

## Legal update

### Internal investigations and disclosure of sensitive information: What protections can legal privileges offer?

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**May 4, 2020**

**Fraud and asset recovery**

**Regulations and investigations**

#### Introduction

Companies conduct internal investigations for a variety of reasons. Internal complaints, legal actions or regulatory investigations, for instance, may trigger internal investigations. Internal investigations may assist companies with fact-gathering, risk evaluation, and identifying appropriate responses.

While internal investigations achieve laudable goals, they may also create legal risks when sensitive information surfaces during the investigation. The information gathered may indeed be relevant in the context of civil, regulatory or even penal proceedings.

Depending on the specific facts of each internal investigation, some or all of the documents generated during the investigation may be privileged, such that a company may refuse to disclose them.

It is therefore important to design and conduct internal investigations in light of the various legal privileges that may apply.

We review below three privileges that may apply to documents generated during an internal investigation:

- solicitor-client privilege (also called legal advice privilege)
- litigation privilege
- case-by-case privilege (application of the Wigmore criteria)

#### Privileges relevant to internal investigations

##### Solicitor-Client Privilege

Solicitor-client privilege allows for full and frank communications between those who need legal advice and those who are able to provide it. Such confidential communications between client and solicitor are seen as fundamental to the proper administration of justice and are protected from disclosure in perpetuity.<sup>1</sup>

Solicitor-client privilege applies when the following three criteria are met:

- there are communications between solicitor and client;

- that entail seeking or providing legal advice; and
- that are intended to be confidential by the parties.<sup>2</sup>

Solicitor-client privilege may apply to a broad range of communications relating to legal advice. Not every communication needs to be framed as a specific request for or giving of legal advice.<sup>3</sup> For example, solicitor-client privilege has been found to apply to:

- investigative files created for the purpose of obtaining legal advice;<sup>4</sup>
- reports prepared by company representatives so counsel can provide legal advice;<sup>5</sup>
- a lawyer's investigation report, when the lawyer's investigative work was inextricably tied to legal advice, rather than simply fulfilling a fact-finding function;<sup>6</sup>
- interviews conducted by a lawyer with employees of a corporation to investigate allegations of harassment by an employee, for the purposes of providing advice on disciplinary measures;<sup>7</sup>
- emails between employees that discuss legal counsel's advice;<sup>8</sup>
- in some cases, communications between lawyers and third-party experts. In the common law provinces, the third party must serve as a "channel of communication" between the client and legal counsel or play a function that is essential to the client-solicitor relationship.<sup>9</sup> In Quebec, third-party expert reports prepared for a lawyer to provide legal advice are generally covered by solicitor-client privilege.<sup>10</sup>

The specific circumstances of each case will need to be examined to determine whether solicitor-client privilege applies. Once it applies, only the client company may waive the privilege.<sup>11</sup>

Even where it applies, solicitor-client privilege does not protect the facts underlying communications between solicitor and client. This means facts discovered by a company during an internal investigation may be discovered by a third party through means other than disclosure of privileged communications.

### **Litigation Privilege**

Litigation privilege protects documents or communications created for the dominant purpose of preparing for pending or contemplated litigation.

Its purpose is to protect the efficacy of the adversarial process by ensuring parties can prepare their opposing positions in private, without adversarial interference and without fear of premature disclosure. Unlike solicitor-client privilege, litigation privilege only lasts for the duration of the litigation.<sup>12</sup>

There are two conditions for litigation privilege to apply:

- communications must be made with existing or contemplated litigation in mind; and
- the dominant purpose of the communication must be to assist with such litigation.<sup>13</sup>

For each document created during an internal investigation, a fact-specific analysis will be conducted to determine whether those two criteria are met.

On the first criterion, courts will consider the timing of the internal investigation and whether litigation was reasonably apprehended when each document was created.<sup>14</sup> On the second criterion, courts will consider alternative purposes for the investigation-related documents and whether the documents would have been created irrespective of whether litigation was contemplated.<sup>15</sup>

### **Case-by-case (Wigmore) Privilege**

In addition to solicitor-client and litigation privileges, courts may also recognize privileges on a "case-by-case" basis.<sup>16</sup>

There are four criteria for establishing a case-by-case privilege (also known as the Wigmore privilege):

- The communications must be made under the understanding they will not be disclosed;
- The element of confidentiality must be essential to the full and satisfactory maintenance of the relationship between the parties;
- The relationship must be one which, in the opinion of the community, ought to be diligently fostered; and
- The harm caused to the relationship by disclosing the communications must be greater than the benefit gained for the correct disposal of litigation.<sup>17</sup>

Case-by-case privileges have been recognized in various settings, such as to protect journalistic sources and researcher-participant confidentiality.<sup>18</sup>

Case-by-case privilege may be relevant to internal investigations where, under assurances of confidentiality by the company, employees report conduct by their colleagues and superiors that they suspect inappropriate. The confidentiality of such complaints is arguably essential to encourage internal reporting, to reduce the likelihood of retaliatory measures against the whistleblower, and to maintain a collegial work environment.

The fourth step of the Wigmore analytical framework, where the court balances the various interests at play in relation to document disclosure, will be critical.<sup>19</sup> Courts may consider the purposes for which the information is sought to be disclosed, how peripherally it relates to the issues before the court, and whether the information is available by any other means. The analysis will necessarily be fact specific.

## Conclusion

Prior to undertaking an internal investigation, companies should consider its purpose and the potential application of privileges. They should also thoroughly contemplate the structure of any internal investigation so as to promote, to the extent possible, the application of legal privileges to documents generated during the investigation. This may include measures such as:

- ensuring legal counsel (in-house and/or external) play a central role in the process, including by having legal counsel provide legal advice on the matters at issue or undertake or direct the internal investigation;
- documenting the process leading up to and including the internal investigation, to facilitate the demonstration that it was conducted to obtain legal advice;
- stating within each document generated during the course of the investigation the purpose of such document (e.g. to obtain legal advice or to prepare for apprehended litigation) and using the phrase “privileged and confidential” or similar language on the documents. While such language will not be sufficient on its own, it indicates the parties’ intention to keep the information confidential;
- since privilege may be waived, a company will need to carefully consider to whom and under what circumstances the documentation generated during the internal investigation is disclosed.

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## Footnotes

<sup>1</sup> *Blank v. Canada (Minister of Justice)*, 2006 SCC 39 (*Blank*), 26; *R. v. McClure*, 2001 SCC 14, 17; *Solosky v. The Queen*, [1980] 1 S.C.R. 821 (*Solosky*), p. 833; *Canada (Privacy Commissioner) v. Blood Tribe Department of Health*, 2008 SCC 44, 9. In Quebec, solicitor-client privilege is recognized as a fundamental right under the *Quebec Charter of Human Rights and Freedoms*, CQLR c C-12, s. 9.

<sup>2</sup> *Solosky*, 837.

<sup>3</sup> *Samson Indian Nation and Band v Canada*, 762, 1995 CanLII 3602, 18 (FCA); *Blank v. Canada (Minister of Environment)*, [2001] F.C.J. No. 1844, 19 (FCA); *Canada (Public Safety and Emergency Preparedness) v. Canada (Information Commissioner)*, 2013 FCA 104, 28; *R. v Husky Energy Inc.*, 2017 SKQB 383 (*Husky*), 20; *R. (Canada) c. Groupe SNC-Lavalin inc.*, 2016 QCCS 1671.

- <sup>4</sup> *Singh v. Edmonton (City)*, [1994] A.J. No. 894; *Manah v. Edmonton Northlands*, [2001] A.J. No. 369; *Talisman Energy Inc v Flo-Dynamics Systems Inc*, 2015 ABQB 561 (*Talisman*).
- <sup>5</sup> *Royal Bank of Canada v. Société Générale (Canada)*, 2005 CanLII 36727 (ON SC).
- <sup>6</sup> *Gower v. Tolko Manitoba Inc.*, 2001 MBCA 11.
- <sup>7</sup> *Vancouver (Regional District) v Greater Vancouver Regional District Employees' Union*, 2015 CanLII 87692 (BC LA).
- <sup>8</sup> *British Columbia (Attorney General) v. Lee*, 2017 BCCA 219, 50; *Alberta (Municipal Affairs) v Alberta (Information and Privacy Commissioner)*, 2019 ABQB 274; *Bank of Montreal v. Tortora*, 2010 BCSC 1430, 12.
- <sup>9</sup> *General Accident Assurance Company v. Chrusz*, 1999 CanLII 7320 (ON CA).
- <sup>10</sup> Denis Ferland et Benoît Emery, *Précis de procédure civile du Québec*, Volume 1 (Art. 1-301, 321-344 C.p.c.), 5e édition, 2015, L'audition des témoins (art. 276-289), EYB2015PPC71, para 1-2268.
- <sup>11</sup> *Canada (Attorney General) v. Chambre des notaires du Québec*, 2016 SCC 20, 45.
- <sup>12</sup> *Blank*, 8.
- <sup>13</sup> Sopinka, Lederman & Bryant, *The Law of Evidence*, 5th Edition, LexisNexisCanada, 2018, §14.216; *Saturley v. CIBC World Markets Inc.*, 2010 NSSC 361, § 49, 50 and 53.
- <sup>14</sup> *College of Physicians of British Columbia v. British Columbia (Information and Privacy Commissioner)*, [2002] B.C.J. No. 2779 (BCCA); *Husky*, 27, 39; *Alberta v. Suncor Energy Inc.*, 2017 ABCA 221, leave to appeal to the SCC refused.
- <sup>15</sup> *Talisman*, 13; *Sidibé c. Banque de développement du Canada*, 2018 QCCQ 9049, 52; *Husky*, 49.
- <sup>16</sup> *R. v. Gruenke*, [1991] 3 S.C.R. 263.
- <sup>17</sup> *Slavutych v. Baker et al.*, [1976] 1 SCR 254, citing John H. Wigmore, *Wigmore on Evidence*, McNaughton rev. ed. (Boston: Little Brown, 1961) vol. 8; *M. (A.) v. Ryan*, [1997] 1 RCS 157, 20.
- <sup>18</sup> See for instance *R. v. National Post*, 2010 SCC 16 (*National Post*); *1654776 Ontario Limited v. Stewart*, 2013 ONCA 184; *Parent c. R.*, 2014 QCCS 132.
- <sup>19</sup> *National Post*, 58.

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