



Privilege in Workplace Investigations and the Fable of the Three Little Pigs

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*"Little pig, little pig, let me come in."
"No, not by the hair of my
chinny chin chin."
"Then I'll huff, and I'll puff, and I'll blow
your house in."*

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Agenda

1. Privilege 101
2. Recent developments
3. Privilege and Investigation Materials
 - Solicitor-Client privilege
 - Third Party documents
 - Litigation privilege
4. Waiver – cautionary tales
5. Top Tips
6. Resources

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Privilege 101

Primer on privilege
(foundation is everything)

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Overview of Privilege

- What is it?
 - An exclusionary rule of evidence that protects certain classes of communications from disclosure to opposing parties and from entry into evidence in legal proceedings
- Why is it important in investigations?

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Class or Blanket Privilege

Solicitor-client privilege (aka: legal advice privilege)

- It applies when:
 - There is a communication between a professional legal advisor and client;
 - which entails the seeking or giving of legal advice; and
 - which is intended to be confidential by the parties

Sollosky v. The Queen, [1980] 1 SCR 821
- Why it's important:
 - #friendswithbenefits
 - Presumption of inadmissibility

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Class or Blanket Privilege

Solicitor-client privilege and In-house Counsel

“If an in-house lawyer is conveying advice that would be characterized as privileged, the fact that he or she is “in-house” does not remove the privilege, or change its nature.”

Pritchard v. Ontario (Human Rights Commission), [2004] 1 S.C.R. 809, 2004 SCC 3 at para 21

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Class or Blanket Privilege

Litigation privilege

- It applies when:
 - Litigation was in reasonable prospect at the time the document was prepared; and
 - The dominant purpose of the author, or of the person under whose direction each document was prepared, was to use it or its contents in order to obtain legal advice or to conduct or aid in the conduct of litigation

Hamalainen v Sippola [1991] BCJ No 3614 (BCCA)

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Class or Blanket Privilege

Litigation privilege

- When is litigation in reasonable prospect:
 - “there must be more than a suspicion that there will be litigation. The difficulty is in drawing the line between a reasonable contemplation and a suspicion.”
Carlucci v. Laurentian Casualty Co., [1991] O.J. No. 269
 - “when a reasonable person, possessed of all pertinent information including that peculiar to one party or the other, would conclude it is unlikely that the claim for loss will be resolved without [litigation]. The test is not one that will be particularly difficult to meet.”
Hamalainen v Sippola [1991] BCJ No 3614 (BCCA)

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Class or Blanket Privilege

Litigation privilege

- Why it's important:
 - intended to create a “zone of privacy” to permit a party to prepare for litigation

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Case-by-case Privilege

The Wigmore Test

- It applies when:
 1. The communication must originate in a confidence that it will not be disclosed
 2. The element of confidentiality must be essential to the full and satisfactory maintenance of the relation between the parties
 3. The relation must be one which the opinion of the community ought to be sedulously fostered
 4. The injury that would have inured to the relation by the disclosure of the communications must be greater than the benefit thereby gained for the correct disposal of litigation

Slavutch v Baker, [1975] SCJ No 29, 55 D.L.R. (3d) 224.

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Protecting Solicitor-Client Privilege

Recent Developments
(under construction)

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Alberta (Information and Privacy Commissioner) v. University of Calgary, 2016 SCC 53

Solicitor-Client Privilege

- IPC requested the University produce certain documents over which the University had claimed solicitor-client privilege
- Issue: whether the IPC had the authority to order the production of solicitor-client privileged material under s. 56(3) of *FOIPP*
- Section 56(3) states: a public body must produce required records to the IPC “[d]espite...any privilege of the law of evidence”

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Alberta (Information and Privacy Commissioner) v. University of Calgary, 2016 SCC 53

Solicitor-Client Privilege

SCC held:

- 1) Solicitor-client privilege is a fundamental policy of the law and should only be set aside in the “most unusual circumstances”
- 2) Privilege can only be overcome where intent is expressed through “clear, explicit and unequivocal language”
 - Language such as “any privilege of the law of evidence” is not enough

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Lizotte v. Aviva Insurance Company of Canada, 2016 SCC 52

Litigation Privilege

- Provincial regulator sought access to information
Aviva Insurance claimed was protected by litigation privilege
- SCC reaffirmed that provincial regulators could not abrogate litigation privilege by inference and that “clear, explicit and unequivocal language” is required in order to lift it
- Litigation privilege can be asserted against third parties (including third party investigators)

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Expanding Powers of the Information and Privacy Commissioners

- In 2017, IPCs issue joint resolution calling for amendments to access to information and privacy legislation
- IPCs state they are authorized to compel the production of records over which solicitor-client privilege is claimed
- “No risk to fundamental rights”

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LifeLabs Dispute

- Oct 2019, LifeLabs discovers cyberattack on its computer systems
- LifeLabs' counsel retains cybersecurity firm to prepare audit report to assist it with providing legal advice
- Feb 2020, OIPC orders LifeLabs to produce audit report pursuant to s. 38(1)(b) of *PIPA*

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LifeLabs Dispute

- LifeLabs argues it does not have to disclose the report because:
 - The report is protected by solicitor-client privilege and litigation privilege; and
 - Section 38(1)(b) of *PIPA* does not allow the OIPC to compel the production of documents protected by privilege.
- The matter is before the BC Supreme Court

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Bill C-58

An Act to Amend the Access to Information Act and the Privacy Act and to make consequential amendments to other Acts (Bill C-58, Chapter 18, 2019)

- Amends the *ATIA* and the *Privacy Act* to give IPCs broader powers
- Permits IPCs to review records withheld by the head of a government institution on the basis that they are protected by privilege
- Not yet in force

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Privilege & Investigation Materials

Solicitor-Client Privilege
(A house made of brick)

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Solicitor-Client Privilege & Reports

The General Rule

- Solicitor-client privilege applies where an investigator is retained by a client to provide legal advice
- Privilege will not apply where an investigator is retained only to investigate and find the facts

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***Gower v. Tolko Manitoba Inc.*, 2001 MBCA 11**

Facts & Issue

- Lawyer was retained to investigate a complaint of sexual harassment
- Report included:
 - Introduction
 - Witness statements
 - Credibility assessments
 - Findings of fact
 - Legal analysis
 - Legal advice
- Issue: Was the investigation report covered by solicitor-client privilege?

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Gower v. Tolko Manitoba Inc., 2001 MBCA 11

Decision

- The Court of Appeal held:
 - The relevant question was not whether counsel was retained to conduct an investigation, but rather whether the investigation was related to the rendering of legal services.
- Entire investigation report was protected from disclosure, both as to facts and legal advice, since the fact-finding was “inextricably linked” to the provision of that legal service
- Retainer letter / terms of reference for the investigation were key

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Gower v. Tolko Manitoba Inc., 2001 MBCA 11

Test

- The onus is on the individual claiming privilege to demonstrate
 1. the document was the giving or obtaining of legal advice
 2. the presence of a solicitor and the presence of a client
 3. the existence of the solicitor-client relationship

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Gower v. Tolko Manitoba Inc., 2001 MBCA 11

The Terms of Reference

1. The Investigator will conduct an investigation as counsel on behalf of the Employer for the purpose of providing a fact finding report and giving legal advice based on the findings in the report
2. The Investigator's notes, fact finding report and legal advice will be protected by solicitor-client privilege. The Investigator will advise all witnesses, including the Complainant and the Respondent that she is conducting this investigation as legal counsel for the Employer.

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Gower v. Tolko Manitoba Inc., 2001 MBCA 11

The Terms of Reference

3. All information supplied to the Investigator by the individuals whom the Investigator interviews ... will be supplied in confidence and will be treated by the Investigator as strictly confidential. The information will be revealed only on a "need to know" basis in order to ensure that the investigation is fair.
4. The Investigator will meet with and interview the Complainant, the Respondent and any other employees or other witnesses whom the Investigator believes have information relevant to the investigation.

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Gower v. Tolko Manitoba Inc., 2001 MBCA 11

The Terms of Reference

5. The Investigator will prepare a report for the Area Manager stating her findings of fact and her conclusions as to whether the findings of fact constitute sexual harassment and a breach of the Employer's harassment policy and will provide legal advice based on those findings of fact and conclusions.
6. The Area Manager will treat the report as strictly confidential and will review the report only with their advisors.

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Durham Regional Police Association v Durham Regional Police Services Board, [2015] OLAA No 361

Facts

- External independent investigator appointed to investigate two harassment complaints against a manager
- Union argued the report should be produced because:
 - The terms of reference appointed the investigator as information-gatherer rather than legal counsel
 - Union representative was present during investigation interviews
 - The report was not prepared with the primary purpose of preparing for litigation

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***Durham Regional Police Association v Durham
Regional Police Services Board, [2015] OLAA No
361***

Decision

- Solicitor-client privilege did not apply because the investigator was not providing legal advice
- If the employer wanted the report to be covered by solicitor-client privilege, it should have specified that in the retainer

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Privilege & Investigation Materials

**Third-Party Documents
(a house made of sticks)**

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Solicitor-Client Privilege

Third party conducts the investigation

- Includes circumstances where legal counsel retains a third-party investigator (investigator may or may not be a lawyer)
- When is the report of the third party covered by solicitor-client privilege?

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***General Accident Assurance Company v. Chrusz*, [1999] OJ No 3291**

- Solicitor-client privilege can extend to communications between a solicitor or a client and a third party in limited circumstances
- Third-party must:
 - serve as a “channel of communications” between the client and legal counsel; or
 - play a function that is essential to the client-solicitor relationship

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**General Accident Assurance Company v.
Chrusz, [1999] OJ No 3291**
Channel of communication

- A party serves as a channel of communications if:
 - it acts as an “agent of transmission”, carrying information between the solicitor and client; or
 - if its expertise is required to interpret the information provided by the client so that the solicitor can understand it (e.g. accountant or valuator)

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**General Accident Assurance Company v.
Chrusz, [1999] OJ No 3291**
Function that is essential

- “If the third party is authorized only to gather information from outside sources and pass it on to the solicitor so that the solicitor might advise the client ... the third party’s function is not essential to the maintenance or operation of the client-solicitor relationship and should not be protected.” (para 122)
- Third party’s services must be necessary for solicitor to provide his or her legal advice for solicitor-client privilege to apply.
- Arguably the same test as in *Gower*:
 - Is the third party simply gathering information/fact-finding?
 - If yes then the report will not be privileged

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College of Physicians of BC v. BC (Information and Privacy Commissioner), 2002 BCCA 665

Facts

- In-house lawyer tasked with investigating a complaint against a physician
- The investigator:
 - obtained opinions of four experts to assist in assessing the complaint
 - prepared two memorandum summarizing the opinions of the experts
- The IPC ordered College to disclose the experts' reports
- College argued reports were protected because they constituted "advice or recommendations developed by or for a public body" and solicitor-client privilege

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College of Physicians of BC v. BC (Information and Privacy Commissioner), 2002 BCCA 665

Decision

- Confirmed *Gower* – legal advice privilege arises only when legal counsel is acting as a lawyer
 - i.e. conducting an investigation to ascertain facts upon which to base a legal opinion to give the client
- College's in house lawyer was engaged in rendering legal advice when she obtained the experts' reports

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College of Physicians of BC v. BC (Information and Privacy Commissioner), 2002 BCCA 665

Decision

Test for when third party communications are protected:

- “third party communications are protected by legal advice privilege only where the third party is performing a function, on a client’s behalf, which is integral to the relationship between the solicitor and the client” (at para. 50)

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College of Physicians of BC v. BC (Information and Privacy Commissioner), 2002 BCCA 665

Decision

- Entirety of expert reports not privileged
- Lawyer’s summary of experts’ opinions not privileged but lawyer’s comments in one memo were not “intertwined” and could be severed

The third party experts “did not perform a function on behalf of the client which was integral to the relationship between the College and its lawyer ... While the experts’ opinions were relevant, and even essential, to the legal problem confronting the College, the experts never stood in the place of the College for the purpose of obtaining legal advice. Their services were incidental to the seeking and obtaining of legal advice” (at para. 51).

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Privilege & Investigation Materials

Litigation Privilege
(a house made of straw)

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Litigation Privilege

Timing is everything...

- Litigation privilege cannot be asserted until (at the earliest) such time as there is a decision to possibly take action (eg. discipline) or until other facts show a reasonable prospect of litigation
- Litigation privilege may be asserted on the work product of third parties
- A document may be redacted if there is more than one dominant purpose of the document
- Litigation privilege is applied on a document by document basis

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Alberta v. Suncor Energy Inc., 2017
ABCA 221

- Suncor asserted litigation privilege over all materials “created or collected” in the course of its internal investigation of a workplace fatality
- Lower Court: all documents created or collected with the dominant purpose that they would assist in contemplated litigation were captured by litigation privilege

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Alberta v. Suncor Energy Inc., 2017
ABCA 221

- Lower court’s framing of the scope of litigation privilege was too broad
- Privilege could only capture any documents that were created with the dominant purpose that they would assist in contemplated litigation rather than any document collected for the purpose of contemplated litigation

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UFCW v. Weetibix [2012] OLAA No. 257

- Interview notes and witness statements created during an investigation were sought by union
- Employer claimed litigation privilege because the material was created before a decision was made to discharge
- Before employer knows what the results of an investigation will be and whether there is cause for discipline litigation cannot be reasonably contemplated

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UFCW v. Weetibix [2012] OLAA No. 257

“Terminations are planned in a way that car accidents and fires are not. That is why investigations precede dismissals whereas investigations occur after accidents and fires. ...[I]nquiries preceding terminations take place in a setting where the dominant purpose cannot be preparing for litigation about termination, because a decision to terminate has not yet been made. By contrast, inquiries into damage to person or property are conducted against the backdrop of a loss that has already occurred and could become the basis for legal action. This explains why the courts have granted litigation privilege to documents created in the course of an accident investigation. The factual difference between terminations and accidents leads me to conclude these court decisions offer me no useful guidance.”

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AOIPC Order F2003-005

Privilege did not apply to investigation report

- Investigator orally disclosed much of the report to the applicant
- Investigator also reported that no important or relevant information was withheld from the applicant
- The letter advising that complaint was dismissed did not provide reasons apart from referring to the report

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AOIPC Order F2003-005

Privilege did not apply to investigation report

- The motive for the investigation was not the threat of legal proceedings
- The apparent emphasis on the investigator's neutrality suggested that his report was not intended for litigation because he need not be neutral for that purpose
- The implementation of the university's policy was contradictory to the report being subject to litigation privilege because the purpose of the investigation was to examine the merits of the complaint, not prepare for litigation

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Waiver of Privilege

(a cold wind blows here while the wolf is out of site)

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What is waiver

R. v. Turpin, [1989] 1 SCR 1296

A person is said to waive a benefit when he renounces or disclaims itIn Black's Law Dictionary...:

Waiver. The intentional or voluntary relinquishment of a known right, or such conduct as warrants an inference of the relinquishment of such right, or when one dispenses with the performance of something he is entitled to exact...

Simply put, waiver does not confer rights, it repudiates them. If you waive your right to A, it does not mean that you are entitled to B. It means only that you are no longer entitled to A.

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Test for waiver

Waiver of privilege occurs when:

The privilege holder:

1. Knows of the existence of the privilege, and,
2. Voluntarily evinces an intention to waive that privilege, however where fairness and consistency require, waiver may also occur where there is an absence of intention

S.&K. Processors Ltd. v. Campbell Avenue Herring,
1983 CanLII 407 at para. 6 (BCSC)

- Intention can be inferred from conduct
- Fairness is a key consideration

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Communication to parties about investigation

Greater Vancouver Regional District v. Greater Vancouver Regional District Employees' Union, 2015 CanLII 87692 (BCLA) (Moore)

- Lawyer retained to conduct investigation into complaint of bullying and harassment against an employee
- Employer and lawyer agreed to terms of reference requiring:
 - Information disclosed in interviews be kept confidential
 - All correspondence between lawyer and employer privileged and confidential
 - Lawyer to prepare privileged and confidential report setting out the lawyer's legal opinion / legal advice

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Communication to parties about investigation

Decision

- Solicitor-client privilege cannot be “limited or abrogated because of the labour relations context in which it arises.”
- Privilege was found to apply to the report and interviews with bargaining unit employees
- However, employer waived privilege when it explicitly referenced and relied upon the lawyer’s findings in the discipline letter to the employee

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Communication to parties about investigation

Arbitrator reasoning

- employer adopted the product of the investigation in its entirety in the discipline letter
- while an employer is under a general obligation to disclose its reasons for discipline, that does not necessitate detailed reference to and reliance on an investigator’s findings and conclusions
- by relying on the investigator’s work product in the disciplinary letter, the employer waived privilege over the investigation report.

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Filing of related submissions

BCEHS v. APBC [2017] BCCAAA No. 26 (Pekeles)

- Two related proceedings, one at the LRB and one at arbitration dealing with the fallout after a workplace investigation
- Union sought disclosure of investigation materials at arbitration
- Report was covered by solicitor-client privilege but privilege had been inadvertently waived when employer filed submissions in the LRB proceeding with key information from the report

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Regulatory and other agency communications

Thomson v. Berkshire Investment Group, 2007 BCSC 50

- Plaintiff in civil litigation sought disclosure of internal investigation materials
- Defendant claimed litigation privilege due to anticipated legal and statutory proceedings
- Defendant had disclosed the same information to other agencies including regulatory body and RCMP

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Regulatory and other agency communications

Thomson v. Berkshire Investment Group, 2007 BCSC 50

BCSC:

- Litigation privilege extended to the information provided by the defendant to the other agencies
- Although the defendant was entitled to claim privilege, that did not mean the other parties in possession could not be compelled to produce the information

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Top Tips

(built in security systems)

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Top Tips for Maintaining Privilege

- Make a plan *before* you start
 - Initial communications and papering appropriately can be important
- Build the strongest house you can using the best materials possible for the circumstances of the case!
 - Terms of Reference are key to establishing solicitor-client privilege

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Top Tips for Maintaining Privilege

Terms of Reference Considerations

Key decisions:

- External legal counsel to the employer providing findings of fact and legal advice directly to the client?
 - Will support solicitor-client privilege and likely the strongest configuration
- “independent” characterization or not?
 - May undermine litigation privilege
- fact-finding only?
 - Consider papering as third party conducting investigation for legal counsel to support a claim of solicitor-client privilege

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Top Tips for Maintaining Privilege

Terms of Reference should specify

Investigator retained directly by client:

- the investigator is retained to provide legal advice
- the information supplied to the investigator will be supplied in confidence and will be treated by the investigator as strictly confidential
- the investigator will provide legal advice based on his or her findings of fact and conclusions
- State clearly that solicitor-client privilege will apply to the work product including notes and report prepared by the investigator and any advice provided and that participants will be advised

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Top Tips for Maintaining Privilege

Terms of Reference should specify

Third party investigator:

- extend the mandate to a function that is essential to the existence or operation of the solicitor-client relationship
 - Consider relying on expertise in the particular area, neutral status, specific purpose of making credibility assessments
 - Be clear that legal counsel will be relying on the findings of the third party to provide legal advice and recommendations to the client and to prepare for any subsequent litigation

If appropriate in the circumstances (eg. post incident investigation):

- Retainer should specify that the dominant purpose of the investigation and the report is to prepare for litigation

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Top Tips for Maintaining Privilege

Assumptions to operate under

- Assume that a third party investigation is unlikely to be protected by legal advice or solicitor-client privilege
- Assume that litigation privilege cannot be invoked until
 - the decision is made to issue discipline / terminate
 - post incident

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Top Tips for Maintaining Privilege

It's more than just the retainer

- Communication to participants in investigation should reflect what is in the retainer
- The work product should match the retainer (if you asked for legal advice make sure the report is not only fact finding)
- Be very mindful of the potential for accidental waiver and give your clients clear direction about this

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Resources

(building supplies)

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Key Decided Cases

Solicitor-Client privilege upheld

- *Gower v. Tolko*
- *Alberta v. University of Calgary*
- *Lizotte v. Aviva*
- *Re Richmond (City)*, 2005 CanLII 48297 (BC I.P.C.) Order F05-35
- *Re Whistler (Resort Municipality)*, 2014 BCIPC 32

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Key Decided Cases

Solicitor-Client privilege not upheld

- *Durham Regional Police*, OLAA No. 361
- *General Accident Assurance Company v. Chrusz*, [1999] OJ No 3291
- *Wilson v. Favelle*, 1994 CanLII 1152, 26 CPC (3d) 273 (BCSC)
- *North Bay General Hospital v. Ontario Nurses' Association*, 2011 CanLII 68580 (Ont LA)
- *Howard v. London (City)*, 2015 ONSC 156
- *Potash Corp. of Saskatchewan Inc. v. Mosaic Potash*, 2010 SKQB 460
- *Bank of Montreal v. Tortora*, 2009 BCSC 1224

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Other Treasures

- Shearer, Gillian. *The Law and Practice of Workplace Investigations*. Edmond Publishing, 2016.
- Gowe, Gregory. "The Law of Workplace Investigations: Update on Key Developments", CLE Employment Law Conference, 2010.
- Beharrell, Tonie and Plomp, Donovan. "Workplace Harassment Investigations – An Update", CLE Human Rights Law Conference, 2017.
- Dew, Michael. "Accidental Waiver of Privilege", CLE, 2013.

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Questions?

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