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Privilege under pressure: managing legal risk in internal investigations

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Internal investigations are increasingly central to effective corporate governance, driven by heightened expectations around transparency, accountability and responsiveness to concerns about corporate conduct. As these investigations become more frequent and sophisticated, understanding their legal implications—including the scope and application of privilege—is essential.

A recent decision from the United States Court of Appeals for the Sixth Circuit in *FirstEnergy Corporation*[1] has prompted renewed attention to privilege in the context of internal investigations. While the case offers valuable insights into U.S. law, it also provides a timely opportunity to examine how Canadian courts approach privilege in similar circumstances. This article uses the U.S. decision as a springboard to explore the Canadian legal framework and offer practical guidance for structuring internal investigations to preserve privilege.

FirstEnergy and the U.S. approach to privilege in internal investigations

In October, the United States Court of Appeals for the Sixth Circuit issued a significant decision on privilege in the context of internal investigations. The case, *FirstEnergy Corporation*, arose from bribery allegations against FirstEnergy, which prompted the company to launch an internal investigation. That investigation later became the subject of a production order in a securities class action brought by shareholders. During discovery, the plaintiffs sought access to the investigation's work product. Although the lower court initially ordered production, the Sixth Circuit overturned that decision, addressing three key privilege doctrines: attorney-client privilege (solicitor-client privilege in Canada), work-product privilege (litigation privilege in Canada) and waiver.

- *Attorney-client privilege* protects communications between a lawyer and client made for the purpose of obtaining legal advice. In *FirstEnergy*, the plaintiffs argued that the investigative work product was not privileged because it was ultimately used for business purposes. The Sixth Circuit rejected this argument, emphasizing that the relevant question is whether legal advice was sought through the investigation—not how the findings were later used. The Court confirmed that solicitor-client privilege can extend to factual findings, provided those facts are closely tied to legal analysis.

- The Court also addressed *work-product privilege*, which protects documents prepared for the dominant purpose of litigation. It reaffirmed that the critical inquiry is whether litigation was reasonably anticipated at the time the materials were created. In *FirstEnergy*, this threshold was met: the company reasonably foresaw litigation stemming from the bribery allegations when it commenced the investigation, and lawsuits followed shortly thereafter.

- Finally, the Sixth Circuit considered *waiver*. It clarified that disclosing non-privileged information—such as the conclusions of an investigation—does not automatically waive privilege over other protected aspects of the investigation. Importantly, the Court also held that sharing information with an auditor does not, on its own, constitute waiver.

The Canadian legal landscape: privilege and internal investigations

Building on the insights from *FirstEnergy*, we consider how Canadian courts assess privilege in internal investigations, with a focus on solicitor-client privilege, litigation privilege and waiver.

Solicitor-client privilege

Canadian courts, like the Sixth Circuit in *FirstEnergy*, have confirmed that solicitor-client privilege applies only where legal advice is being provided—not merely where a lawyer is involved[2]. The key consideration is whether the lawyer is acting in a professional legal capacity. If the lawyer's role is limited to fact-finding without offering legal advice, privilege will not attach[3].

In *Vecchio Longo Consulting Services Inc. v. Aphria Inc.*, for example, the Ontario Superior Court of Justice held that solicitor-client privilege protected the work product of an investigation led by a law firm. Justice Perell emphasized that the firm was engaged to provide legal advice, not to act as a "private investigator" focused solely on business matters[4].

When assessing whether privilege applies, courts often look to the lawyer's retainer. While the terms of engagement can be persuasive, they are not determinative[5]. In one case, privilege was upheld even though the engagement letter did not explicitly reference legal advice because the lawyer's role was clearly legal in nature[6].

As for the scope of protection, Canadian jurisprudence generally aligns with *FirstEnergy*: facts gathered during an investigation may be privileged if they are closely connected to legal analysis. Courts accept that it is generally not permissible to sever findings of fact made in an investigative report covered by solicitor-client privilege when they form the basis of, and are inextricably linked to, the legal advice provided[7]. However, neutral facts that do not reveal the substance of legal advice are less likely to be protected[8].

Where third parties are involved in an investigation, privilege will typically apply if the third party serves as a necessary conduit between the lawyer and the client for the purpose of delivering legal advice[9]. If the third party is simply collecting information and passing it along, privilege is less likely to apply[10].

This principle is illustrated in *Lewis v. WestJet Airlines Ltd.*, where the court found that litigation privilege did not extend to an investigative report prepared by a consultant, Ernst & Young[11]. Although the consultant acted on instructions from counsel, the court concluded that Ernst & Young's role was incidental to the legal advice being provided and not integral to the solicitor-client relationship[12].

Litigation privilege

In Canada, litigation privilege may apply to internal investigations either in addition to, or as an alternative to, solicitor-client privilege. As affirmed in *FirstEnergy*, the threshold question is whether there was a "reasonable anticipation of litigation" at the time the materials were created. However, this threshold does not automatically shield an entire investigation. Courts assess privilege on a document-by-document basis, requiring that each item be prepared for the dominant purpose of litigation[13].

Importantly, litigation privilege may still apply even if the work product is later used for other purposes[14]. That said, if those other purposes obscure whether litigation was the dominant driver behind the creation of the material, the privilege claim may fail[15].

Clear-cut cases typically involve investigations initiated after litigation has commenced, where the anticipation of legal proceedings is evident[16]. More complex scenarios arise when litigation follows an investigation already underway. In such cases, parties must provide concrete evidence—beyond mere assertions—to demonstrate that litigation was

reasonably anticipated at the outset[17]. Without such evidence, courts may decline to uphold the privilege.

The decision in *Huang v. Bank of Montreal* illustrates this point. Despite the involvement of legal counsel throughout the investigation and the investigator's assertion that litigation was likely, the court found no litigation privilege[18]. An email referencing a "customer escalation and dispute re: security deposit box" was deemed insufficient to establish that litigation was the dominant purpose[19]. Moreover, the plaintiff's suggestion that the bank retain legal counsel—made six months after the investigation began—did not retroactively support the privilege claim[20].

Where litigation arises partway through an internal investigation, its emergence may support an argument that litigation was reasonably anticipated at the time the investigation began. However, the mere fact that litigation has commenced is unlikely, on its own, to retroactively cloak the entire investigation in privilege. Courts will still assess whether litigation was the dominant purpose of the investigation at its inception, and litigation privilege will not apply where that purpose was not reasonably contemplated.

A final consideration is the intersection of litigation privilege with statutory duties to investigate (for example, harassment or workplace accident investigations under occupational health and safety legislation). While Canadian jurisprudence on this issue is limited, the Alberta Court of Appeal has noted that statutory obligations do not automatically negate a claim for litigation privilege[21]. Courts must examine each document individually to determine whether its dominant purpose was compliance with statutory requirements, preparation for litigation or another objective[22]. That said, it may be more difficult to assert a claim for litigation (or solicitor-client) privilege in such circumstances—particularly where there is a statutory duty to disclose the relevant investigation report to parties and/or regulators[23].

Waiver

In Canada, whether disclosure of information from an internal investigation results in a waiver of privilege depends on both the nature of the disclosure and the recipient. As in the United States, disclosure to certain third parties—such as an auditor, which has a statutory duty to consider issues that may be investigated—does not automatically waive privilege for all third parties[24].

However, public disclosure of investigative details may trigger waiver, particularly where the information shared exceeds what is legally required. In *BlackRock*, for example, the court found that Valeant had waived privilege by releasing extensive and specific details about its internal investigation through press releases[25]. The company's attempt to rely on statutory disclosure obligations was unsuccessful, as those obligations did not necessitate the level of detail disclosed[26]. By contrast, in *Aphria*, the court held that privilege was preserved because the company had limited its public disclosures to what was strictly required by statute[27].

To date, we are not aware of any Canadian court that has directly addressed whether the conclusions of an internal investigation are, in and of themselves, outside the scope of privilege in the manner articulated by the Sixth Circuit in *FirstEnergy*.

Waiver may also arise in the context of litigation or regulatory proceedings. In court, privilege may be lost if a party relies on an investigative legal opinion to advance or defend a material aspect of its claim[28]. Similarly, disclosure of investigative findings to a regulator may constitute waiver—particularly where the information was not compelled and goes beyond what was strictly necessary[29]. We note that there are statutory protections to prevent waiver under some legislation. For example, the *Bank Act* allows banks to voluntarily share privileged information with the Office of the Superintendent of Financial Institutions without a waiver of privilege[30], and some evidence-related Acts also allow for sharing of confidential information between public sector bodies without waiver of privilege[31].

Practical takeaways

Drawing from Canadian case law, the following are practical strategies for structuring internal investigations in a way that maximizes the likelihood of preserving privilege:

- **Engage legal counsel for legal advice—not just fact-finding.** If lawyers are conducting the investigation, ensure they are retained to provide legal advice in their professional capacity. Simply involving a lawyer is not enough. Clearly define the scope of the engagement in the retainer to reflect the legal advisory role[32].
- **Document the basis for anticipating litigation.** Where an investigation is initiated in response to potential litigation, record the reasons for that anticipation and preserve any supporting evidence. If there is a parallel statutory duty to investigate, distinguish which documents were created for litigation purposes versus those prepared solely for regulatory compliance.
- **Limit disclosures to what is legally required.** If statutory obligations require disclosure of investigation-related information, ensure that only the minimum necessary details are shared. Avoid public or voluntary disclosures that go beyond what is mandated, as these may risk waiver of privilege.
- **Be cautious when involving third parties.** If external consultants or investigators are engaged, assess whether they are acting as necessary intermediaries between counsel and client. Privilege is more likely to apply when third parties are integral to the delivery of legal advice, rather than simply collecting or transmitting information.
- **Avoid referencing privileged material in litigation or regulatory proceedings.** Invoking investigative findings or legal opinions to support a claim or defense may result in waiver. Similarly, voluntary disclosure of conclusions to regulators —if not compelled or otherwise protected—can jeopardize privilege.
- **Maintain clear records of purpose and process.** Courts assess privilege on a document-by-document basis. Keeping detailed records of why and how each document was created can help substantiate privilege claims if challenged.
- **Train internal teams on privilege risks.** Ensure that those involved in investigations understand how privilege works and the importance of maintaining confidentiality, especially when communicating findings internally or externally.

FOOTNOTES

1. *In re FirstEnergy Corporation,* No. 24-3654 (6th Cir. 2025).
2. *Vecchio Longo Consulting Services Inc. v. Aphria Inc.,* 2023 ONSC 6336, paras. 63-68 [*Aphria*]; *BlackRock Asset Management Canada Ltd., c. Valeant Pharmaceuticals International Inc.,* 2024 QCCS 722, para. 20 [*Blackrock*]; *Gower v. Tolko Manitoba,* 2001 MBCA 11, para. 39 [*Gower*]; *CNOOC Petroleum North America ULC v. ITP SA,* 2023 ABKB 689, para. 57 [*CNOOC Petroleum*].
3. *Gower,* para. 37; *Prosser v. Industrial Alliance Insurance,* 2024 ABKB 87, para. 20 [*Prosser*].
4. *Aphria*, paras. 63-66.
5. *BlackRock*, paras. 30, 61-62; *Gower*, para. 40.
6. *Canada (Attorney General) v. Slansky,* 2013 FCA 199, paras. 94-105 [*Slansky*].
7. *Slansky*, para. 112; *BlackRock*, para. 21; *Gower*, para. 38.
8. *BlackRock*, para. 21.
9. *Lewis v. WestJet Airlines* Ltd., 2025 BCSC 1565, para. 39-40 [*Lewis*]; *Prosser*, paras. 36, 61; *General Assurance Company v. Chrusz,* 1999 CanLII 7320 (ON CA).
10. *Lewis,* para. 41, *Prosser*, para. 61.
11. *Lewis,* para. 42.
12. *Lewis*, para. 42-43.
13. *Alberta v. Suncor,* 2017 ABCA 221, paras. 28, 35 [*Suncor*]; *Prosser*, para. 14.

14. *BlackRock*, para. 69; *Lewis,* para. 54.

15. *CNOOC Petroleum*, para. 64.

16. *Aphria*, para. 70; *BlackRock*, para. 73; *Lewis,* paras. 50-55.

17. *Huang v. Bank of Montreal,* 2024 ONSC 5848, para. 33 [*Huang*]; *PF Consumer Healthcare c. Danisco Canada Inc.*, 2025 QCCS 2671, paras. 48-50.

18. *Huang*, para. 14-15.

19. *Huang*, para. 29.

20. *Huang*, para. 30-31.

21. *Suncor*, para. 43.

22. *Suncor*, para. 43.

23. Under the *Canada Labour Code*, employers are required to provide a copy of a harassment investigation report to both parties. There are also mandatory reports that must be prepared and provided to certain regulators following workplace accidents or fatalities.

24. *BlackRock*, paras. 75-76; *Philip Services Corp. v. Ontario Securities Commission,* 2005 CanLII 30328 (ON SCDC), paras. 57-58.

25. *BlackRock*, para. 84.

26. *BlackRock*, para. 84.

27. *Aphria*, para. 76.

28. *BlackRock*, paras. 41, 93; *Prosser*, paras. 133-135; *Aphria*, para. 60.

29. *CNOOC Petroleum*, para. 72.

30. See section 638.1(1) of the *Bank Act,* SC 1991, c 46.

31. See, for example, section 30.1 of Ontario's *Evidence Act,* RSO 1990, c. E.23.

32. In *Toronto Metropolitan Faculty Association v. Toronto Metropolitan University,* 2024 CanLII 109523 (ON LA), Arbitrator Hart held that a lawyer conducting an investigation under a solicitor-client relationship with the organization creates a reasonable apprehension of bias (meaning the investigation is not independent). This case is likely not binding, as it is a labour arbitration decision, but should be noted.

To discuss these issues, please contact the author(s).