It is that passage the Board seeks to have struck from the record.

II. Solicitor-Client Privilege

A. Position of the Board

6. The Employer submits that the high level summary of legal advice included in Ms. MacKinnon's response is protected by solicitor-client privilege. The Board takes the position that solicitor-client privilege is very strictly guarded. The Employer noted that the Supreme Court has described solicitor-client privilege as a "fundamental civil and legal right" that is "fundamental to the justice system in Canada" (as quoted in *Guelph (City) v. Super Blue Box Recycling Corp.*, 2004 CarswellOnt 4488 (ONSC)). In *Guelph (City)*, the Superior Court noted that the functional purpose of solicitor-client privilege "goes to the very heart of the administration of the legal system."

7. The Board argued that there are only limited circumstances where communications protected by solicitor-client privilege can be compelled notwithstanding the privilege. One of those limited circumstances is waiver. The Board argued that privilege had not been waived in this case. In *Guelph (City)*, the Court held that privilege can be waived either expressly or implicitly. The parties agreed there had been no express waiver in this case.

8. The Employer also relied on *Masse v. TerraFarma Inc.*, 2024 ONSC 789, where the Superior Court noted that any analysis of implicit waiver must begin by recognizing the importance of solicitor-client privilege. The Employer emphasized that in *R. v. McClure*, 2001 SCC 14 (quoted in *TerraFarma*), the Supreme Court found that solicitor-client privilege “must be as close to absolute as possible”, that it will only give way in “certain clearly defined circumstances, and does not involve a balancing of interests on a case-by-case basis”.

9. The Court in *TerraFarma* also relied on the decision in *Soprema Inc. v. Wolrige Mahon LLP*, 2016 BCCA 471. *Soprema* quoted from the decision in *Goodis v. Ontario (Ministry of Correctional Services)*, 2006 SCC 31, where the Supreme Court held that communications protected by solicitor-client privilege should only be disclosed where “absolutely necessary”, applying “as restrictive a test as may be formulated short of an absolute prohibition”. Finally, on this point, the Board also emphasized the holding in *McQueen, et al. v. Mitchell, et al.*, 2022 ONSC 649 (also quoted in *TerraFarma*) that “caution must be exercised” to avoid treating implied waiver as a “discretionary call about trial fairness” and that the “implication of waiver must be consistent with the “near absolute protection of solicitor-client mandated by the Supreme Court.”

10. In *McQueen*, the Court held that implicit waiver can occur when a client’s voluntary conduct indicates an “implied or objective intention to waive it”. Again, according to *McQueen*, this will only happen in the “clearest of cases” and does not involve a balancing of interests.

11. Relying on *Guelph (City)*, the Board argued that implicit waiver can occur when the privileged communication itself is disclosed or when the privileged communication is relied upon as part of a substantive position

taken during legal proceedings. Beginning with disclosure, in *Guelph (City)*, the Court found that disclosure can occur either through disclosure of the actual communication itself or by disclosure of the substance of the communication. The Employer argued that in order to establish waiver by disclosure, the party seeking to rely on the disclosed communication (i.e., the Federation in this case) must establish an intentional disclosure of privileged communication that is intended to waive privilege by a person authorized to make the disclosure and waive the privilege.

12. The Board argued that establishing an intention to waive privilege, in the modern world, where it is common for legal advice to be provided to a large number of people within the same organization is more complicated than it may have been previously. The Board noted that in *Donofrio v. Vaughan (City)*, 2008 CanLII 37054, the Court (relying on *Guelph (City)*) concluded that no single councillor, including the mayor, could unilaterally waive the City's privilege precisely because the privilege belongs to the City.

13. Similarly, in this case, the Board argued that privilege belongs to the Board, not to any one individual, and that no one individual, including Ms. MacKinnon, could unilaterally waive that privilege. Given that Ms. MacKinnon did not have authority to unilaterally waive the Board's solicitor-client privilege, she could have not intended to do so. The Board argued that in the circumstances, the Federation has failed to satisfy the onus required to overcome solicitor-client privilege.

14. The Board also noted that the mere disclosure that a party has sought and obtained legal advice is not enough to constitute waiver. In *Guelph (City)* and *TerraFarma*, this point was addressed in some detail. In addition, in *TerraFarma*, the Court noted that even where the disclosure went beyond simply noting the fact of having received legal advice and also included the

“bottom line” of that advice, it still did not satisfy the requirements of an implied waiver. The same conclusion was reached in *Oro-Medonte (Township)*, 2023 CanLII 17172 (ON IPC) and *District School Board of Niagara*, 2018 CanLII 27873 (ON IPC). In the latter decision, the adjudicator held that disclosure of the bottom line legal advice did not constitute a waiver, either explicit or implicit.

15. As set out above, the Board argued that in addition to waiver through disclosure, waiver can occur if the privileged communication will be relied upon as part of a substantive position taken during this hearing. The Board noted that it has not argued good faith reliance on legal advice in this case. That being said, the Board acknowledges that if it seeks to rely upon the legal advice received to explain its conduct, it will then have been taken to waived privileged over that subject matter. The Employer submits that it has no such intention in this case.

16. The Board also argued that the Grievor would not be prejudiced by granting its motion. While re-iterating that the balance of fairness is not a relevant consideration to questions of solicitor-client privilege, the Board also noted that the fact that the Board received legal advice does not help determine the issues before me.

B. Position of the Federation

17. The Federation argued that the comments at issue are not protected by solicitor-client privilege. The Federation noted that the comments, from the Board’s Human Resources Coordinator to an independent investigator, summarizing the legal advice received by the Board, does not fall within the protection of solicitor-client privilege. In addition, the investigator then provided the comments to the Grievor taking an additional step outside the zone protected by solicitor-client privilege. The Grievor then provided the

comments to the Union, as part of the Union's request to the Grievor to gather all arguably relevant documents so that they could be produced to the Board in preparation for the hearing.

18. In the alternative, the Federation argued that by making the statement to the third party investigator, Ms. MacKinnon had voluntarily waived any solicitor-client privilege which could attach to her comments. The Federation took the position that in summarizing the legal advice received, Ms. MacKinnon was effectively telling the investigator that she could not have harassed the Grievor because she was doing what she was told to by legal counsel. In effect, according to the Federation, whatever privilege may have attached to the communication at issue was voluntarily waived when Ms. MacKinnon relied on the legal advice as an element of her defence to being named in the Grievor's harassment complaint. The Federation relied on *One York Street Inc. v. 23600863 Ontario Limited*, 2026 ONCA 176 (CanLII), *British Columbia Emergency Health Services and Ambulance Paramedics of British Columbia*, 2017 CarswellBC 87, *Greater Vancouver (Regional District) and GVRDEU (McGregor)*, 2015 CarswellBC 3844, and *Gorsky et Al, Waiver in Evidence and Procedure in Canadian Labour Arbitration*, in support of this position.

19. In addition, the Federation argued that Ms. MacKinnon's comments also satisfied the requirements for inadvertent waiver. In either case, whether voluntary or inadvertent, the Federation argued that Ms. MacKinnon's conduct, in summarizing the legal advice received as part of her response to being named in a harassment complaint to a third party investigator, constituted a waiver of any privilege. The Federation relied on *S. & K. Processors Ltd. v. Campbell Ave Herring Producers, Ltd.* (1983), 35 C.P.C. 146 (B.C. S.C.), *Toronto Transit Commission v. ATU, Local 113*, 2004

CarswellOnt 2908 and Sopinka, Lederman & Bryant, *The Law of Evidence in Canada*, 6th Ed. [ii] Voluntary at para. 14. 158 in support of its position.

20. Finally, the Federation took issue with the Board's position that fairness is not part of the required analysis for determining if solicitor-client had been waived. According to the Federation, fairness must be considered and in this case, fairness required the comments at issue to be admitted. The Federation argued that even if the comments were privileged, it was not open to the Board to disclose some, but not all, of the investigation report. Put differently, disclosure of part of the investigator's report required disclosure of the entirety of the report. The Federation relied on *Ontario (Ministry of Correctional Services) v. OPSEU*, 1994 CarswellOnt 6070.

21. The Federation also noted that Ms. MacKinnon provided her statement to the third party investigator in the middle of the events at issue. The Grievor received the investigator's report in 2022. She was terminated in 2025. The Grievor filed four grievances after receiving the investigation report that included Ms. MacKinnon's comments. Fairness requires that the Grievor be able to rely on those comments given the significance attributed to the comments by the Grievor.

C. Reply of Employer

22. The Employer reiterated that disclosure of legal communication does not in and of itself satisfy the requirements of waiver. There must also be an explicit or implied intention to waive the privilege. The Employer argued there is no basis to imply an intention to waive solicitor-client privilege in this case. There is nothing before me that suggests that Ms. MacKinnon was aware that the information privileged or that she intended to waive that privilege.

23. In addition, the Employer noted that Ms. MacKinnon did not have authority to waive the privilege. There is no dispute that privilege belongs to the client. In this case, it is the Board that holds the privilege. The Board is therefore the only party that can waive the privilege and there is simply no evidence suggesting that that is what occurred.

24. In terms of issues of fairness, the Employer argued that fairness is only considered in the context of a partial disclosure of privileged material. In that context, fairness requires disclosure of all of the privileged material. A party cannot pick and choose the portions of privileged material it will produce. Allowing it to do so would be unfair.

III. Hearsay/Relevance/Prejudice

A. Position of the Board

25. In the alternative, the Board argued that the evidence at issue is hearsay and is inadmissible. The Employer noted that in the statement at issue, Ms. MacKinnon is paraphrasing what she claims she was told by counsel. That constitutes hearsay.

26. The Employer argued that because the evidence is hearsay it should not be accepted. While acknowledging that hearsay is sometimes admitted it is necessary and reliable, the Board argued that neither condition is met in this case.

27. The statement itself has none of the trappings of reliability or necessity (see for example *R. Khelawon*, 2006 SCC 57, *Peterborough Victoria Northumberland and Clarington Catholic District School Board v. Ontario English Catholic Teachers' Association*, 2011 CarswellOnt 3128 and *Ontario (Ministry of Children and Youth Services) v. Ontario Public Service Employees' Union (Iyamu)*, 2015 CanLII 32586 (ON GSB). It was not made

under oath. Rather, according to the Board, Ms. MacKinnon was providing a cursory summary of a conversation she had with the Board's legal counsel. In addition, the Board noted that short of calling counsel to testify, there would be no way to correct this evidence or test its accuracy.

28. In addition, the Board argued that even if I was satisfied that the impugned statement was necessary and reliable, it should nonetheless be excluded because its probative value is greatly outweighed by its prejudicial effect. As noted above, the Board took the position that the statement does not help address any of the issues before me. The statement at issue, and the description of the legal advice given, does not indicate that the Employer accepted the advice, acted on the advice or took any steps whatsoever with respect to the Grievor as a result of the advice., To the extent that the Union may rely on this evidence to demonstrate the Grievor's state of mind at the relevant time, the Board noted the Grievor's state of mind is not at issue in these proceedings.

29. Finally, not only is the evidence irrelevant but it is highly prejudicial. As such, in the circumstances, it should be struck from the record. The Board relied on *University Health Network v. Ontario Nurses' Association*, 2025 CanLII 421 in support of its position.

B. Position of the Federation

30. The Federation argued that it was too early to determine if this evidence would constitute hearsay. The Federation submitted that there were a number of examples where the comments at issue would not be hearsay. As such, the Federation urged the Board to decline making a finding on this issue until such time as the evidence was tendered (assuming it is found not to be privileged).

31. Finally, the Federation argued that the comments at issue were clearly relevant. As set out in the Federation's opening statement, the Federation argues that the Board used legitimate workplace concerns with respect to the Grievor's performance, but, instead trying to help the Grievor, they used the workplace plans to build discipline against the grievor. In the circumstances, the comments could be relevant to that issue.

32. In addition, according to the Federation, the comments at issue played a significant role in the Grievor's belief that she was being targeted by the Board. To the extent that the Board has signalled that it may argue (in the alternative) that reinstatement is not appropriate because the Grievor believes the Board is "out to get her", the Federation argued that the comments at issue are relevant to that issue. In short, according to the Federation, the comments at issue speak to why the Grievor felt targeted by the Board. As such they may be relevant to the issue of remedy and whether reinstatement is appropriate in the circumstances.

IV. Analysis

A. Solicitor-Client Privilege

33. For the reasons set out below, the Employer's motion to have the comments struck from record is denied. Having reviewed all of the cases provided, and considered the relevant factual context, I have concluded that the case before me is materially different from the cases relied on by the parties. Writ large, in those cases, the issue was whether a party was entitled to the production of legal advice or a legal opinion on the basis of disclosure already received. In other words, a party learned of the existence of a legal opinion or legal advice, and on the basis of that knowledge, the party sought the entire opinion or advice.

34. In the cases relied on by the Employer, the Courts effectively concluded that based on the extent of the disclosure and the importance of solicitor-client privilege (amongst other factors), the party seeking the entire legal opinion or advice was not entitled to it. For example, in *TerraFarma*, the plaintiff was seeking production of documents and answers to questions not answered during discovery respecting legal advice received by the defendant in connection with a workplace investigation. In other words, the plaintiff was aware that the defendant had received legal advice and sought production of additional documents and answers to questions related to that advice on the basis of that knowledge. Similarly, in *Guelph (City)*, *Donofrio*, *Oro-Medonte (Township)*, and *District School Board of Niagara*, the defendants were seeking the production of additional documents. In all of those cases, the request for additional documents related to the legal advice was denied. That is not the case before me.

35. In this case the Grievor is not seeking any additional information. As set out above, this is a motion to strike a comment that the Grievor was provided with over four years ago. In that sense this case is more akin to the Grievor being told that the Board received legal advice and she is now seeking to rely on that fact and that fact alone.

36. In reaching this conclusion, I note that I agree with the position taken by the Board, that disclosing that a party has received legal advice, and even disclosing the “bottom line” of that decision, does not constitute a waiver of solicitor-client privilege. More specifically, the Board argued that the comments at issue in this case only revealed the fact that the Board had received legal advice, and the broadest of outlines of that evidence. As such, the comments did not amount to a waiver of solicitor-client privilege. In *TerraFarma* the Court held that there was no “basis upon which to

conclude that this offhand comment revealing the barest of descriptions of legal advice constitutes a waiver.” I agree with that conclusion.

37. Having concluded that the comment does not amount to a waiver, how should that comment be characterized. I am satisfied that the comment itself, the “offhand comment” to borrow from *TerraFarma*, is not privileged. In other words, disclosing the fact of having received legal advice is not protected by solicitor-client privilege. It is the content of that advice that is privileged and in this case, the Grievor is not seeking the content of that advice (beyond what is contained in the high level summary included in Ms. MacKinnon’s response to the investigator).

38. In that sense, it appears to me that there is significant overlap between the rationale for concluding that disclosing the receipt of legal advice does not constitute waiver of solicitor-client privilege and the rationale for concluding that disclosing the receipt of legal advice is not privileged. In both cases, no privileged information has been shared. That is why the waiver cases spend some time looking at the nature of the information shared in order to determine if privilege has been waived. At some point, the details of the legal advice obtained crosses a line from simply disclosing that legal advice was obtained and reveals the details of the legal advice received. In those circumstances, the sharing of the actual legal advice is one of the factors looked at in determining if a party has waived solicitor-client privilege. However, where the only information disclosed is that legal advice has been obtained, nothing privileged has been shared. If nothing privileged has been shared, solicitor-client privilege clearly does not apply. In that way, and as applied to this case, the fact that the information shared by Ms. MacKinnon does not constitute a waiver of solicitor-client privilege also supports the conclusion that the information shared by Ms. MacKinnon is not protected by solicitor-client privilege.

39. One example should suffice to drive this point home. It is not uncommon for grievors charged with a criminal offence to refuse to answer questions from their employers because they have been told by counsel not to do so. Answering the question in that way does not constitute a waiver. Nor is it privileged.

40. Applied to this case, I am satisfied that the Grievor can rely on the fact that Ms. MacKinnon told the third party investigator that she had received legal advice. She can also rely on the very high level summary of that advice, as contained in the comment at issue.

41. To be clear, this does not entitle the Grievor to any information beyond what the investigator included in the report. In other words, the Grievor is not entitled to anything beyond the bottom line already received. Had this been a case like *Guelph (City)* or *TerraFarma* (or any of the others cited above) where the Grievor was seeking additional information because she had been told that the Board had received some legal advice, I would have had no problem concluding that she was not entitled to that legal advice for the reasons set out in those decisions. However, for the reasons already provided, that is not the situation before me.

42. In light of the conclusions above, that the comment at issue is not privileged and does not constitute a waiver, I need not address the issue of whether or not Ms. MacKinnon intended to waive privilege or whether she had the authority to do so.

43. Before concluding, I think it is appropriate to say a few words about fairness. Given my conclusion that this case does not actually engage solicitor-client privilege, because the comment at issue is not privileged, it is appropriate to consider issues of fairness. That is particularly the case here

because, as set out above, the Grievor has known that the Board received legal advice for over four years, and as argued by the Federation many others have come into possession of that information as well. Ms. MacKinnon told the third party investigator that the Board had received legal advice. The investigator told the Grievor when she provided the Grievor with Ms. MacKinnon's responses to the allegations in the harassment complaint. The Grievor then provided that information to the Union and, finally, the Union informed the Board when it provided the Board with Ms. MacKinnon's responses as part of the pre-hearing production process. Fairness, in this context, where many people beyond the Board and their legal counsel are aware of the fact that the Board received legal advice in response to the grievances at issue, supports the conclusion that the Grievor be allowed to rely on the comment. Fairness also favours allowing the Grievor to rely on the comment insofar as the comment has been an important part of how the Grievor understands what has happened over the past few years.

B. Hearsay/Relevance/Prejudice

44. On the issue of hearsay, relevance, and prejudice I also agree with the Federation. Depending on how the evidence is called, and the purpose for which it is called, the comment at issue may or may not amount to hearsay. Similarly it may or may not be relevant. Finally, given the potential relevance of the comment at issue, it could significantly prejudice the Grievor not to be able to explain why she came to interpret the Board's conduct in the manner that she did.

45. I have not heard any evidence in this matter. Given the uncertainty on how this evidence will be called, and how it will be relied upon, it is

premature to make a determination as to whether the comment should be excluded on any of the grounds put forward by the Board.

46. Accordingly, and for all of the foregoing reasons, the Employer's motion is dismissed.

Dated this 19th day of May 2026.

"Adam Beatty"

Adam Beatty, Arbitrator