CITATION: Temagami (Municipality) v. Temagami Barge Limited et al, 2023 ONSC 7064
COURT FILE NO.: CV-23-53
DATE: December 14, 2023

SUPERIOR COURT OF JUSTICE – ONTARIO

RE: **CORPORATION OF THE MUNICIPALITY OF TEMAGAMI**,
Applicant/Responding Party

AND:

TEMAGAMI BARGE LIMITED, DASHIEL LOWERY DELAROSBEL,
Respondents/Moving Parties

AND:

HER MAJESTY THE QUEEN IN RIGHT OF THE PROVINCE OF ONTARIO AS REPRESENTED BY THE MINISTER OF NORTHERN DEVELOPMENT, MINES, NATURAL RESOURCES AND FORESTRY,
Respondent/Responding Party

BEFORE: Justice J.S. Richard

COUNSEL: *Charles Loopstra*, for the Applicant/Responding Party
Brian Chung and Leo Longo, for the Respondents/Moving Parties
Eunice Machado, for the Respondent/Responding Party, not appearing

HEARD: December 13, 2023

REASONS

Motion to compel answers to undertakings, refusals and questions

[1] The Respondents in this Application, Temagami Barge Limited and Dashiell Lowery Delarosbel, bring a motion requesting:

1. An order requiring the Applicant to answer undertakings given and questions refused at the cross-examination of Daryl Bell during cross-examinations held on August 4, 2023, within 10 days;
2. An order, if necessary, requiring Mr. Bell to attend continued cross-examinations to answer all proper follow-up questions arising from the undertakings and answer productions given for questions refused or taken under advisement, or to which inadequate answers were subsequently provided; and
3. Costs of this motion.

Background

[2] The Respondent, Temagami Barge Limited, is a corporation owned by Respondent Dashiel Lowery Delarosbel (collectively, the "Moving Parties"). Temagami Barge Limited operates a business on property located within the boundaries of the municipality of Temagami. The land on which Temagami Barge Limited operates its business is designated provincial crown land ("subject property").

[3] The Applicant, the Corporation of the Municipality of Temagami (the "Municipality"), is of the view that the Moving Parties are not complying with current zoning by-laws, and they are essentially asking the court for a permanent injunction. Accordingly, an application was commenced on April 20, 2022, for declaratory and injunctive relief against the Moving Parties (the "Application") on the basis of alleged current non-conformance and multiple illegal uses on the subject property by Temagami Barge Limited.

[4] Daryl Bell, a former municipal by-law officer for the Municipality, was cross-examined on August 4, 2023. During these cross-examinations, Mr. Bell provided several undertakings, refusals and questions taken under advisement.

[5] The Municipality takes the position that all but two requests were satisfied as of September 14, 2023, at the very least which was before service of the Moving Parties' Motion Record, and that these two unmet requests are in fact sheltered by litigation privilege.

[6] The Municipality therefore submits that the Moving Parties' motion was brought as a frivolous and vexatious attempt to delay the hearing of the Municipality's Application since a delay would secure another season of operations for Temagami Barge Limited. The Municipality further submits that this tactic amounts to an abuse of the court's process and wastes valuable time and resources.

[7] In contrast, the Moving Parties argue that the questions sought to be answered are directly related to the issues raised in the Application, that they all remain outstanding, and that they are not subject to litigation privilege. They further submit that not only has the Municipality failed to satisfy its obligations to disclose, but that it has also failed to prove that the subject communications or documents are privileged.

[8] This motion focuses on the following five undertakings, refusals and/or questions from the August 4, 2023 cross-examinations of Mr. Bell:

Item #1	undertaking to advise whether any privilege is alleged over the memo from Jamie Robinson and check whether it was sent to the Municipality;
Item #2	taken under advisement to provide the information provided by the Ministry that led to Mr. Bell's understanding of the background and what had been going on with the Property;
Item #3	taken under advisement to review the Municipality's files regarding the subject property and to provide copies of anything else that is relevant;

Item#4	under advisement to provide a copy of the Municipality's file that had already been created about the property prior to Mr. Bell's employment with the Municipality;
Item #5	refusal to provide a copy of any inspection notes prepared by Mr. Bell at the time of his inspection of the property.

Issues

[9] This motion requires a determination of the following issues:

1. Are there any undertakings, refusals and questions from Mr. Bell's cross-examination of August 4, 2023, that remain outstanding?
2. If there are,
   a) should the Municipality be compelled to answer them?
   b) should Mr. Bell be compelled to reattend cross-examinations to answer follow-up questions that may arise from answers provided to the outstanding questions?

Applicable Law

[10] By design, not only are Applications simpler in the manner within which evidence is to be presented to the court, i.e. by documentary evidence as outlined by Rule 38, applications do not require examinations for discovery or affidavits of documents.

[11] Cross-examinations within the context of Applications may occur under Rule 39.02, which states:

On a Motion or Application

39.02 (1) *A party to a motion or application who has served every affidavit on which the party intends to rely and has completed all examinations under rule 39.03 may cross-examine the deponent of any affidavit served by a party who is adverse in interest on the motion or application. R.R.O. 1990, Reg. 194,r. 39.02 (1).*
(...)

39.02(2) *A party who has cross-examined on an affidavit delivered by an adverse party shall not subsequently deliver an affidavit for use at the hearing or conduct an examination under rule 39.03 without leave or consent, and the court shall grant leave, on such terms as are just, where it is satisfied that the party ought to be permitted to respond to any matter raised on the cross-examination with evidence in the form of an affidavit or a transcript of an examination conducted under rule 39.03. R.R.O. 1990, Reg. 194, r. 39.02 (2)*

[12] Rule 39.03 allows for examination of a witness. Having deposed an affidavit, Mr. Bell's cross-examinations are governed by Rule 39.02(1).

(a) Relevance

[13] It has long been established that on an application, the scope of the cross-examinations is considerably narrower than in an action and that cross-examinations under Rule 39.02 are not a substitute for examinations for discovery or the production of documents under Rule 31 (*BOT Construction (Ontario) Ltd. v. Dumoulin*, [2007] O.J. No. 4435 (S.C.J.) at para. 6; see also *Ontario v Rothmans Inc*, 2011 ONSC 2504).

[14] Relevancy is the ultimate determining factor in determining the parameters of cross-examination, and the proposed party to be examined must be in a position to offer relevant evidence (*Transamerica Life Insurance Co. of Canada v. Canada Life Assurance Co.* (1995), 27 (O.R. (3d) 291); see also *Moyle v. Palmerston Police Services Board*, [1995] 25 O.R. (3d) 127 (Ont.Div.Ct.).

[15] While there is no onus on the party requesting the examination to establish that such examinations will in fact yield relevant information, as explained by the Ontario Court of Appeal in the *Ontario Federation of Anglers & Hunters v. Ontario (Ministry of Natural Resources)*, 2002 CanLII 41606, however, at para 10, that they cannot be used as discovery or as "fishing expeditions."

[16] The test of relevance is determined by what is relevant, or connected, to the application and to what is contained in the affidavit material. If the examinations, or questions during examinations, are relevant then they must be answered, unless a refusal to do so can be justified on the basis of privilege.

(b) Privilege

[17] Where privilege is claimed, the onus is on the party claiming privilege to establish such privilege (*Sky Solar (Canada) Lid v Economical Mutual Insurance Company*, 2015 ONSC 4714 at para 73, "*Sky Solar"*).

[18] If the nature of the privilege claimed is litigation privilege, as opposed to solicitor-client privilege, then two elements must be established:

1. That litigation was ongoing or contemplated; and
2. that the information or documents for which litigation privilege is sought were created for the dominant purpose of litigation. (*Sky Solar,* at para 99)

[19] As explained by Master Dash, as he then was, in *Mamaca (Litigation Guardian of) v. Coseco Insurance Co*., 2007 CanLII 9890, at paras 14-15:

> *14* *It is however not sufficient to establish litigation privilege that documents be prepared or actions be taken at a time when litigation is reasonably contemplated. The documents for which litigation privilege is claimed must also have been prepared for the dominant purpose of that contemplated litigation, that is for assistance in preparation for or conduct of that litigation.* ***There is a distinction between the creation of a document for the dominant purpose of investigation and claim determination as opposed to creation of the document for the dominant purpose of anticipated litigation. After determining that there is "a real prospect of litigation reasonably supported by the evidence … the question then is***

whether the dominant purpose of the documents in question was to investigate the accident and the claim or to assist the defendant in the contemplated litigation*." It would not be sufficient to establish that the ongoing investigation and resulting documents were for the dual purpose of claims assessment and anticipated litigation.* ***The dominant purpose must be to assist in the anticipated litigation****.*

> *15 The onus is on the party claiming litigation privilege to lay an evidentiary foundation for that privilege. The best evidence would be an affidavit from the claims handler as to* ***when she reasonably anticipated that litigation was likely and why and that her ongoing investigation and document creation was to assist in the defence of that litigation.*** *It would however not be sufficient evidence for the adjuster to make general assertions that all documents created after litigation was reasonably anticipated were prepared for purposes of that litigation. The evidence must be specific and speak to the content of each document. The court could also look to the circumstances and the chronology of events to help in determining the dominant purpose for creation of the documents. It may also "inspect the document for the purpose of determining ... the validity of a claim of privilege" pursuant to rule 30.06(d). (Emphasis added)*

[20] The relevant time for which the dominant purpose for a document's creation is to be assessed is at the time of creation (*Nova Chemicals et al v CEDA-Reactor Ltd et al*, 2014 ONSC 3995, at para 35). This can assist in determining whether or not a document was created in preparation for litigation, rather than for mere purposes of investigation or potential for litigation.

ANALYSIS

(1) Are undertakings, refusals and questions outstanding?

Item #1 undertaking to advise whether any privilege is alleged over the memo from Jamie Robinson and check whether it was sent to the Municipality

[21] Jamie Robinson was a land use planner formerly hired under contract by the Municipality. He worked for a firm called MHBC. He deposed an affidavit that was filed by the Municipality in support of its Application. Mr. Robinson was cross-examined on April 28, 2023.

[22] Daryl Bell was cross-examined on August 4, 2023, and was asked the following:

> 75. Q. Did you ever receive a memo from MHBC about this matter, this property?
> A. I don't recall.
>
> (…)
>
> 79. Q. Okay .
>
> MR. LONGO: Mr. Loopstra, did you ever have the opportunity to obtain that memo from Mr. Robinson and make a determination respecting whether you would allege any solicitor/client confidentiality under the circumstances that have been described today?

> MR. LOOPSTRA: Well, it wouldn't necessarily be solicitor/client privilege, it may be litigation privilege, but I will check. I made a note to check, see if the memo from Jamie Robinson was sent
>
> (…) to the Municipality and that's an outstanding undertaking, I will certainly get back to you on it.
>
> MR. LONGO: Thank you, sir.

[23] With respect to this undertaking, the relevancy of the memo prepared by Jamie Robinson, dated November 7, 2019 (the "Robinson Memo") is not contested.

[24] The Municipality, however, is refusing to provide a copy of this memo on the basis of litigation privilege. According to the Municipality, moreover, the Robinson Memo was a planning memorandum prepared at the request of the Municipality's litigation counsel, Mr. Loopstra, following his firm's retainer in September 2019. The Robinson Memo is addressed to Mandy Ng, a lawyer at Mr. Loopstra's firm, and not to the Municipality.

[25] The Moving Parties argue that the Municipality has not discharged its onus of proving on the balance of probabilities that the Robinson Memo was prepared with the dominant purpose of preparing for litigation. They base this on the fact that it was prepared in 2019 when the Application was only formally commenced in 2022, and when Mr. Bell's first investigation of the subject property was only conducted in 2021.

[26] While I agree that a significant amount of time went by between the end of 2019 and 2022, the timeline has to be viewed in light of the COVID-19 pandemic and its effects on litigation practices as a whole. I do not find that this amount of time, in itself, especially during this particular time period, can destroy the argument of litigation privilege.

[27] Secondly, the Moving Parties argue that the Municipality has failed to put forward evidence as to the precise nature of the memo, and therefore, it is impossible for them, or for the court, to make a determination on litigation privilege. They also draw an analogy to a claims adjuster who gathers information for the purpose of dealing with a claim, and rely on the Ontario Court of Appeal's decision *General Accident Assurance Company et al. v. Chrusz et al*. (1999), 1999 CanLll 7320 (ONCA):

> *Broad privilege claims which blanket many documents, some of which are described in the vaguest way, will often fail, not because the privilege has been strictly construed, but because the party asserting the privilege has failed to meet its burden.*

[28] As evidence to this motion, the Municipality attached an exhibit to a sworn affidavit explaining that the Robinson Memo was prepared at the request of counsel in contemplation of this litigation, that it was dated November 7, 2019, and that it was addressed to counsel, and not to the Municipality. This is not analogous to an insurance claim. Rather, it is a document that was specifically created by counsel for the purpose of seeking an injunction.

[29] Accordingly, this court accepts that the dominant purpose of the Robinson Memo was litigation, and that it is therefore protected by litigation privilege.

Item #2 "under advisement" to provide the information provided by the Ministry that led to Mr. Bell's understanding of the background and what had been going on with the Property

[30] The following excerpt from Mr. Bell's cross-examinations explains this request:

97. Q. Okay. So what information were you given by the Ministry in order to proceed with this case?

A. The property was being used, it was not necessarily owned by an individual and the use of the land under the zoning bylaw, which is zoned as- currently as a special management area and it didn't comply with the bylaw.

98. Q. And the Ministry people were telling you what your zoning said and it didn't comply with the bylaw ..

A. No, they were providing information as to what has been going on with the history.

99. Q. Okay. I'd like you to provide me, so that I can review, the information that you were provided by the Ministry that led to your understanding of the background and what had been going on, etcetera. Is that something that you can provide? You clearly must have kept that information as being significant or important.

MR. LOOPSTRA: All right, we'll take that under advisement. [*U]

[31] The Municipality takes the position that this question has been satisfactorily answered within the scope of the Application. Specifically, Mr. Bell provided everything that was available to him, as was requested. Secondly, the Municipality subsequently did an additional search of all municipal files, without the assistance of Mr. Bell as he is no longer employed by the Municipality, and an additional 153 pages of documents were forwarded to the Moving Parties prior to this motion being brought.

[32] The Moving Parties submit that Mr. Bell needs to be re-examined so that they can ask questions relating to these additional documents, but they fail to show (1) how Mr. Bell would have any knowledge of these documents, and (2) how these are at all relevant to the Municipality's Application relating to the Moving Parties' current use of the property.

[33] Specifically, the Moving Parties pointed to a letter October 9, 1992 that authored by a law firm and addressed to Temagami Barge Limited. The Moving Parties seek as a remedy to this motion the ability to re-examine Mr. Bell. A witness can be cross-examined in respect to information that is within his or her knowledge, and to propose that Mr. Bell would have any knowledge pertaining to such information, when he deposed that he had provided all that he knew, is far-reaching.

[34] Undertakings require best efforts. In reviewing the answers of Mr. Bell provided in Cross-examinations, as well as the supplementary 153 pages of historical documents subsequently provided, this court finds that best efforts were undoubtedly employed, and item #2 has therefore been satisfied.

> Item #3 under advisement to review the Municipality's files regarding the subject property and to provide copies of anything else that is relevant (*Q. 102 of Bell Transcript*);

[35] At question 100 of the cross-examination transcript of Mr. Bell, he is asked if he has any knowledge of any other municipal files relating to the subject property and uses:

> 100. Q. Were there any Municipal files, Mr. Bell, that you referred to or examined in making your determinations respecting the subject property and the uses thereon?
>
> A. Yes.
>
> 101. Q. What files were those?
>
> A. The files that we had- the Municipality had already accumulated over the years referring to this particular property and their land use.
>
> 102. Q. All right. And, I take it, sir, you don't have any of those files with you today?
>
> A. I do not have access to those files.

[36] Mr. Loopstra then goes on to take under advisement to review the Municipality's files regarding the subject property and to provide copies of any additional documents they may find. Subsequently, 153 pages of mostly historical documents, not in Mr. Bell's possession, but in the Municipality's possession, were provided to the Moving Parties.

[37] This answer can therefore not be deemed a refusal as it was satisfied.

> Item#4 under advisement to provide a copy of the Municipality's file that had already been created about the property prior to Mr. Bell's employment with the Municipality (*Q. 129 of Bell Transcript*);

[38] During his cross-examinations, Mr. Bell explained that when he started doing work for the Municipality, it already had a file relating to the subject property and that it contained documents predating his involvement.

[39] Specifically, in answering question 127, he explains:

> A. There was a file that had already been created prior to me coming to the Municipality on this property.
>
> 128.Q All right. And does that deal with Municipal zoning issues?
>
> A. Yes.
>
> 129. Q. All right. And can that file be produced so that it can be reviewed?
>
> MR. LOOPSTRA: Well, I think that's already under- that is not already under a previous under advisement?

MR. LONGO: I just want to make certain that it is.

A. It's the file that I used, yes.

MR. LONGO: Okay. Then I would restate my request to have that file | material produced?

MR. LOOPSTRA: Under advisement. [*U]

MR. LONGO: Thank you.

[40] This item is therefore not independent of item #3, as was "restated" by Mr. Longo. For reasons already mentioned, it was satisfied and is no longer outstanding with item #3.

Item #5 refusal to provide a copy of any inspection notes prepared by Mr. Bell at the time of his inspection of the property

[41] Relevancy is not contested on this item. In support of its position on this motion, the Municipality submitted as an Exhibit to an Affidavit an email between counsel dated September 20, 2023, in which counsel for the Municipality explained:

> *Respectfully, this is an entirely unnecessary motion given that we have already provided fulsome answers in respect of the five items you are seeking. In your below email, you request a list of documents that our client is asserting privilege over. As indicated in the past, there is no requirement to produce an Affidavit of Documents on an application, however, in the interest of attempting to avoid an unnecessary motion, I can advise that in respect to the matters at issue on the motion, there are only two items we assert privilege (…)*

The first being the Robinson Memo which has already been addressed, and the second being copies of photographs taken by Mr. Bell on October 28, 2021 that contain his personal notes.

[42] Specifically, counsel for the Municipality explains in its evidence that the notes on the photos are protected under litigation privilege:

> *2. Copies of Mr. Bell's photographs of the property taken October 28, 2021 which contain additional notes directed to my attention. His notes were not taken during any inspection, rather, they were written upon my request several months later, at the time of preparing his Affidavit, so I could understand what I was looking at. The notes were made in contemplation of litigation and, as previously advised, there is no further inspection file available.*

[43] During cross-examinations, Mr. Bell testified that he took photographs during his inspection of October 28, 2021. After Mr. Bell confirmed that he had taken notes, counsel for the Municipality indicated that these were subject to litigation privilege, to which counsel for the Moving Parties answered "okay," and moved on.

[44] The Moving Parties now challenge this claim, asserting that there is no evidence before the court to prove the litigation privilege. This court disagrees on the basis that the email between counsel is evidence the notes on the photographs were made subsequently, and only at counsel's request to prepare for an application meets the litigation privilege test.

[45] There are therefore no undertakings, refusals or questions from Mr. Bell's cross-examination of August 4, 2023, that remain outstanding.

2. If there are,

(a) should the Municipality be compelled to answer them?

[46] There are none as they have already been answered.

(b) should Mr. Bell be compelled to attend continued cross-examinations for the purpose of answering follow-up questions that may arise from answers provided for the outstanding questions?

[47] Not only is an affiant expected to have knowledge of what she or he is asked, but Mr. Bell deposed time and again that he did not have any additional information other than the information he had given and that he was giving. Re-examining him would be a waste of time and resources for all involved.

[48] In an abundance of caution, however, if this court erred in finding that the evidentiary record was sufficient to prove litigation privilege on the balance of probability on item #5 (notes on the inspection photos), then at the most, a written cross-examination, similar to a Rule 35 examination, limited to two questions, could be permitted:

(1) When did Mr. Bell make notes on the photographs?

(2) Why did he make notes on the photographs?

[49] Leave under 39.02 could thereby be granted allowing the Municipality to file an additional affidavit answering those two questions, which would either leave the Municipality to either continue claiming litigation privilege on the notes, or to abandon it and produce copies.

[50] As gatekeeper of its process and in keeping with the principles of Rules 1.04 and 1.05, to prevent further delays in this Application, this court orders that this additional information be provided. For purposes of expediency and efficiency, this information shall be provided by way of an affidavit, which shall be filed with the court under Rule 39.02(2).

Order

[51] Accordingly, I make the following order:

1. The Respondents' motion is dismissed with costs;
2. By no later than January 15, 2024, the Applicant shall file an additional affidavit sworn by Daryl Bell, answering the following questions:

   (1) When did Mr. Bell make notes on the inspection photographs taken on October 28, 2021?

   (2) Why did Mr. Bell make notes on the inspection photographs taken on October 28, 2021?

3. Costs submissions, limited to no more than 1 page, single-spaced, plus a bill of costs, may be submitted to the court, by no later than January 30, 2024

Justice J.S. Richard
Date: December 14, 2023