Court of King's Bench of Alberta

Citation: Prosser v Industrial Alliance Insurance, 2024 ABKB 87

Date: 20240214
Docket: 1801 06362
Registry: Calgary

Between:

Paul Prosser

Plaintiff

- and -

Industrial Alliance Insurance and Financial Services Inc

Defendant

Reasons for Decision
of the
Honourable Justice J.T. Eamon

I Introduction

[1] In this wrongful dismissal action, the Plaintiff applies for disclosure of various records and information concerning the Defendant's decision to terminate the Plaintiff's employment for cause. The records and information were obtained by a human resources consultant who was retained by the Defendant to investigate alleged harassment by the Plaintiff in one of the Defendant's workplaces. The Defendant claims the records and information derived therefrom are privileged because the investigation was in contemplation of litigation or conducted for the purpose of placing information before legal counsel for advice.

[2] The harassment allegations came from two employees of the Defendant who worked in the same office as the Plaintiff. On February 22, 2018, "Complainant 1" alleged systemic harassment in the office by the Plaintiff and claimed they had been constructively dismissed.

[3] The Defendant almost immediately started an internal investigation in accordance with its Respectful Workplace Policy and retained legal counsel to provide it advice about the allegations. Complainant 1's lawyer sent a demand letter to the Defendant on February 27, 2018. The next day, the Defendant retained the external human resources consultant ("Investigator") to investigate the matter. I will refer to this Investigator's work as the "Investigation", to distinguish it from any work done in the brief internal investigation which appears not to have continued after the Investigation commenced.

[4] During the Investigation, another employee ("Complainant 2") made allegations of harassment against the Plaintiff.

[5] The Investigation was completed March 9, 2018. The Defendant terminated the Plaintiff on March 28, 2018.

[6] The records (and related refused undertaking requests) in issue are:

(a) The transcript and recording of the Plaintiff's interview by the Investigator.

(b) The transcript and recording of Complainant 1's interview by the Investigator and records of the interview.

(c) The identity of Complainant 2, particulars of Complainant 2's allegations, and the information gathered from Complainant 2 in the Investigation including the transcript, recording and notes of the interview.

(d) Generally, information that was gathered in the Investigation including allegations of misconduct, particulars of various alleged incidents, names of persons present during the alleged misconduct, and interview transcripts of employee interviews conducted by the Investigator.

[7] The Plaintiff does not seek disclosure of the Investigator's report by which it communicated the results of the Investigation to the Defendant and its lawyers.

[8] The Defendant says all of the records of the Investigation, other than the report, are in the hands of the Investigator.

[9] The issues are whether the records, and information derived therefrom, are privileged, and if so, whether the Defendant waived privilege by pleading matters concerning the Investigation in its statement of defence in this action.

II Privilege claims

[10] The Defendant asserts two privilege claims: litigation privilege and solicitor and client privilege (sometimes called legal advice privilege).

[11] The Defendant bears the onus to prove its privilege claims. Before turning to the Defendant's evidence, I will describe the legal elements of both types of privilege.

[12] The privileges are distinct from each other and serve different purposes. Solicitor-client privilege "has been strengthened, reaffirmed and elevated in recent years" while litigation

privilege "has had, on the contrary, to weather the trend toward mutual and reciprocal disclosure which is the hallmark of the judicial process" (***Blank v Canada (Minister of Justice)***, 2006 SCC 39 at para 61).

[13] The test for litigation privilege is the dominant purpose test, affirmed in ***Blank***. It was described by the Alberta Court of Appeal in ***Canadian Natural Resources Limited v ShawCor Ltd***, 2014 ABCA 289 as follows:

> [82] The test for litigation privilege in Alberta is that of "dominant purpose" as described by this Court in ***Nova, An Alberta Corporation v Guelph Engineering Co*** (1984), 1984 ABCA 38 (CanLII), 50 AR 199 [***Nova***]. The dominant purpose test was explained in ***Moseley*** [v ***Spray Lakes Sawmills (1980) Ltd.***, 1996 ABCA 141 (CanLII), 184 AR 101] at para 24 as follows:
>
> > The key is, and has been since this Court adopted the dominant purpose test in ***Nova***, that statements and documents will only fall within the protection of the litigation privilege where the dominant purpose for their creation was, at the time they were made, for use in contemplated or pending litigation. [emphasis in original]
>
> ...
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> [84] In addition, it must be remembered that under the dominant purpose test, the focus is on the purpose for which the records were prepared or created, not the purpose for which they were obtained: ***Ventouris v Mountain***, [1991] 1 WLR 607 at 620-622 (Eng CA); ***General Accident Assurance Company v Chrusz et al*** (1999), 1999 CanLII 7320 (ON CA), 45 OR (3d) 321 at 334 (CA). Pre-existing records gathered or copied at the instruction of legal counsel do not automatically fall under litigation privilege: ***Bennett v State Farm Fire and Casualty Company***, 2013 NBCA 4 at paras 47-51, 358 DLR (4th) 229. Because the question is the purpose for which the record was originally brought into existence, the mere fact that a lawyer became involved is not automatically controlling.

[14] Litigation privilege is not a blanket privilege. Also, the purpose for which records relating to an incident are created may evolve over time. Consequently, in an application for production of records over which litigation privilege is claimed, the privilege must be assessed record by record (or by groups of like records), determining the dominant purpose behind the creation of each as distinct from the purpose for which it may have been collected or put to use (***ShawCor*** at para 87; ***Alberta v Suncor Inc***, 2017 ABCA 221 at para 29, 34, 37).

[15] Litigation privilege may apply to the investigative files if the Defendant proves the elements of the dominant purpose test.

[16] To qualify for solicitor-client privilege, a communication must be: (1) between a solicitor and client; (2) given in the context of seeking or giving legal advice; and (3) intended by the parties to be confidential (***Solosky v R*** (1979), 1979 CanLII 9 (SCC), [1980] 1 SCR 821 at para 28; ***ShawCor*** at para 80).

[17] It is not necessary that each communication between solicitor and client request or offer legal advice, or even that each communication be between solicitor and client. Solicitor-client privilege covers a continuum of communications "so as to allow the lawyer to understand the

client's circumstances and advise accordingly, and for the client to receive, understand and process that advice" (***CNOOC Petroleum North America ULC v 801 Seventh Inc***, 2021 ABQB 861 at paras 29-35; see also ***Samson Indian Nation Band v Canada***, 1995 CanLII 3602 (FCA), [1995] 2 F.C. 762 at para 8 and ***Lewisporte (Town) v Newfoundland and Labrador (Information and Privacy Commissioner)***, 2022 NLSC 130 at para 35). That aspect of solicitor-client privilege is "evolving law" (***CNOOC Petroleum North America ULC v 801 Seventh Inc***, 2022 ABCA 293 at para 4). The boundaries of such privilege may not yet be fully developed.

[18] Solicitor-client privilege does not have to be in contemplation of litigation ***(ShawCor*** at para 36). The privilege is distinct from litigation privilege and there is no requirement of pending or contemplated litigation (see, for example, ***Canada (Privacy Commissioner) v Blood Tribe Department of Health***, 2008 SCC 44 at para 10).

[19] Not every form of communication with a solicitor by a client is necessarily covered by solicitor-client privilege (***ShawCor*** at para 80). "The privilege attaches to communications between lawyer and client designed to seek out or give legal advice" (*ibid*).

[20] Consequently, where a lawyer is only retained to conduct a factual investigation or provide non-legal advice, the Courts have generally held that the communications are not privileged. In ***Gainers Inc v Canadian Pacific Ltd***, 1993 CanLII 7028 (AB KB) at paras 7 – 11, the Court held that communications conducted by in-house counsel who appeared "to have been acting as an investigator, not as a lawyer giving legal advice or forming legal, as distinct from factual, opinions" were not privileged unless they met the test for litigation privilege. To the same effect see the discussions in ***Gower v Tolko Manitoba Inc***, 2001 MBCA 11 at para 37; ***Wilson v Favelle*** (1994), 1994 CanLII 1152 (BC SC) at para 12; and, ***Lewisporte*** at para 33.

[21] Where does a third-party investigative file fit into solicitor-client privilege, where the third party is not retained or qualified to provide legal advice?

[22] The Defendant submits that Alberta case law consistently holds that where one of the purposes of an investigation was to ascertain facts to place before the client's lawyers for legal advice, the investigative file is subject to solicitor and client privilege. In support of this submission, the Defendant cites ***Singh v Edmonton (City)***, 1994 ABCA 378; ***Manah v Edmonton Northlands***, 2001 ABQB 230 (AJ); ***Talisman Energy Inc v Flo-Dynamics Systems Inc***, 2015 ABQB 561 (AJ).

[23] The Defendant further submits that third party materials may form part of the privileged continuum of communications between lawyer and client in connection with the provision of legal advice. It submits that in the context of third-party workplace investigations, this will be the case where the "third party employs an expertise in assembling information provided by the client and in explaining that information to the solicitor … [serves] as a conduit of advice from the lawyer to the client and as a conduit of instructions from the client to the lawyer". In support of this proposition, the Defendant cites ***Lewisporte*** and ***General Accident Assurance Co v Chrusz***, 1999 CanLII 7320, 45 O.R. (3d) 321 at p 353, 1999 CarswellOnt 2898 at para 111 (ONCA) (further citations to ***Chrusz*** herein are to 45 O.R. (3d)).

[24] In ***Singh***, the Defendant City became aware of alleged misconduct by an employee. It conducted a confidential investigation. The Plaintiff sought disclosure of the investigation file in a later wrongful dismissal action. The file included witness statements and notes of the investigation. The "one purpose" of creating the investigative file was to provide it to the

company's lawyers for legal advice. The Court held that the file was covered by solicitor-client privilege and found it unnecessary to deal with the claim to litigation privilege.

[25] ***Singh*** was followed in ***Manah***, where the same fact pattern was in issue.

[26] Similarly, in the well-known case of ***Susan Hosiery Ltd v Minister of National Revenue***, 1969 CanLII 1540 (CA EXC), 2 Ex CR 27 at p 34 the Court found solicitor-client privilege over communications from the client's accountant directly to legal counsel for the purpose of obtaining legal advice for the client. The Court observed:

> What is important to note about both of these rules is that they do not afford a privilege against the discovery of facts that are or may be relevant to the determination of the facts in issue. What is privileged is the communications or working papers that came into existence by reason of the desire to obtain a legal opinion or legal assistance in the one case and the materials created for the lawyer's brief in the other case. The facts or documents that happen to be reflected in such communications or materials are not privileged from discovery if, otherwise, the party would be bound to give discovery of them. ...
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> (Underlining added).

[27] In ***Talisman***, an anonymous whistleblower advised a senior officer at Talisman that one of Talisman's former employees had caused it to enter into contracts with third parties at a time when the former employee had an undisclosed financial interest in these third parties. Later the same day Talisman commenced an investigation headed by one of its in-house lawyers. The documents were created from the date of this first contact to the date Talisman retained counsel to pursue recovery proceedings. Talisman claimed privilege from disclosure of the internal investigation file.

[28] Applications Judge Prowse found that Talisman had not proved litigation privilege. There were two possible purposes of the investigation (contemplation of litigation and compliance with a workplace whistleblower program) but Talisman had obstructed cross-examination about the purpose of the investigation. Consequently, "Talisman has not met the onus which rests on it to establish that the dominant purpose of the investigation was to assist in anticipated litigation because Talisman has prevented the very inquiries necessary to determine the question" (***Talisman*** at para 17).

[29] In contrast, Prowse AJ upheld Talisman's claim to solicitor-client privilege. Prowse AJ started with the proposition that solicitor-client privilege applies to privileged communications between in-house counsel as much as external counsel:

> [35] Legal advice privilege attaches to communications between a solicitor and client for the purpose of obtaining legal advice. It can exist between a client such as Talisman and an in-house lawyer just as it can exist between client and its outside counsel. ...

[30] In answering the question whether appointing a lawyer to head the investigation established conclusively that the investigation was subject to solicitor-client privilege, Prowse AJ concluded that provision of legal advice need only be one of the purposes of the investigation. He held:

> [42] The evidence is clear that one of the purposes of the investigation which was pursued by Talisman was to ascertain the facts in order to get legal advice from their in-house counsel and, if the matter proceeded further, their outside counsel. As such, the investigative file is subject to legal advice privilege.
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> (Underlining added).

[31] ***Gower*** is a leading case on the subject of investigations by lawyers in such circumstances. In that case, a company retained a lawyer to investigate alleged harassment by one of its employees and provide legal (and other) advice based on the findings of the investigation. The lawyer conducted an investigation including witness interviews and reported the witness interviews, fact findings, legal analysis and legal advice.

[32] The Manitoba Court of Appeal held that the entirety of the lawyer's report – both investigative findings and legal advice – were subject to solicitor-client privilege. The Court observed:

> 19 ... Courts have consistently recognized that investigation may be an important part of a lawyer's legal services to a client so long as they are connected to the provision of those legal services. ...
>
> ...
>
> 36 Legal advice privilege is not dependent upon there being litigation in progress or even in contemplation at the time the communication takes place. Nowhere in the definition of legal advice privilege is there any requirement that the communications between the lawyer and his/her client be for the dominant purpose of litigation. Rather, what must be present is the provision of legal advice as one of the purposes of the document, but that legal advice is not confined to a situation where litigation is contemplated.
>
> 37 In the situation at hand, it is clear from the evidence that Janzen was asked to investigate and perform a fact-finding function. If that is all she was asked to do then, regardless of the fact that she is a lawyer, she would not have been providing legal advice and would have been acting as an investigator, not as a lawyer. Consequently, legal advice privilege would not have been available.
>
> 38 However, there is strong evidence that she was asked to do more. The investigation to determine the veracity of the allegations made against the plaintiff was only one part of her tasks. It is clear that the client requested Janzen make recommendations based on the facts that she gathered and provided advice with respect to the legal implications of those recommendations. Thus, the fact gathering was inextricably linked to the second part of the tasks, the provision of legal advice.
>
> 39 The appropriate test is not whether the investigative function performed by Janzen could have been performed by a non-lawyer. It clearly could have, but as the motions judge held, relying on *Wigmore on Evidence*, 1999 supplement (New York: Aspen Law & Business, 1999) at para. 2296, and *In Re Allen*, 106 F.3d 582 (4th Cir. 1997) at para. 26:

> The relevant question is not whether Allen was retained to conduct an investigation, but rather, whether this investigation was "related to the rendition of legal services."

(Underlining added).

[33] However, the solicitor-client privilege in such a case does not necessarily apply to all aspects of a lawyer's investigation. Where a lawyer is retained to provide legal advice and conducts investigations for the purpose of providing it, communications with third parties external to the client (such as retaining an expert to inform counsel) do not necessarily fall within solicitor-client privilege. This principle was established in ***Wheeler v Le Marchant*** (1881), 17 Ch. D. 675 (CA) at pp 682, 684 – 685.

[34] ***Chrusz*** is a modern example of such a case. An insurance company claimed solicitor-client privilege over communications between an independent claims adjuster and the lawyer for the insurer who was retained to provide legal advice on the insured's coverage claim. The adjuster was not representing the insurer, therefore he was not serving as a conduit between solicitor and client. His function was to gather information about an insured's loss from sources extraneous to the insurer.

[35] The Court found that the communications were not solicitor-client privileged. Doherty JA's reasons on solicitor-privilege were adopted by the Court in that case. Doherty JA noted that his reasons do not address communications involving employees of the client and/or the lawyer (*ibid* at p 351, footnote 4) and in that context observed:

> ... the authorities establish two principles:
>
> • not every communication by a third party with a lawyer which facilitates or assists in giving or receiving legal advice is protected by client-solicitor privilege; and
>
> • where the third party serves as a channel of communication between the client and solicitor, communications to or from the third party by the client or solicitor will be protected by the privilege so long as those communications meet the criteria for the existence of the privilege.
>
> (***Chrusz*** at p 352).

[36] The privilege applies to cases where a third party serves as an intermediary or line of communication between solicitor, such as third parties who perform such functions as translating, interpreting, or recording and transmitting client information to enable a lawyer to provide a client with legal advice (***Chrusz*** at pp 352 – 353).

[37] Such cases may include those where third parties who employ an expertise in assembling information provided by the client and explaining that information to the lawyer (***Chrusz*** at pp 353 – 354). Doherty JA characterized ***Susan Hosiery*** as such a case. Another example cited in ***Chrusz*** is ***Smith v Jones***, 1999 CanLII 674 (SCC) where Doherty JA characterized a psychiatrist as an interpreter who assisted the patient in imparting information to the lawyer.

[38] In cases where the third party cannot be described as an agent or mere conduit for the client, Doherty JA observed:

> ... I think that the applicability of client-solicitor privilege to third party communications in circumstances where the third party cannot be described as a

> channel of communication between the solicitor and client should depend on the true nature of the function that the third party was retained to perform for the client. If the third party's retainer extends to a function which is essential to the existence or operation of the client-solicitor relationship, then the privilege should cover any communications which are in furtherance of that function and which meet the criteria for client-solicitor privilege.
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> Client-solicitor privilege is designed to facilitate the seeking and giving of legal advice. If a client authorizes a third party to direct a solicitor to act on behalf of the client, or if the client authorizes the third party to seek legal advice from the solicitor on behalf of the client, the third party is performing a function which is central to the client-solicitor relationship. In such circumstances, the third party should be seen as standing in the shoes of the client for the purpose of communications referable to those parts of the third party's retainer.
>
> 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, or if the third party is retained to act on legal instructions from the solicitor (presumably given after the client has instructed the solicitor), the third party's function is not essential to the maintenance or operation of the client-solicitor relationship and should not be protected.
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> (***Chrusz*** at pp 356 - 357).

[39] Similarly, the British Columbia Court of Appeal in a decision relied on by Prowse AJ in ***Talisman***, rejected the application of solicitor-client privilege to information gathered from sources outside of the client (***College of Physicians of BC v British Columbia (Information and Privacy Commissioner)***, 2002 BCCA 665).

[40] In that case, a lawyer acting for the College of Physicians sought an expert's opinion concerning a complaint about a physician, for the purpose of providing legal advice about the physician's conduct. The expert was not an agent or representative of the client. The Court held that solicitor-client privilege did not apply to the expert's communications with counsel, because the third party was not "performing a function, on the client's behalf, which is integral to the relationship between the solicitor and the client" (*ibid* at para 50).

[41] In contrast, where information is gathered by the lawyer from sources within the client, the Courts are more likely to accept such communications are privileged.

[42] In its reasons in ***College of Physicians of BC***, the Court contrasted the situation before it with ones where the communications in question were between a corporation's employees and legal counsel where privilege was found to apply (*ibid* at paras 52 – 57 citing ***Gower*** and ***Upjohn Co v United States***, 449 U.S. 383 (1981)).

[43] The Court placed ***Gower*** in the category of an investigation by a lawyer, who obtained the factual information from a client's employees (***College of Physicians of BC*** at para 55).

[44] The second example cited by the Court is a decision of the United States Supreme Court, ***Upjohn Co v United States***, 449 U.S. 383 (1981). In this case, the Court found solicitor-client privilege over communications made by a corporation's employees to legal counsel, at the direction of corporate supervisors, in order for the corporation to secure legal advice from

counsel (***Upjohn*** at p 394). The employees were sufficiently aware that they were being questioned so that the corporation could obtain legal advice (*ibid*). The Court observed:

> In the case of the individual client, the provider of information and the person who acts on the lawyer's advice are one and the same. In the corporate context, however, it will frequently be employees beyond the control group as defined by the court below -- "officers and agents . . . responsible for directing [the company's] actions in response to legal advice" -- who will possess the information needed by the corporation's lawyers. Middle-level -- and indeed lower-level employees -- can, by actions within the scope of their employment, embroil the corporation in serious legal difficulties, and it is only natural that these employees would have the relevant information needed by corporate counsel if he is adequately to advise the client with respect to such actual or potential difficulties. ...
>
> ... The control group test adopted by the court below thus frustrates the very purpose of the privilege by discouraging the communication of relevant information by employees of the client to attorneys seeking to render legal advice to the client corporation.
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> (***Upjohn*** at pp 391 – 392).

[45] In ***Canada (Attorney General) v Slansky***, 2013 FCA 199, relied on by the Plaintiff, legal counsel interviewed witnesses who were not speaking on behalf of the client in the course of an investigation conducted for the purpose of providing legal services to a client. The Court refused to extend solicitor-client privilege to these external witness statements (*ibid* at paras 69, 70, 114).

[46] In the present case, like ***Talisman***, there is an issue whether the Defendant has proved the necessary dominant purpose to establish litigation privilege. Therefore, the issue arises whether it is sufficient, to support a claim of solicitor-client privilege, to show that “a” purpose (whether or not a dominant, main, primary or similar purpose) of an investigation conducted by a non-lawyer into non-privileged corporate matters was to provide information derived therefrom to a lawyer to obtain legal advice.

[47] The cases cited by the Defendant where solicitor-client privilege was upheld either involve witness statements of non-privileged events, or assemblies of existing records, that came into existence or were assembled for the sole purpose of communicating same to the lawyer in pursuit of legal advice (***Singh*** and ***Manah***) or cases where a lawyer (or their staff) conducted a fact investigation for the purpose of providing legal advice (sometimes combined with other advice) to their client (***Talisman***). ***Susan Hosiery*** also falls into the first category. ***Upjohn*** and ***Gower*** fall into the second category.

[48] In my opinion, these cases do not necessarily apply to any fact investigation conducted by non-lawyer third parties into sources internal to the client, such as interviews of the client’s employees, where one of the purposes is to communicate the information to a lawyer to obtain legal advice and another purpose is in furtherance of non-privileged corporate operations such as required governance or financial operations.

[49] Solicitor-client privilege is essential to the administration of justice and ensures the free and candid flow of factual and other information between solicitor and client that is necessary to provide legal advice (***Blood Tribe*** at para 9). Its purposes include “promoting frank

communications between client and solicitor where legal advice is being sought or given, facilitating access to justice, recognizing the inherent value of personal autonomy and affirming the efficacy of the adversarial process" (***Chrusz*** at p 348). Autonomy may include the client's ability "to control the dissemination of personal information and maintain confidences" (***Chrusz*** at p 347).

[50] It is particularly important to recognize that "[e]xperience shows that people who have a legal problem will often not make a clean breast of the facts to a lawyer without an assurance of confidentiality "as close to absolute as possible" (***Blood Tribe*** at para 9). Further:

> 2 ... This privilege is fundamental to the justice system in Canada. The law is a complex web of interests, relationships and rules. The integrity of the administration of justice depends upon the unique role of the solicitor who provides legal advice to clients within this complex system. At the heart of this privilege lies the concept that people must be able to speak candidly with their lawyers and so enable their interests to be fully represented.
>
> (***R v McClure***, 2001 SCC 14)

[51] The holding in ***Singh***, which is binding on me, is consistent with the rationale underlying solicitor-client privilege. The statements and other file materials were obtained or created for the sole purpose of transmitting them to counsel for legal advice. The privilege should apply to such communications, even though the information of each employee nevertheless might be compellable through legal processes, because the statements and other file materials were themselves the form of communication to counsel.

[52] However, ***Singh*** does not address the situation where a third party's investigation may have been for two genuine purposes, one to ascertain and transmit information to legal counsel to obtain legal advice and the other to ascertain information to conduct non-privileged corporate operations. Nor does ***Singh*** address whether witness statements or notes would similarly be privileged if not themselves forming part of the communication to counsel.

[53] There is good reason to apply solicitor-client privilege to records created or obtained by a lawyer whose retainer includes accessing the client's files and employees to ascertain the facts and providing legal advice based on such information, whether or not the lawyer might also provide non-legal advice within the same retainer. Forcing disclosure of the lawyer's investigatory work in such a situation would force disclosure of the fact of the lawyer's retainer, the identity of the lawyer, the nature of their retainer, and their concerns, strategies and analyses (ie, their thinking processes). These matters are privileged and may be highly sensitive. Attempting to force severance of the lawyer's investigations of the facts from their legal analysis and advice could seriously erode solicitor-client privilege.

[54] However, many third-party investigations are one or more steps removed from these cases.

[55] First, there is a range of third parties who might be involved with a legal problem in some way. Some may possess specific information on behalf of the client and expertise required by the lawyer to understand the client's affairs, such as the client's accountants or a physician obtaining information from a client operating under some form of disability or illness that precludes them from communicating directly.

[56] In contrast, interviewing employees of companies to ascertain historical facts is ordinary work for lawyers, employers and consultants and not a unique or special skill that can only be provided by qualified third parties. This distinguishes the examples provided by Doherty JA in ***Chrusz***, where the third party's expertise was required for the client to convey information in an understandable fashion to the lawyer.

[57] Second, an investigation might be conducted for both privileged and non-privileged purposes. Corporations ordinarily require information for governance and human resources purposes. It is not necessarily the case that any legal advice purpose should override all other purposes without more.

[58] The spectre of compelled disclosure of such a factual investigation report should not necessarily impede a corporate client in obtaining legal advice. If it had not sought legal advice and nevertheless would have investigated the matter to comply with its ordinary operational or governance requirements, it cannot reasonably expect the almost absolute assurance of confidentiality that comes with solicitor-client privilege.

[59] A disclosing employee who is not disclosing to a lawyer (or their representatives) similarly has no reasonable expectation of confidentiality if the information will be used for ordinary corporate purposes. Information learned by employees in the ordinary course of conducting non-privileged operations, while often confidential, is usually subject to legal requirements to disclose under applicable regulatory or statutory regimes or in law suits. The rationale that clients must be able to speak candidly to their lawyers to ensure the efficacy of legal advisors in the administration of justice does not nearly apply with the same force where the information is actually being gathered for a variety of privileged and non-privileged purposes.

[60] Third, information gathered by a third party fact investigator would not necessarily result in disclosure of privileged information about the existence or nature of a solicitor-client relationship, including: the fact and nature of a lawyer's retainer; the identity of the lawyer; the client's legal concerns, objectives or strategies; and, the thought processes, strategies, or objectives of the lawyer.

[61] In my opinion, a third party's function is not essential to the maintenance or operation of the solicitor-client relationship merely because it conducted a fact investigation into the client's internal sources (records or employee recollections) for both privileged and non-privileged purposes.

[62] A Court would also require evidence on such matters as whether the third party investigator has a specific recognized expertise required by lawyers to communicate with their client or understand the client's affairs, are acting as the client's agent or conduit in communicating with the lawyer, or that the need for legal advice necessitated a more thorough or different type of investigation than would have ordinarily been carried out and some good reason why it could not have been conducted directly by the lawyers.

[63] Without conflating solicitor-client privilege with litigation privilege, it may also be that in cases where solicitor-client privilege is claimed over a third-party fact investigation that was conducted for mixed purposes, the Courts would require evidence on the relative dominance of each of the purposes, similar to the dominant purpose test, to assess solicitor-client privilege claims over such investigations. I do not decide whether such evidence is required. As will be

explained below, the Defendant has not established a dominant purpose or any other reason to find that the Investigator's function was essential to the maintenance or operation of the solicitor-client relationship or within the continuum of privileged communications.

[64] I turn to the Defendant's evidence and admissions in its statement of defence concerning the genesis and purpose of the Investigation.

III Pleadings and affidavit evidence

(a) Introduction

[65] The Defendant submitted that there were two investigations. The first was an initial internal investigation in accordance with the Defendant's Respectful Workplace Policy. Before this investigation was completed, the Defendant received a demand from Complainant 1's lawyer and engaged the Investigator and external legal counsel (Stikeman Elliott) the following day. It submits the dominant purpose of the investigation by the Investigator and the creation of the records therein was in contemplation of litigation by Complainant 1, the Plaintiff, or other employees who were or may have been impacted by alleged harassment in their office. Further, the only purpose was to place the information before Stikeman Elliott for legal advice.

[66] The Defendant bears the onus to prove these factual assertions because it is the claimant of the privileges. The Court must consider its affidavit evidence, and as well any admissions the Defendant might have made in its statement of defence.

[67] If material evidence from the Defendant conflicts with other evidence tendered by the Defendant or with any admissions in its pleadings, then a further issue is whether the Court can resolve the privilege issue in this chambers application.

(b) Pleadings and Defendant's affidavit evidence

[68] To understand the Defendant's pleadings it is necessary to briefly outline the Plaintiff's allegations in the law suit.

[69] In his statement of claim, the Plaintiff claimed the defendant dismissed him without cause and breached its duty of good faith and fair dealing with the Plaintiff including: falsely alleging that the Plaintiff committed harassment in the office while in truth other employees of the Defendant had done so; subjecting him to an inept and unfair investigation to justify cause knowing there were no grounds for cause; and, misrepresenting the nature of the investigation to him including that he would not need a lawyer's assistance due to the routine nature of the investigation and the fact that his conduct was beyond reproach.

[70] The Defendant's statement of defence did not simply deny the allegations. It responded that there was just cause for termination of the Plaintiff's employment and that it treated the Plaintiff fairly. The Defendant further pled in its statement of defence the genesis and purpose of the Investigation; the Investigation process; the receipt of the two complaints leading to his termination; that the Investigation was "fair, thorough and impartial"; that the Investigation found evidence substantiating the allegations and breach of the Defendant's Respectful Workplace Policy; and, that the Defendant's actions constituted grounds for termination for just cause.

[71] With respect to the object of the Investigation, the Defendant pled:

> 13. Upon receipt of the complaint, in accordance with Industrial Alliance's Respectful Workplace Policy and its duty to provide its employees with a safe workplace free from harassment, an investigation into the allegations was commenced. Although initially started as an internal investigation, due to the seriousness of the allegations made against Mr Prosser it was determined that the investigation be carried out by an independent third party and consequently a third party investigator was engaged.
>
> (Defendant's statement of defence, para 13).

[72] As to affidavit evidence, the Defendant's initial affidavit of records and second amended affidavit of records were provided in the present application together with two further affidavits of its corporate representative of May 23, 2019 and December 2, 2022.

[73] The affidavits of records claim privilege over the Investigation report, various Investigator notes and statements from employees during the investigation, and an email from Complainant 2. The affidavits assert solicitor and client or litigation privilege.

[74] Privilege claims in affidavits of records must "state the actual privilege being relied upon with respect to that record and describe the record in a way that, without revealing information that is privileged, indicates how the record fits within the claimed privilege" (***ShawCor*** at para 36, underlining added). In the present case the affidavits of records do not describe the record in a way that indicates how the record fits into the privilege.

[75] In support of its submissions, the Defendant relied heavily on the two affidavits of its corporate representative (the Senior Vice President, Sales) providing evidence with respect to the object, purpose, course and process of the Investigation. These add additional information with respect to the records over which privilege is claimed.

[76] The first affidavit (May 23, 2019) states that after receiving the first complaint:

> 5. In accordance with Industrial Alliance's Respectful Workplace Policy and its general duty to provide its employees with a safe workplace free from harassment, an investigation into the allegations was undertaken. Given the seriousness of the allegations, Industrial Alliance chose to have the investigation conducted by an independent third party.
>
> 6. I am advised by Industrial Alliance's legal counsel that, with their assistance, a third party investigator, [name redacted by Eamon J], was engaged on or around February 28, 2018, to investigate the allegations (the "Investigation").
>
> ...
>
> 9. I am advised by Industrial Alliance's legal counsel that [the Investigator's] investigation report was provided to it and to Industrial Alliance for the purposes of obtaining legal advice with respect to the findings of the investigation and determining the appropriate course of action in light of such findings.

[77] The witness also described, based on information from others: the name of the third party Investigator; the fact the Investigator interviewed several employees in the Calgary office including the Plaintiff and Complainant 1; the Investigator made handwritten notes; the Investigator recorded the interviews; and, during the course of the Investigation, Complainant 2

"came forward" with further allegations against the Plaintiff, which were also investigated by the Investigator.

[78] Noticeably absent from the affidavit is any suggestion that the Investigation, as opposed to the final Investigation report, was conducted for the purpose of obtaining legal advice or that underlying records such as witness interviews were created for the purpose of transmitting same to counsel or for the dominant purpose of contemplated litigation.

[79] The same deponent's second affidavit (December 2, 2022) states that the deponent repeats and adopts the content of their earlier affidavit. This affidavit continues with additional information, including the following:

> 5. Further to paragraphs 5 and 6 of the May 2019 Affidavit, while Industrial Alliance's decision to retain [the Investigator] was in accordance with Industrial Alliance's Respectful Workplace Policy and its general duty to provide employees with a safe workplace, the primary purpose of the Investigation was to inform the legal advice being provided by Stikeman Elliott, primarily with respect to potential litigation. Attached as Exhibit "A" is a copy of Industrial Alliance's Respectful Workplace Policy.
>
> ...
>
> 8. I understand based on information from Stikeman Elliott that Industrial Alliance engaged [the Investigator] to conduct the Investigation on or about February 28, 2018. Considering the Complaint and the communications received from the Complainant and her counsel detailed in the preceding paragraphs, potential litigation both in respect of the Complainant's allegations of constructive dismissal, and in respect of any further action, including terminations, resulting from the Complaint and the Investigation were within the contemplation of Industrial Alliance. As such, based on information from Stikeman Elliott, I understand that Industrial Alliance's primary purpose in engaging [the Investigator] to conduct the Investigation was to ascertain the facts necessary for Stikeman Elliott to provide legal advice as to how to address the Complaint and the potential litigation arising from the Complaint and/or additional facts at that time unknown to Industrial Alliance.

[80] The Defendant's Respectful Workplace Policy ("Policy") is appended to the second affidavit. It provides, *inter alia*, for a process to make and resolve workplace complaints.

[81] The Policy provides for the following objectives:

> The Company's objectives in implementing this policy are to:
>
> • Maintain a harassment-free environment in order to protect the physical and psychological integrity of its employees and to safeguard their dignity.
>
> • Contribute to awareness, information and training in the workplace in order to prevent harassing behaviour.
>
> • Promote open communication, prevention and prompt resolution of harassment situations.

- Provide employees with the necessary support by setting up assistance and recourse mechanisms.

(Policy at p 1).

[82] The Policy designates individuals (or groups) to act for the Defendant in processing complaints. Such persons are designated "contact persons" or two or more contact persons may be called upon to form a review committee to process a complaint. Based on review committee needs, an individual from the legal department will be called upon to become a member of the review committee (Policy at p 5).

[83] The Policy provides for investigation as follows:

INVESTIGATION

When a formal written complaint has been filed, the Contact Person or the Review Committee shall immediately (within 10 days following receipt of such complaint) review the complaint to determine whether the subject of the complaint falls within the parameters of this policy and warrants an investigation.

- The investigation shall be carried out discreetly so as to protect the reputation of the individuals involved.
- The investigation shall enable the individuals involved to be heard. They may be asked to provide a written, signed statement of their version of the facts.
- The Contact Person or Review Committee, if applicable, may interview the individuals whose names have been given by the individuals involved.
- The parties involved shall be informed of their rights, responsibilities, the nature of the complaint and the progress of the intervention by the Committee members.
- The Contact Person or Review Committee, as the case may be, will:
    1. investigate the situation or retain the services of an independent third party to investigate
    2. determine if harassment has taken place, based on the information presented
    3. recommend corrective action, if required
    4. recommend immediate and long term preventative measures required so that the situation does not happen again
    5. informs the individuals involved
    6. report of the results of its investigation and recommendations to the persons concerned

(Policy at p 6).

[84] It is notable that the process contemplates an internal or external investigation, a requirement that all parties are enabled to be heard, recommendations for corrective actions and future preventative measures, and reporting to the persons concerned.

[85] The Policy further provides that the "accused" is subject to disciplinary measures or sanctions ranging from a reprimand to dismissal. A complainant who acts frivolously, vexatiously, or files a false complaint is also subject to disciplinary measures (Policy at p 7).

[86] Finally, the Policy provides for confidentiality, except to the extent disclosure is necessary for the Defendant to remedy the situation, or disclosure to appropriate authorities is required by law (Policy at p 7). It does not mention investigations or their contents being subject to solicitor-client or other form of privilege, or that the purpose of the investigation is to obtain legal advice.

[87] There is no evidence that the law firm effectively used the human resources consultant as its instrument to gather information, included it within its privileged deliberations, or worked closely with it in investigating the facts.

[88] There is no evidence that the Defendant abandoned the requirements of the Policy.

[89] There is no evidence or any circumstance suggesting that the Investigator possessed or required expertise to conduct interviews of non-privileged historical events, or that the lawyers required assistance in interpreting or acquiring client information directly.

[90] There is no evidence that the scope or thoroughness of the Investigation changed with the appointment of the Investigator.

(c) Findings on Defendant's affidavit evidence

[91] Generally speaking, the Court usually cannot try credibility issues on conflicting affidavit evidence in a chambers application. During the hearing, I raised the issue whether the two affidavits of the Defendant's corporate representative are conflicting on the fundamental issue of the purpose of the Investigation and creation of the records therein. If so, must the Court refer the records production application to an oral evidence hearing or trial of an issue or might the Court resolve the matter in a just, proportionate and more timely fashion in this chambers application without oral evidence or cross-examination in Court on the point?

[92] I raised a further issue whether it is appropriate for the Defendant's law firm to both inform the deponent on the controversial factual issue of the purpose of the Investigation and the creation of the records over which privilege is claimed, and act as advocate on the application. If not, can the information and belief of the deponent derived therefrom be accepted by the Court?

[93] In supplemental submissions, the Plaintiff submitted the Court can resolve this application in the face of the apparently conflicting evidence from the same deponent and that doing so would be fair, just and proportionate.

[94] The Plaintiff relies on ***Sandhu v Siri Guru Nanak Sikh Gurdwara of Alberta***, 2015 ABCA 101, where the Court refused to interfere with the Chambers Justice's decision to proceed in the face of conflicting affidavit evidence tendered by one party. It reasoned:

> [78] In *Nieuwesteeg v Barron*, 2009 ABCA 235, 460 AR 329, this Court concluded that a chambers judge should direct that a matter be tried, or at least that oral evidence be heard where he or she is unable to resolve conflicting affidavit evidence. Credibility cannot be tried "merely by reading affidavits which conflict on primary facts": *Charles v Young*, 2014 ABCA 200 at para 4.

[79] However, last year the Supreme Court of Canada in *Hryniak v Mauldin*, 2014 SCC 7, [2014] 1 SCR 87 determined that the fact that some conflict exists in the affidavit evidence of opposing parties in an application for summary judgment does not mandate setting the matter for trial in every situation. Where the judge finds that he or she can make a fair and just determination on the merits of the application, it should proceed without oral evidence. This arises where the judge can make the necessary findings of fact and apply the law to those facts. This is often a proportionate, more expeditious and less expensive way to achieve a just result than a trial.

[80] This approach to litigation economy may also be applied to this application which, like a summary judgment application, addressed issues which resolved the litigation in its entirety.

[81] Therefore, conflict on certain points in the parties' affidavits does not alone mean it should have been adjourned for oral testimony or a full trial. It may be that the conflicts do not arise on essential facts. It may be that analysis shows no factual conflict exists, but only a conflict of the litigants' separate opinions. It may be, as here, that one party relies on several affidavits, which contain internally conflicting evidence, including some evidence which agrees with or supports the evidence lead by the opposite party, and thus amount to admissions against interest. It may be that issues can be resolved on the basis of those portions of the affidavits which are not in dispute, as in *Seymour Resources Ltd. v Hofer*, 2004 ABQB 303 at para 20, [2004] AJ No 1087.

[82] The conflict here is said to arise from the affidavit evidence of Jarnail Randhawa that each membership applicant was rejected for one of four reasons, and not because of their association with Messrs. Sandhu and Hundle. However, the Society's initial affidavit from Bikkar Randhawa evidenced the opposite, that some of the 80 were rejected simply because of association with Messrs. Sandhu and Hundle, or with those launching an earlier application for redress from the same oppressive conduct as that alleged here.

[83] The chambers judge found that he was able to resolve the conflicting affidavit evidence because some of the Society's evidence confirmed the respondent's evidence on this key point. He also resolved it by concluding that reduced weight should be attached to Jarnail Randhawa's evidence, essentially because of actions leading to the conclusion Mr. Randhawa was attempting to engineer further delay or circumstances which practically-speaking precluded his being tested on his credibility. In addition, he offered little detail or particulars to support his evidence, particulars which should have been readily available to him as a member of the Religious Committee. A chambers judge has discretion to assign different weight to different affidavits as here: *Leis v Leis*, 2014 ABCA 36 at para 45, [2014] AJ No 73.

[84] The chambers judge's conclusion that he could make a fair and just determination on the merits of the application based on the evidence before him is also supported by the fact that he expressly asked the Society's counsel if he wanted a trial if he found there was a conflict of evidence based on affidavits and

> examinations on affidavits, to which counsel replied "We don't wish to have one".
>
> [85] His conclusion to proceed to make a determination on the basis of the affidavit evidence plus the results of any questioning on those affidavits was thus reasonable, and should be accorded deference.
>
> (Underlining added).

[95] Plaintiff's counsel further submits that lawyers should not give evidence, by informing the deponent on matters of substance, where they are also appearing as counsel on the case (***Meier v Honda Motor Co*** (1991), A.R. 241 (AJ) at p 248; ***Crouser v 493495 Alberta Ltd***, [1996] A.J. No. 967 (Alta QB)). Counsel submits the portions of the affidavits reliant on information from Stikeman Elliott be struck out.

[96] In this regard, the law Society of Alberta Code of Professional Conduct provides:

> 1.1-1
>
> ...
>
> "lawyer" means an active member of the Society, an inactive member of the Society, a suspended member of the Society, a student-at-law and a lawyer entitled to practise law in another jurisdiction who is entitled to practise law in Alberta. A reference to "lawyer" includes the lawyer's firm and each firm member except where expressly stated otherwise or excluded by the context;
>
> ...
>
> 5.2-1 A lawyer who appears as advocate must not testify or submit his or her own affidavit evidence before the tribunal unless permitted to do so by law, the tribunal, the Rules of Court or the rules of procedure of the tribunal, or unless the matter is purely formal or uncontroverted.

[97] These extracts reflect the boundaries of ethically permissible evidence from lawyers in contested matters (***Holden v Holden***, 2022 ABCA 341 at para 50 and footnote 37 and authority cited therein). The same rule applies to information from a lawyer to a deponent: a lawyer must not inform the deponent on contested issues of fact and appear as advocate in the matter.

[98] In some cases the lawyer might be the only source of necessary evidence. In such cases, the Court might permit another lawyer from the same law firm to argue the specific application or make other arrangements such as a temporary appearance by a lawyer from a different firm to avoid undue cost or delay associated with changes of law firm. Such accommodations should normally be addressed in advance.

[99] The Respondent submitted that the two affidavits do not conflict.

[100] The Respondent submitted the second affidavit builds on and clarifies the first affidavit. The first affidavit stated the Defendant had serious concerns about the Plaintiff's conduct, while the second affidavit further details those concerns.

[101] Further, the Defendant submits that if there is inconsistency, the Court should nevertheless resolve the matter in chambers in favour of the Defendant. It also relies on the

Sandhu case, as well as Rule 1.2(2)(b) of the Alberta Rules of Court and Renke J's reasoning in ***R Floden Services Ltd v Solomon***, 2015 ABQB 450 at paras 18-24.

[102] Counsel further submits that the deponent's evidence is not contentious, therefore counsel may inform the deponent on the point under consideration. In any event the evidence is nevertheless admissible.

[103] The Respondent further submits that were I to strike its evidence, I should also strike the affidavit filed in support of the Plaintiff's application, being an affidavit of a legal assistant of the Plaintiff's law firm, leading to the absurd result of there being no evidence before the Court.

IV Analysis

[104] I must consider whether the records or information were privileged, and if so whether the Defendant waived the privilege.

(a) Whether records were privileged.

[105] The Defendant bears the onus to prove the privilege claims.

[106] With respect to solicitor-client privilege, the Defendant submits that the Investigation information was assembled by the Investigator for the purpose of providing it to Stikeman Elliott so that the lawyers could provide accurate legal advice, including with respect to prospective litigation. It submits that the Investigator leveraged its expertise and experience in human resources and workplace investigations to discover, assemble, compile, and communicate the relevant information to Stikeman Elliott. In this regard, the Investigator was authorized to communicate directly with Stikeman Elliott and acted as a conduit of information between the Defendant and its external legal counsel.

[107] As to litigation privilege, the Defendant submits the records were created for the dominant purpose of anticipated litigation.

[108] The Defendant claims these purposes existed at the outset of the Investigation, as opposed to either purpose evolving over time.

[109] All of the records sought appear to have been created in the Investigation by the Investigator, with the exception of emails from Complainant 2 listed in the Second Supplemental Affidavit of Records. These were created by Complainant 2 and received by the Investigator.

[110] If the investigation was for a privileged purpose, it would be a fair inference that the records created by the Investigator were for the same purpose. However, as explained below I would not make the same inference with respect to the complaint from Complainant 2.

[111] I do not agree with the Respondent's submission that the two affidavits of the Defendant's corporate representative do not conflict. The earlier affidavit states that the Investigation was in accordance with the Policy and the Defendant's obligations to its employees to ensure a safe workplace. It states that the Investigator's report was to obtain advice from counsel.

[112] This affidavit does not address the investigation records or information that was gathered (statements, notes, transcripts) or depose that they were created for the purpose of informing counsel or transmitting to instruct counsel or that the Investigation generally was for privileged purposes.

[113] These are significant omissions. The Respectful Workplace Policy should not be lightly assumed to be an unimportant operational process. To the contrary, the Policy emphasizes the importance and need for a complaints process (Policy, page 1, “Introduction” and “Purpose”). It emphasizes that where an investigation is warranted the company must provide opportunity for both complainant and “accused” (in the wording from the Policy, page 7, “Disciplinary Measures and Sanctions”) to “be heard” (Policy page 6). This imports a meaningful opportunity to be heard. In the case of a complainant, it would at least permit the accused to know the specific allegations against them in order that they could respond. The company representatives under the Policy (a “Contact Person” or “Review Committee”) must investigate, decide, report, recommend corrective and future preventative actions if any, and inform the individuals involved (Policy at p 6).

[114] In short, the Policy serves an important function to protect and preserve the wellbeing and dignity of the Defendant’s employees.

[115] The first affidavit is consistent with the representation in the statement of defence (filed June 25, 2018) as to the object and genesis of the Investigation. This affidavit does not establish litigation privilege, because it does not demonstrate that the dominant purpose for creating the records or acquiring the information was in contemplation of litigation. I am not prepared to assume or infer that the non-privileged operational purpose under the Policy was not also an equally important purpose.

[116] As to solicitor-client privilege, the Defendant’s first affidavit demonstrates that the purpose of the Investigator’s final report was to inform counsel and the Defendant to obtain legal advice and determine the appropriate course of action. The final report is probably solicitor-client privileged as one prepared to obtain legal advice. The Plaintiff does not seek disclosure of the Report, therefore I have not found it necessary to suggest to the parties that I review the report to come to a final determination whether it is privileged.

[117] However, the Defendant’s first affidavit does not demonstrate that the Investigation and the records and notes created therein was for the sole (or even a dominant, main or primary purpose) of obtaining legal advice. Again, I am not prepared to assume or infer that the Defendant abandoned its objectives under the Policy which are properly characterized as non-privileged corporate operational objectives: to discharge its human resources undertaking to its employees to provide an effective complaints resolution process and recommend corrective action, and to implement governance objectives by considering whether to recommend preventative measures for the future.

[118] With the second affidavit, I am being asked to accept a different interpretation of the events – that the company started an internal investigation under the Policy but quickly dropped it and replaced it with an external investigation with the purpose only to prepare for litigation and obtain legal advice.

[119] The second affidavit is not a clarification. It is a significant revision. A privileged investigation is a substantially different process than a Policy investigation.

[120] The Policy contemplates an investigation may be conducted by the company representatives or by an “independent third party”. It contemplates that an outcome, report and operational recommendations are to be forthcoming from the company representatives appointed to act under the Policy. It does not mention privilege over the investigation. It contemplates the

investigation may be disclosable where required by law. If the outcome of investigation, as referenced in the required report to the parties, were termination, discipline or sanction, the accused party would reasonably expect to have access to the case against them in the event they wished to challenge the decision. That expectation further suggests the Policy investigation would not be privileged.

[121] Can the claim to privilege be resolved in a fair, just and proportionate fashion in this special chambers application?

[122] The answer is, yes. The Court need not necessarily resort to an oral hearing where the conflicting affidavits come from the same side and one can reasonably be construed as an admission against interest (***Sandhu*** at para 81).

[123] It is fair and just to hold the Defendant to the admission in the first affidavit. It made the same admission in its statement of defence. The Defendant had ample opportunity to present evidence and explanations of the inconsistencies in its evidence.

[124] I do not find it necessary to address the Plaintiff's request to strike information provided to the Defendant's deponent by Stikeman Elliott. I have assumed the evidence is admissible, but for the above reasons the Defendant has presented unexplained, contradictory information. The fact the contradictions come from legal counsel, who as informants rather than deponents are insulated from cross-examination, is part of my serious concern over the lack of explanation.

[125] Further, proportionality requires that this long pending disclosure dispute be resolved without the expense and delay of an oral evidence hearing on the chance that the Defendant might modify or further explain its evidence.

[126] Given this sophisticated Defendant has had a fair opportunity to explain the contradictions, the matter should be resolved on the basis that it has not discharged its onus of proof by providing unexplained, contradictory information.

[127] If I had found the purpose of the Investigation was privileged, I would nevertheless have refused to find privilege over Complainant 2's complaint.

[128] The mere fact Complainant 2 emailed the Investigator or "came forward" in the course of the Investigation is not sufficient proof of either privilege. The evidence does not indicate why or under what circumstances Complainant 2 chose to email the Investigator. It is reasonable to think, in the absence of contrary evidence, that they were simply making additional complaints under the Policy.

[129] The onus is on the Defendant. It has had ample opportunity, with capable legal advice, to file evidence in support of its case. It has not proved Complainant 2's emails were created for the purpose of the Investigation.

[130] Consequently, I refuse to find that the Investigation or its underlying records were created for the dominant purpose of litigation or are subject to solicitor-client privilege.

(b) Waiver

[131] If the records were privileged, I would have found the privilege was waived.

[132] Both parties appear to accept that reliance on privileged information in a pleading can constitute a waiver of privilege. The Defendant accepted the Plaintiff's description of applicable law as follows:

> The Alberta Court of Appeal affirmed that privilege can be waived expressly or impliedly through conduct. Waiver of privilege is ordinarily established where it is shown that the possessor of privilege knows of the existence of privilege and voluntarily evinces an intention to waive that privilege. Further, waiver may also occur in the absence of intention to waive, where fairness and consistency so require. Waiver of privilege as to part of a communication will be held to be waiver as to the entire communication.
>
> [footnotes deleted]

[133] A party may impliedly waive solicitor-client privilege where it relies in part upon the privileged communications to either ground its claim or base its defence to a claim made against it. In ***Petro Can Oil & Gas Corp v Resource Service Group Ltd***, 1988 CanLII 3474 (AB KB), Mason J observed:

> ... It is well accepted that a party may impliedly waive solicitor-client privilege where it relies in part upon the privileged communications to either ground its claim or base its defence to a claim made against it: see ***Rogers v. Bank of Montreal***, 1985 CanLII 397 (BC SC), [1985] 4 W.W.R. 503, 61 B.C.L.R. 239, 57 C.B.R. (N.S.) 251 (S.C.), affirmed 1985 CanLII 141 (BC CA), [1985] 4 W.W.R. 508, 62 B.C.L.R. 387, 57 C.B.R. (N.S.) 256 (C.A.); ***Alta. Wheat Pool v. Estrin***, 1986 CanLII 1785 (AB KB), 49 Alta. L.R. (2d) 176, [1987] 2 W.W.R. 532, 14 C.P.C. (2d) 242, 75 A.R. 348 (sub nom. ***Alta. Wheat Pool v. Dawson Resources Ltd***.) (Q.B.). The underlying rationale for finding implied waiver in such circumstances is based on fairness. It would be unfair to permit a party who has set up a claim or defence based on privileged communications to preclude his opponent from discovering against that claim by relying upon the privilege. If privilege were successfully raised, the opponent would be left with no reasonable method for exploring the validity of the claim or defence: see Wigmore on Evidence (McNaughton revision), vol. 8, at paras. 2327 and 2388; and J.N. Craig, "Privilege in Discovery of Documents" (1985), 23 Alta. L. Rev. 388 at p. 393 ....

[134] A mere denial of the Plaintiff's allegations would not effect a waiver of privilege (***PetroFrontier Corp v Macquarie Capital Markets Canada Ltd***, 2022 ABCA 136 at para 49). Rather, the analysis is guided by the following passage from 8 J. Wigmore, *Evidence in Trials at Common Law* 635-36 (J. McNaughton rev. 1961):

> What constitutes a *waiver by implication*? Judicial decision gives no clear answer to this question. In deciding it, regard must be had to the double elements that are predicated in every waiver, i.e., not only the element of implied intention, but also the elements of fairness and consistency. A privileged person would seldom be found to waive, if his intention not to abandon could alone control the situation. There is always also the objective consideration that when his conduct touches a certain point of disclosure, fairness requires that his privilege shall cease whether he intended the result or not. He cannot be allowed, after disclosing as much as he pleases, to withhold the remainder.
>
> (***PetroFrontier Corp*** at para 45).

[135] The Defendant further submitted that reliance on an investigation report would not necessarily imply waiver of privilege over the underlying investigation materials. I agree that as a matter of law, waiver of privilege over the report does not necessarily effect a waiver over underlying materials. This depends on the circumstances.

[136] The Plaintiff submits waiver occurred because (1) the Defendant relied on the investigation report as an element of its defence; (2) fairness and justice require a waiver; (3) the Defendant relied on the underlaying investigation materials to base its defence.

[137] The Defendant submits that it has not relied on the Investigation report or Investigation materials, therefore no waiver occurred.

[138] As mentioned, the Plaintiff pleads both dismissal for cause and unfair treatment in respect of dismissal. In this context, the Defendant's statement of defence relies on the two complaints (paras 12, 14) and the following assertions: the investigation was fair, thorough and impartial (paras 15, 24); the Investigator interviewed "the Complainant and several witnesses" (para 15); the Plaintiff "was given a full opportunity to respond to the allegations made against him and to provide his response to them" (para 15); the Investigation was conducted in accordance with the Respectful Workplace Policy (para 15); the Investigation found that the evidence supported the allegations of harassment, breach of the Policy, and creating an uncomfortable and poisoned work environment (para 18); the Investigation substantiated the complaints (para 19, 25); given the Investigation findings the Defendant had just cause to terminate the Plaintiff's employment (para 20, 25).

[139] The Defendant does not say merely deny the allegations. It voluntarily goes much further. It expressly relies on the receipt of the two complaints and the Investigation results in its decision to terminate. In response to allegations that it treated the Plaintiff unfairly, it places in issue the manner in which the Investigation was conducted including pleading that the Plaintiff was given a fair opportunity to respond to the allegations. It explicitly relies on the sufficiency of the evidence obtained in the Investigation and the findings of the Investigation.

[140] These issues cannot be challenged by the Plaintiff without disclosure of the Investigative process, steps, and conduct of the Investigation, and the evidence gathered. As mentioned, the Plaintiff does not seek the Investigation report, so I have not considered waiver of the report itself.

[141] The Plaintiff established that the Defendant waived any privilege that otherwise applies to any of these aspects of the Investigation including the names of the Complainants and underlying evidence, information, notes, or communications received by the Investigator in the course of the Investigation.

(c) Other matters

[142] In view of my conclusion that the evidence tendered by the Defendant does not prove a potential privilege existed, I did not find it necessary to suggest that I review any purportedly privileged records.

[143] I commented earlier on the Defendant's use of counsel to inform the deponent on contested matters. The Plaintiff's affidavit also requires comment. It was sworn by a legal assistant and contains

(a) narrative on controversial issues,

(b) information from counsel on substantive matters,

(c) expressions of belief in the relevance and materiality of undertaking requests,

(d) legal argument including who bears the onus to prove a privilege claim, what they must prove, and expressions of belief whether such documents are privileged and if so, whether privilege was waived.

[144] Obviously, this affidavit was prepared by a lawyer in the Plaintiff's law firm (not necessarily the lawyer who appeared to argue the application). These comments should not be taken to reflect poorly on the assistant or counsel who appeared to present oral submissions on this application.

[145] There is no objection to an assistant exhibiting Court filed or other formal litigation documentation such as pleadings, undertaking requests or responses, transcripts, or relevant correspondence between opposing counsel ***(Canada (Attorney General) v Andronyk***, 2017 ABCA 139 at para 21 (Watson JA in chambers)). It is sometimes permissible to include some narrative evidence to orient the reader and help them understand the affidavit.

[146] However, affidavits should not contain information from counsel on substantive matters, excessive and unnecessary narrative, or legal argument or opinions as to the sufficiency of the opposing party's evidence.

[147] Consequently, I have accepted as evidence the exhibits to the assistant's affidavit (other than exhibit 15, which is additional narrative and argument) but not the various other assertions, narratives and arguments in the affidavit that are unhelpful and unnecessary in understanding and resolving the application.

[148] I remind counsel who prepared this affidavit that affidavits are for evidence, not argument, and that the swearing of an affidavit by a legal assistant working for a party's counsel of record is not acceptable other than for non-controversial matters (eg, ***Paquin v Lucki***, 2017 ABCA 79 at para 9 (Strekaf JA in chambers); ***Calf Robe v Canada***, 2006 ABQB 652, para 11).

[149] I also provide the following comments mindful that the underlying investigative records remain in the possession of the Investigator and have not been delivered to the Defendant or Stikeman Elliott.

[150] To date, the Defendant has not only refused to disclose the Investigation materials and undertaking requests to disclose those records, but also has refused to disclose all allegations of misconduct asserted in the action (Undertaking 68), the name of Complainant 2 (Undertaking 64), all information of inappropriate conduct by the Plaintiff that Complainant 2 observed or knows (Undertaking 65), the names of those who witnessed the matters referenced in para 15 of the statement of defence (Undertaking 74), information of what TJ saw or heard with respect to a specific incident (Undertaking 75), any information of who saw or heard a certain incident (Undertaking 76), information of who saw or heard a certain comment about shorts (Undertaking 77), any information the Defendant has of what KC or TJ saw or heard with respect to a specific incident (Undertaking 79), information the Defendant has regarding any of the allegations that was not provided in the third party investigation (Undertaking 80), and who was present when the Plaintiff made a specific statement (Undertaking 81).

[151] The Defendant's response to undertaking requests mostly has been that it does not have information apart from the Investigation and that the Investigation is privileged.

[152] I note that pursuant to Rule 5.4 the Defendant's corporate representative must reasonably inform himself of all the allegations in the statement of defence. Even if the records had been privileged, this would not relieve the Defendant of its obligation to make reasonable efforts to inform itself of the events by inquiring directly with its present and former employees. The Plaintiff also has rights of direct examination of present and former employees under Rule 5.17.

[153] It might be that the production of the privileged materials does not fully answer the all the undertaking requests. If there are other issues around the sufficiency of the Defendant's answers should it provide only the records over which privilege was claimed, these reasons do not address them. The parties would need to return to an Applications Judge to resolve such matters.

[154] I remind the parties that if the Defendant has not got control of the records sought in this application (ie, if it argues that the consultant's records are not in the Defendant's control), the Defendant nevertheless has obligations under Rule 5.4 to make reasonable efforts to inform itself, which may include speaking to current and former employees of the Defendant. Also, a third party records application is available to obtain the records directly from the consultant or even to compel the consultant to submit to examination (Rule 5.17). Such applications are not precluded by these reasons.

V Conclusion

[155] The Defendant is ordered to (1) disclose to the Plaintiff the name of Complainant 2 and particulars of their allegations; (2) provide to the Plaintiff's counsel of record, copies of the investigation materials (other than the investigation report) including a complete set of communications from both Complainants and interview transcripts and notes to the extent they are within the Defendant's control; (3) provide the Plaintiff's counsel of record an amended affidavit of records complying with its disclosure obligations for non-privileged records.

[156] If the privilege rulings herein do not fully resolve the refusals to answer Undertakings 64, 65, 68, 74 – 77, and 79 – 81, a party may apply to an Applications Judge, or a Justice in Chambers if permitted by the presiding justice, for further directions.

[157] In the event any relevant and material records or information appear outside the control of the Defendant such that a party wishes to bring a third party records disclosure application or application to examine the Investigator on notice to the Defendant and Investigator, a party may apply to an Applications Judge, or a Justice in Chambers if permitted by the presiding justice, for further directions.

Heard on the 16th day of August, 2023; supplemental submissions the 15th day of September 2023.
Dated at the City of Calgary, Alberta this 14th day of February, 2024.

J.T. Eamon
J.C.K.B.A.

Appearances:

Stewart LaPrairie, of Sawers Barristers and Solicitors
for the Applicant Plaintiff

Cheryl Rea, of Stikeman Elliott
for the Respondent Defendant