

ORDER ON APPLICATION BY THE CITY OF HAMILTON FOR PRIVILEGE

DATE: Heard on August 9, 2022

ARBITRATOR: Frank Marrocco, Q.C.

APPEARANCES:

Counsel:

Parties:

**Counsel for the moving party,
the City of Hamilton:**

Eli S. Lederman, Delna Contractor, and Samantha Hale,
Lenczner Slaght LLP

**Counsel for the responding
party, Commission Counsel:**

Tina Lie, Shawna Leclair, and Lauren Rainsford,
Paliare Roland Rosenberg Rothstein LLP

Overview

1. The moving party, the City of Hamilton (the “**City**”), has commenced this application to quash the summons issued by the responding party, Commission Counsel, in the Red Hill Valley Parkway Inquiry (the “**RHVPI**”). Specifically, the City takes the position that Commission Counsel cannot compel the production of 56 unique documents over which it asserts solicitor-client privilege and/or litigation privilege.
2. Commission Counsel contests the City’s characterization of the application, and distills the parties’ dispute to two fundamental questions:
 1. Does solicitor-client privilege and/or litigation privilege apply to each of the 56 unique documents?; and
 2. If so, has that claim of privilege been waived by the City’s decision to call the RHVPI?

3. I find that my jurisdiction only extends to the two issues set out by Commission Counsel. As such, I provide my reasons on the admissibility of each individual document in chart format.

Framework & Applicable Law

(a) The Purpose of Public Inquiries

4. Public inquiries fulfill an important function in Canadian society. They are “ad hoc bodies” that can be called on an “as needed” basis. However, they are often convened in the aftermath of a major event or tragedy to help the community “uncover the truth” of what occurred, and to develop recommendations for the prevention of similar, future incidents. According to the Supreme Court of Canada, the primary purpose of public inquiries is “fact-finding.”¹ To that end, public inquiries are usually granted broad investigative powers and work independently, free of the many procedural impediments that can constrain other institutions like the judiciary.
5. In Ontario, the *Public Inquiries Act, 2009*, S.O. 2009, c. 33, Sched. 6, provides the framework for the establishment of public inquiries, and the processes to be followed. Subsections 8(3) and 33(13) make clear that a commission cannot collect or receive evidence as part of the public inquiry if the information is inadmissible “by reason of any privilege under the law of evidence.”
6. Here, the City asserts solicitor-client privilege and/or litigation privilege over the 56 unique documents. I thus restrict my reasons to these two types of privilege.

(b) Solicitor-Client Privilege

7. Solicitor-client privilege is fundamental to the operation of our justice system. It ensures that individuals can speak with a lawyer candidly, so they can obtain appropriate advice and have

¹ [1995] 2 S.C.R. 97, at paras. 60 and 62.

their interests fully represented.² Over the years, “solicitor-client privilege has evolved from being treated as a mere evidentiary rule to being considered a rule of substance and, now, a principle of fundamental justice.”³

8. Solicitor-client privilege comes into existence the moment that a client seeks legal advice from their lawyer, irrespective of whether they face current or imminent litigation.⁴ The privilege attaches not only to the advice itself, but to all communications between the lawyer and their client for the provision of legal advice.⁵ This includes documents that constitute a “necessary step” in the process of receiving legal advice, that become “incidental” to the acts of obtaining and giving of legal advice, and/or that if produced, could reveal the legal advice.⁶
9. In order to assert solicitor-client privilege, a party must make out three elements:
 - (1) That there is a communication between a solicitor and their client;
 - (2) That the communication entails the seeking or giving of legal advice; and
 - (3) That the parties intended the communication to be confidential.⁷
10. Solicitor-client privilege may apply to communications between a lawyer and a third party. In the seminal case of *General Accident Assurance Co. v. Chrusz*, Doherty J.A. stated that when a third party serves as a messenger, translator, or conduit for the client to instruct their lawyer, the communications between the third party and the lawyer would be privileged. Additionally, any communications from a third party, which assemble or explain the client’s information so

² *Foster Wheeler Power Co. v. Société intermunicipale de gestion et d’élimination des déchets (SIGED) inc.*, 2004 SCC 18, [2004] 1 S.C.R. 456, at para. 34.

³ *Canada (National Revenue) v. Thompson*, 2016 SCC 21, [2016] 1 S.C.R. 381, at para. 17.

⁴ *Blank v. Canada (Minister of Justice)*, 2006 SCC 39, [2006] 2 S.C.R. 319, at para. 28 [“Blank”].

⁵ *Archean Energy Ltd. v. Minister of National Revenue* (1997), 202 A.R. 198 (Alta. Q.B.), at para. 5.

⁶ *Wintercorn v. Global Learning Group Inc.*, 2022 ONSC 4576, at para. 45(viii).

⁷ *Solosky v. The Queen*, [1980] 1 S.C.R. 821, at p. 837.

that they can seek out or obtain legal advice, would be privileged. The key question is whether the third party plays an essential role in the formation and maintenance of the solicitor-client relationship.⁸

11. Documents, information, or communications deemed to be solicitor-client privileged are *prima facie* inadmissible, subject to a few limited exceptions.⁹ The privilege will remain in force even after the parties' solicitor-client relationship has been terminated.¹⁰ As emphasized by Major J. in his oft-quoted sentence from *R. v. McClure*, once proven, "solicitor-client privilege must be as close to absolute as possible to ensure public confidence and retain relevance."¹¹

(c) Litigation Privilege

12. Unlike solicitor-client privilege, the law does not restrict the application of litigation privilege to the communications between a lawyer and their client. It can also cover non-confidential communications, and sometimes other documents, that pass between a lawyer and third parties.
13. The objective of litigation privilege is to ensure the efficacy of the adversarial process. Parties "represented or not, must [therefore] be left to prepare their contending positions in private, without adversarial interference and without fear of premature disclosure."¹²
14. A party can assert this privilege over a certain document or communication if the dominant purpose behind its creation was the preparation for any existing, reasonably contemplated, or

⁸ (1999), 45 O.R. (3d) 321 (C.A.), at 353-59.

⁹ *Currie v. Symcor Inc.*, [2008] O.J. No. 2987 (Div. Ct.), at para. 35.

¹⁰ *Blank*, at para. 37.

¹¹ 2001 SCC 14, [2001] 1 S.C.R. 445, at para. 35.

¹² *Blank*, at paras. 27-28.

anticipated litigation.¹³ However, litigation privilege is neither absolute in scope nor permanent in duration. It ends when litigation, or related litigation, concludes.¹⁴

(d) Implied Waiver

15. As described above, Commission Counsel submits that the City implicitly waived its claims of privilege over the 56 unique documents when Council called the RHVPI and enacted the associated Terms of Reference.

16. In *Roynat Capital Inc. v. Repeatseat Ltd.*, the Divisional Court confirmed that a party may be held to have implicitly waived solicitor-client privilege “where fairness and consistency so require.” The “double elements” of “implied intention,” as well as “fairness and consistency,” must be present. That is, the client must show “some manifestation of a voluntary intention to waive the privilege, at least to a limited extent.”¹⁵

17. Ultimately, “whether fairness and consistency require [an] implied waiver of privilege is case specific and factually dependent.” The use of implied waiver “will be limited to circumstances where the relevance of the evidence in question is high, and the principles of fairness and consistency require disclosure....”[Emphasis added.]

18. The jurisprudence suggests that there can be an implied waiver of litigation privilege on the same basis as solicitor-client privilege.¹⁶

19. For the purpose of my reasons, I note that public inquiries operate differently from adversarial proceedings. They are established to perform certain fact-finding and recommendation-making

¹³ *Lizotte v. Aviva Insurance Company of Canada*, 2016 SCC 52, [2016] 2 SCR 521, at para. 19.

¹⁴ *Blank*, at paras. 34-35, 37.

¹⁵ 2015 ONSC 1108, 125 O.R. (3d) 596, at paras. 80-81.

¹⁶ *Cromb et. al. v. Bouwmeester et al.*, 2014 ONSC 5318, at para. 48.

functions, including in relation to misconduct. In order to strike a balance between the need to maintain privilege and advance the truth-seeking, fact-finding, and recommendation-making goals of the RHVPI, I only found a waiver of privilege over the City's documents if they were "highly relevant" to the plain and ordinary meaning of the Terms of Reference. Fairness and consistency to all those who may be affected by the final report from the RHVPI mean that it is necessary to produce documents highly relevant to the Terms of Reference, so as to avoid factual inconsistencies, erroneous findings of misconduct, and unsuitable recommendations.

Dated Toronto, Ontario this 15th day of August 2022

A handwritten signature in cursive script, reading "Frank Marrocco", is positioned above a horizontal line.

The Honourable Frank Marrocco, Q.C.