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WHEN ARE WORKPLACE INVESTIGATIONS PROTECTED BY PRIVILEGE

CHALLENGING CLAIMS OF PRIVILEGE WORKPLACE INVESTIGATION REPORTS

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CHALLENGING CLAIMS OF PRIVILEGE – WORKPLACE INVESTIGATION REPORTS

Workplace investigations often collect information that is relevant and helpful to parties in future litigation. Of course, privilege is a major exception to the general rule of evidence that everything relevant is admissible. This section will explore how to go about challenging claims of solicitor-client privilege and litigation privilege when these claims are made with respect to workplace investigations.

The most common catalysts for workplace investigations are instances where an employer must determine if just cause exists to terminate an employee and where a complaint or instance of harassment triggers an investigation under the *Occupational Health and Safety Act* (OHSA). These two types of investigations will be explored in turn, with particular attention to the importance of the terms of any retainer, the identity of the investigator, and the nature of the findings. We will then turn to a discussion of the newly introduced Bill 132 and its likely effect on attempts to challenge privilege.

1. Workplace investigations into cause for discipline and termination

A wrongful dismissal suit is common following a termination for purported cause. In that context, litigation privilege is likely to be claimed by the employer over documents related to the investigation into incident(s) alleged to constitute cause. Litigation privilege may be claimed over documents prepared for the dominant purpose of litigation and when litigation is a reasonable prospect at the time the document was prepared.

In the arbitration context, challenges to privilege may succeed where the documents sought are interview notes and witness statements produced in the course of an investigation that may result in the discipline or discharge of an employee. Timing may be important in challenging litigation privilege under these circumstances. In *Central Park Lodge and Service Employees International Union*, an arbitrator found that witness interviews conducted prior to the discharge of an employee were not protected by litigation privilege because they could not have been done for the purpose of litigation or in reasonable expectation of litigation as no decision to dismiss had yet been made. The result of the interviews could have been that there was no just cause for discipline, in which case, no litigation could have resulted.[1] *Weetabix Canada Ltd. and UFCW Union* followed this reasoning as well; Arbitrator Brown held that witness statements gathered before a final decision to terminate had been made were not privileged and must be disclosed.[2] The Arbitrator found that cases on litigation privilege attaching to investigation reports prepared after accidents or fires had no application, noting that such incidents have already occurred by the time the investigation is done, whereas a decision regarding termination has not yet been made at the time a workplace investigation is being conducted.[3]

The same conclusion was reached in *Thunder Bay Regional Health Sciences Services v ONA, Local 93,* where an employer had created an investigation file in response to a complaint of patient abuse allegedly committed by the grievor, a registered nurse.[4] The employer claimed both litigation privilege and case-by-case confidential relationship privilege under the *Wigmore* criteria. In this case, the document at issue was a document containing the opinion of management about the incident rather than fact-finding documents like witness statements. The opinion was ordered produced as it was relevant to the decision to terminate and did not meet the *Wigmore* criteria nor attract litigation privilege.

In light of this line of cases, one route to challenge privilege, at least in the labour arbitration context, is to focus on when documents were prepared. An employee can argue that litigation does not apply if a decision to terminate had not yet been made at the time the documents in question were being prepared.

The application of litigation privilege to cause for termination investigations appears to vary as between the arbitration and civil contexts. In *Billard v Clearwater Seafoods Limited Partnership,*[5] the management of a commercial vessel received anonymous allegations about one of its employees and retained an external company to conduct an investigation for the purpose of obtaining legal advice with respect to whether just cause existed to terminate the employee.

The Supreme Court of Newfoundland was satisfied that litigation privilege applied to the investigation report itself because the purpose of commissioning the report was to provide the employer with sufficient evidence to justify a termination for just cause, as opposed to any sort of "joint venture" on the part of the employer and employee to clear the employee's name.[6] It is interesting to note that that court implicitly equated justifying termination for cause with preparing for litigation with respect to the termination, although these are seen as separate stages in the arbitration context. This broad approach makes it more difficult to challenge a claim of litigation privilege. Care should be taken to draw a sharp line for the court between investigations undertaken to make a decision about whether to terminate and investigations done after a decision has been made, which could well be prepared for use in litigation.

Solicitor-client privilege may also be claimed over investigations for the purpose of determining cause. When it comes to solicitor-client privilege, the terms of the retainer may be important in determining whether privilege attaches to an investigation report prepared by a lawyer. This held true in *Howard v City of London*.[7] The plaintiff was terminated for her role in a tragic incident involving a long-term care home resident, based on the legal advice and recommendations contained in the report of a lawyer retained for the very purpose of carrying out the investigation. In a wrongful dismissal suit, she sought production of all documents related to the investigation.

Justice Faieta held that terms of the retainer made it clear that solicitor-client privilege attached: the employer had retained the lawyer in a privileged and confidential letter; the employer asked the lawyer to act for it; it noted that the report would contain "privileged recommendations, opinions and advice"; and its request required the lawyer to perform legal analysis in the course of his investigation by determining compliance with applicable regulations and due diligence.[8]

Two interesting challenges were raised to solicitor client-privilege by the employee in *Howard*. The employee relied on the common interest exception to privilege because she had initially led the investigation herself in her role as Administrator of the home. The court found this exception did not apply; the lawyer was clearly retained only by the defendant and not jointly by the employee and employer although they were part of the same organization.[9] The second challenge raised was waiver of privilege. This argument succeeded – the employer had waived its solicitor-client privilege when it produced parts of the investigation report to the public and the defendant was thus required to produce the investigation documents.[10]

A challenge to privilege will not always live or die by the terms of the retainer. In *Slansky v Canada (Attorney General),* the majority of the Federal Court of Appeal held that "while a retainer is important evidence of whether a solicitor-client relationship has been established, the terms of the retainer are not necessarily conclusive, and must be construed in light of all the relevant circumstances".[11] In other words, it is not what the retainer says, but what the facts actually are.

This caveat can play out both in favour and counter to attempts to challenge privilege; in *Slansky*, the lawyer's fact-finding mandate did not preclude a finding of solicitor-client privilege in an investigation of judicial misconduct. The majority found that despite the engagement letter's description of the lawyer's role as a gatherer of facts, the nature of the allegations made

it necessary for the lawyer to use his legal skills and knowledge. Thus, solicitor-client privilege was engaged.[12] However, witness statements collected by the lawyer were not covered by privilege because they were not made on behalf of the client.

Where an investigation is carried out by a non-lawyer, as it often is, challenges to claims or privilege have a greater chance of success. The courts have generally held that a third party who gathers information for use of counsel is not central to the solicitor-client relationship. As a result, a report issued by a third party is not subject to solicitor-client privilege. Further, where such work is undertaken in the normal course of business and not in preparation for litigation, it will be producible in any subsequent legal proceedings.[13]

2. Workplace harassment and violence investigations

Many of the same considerations apply to challenging claims of privilege in the context of workplace harassment or violence investigations, whether mandated by the OHSA or independent of it. The nature of the investigation and investigator and the terms of any retainer will play a similar role in claims of privilege in workplace harassment and violence investigations as in the above termination cases. However, some differences stem from the purpose of workplace harassment and violence investigations.

The amendments to OHSA introduced by Bill 168 require employers to have workplace harassment and violence programs that include measures and procedures for workers to report incidents of workplace harassment and violence and set out how the employer will investigate and deal with incidents or complaints. Where an investigation into workplace harassment and violence is required by an employer's program, this could be a helpful factor in challenging claims of privilege.

Although not a harassment case, the Court's approach in *Talisman Energy Inc. v Flo-Dynamics Systems Inc.* is instructive in exploring this idea. In *Talisman Energy*, the plaintiff company launched an investigation in response to a whistleblower's tip that a former employee had caused the company to enter into contracts in which the employee had an undisclosed financial interest.[14] The company claimed litigation and solicitor-client privilege over the investigation report. The Court held that the company had not met the onus of demonstrating that the dominant purpose of the investigation was to assist in anticipated litigation; rather, there was a legitimate question as to whether the investigation was carried out as a requirement of the company's whistleblower program.[15] However, as one of the purposes of the investigation was to ascertain facts to get legal advice, the investigative file was subject to solicitor-client privilege.[16]

As will be seen in the below discussion of Bill 132, the new requirement to carry out an investigation into complaints or incidents of harassment or violence may bolster challenges to litigation privilege where investigations are done pursuant to statutory requirement rather than for the dominant purpose of litigation.

Even where litigation privilege is successfully challenged, solicitor-client privilege may still attach to even documents containing the factual findings of a harassment investigation. This is illustrated in *Reis v CIBC Mortgages Inc.* where an employee whose harassment complaints had been investigated brought a motion in her wrongful dismissal suit for production of certain investigation-related interview notes.[17] The employee charged with conducting the investigation had made the notes at issue in order to obtain legal advice and assist counsel in responding to a Human Rights application by the plaintiff. The notes were in fact used by counsel to prepare a response to the application.

Master Dash was satisfied that both litigation and solicitor-client privilege applied and neither was waived when the notes were used by counsel to prepare a letter that was produced to the plaintiff.[18] Of course, any relevant factual information contained in the investigation notes was still discoverable, but the opinions, conclusions and recommendations of the author of the notes were not.[19]

Where the role of an investigator is to determine what actually transpired and report to the employer, and not to provide legal advice, privilege may not apply. In *Wilson v Favelle,* the Ministry of Health hired a lawyer to conduct an investigation into allegations of sexual harassment and the complainant sought the production of the investigation report.[20] Regardless of the fact that the lawyer swore an affidavit that she was retained to provide legal advice, the Court came to the contrary conclusion based on its interpretation of the lawyer's retainer agreement, which described her role as that of a fact-finder.

Conversely, where it was clear from the retainer agreement that the lawyer in a sexual harassment investigation had been retained both for fact-finding and to provide legal advice, the Manitoba Court of Appeal in *Gower v Tolko Manitoba Inc.* held that the entire report was subject to solicitor-client privilege.[21] The "fact-gathering was inextricably linked to the second part of the tasks, the provision of legal advice".

3. The potential impact of Bill 132

Bill 132, *An Act to amend various statutes with respect to sexual violence, sexual harassment, domestic violence and related matters*, recently received Royal Assent and will take effect September 8, 2016.[22] For employers, important changes will stem from Bill 132's amendments to the OHSA, which include modifying the current definition of "workplace harassment" and imposing additional obligations on employers concerning their workplace harassment policies, programs and investigations.

An employer's program to implement its workplace harassment policy must now set out how complaints of workplace harassment will be investigated and dealt with. An investigation into incidents or complaints of harassment is now required in order to fulfil the employer's duty to protect workers from workplace harassment.[23]

The results of the investigation must be shared with the complainant and alleged harasser. However, an employer's program must include a statement that information obtained about an incident or complaint will not be disclosed unless disclosure is necessary for the purpose of investigating or taking corrective action, or otherwise required by law.[24]

Notably, an OHSA inspector may order an employer to hire an impartial third-party, at the employer's expense, to conduct an investigation and issue a report.[25] Any investigation conducted and report created either by the employer or a third- party is not required to be submitted to the occupational health and safety committee.[26]

(a) Impact of the amendments on privilege analysis

Although Bill 132 does not explicitly discuss the privileged nature of investigations and reports, the changes could affect a court's treatment of challenges to privilege. If an investigation was carried out as a requirement of the employer's workplace harassment program, or pursuant to an OHSA inspector's order, it would not be carried out for the dominant purpose of anticipated litigation and thus would not enjoy the protection of litigation privilege.

Further, if an OHSA inspector appointed an impartial third-party investigator, solicitor-client privilege would not attach to the investigation either.

Lastly, the amendments require that the results of the investigation be shared with the worker who has allegedly experienced harassment and the alleged harasser (if also an employee). This means that at least the results of the investigation are *de facto* not privileged, or that the privilege may be waived to some extent by this disclosure. Even the protection against disclosure of information about the incident allows disclosure for the purpose of the investigation or where otherwise required by law. Discovery obligations may constitute a legal requirement to disclose. The only safe territory may be legal advice stemming from the results.

Accordingly, in addition to its other benefits, Bill 132 is likely to assist those attempting to challenge claims of privilege over workplace investigations.

4. Conclusion

A number of different routes of attack are available in challenging claims of privilege over workplace investigations. In the arbitration context, timing appears to be important; when the investigation occurs prior to a decision to terminate, litigation privilege may be successfully challenged. This may be more difficult in the civil context. In the context of harassment investigations, litigation privilege may not apply where the employer is required to conduct an investigation under a program pursuant to the OHSA.

The terms of a retainer are important, although not determinative, in attempts to challenge claims of solicitor-client privilege. Privilege may apply differently to factual findings as compared to report recommendations, although the case law is mixed on this point. Where a non-lawyer conducts the investigation, challenging privilege may be easier on all fronts.

Overall, it is clear that the walls of privilege can often be breached in the context of workplace investigations. The best approach is to explore weak points from all angles. The changes introduced by Bill 132 will likely make this task easier.

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[1] *Central Park Lodge and Service Employees International Union*, (2001) 965 LAC (4th) 192 at para 13; See also *Sasso and Bank of Montreal, Re,* 2013 FC 584, 2013 CarswellNat 1738 at paras 24-25 where the Federal Court found that an adjudicator erred in confusing "reasonable expectation" of litigation with "reasonable prospect", with the latter being the correct standard.
[2] *Weetabix Canada Ltd. v UFCW Union*, 2012 CanLII 51969 at p. 3-4.
[3] *Weetabix Canada Ltd. v UFCW Union,* 2012 CanLII 51969 at p. 6.
[4] *Thunder Bay Regional Health Sciences Services v ONA, Local 93*, 2012 CarswellONT 2012.
[5] *Billard v Clearwater Seafoods Limited Partnership*, 2013 NLTD(G) 60.
[6] *Billard v Clearwater Seafoods Limited Partnership*, 2013 NLTD(G) 60 at para 22.
[7] *Howard v City of London,* 2015 ONSC 3698.
[8] *Howard v City of London*, 2015 ONSC 3698 at para 27.
[9] *Howard v City of London*, 2015 ONSC 3698 at para 30.
[10] *Howard v City of London*, 2015 ONSC 3698 at paras 32-33.
[11] *Slansky v Canada (Attorney General),* 2013 FCA 199, 2013 CarswellNat 3338 at paras 89, 94.
[12] *Slansky v Canada (Attorney General),* 2013 FCA 199, 2013 CarswellNat 3338 at para 105.
[13] *Liquor Control Board of Ontario v Lifford Wines Agencies Ltd*, (2005) 76 OR (3d) 401 (ONCA) at paras 69-76; *College of Physicians of BC v British Columbia (Information and Privacy Commissioner)*, 2002 BCCA 665 at paras 29-51.
[14] *Talisman Energy Inc. v Flo-Dynamics Systems Inc.,* 2015 ABQB 561, 2015 CarswellAlta 1674.

[15] *Talisman Energy Inc. v Flo-Dynamics Systems Inc*., 2015 ABQB 561, 2015 CarswellAlta 1674 at paras 16-17.
[16] *Talisman Energy Inc. v Flo-Dynamics Systems Inc*., 2015 ABQB 561, 2015 CarswellAlta 1674 at para 42.
[17] *Reis v CIBC Mortgages Inc*., 2011 ONSC 2309, 2011 CarswellOnt 2632.
[18] *Reis v CIBC Mortgages Inc.*, 2011 ONSC 2309, 2011 CarswellOnt 2632 at paras 17-19.
[19] *Reis v CIBC Mortgages Inc*., 2011 ONSC 2309, 2011 CarswellOnt 2632 at para 20-21.
[20] *Wilson v Favelle,* [1994] BCJ No 1257 (BCSC).
[21] *Gower v Tolko Manitoba Inc,* [2001] MJ No 39 (MBCA).
[22] Bill 132, *An Act to amend various statutes with respect to sexual violence, sexual harassment, domestic violence and related matters,* S.O. 2016 C.2.
[23] Bill 132, *An Act to amend various statutes with respect to sexual violence, sexual harassment, domestic violence and related matters*, S.O. 2016 C.2, Schedule 4, s. 32.0.7(1).
[24] Bill 132, *An Act to amend various statutes with respect to sexual violence, sexual harassment, domestic violence and related matters*, S.O. 2016 C.2, Schedule 4, s. 32.0.6 (2)(c) - (e).
[25] Bill 132, *An Act to amend various statutes with respect to sexual violence, sexual harassment, domestic violence and related matters*, S.O. 2016 C.2, Schedule 4, s. 55.3(1).
[26] Bill 132, *An Act to amend various statutes with respect to sexual violence, sexual harassment, domestic violence and related matters*, S.O. 2016 C.2, Schedule 4, s. 32.0.7(2).