

EMPLOYMENT LAW CONFERENCE – 2010 (DAY 1)

Paper 6.1

The Law on Workplace Investigations: Update on Key Developments

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THE LAW ON WORKPLACE INVESTIGATIONS: UPDATE ON KEY DEVELOPMENTS

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I. INTRODUCTION

The purpose of this paper is to provide an update on some key developments on the law relating to workplace investigations, with a particular focus on recent BC court cases.

This paper does not purport to be a comprehensive overview on the law pertaining to workplace investigations and does not address, for example: (1) the duty to investigate workplace incidents under occupational health and safety legislation; (2) the duty to investigate alleged breaches of human rights legislation, other than in a very cursory manner; and (3) the “investigation” provisions/exceptions in privacy legislation. Rather, it is a review of some key issues, cases and developments that may be of interest to the employment law community.

I conclude the paper by setting out some additional items that employment lawyers may want to add to their workplace investigation checklists.

II. DOES AN EMPLOYER HAVE A COMMON LAW DUTY TO PROVIDE THE EMPLOYEE WITH A FAIR HEARING/CONDUCT AN INVESTIGATION?

In *van Woerkens v. Marriott Hotels of Canada Ltd.*, 2009 BCSC 73 at para. 149 (“*van Woerkens*”), the court confirmed that “at common law, where the relationship between the parties is governed by a contract of employment, the employer is under no legal duty to provide a fair hearing to an employee before terminating the employment contract”.^{1 2}

¹ Note: this applies to “ordinary” (also called “master- servant” or “contractual”) employment relationships. However, there can be a requirement of procedural fairness where there is no contract of employment or where it is imposed by statute: *Dunsmuir v. New Brunswick*, 2008 SCC 9 at para. 115-16; see also *Elgert v. Home Hardware Stores Limited*, 2010 ABQB 43 at para 23-24; *Leach v. Canadian Blood Services*, 2001 ABQB 54 at paras. 142-43. This paper focuses on “ordinary” employment relationships.

Further, the failure to investigate or investigate properly will not render the employer's decision to terminate the employee for just cause invalid: *van Woerkens* at para. 149; *Leach v. Canadian Blood Services*, 2001 ABQB 54 at paras. 145 & 149 ("*Leach*").

In part, this is because in a just cause wrongful dismissal action, "Any concerns about the fairness or impartiality of the employer's investigation is effectively removed by the complete and impartial assessment of the facts undertaken by this court at trial": *Leach, supra*, at para. 158.

Nevertheless, in many cases the courts have noted the importance of an employer engaging in a fair process or providing the employee with an opportunity to respond: *Leach, supra*, at para 147. Further, there can be significant consequences for an employer that does not investigate, or conducts a flawed investigation.

III. WHAT EXPOSURE TO LIABILITY/DAMAGES DOES AN EMPLOYER FACE FOR FAILING TO PROPERLY CONDUCT AN INVESTIGATION?

Even though there is no common law duty to investigate workplace misconduct, employers are well advised to do so in light of the exposure to liability/damages that can result from not investigating, or not properly investigating, workplace misconduct.

A. Dismissal for Just Cause Not Supported

The most obvious way that the failure to investigate, or an improper investigation, can expose an employer to liability/damages is that the employer will make its decision to terminate for just cause on the basis of facts that do not stand up to scrutiny. As the court stated in *van Woerkens, supra*:

...an employer that fails to conduct an adequate and fair investigation into an allegation of sexual harassment or other misconduct and does not afford the employee a reasonable opportunity to respond to the allegations of misconduct, runs the risk that it may not be able to discharge the burden of establishing cause for dismissal (at para. 150).

i. Allegations of serious misconduct - theft, fraud, dishonesty, criminal conduct, etc.

This risk is particularly apparent in cases where the allegations of misconduct pertain to dishonesty, theft, criminal conduct and perhaps other serious misconduct such as sexual harassment. Although the balance of probabilities standard still applies in such cases, a more "vigorous assessment" of the evidence or a "higher degree" of probability is required in light of the stigma attached to such allegations: *Strauss v. Albrico*, 2007 BCSC 197 at para. 37 ("*Strauss*"); *Porta v. Weyerhaeuser Canada Ltd.*, 2001 BCSC 1480 at para. 10 ("*Porta*").

² Terms and conditions pertaining to procedural fairness, including the conduct of investigations, could of course always be addressed in the contract of employment: see *Dunsmuir v. New Brunswick, supra*, at para. 104.

ii. **Contextual approach**

The courts have noted that investigations must be sufficiently expansive to satisfy the “contextual approach” for determining just cause, set out by the Supreme Court of Canada in *McKinley v. BC Tel*, 2001 SCC 38. As stated by Cullen J. In *Porta, supra*:

...the requirement of a contextual approach and an analysis of the nature and circumstances of the misconduct established by McKinley places an onus on a defendant asserting just cause to take a similar contextual approach in its investigation of misconduct and in its determination of the appropriate sanction. Where the investigation conducted in the first instance by a defendant asserting just cause is insufficiently broad to establish the full nature and circumstances of the misconduct and thereby the ability of the court to conduct the sort of analysis envisaged in McKinley is impaired, it follows that the defendant will similarly be impeded in discharging its onus of proof in connection with its claim of just cause (at para. 14).

See also *Strauss, supra*, at para. 39.

B. Damages for Bad Faith or Unfair Dealing in the Manner of Dismissal

In *van Woerkens, supra*, the court stated:

An employer who fails to investigate the validity of allegations against an employee, and as a result is unable to establish cause, runs a further risk. If the employer draws unfounded conclusions damaging to an employee’s reputation without affording the employee any opportunity to answer those allegations, it exposes itself to a claim for damages for breach of its obligation of fair dealing in the manner of termination of the employment contract...(at para. 152).

There are several pre-*Honda v. Keays* cases in which the failure to investigate, or investigate properly, served as the basis for awarding *Wallace* damages (an extension of the notice period). See for example:

- *Stone v. SDS Kerr Beavers Dental, A Division of Sybron Canada Ltd.* [2006] O.J. No. 2532, aff’d 2007 ONCA 543;
- *Geluch v. Rosedale Golf Assn., Ltd.* [2004] O.J. No. 2740; and
- *Robinson v. Fraser Wharves Ltd.*, 2000 BCSC 199.

Notably, the courts refrained from awarding *Wallace* damages in cases where the employer’s investigation into the employee’s alleged theft was insufficient, but the employer had objectively justifiable grounds to believe that the theft occurred. See for example: (1) *Strauss, supra*; (2) *Porta, supra*.

C. Punitive Damages

There have been several cases in which an award of punitive damages has been awarded to the plaintiff based, at least in part, on the employer’s failure to investigate or investigate properly, before dismissing for just cause. For example:

- In *Nishina v. Azuma Foods (Canada) Co. Ltd.*, 2010 BCSC 502, the employer was ordered to pay \$20,000 in punitive damages for dismissing the employee for just cause because *inter alia* it did not properly investigate the allegations of misconduct.³
- In *Elgert v. Home Hardware Stores Limited*, 2010 ABQB 73 (CanLII), a jury found that a senior manager did not sexually harass two subordinates and was entitled to *inter alia*: (1) \$300,000 in punitive damages; (2) \$200,000 in aggravated damages; and (3) a 24 month notice period.⁴ Key to the plaintiff's case was that the employer had conducted a flawed investigation. The employer is appealing.

D. False Imprisonment

In *Kalsi v. Greater Vancouver Associate Stores Ltd.*, 2009 BCSC 287, the court awarded a terminated employee \$6,500 in damages for "false imprisonment" during the employer's theft investigation.

The plaintiff had been employed as a mechanic at a Canadian Tire store. He was accused by the store's security officer of stealing a light bulb from the store while off duty. Upon confronting him, the store's security officer told the plaintiff to follow him up to the lunchroom. Once in the lunchroom, it was the plaintiff's evidence that he was *inter alia*:

- questioned by the security officer;
- required to write out a statement by the security officer;
- told by the security officer that he should contact a lawyer, but then told not to answer the call when the lawyer phoned;
- required to wait for about an hour for the security's officer supervisor to arrive and then questioned by the supervisor for a period of time; and
- crying, shaking and upset by the end of the meeting.

In total, the plaintiff was in the lunch room for two and a half hours. There was no mention in the decision, however, that he had asked or attempted to leave, or that he had been clearly blocked from leaving.

The employer subsequently laid a formal complaint with the police, but the police did not proceed with the matter. It also terminated Mr. Kalsi's employment for cause. The plaintiff brought a claim for damages *inter alia* due to false imprisonment.

The tort of false imprisonment is based on a finding that the person has been restrained against his will without lawful authority.

³ It should be noted that the court did not expressly find in this case that the employer's conduct was "harsh, vindictive, reprehensible, and malicious" and/or "so malicious and outrageous" that it deserved punishment on its own, thereby possibly calling into question whether punitive damages were appropriate.

⁴ Although the matter was heard by a jury, the judge issued 13 written decisions, mainly in relation to various pre-trial applications brought by the parties.

The plaintiff's argument focused on sections 493 and 494 of the *Criminal Code*. Section 494 states that a person who is not a police officer may "arrest" a person in certain circumstances. However, Section 493 requires that anyone making such an arrest shall "forthwith deliver that person to a police officer". The plaintiff took the position that:

- if the employer had thought a theft had occurred, it should have advised the plaintiff of the reasons for his detention, read him his *Charter* rights and called the police; and
- because no theft had in fact occurred, the plaintiff was: (1) arrested without "lawful authority" and (2) falsely imprisoned when was detained by the security officer for over two hours.

The court concluded that the security officer "initially had reasonable grounds to detain [the plaintiff]. What failed to happen thereafter was to promptly or forthwith deliver [the plaintiff] to a police officer" (at para. 321). The court further stated, "I find the lengthy detention and failure to notify the police transformed an initially lawful detention into an unlawful detention" (para. 323).

E. Negligent Investigation

In *Hill v. Hamilton-Wentworth Regional Police Services Board*, 2007 SCC 41 (CanLII) ("*Hill*"), the Supreme Court of Canada recognized the tort of negligent investigation as applied to police officers and the suspects they are investigating.

In three recent appellate cases, Canadian courts have considered whether this tort should be extended to parties who participate in workplace investigations.

i. Against Employers

The facts in *Correia v. Canac Kitchens*, 2008 ONCA 506 ("*Correia*") are egregious. The employer Canac Kitchens (and its parent company) suspected that there was theft and drug dealing occurring at the Canac plant, which had some 800 employees. They retained a private investigation firm to conduct an investigation. The private investigation firm planted one its own investigators among the employer's workforce.

As a result of the investigation, the plaintiff, who was 62 years old with long service, was eventually brought into a meeting where his employment was terminated for cause. He was then immediately taken to a second office where he was arrested by the police for theft.

In due course it became apparent that, through a series of mistakes, the plaintiff had been confused with another employee with a similar name, but who was almost 40 years younger.

Canac offered the plaintiff his job back, but he refused. He eventually filed a lawsuit against the employer, the parent company, the private investigation firm, the police and several individuals including Cana's head of human resources for, *inter alia*, negligent investigation. On summary motion judgments brought by all the defendants except the police, the motions judge had dismissed several of those causes of action, including for negligent investigation.

The Ontario Court of Appeal upheld the decision to dismiss the claim for negligent investigation against the employer and its parent company, applying the two part *Anns v. Merton* test for determining whether a person owes a duty of care to another.

On the first question, the court concluded that a triable issue existed whether the relationship between the plaintiff and the employer and its parent company disclosed sufficient foreseeability and proximity to establish a *prima facie* duty of care.

On the second question, however, the court pointed to two policy considerations for refusing to recognize a duty of care on the employer and the parent company.

First, the court stated that recognizing such a duty raised the possibility of “legal incoherence” (para. 71). Specifically, the court stated:

The fundamental premise of the employer-employee relationship in Canada is the right, subject to contractual terms to the contrary, of either party to terminate the relationship. Thus, in *Wallace*, the Supreme Court of Canada rejected the submission that an employer must have good faith reasons for dismissal or that there could be an independent action or head of damages for breach of such alleged duty of good faith, either in contract or in tort. In our view, it would be inconsistent to nevertheless recognize a duty on an employer not to conduct a negligent investigation regarding an employee. To do so would be to do indirectly what the Supreme Court expressly rejected in *Wallace*.

The Supreme Court, for policy reasons explained in *Wallace*, has refused to recognize an action in tort for breach of a good faith and fair dealing obligation. In this case, Canac fired the plaintiff for cause. It concedes that it was wrong in doing so and it may have been negligent. But, in our view, to recognize a tort of negligent investigation for an employer would be inconsistent with the holding in *Wallace*. It would, in effect, carve out an exception from the broad holding in *Wallace* where the reason for the dismissal was an allegation of criminality... (at paras. 72-73).

Second, the court stated that it was refusing to recognize a duty of care on the employer and its parent company because the potential “chilling effect” it could have on reports of criminality by honest people to the police, stating that, “Someone not in the business of private investigation who honestly, even if mistakenly, provides information of criminal activity should be protected...” (at para. 74).

ii. **Against Private Investigators Retained by Employers to Investigate Criminal Wrongdoing**

The Ontario Court of Appeal in *Correia, supra* did, however, allow the claim for negligent investigation to proceed against the private investigation firm, thereby overturning the motions judge on this issue.

Specifically, the court concluded that policy reasons favoured recognizing a duty of care in respect of a private investigation firm hired by an employer to investigate criminal wrongdoing. The court noted *inter alia* that the circumstances of the private investigator firm in this case were roughly analogous to the police investigators in *Hill* (para. 67). The court was clear to emphasize, however, that:

... this conclusion applies only to the liability of private investigation firms in this specific context: when a relationship is created between a private investigator hired by an employer and a specific employee who

is being investigated. The question whether there existed such a duty on the facts of the case is a matter that should be determined after a trial (para. 69).

This case settled before going to trial on its merits and thus the issue of whether the private security firm was liable for negligent investigation on these facts was not determined by the courts.⁵

iii. Against the individual employee who manages the investigation

The case of *Hildebrand v. Fox*, 2008 BCCA 434 (“*Hildebrand*”), application for leave to the Supreme Court of Canada dismissed 2009 CanLII 13443 (S.C.C.), concerned allegations made against a school principal employed by the school board in the Sooke School District (the “Board”).

A teacher’s assistant working in the school alleged that the principal grabbed the assistant by the arm, pulled her towards a parent and then continued to hold her arm tightly while speaking to the parent, thereby bruising the assistant’s arm.

The superintendent of the Board retained a third party to investigate the complaint. After conducting some interviews, the investigator prepared a summary of the allegations. A copy was provided to the principal. The principal’s lawyer expressed concern to the Board about the lack of thoroughness of the investigation.

The investigator subsequently prepared a final report. Without giving the principal an opportunity to respond to this report, the superintendent issued her a letter of discipline. In response, the principal’s lawyer requested that the superintendent: (1) withdraw the letter of discipline and (2) refrain from sending a copy to the BC College of Teachers until the principal had responded to the report. The superintendent did not accede to the request, and forwarded a copy of the report to the College, as well as to the teacher’s assistant and the teacher’s assistant’s union.

The principal filed a lawsuit against the Board and the superintendent in his personal capacity. The principal claimed that the superintendent was grossly negligent⁶ in failing to meet the standard of care he owed the principal in relation to how the investigation was conducted, and the outcome that resulted from it.

The chambers judge dismissed the principal’s action against the superintendent in his personal capacity, finding that it was plain and obvious that the allegations did not amount to gross negligence. The chambers judge did not address the other two grounds: (1) whether a duty of care was owed by the superintendent to the principal; and (2) whether there was an independent cause of action against the superintendent.

⁵ Email correspondence between the author and Rebecca Nelson, counsel for Mr. Correia (May 5-6, 2010).

⁶ Section 94 of the *School Board Act*, R.S.B.C. 1996, c. 412 contains a partial bar prohibiting claims being made against employees of the Board for negligence *simpliciter* for actions/omissions in their performance of their duties or in the exercise of their powers.

The BC Court of Appeal ruled that it was not plain and obvious that the allegations of gross negligence disclosed no reasonable cause of action against the superintendent. As such, the court went on to consider whether it was plain and obvious that the superintendent did not owe a duty of care to the principal.⁷ On this point, the court stated:

I agree with the position of Ms. Hildebrand that the above authorities do not make it plain and obvious that Mr. Fox did not owe her a duty of care in connection with the investigation into the incident in question. Ms. Hildebrand is not claiming a breach of a duty of fairness or other principle of procedural fairness. She is asserting that Mr. Fox, who is not her employer, owed her a duty of care, upon which she can found a claim of gross negligence.

Correia does stand for the proposition that an employer does not owe a duty of care to an employee in connection with a criminal investigation leading to the termination of the employee...

The court relied on two policy considerations to negate a *prima facie* duty on the part of the employer. The first was the existence of a contract between the employer and the employee.... The second policy consideration was that the imposition of a duty of care on the employer would have a chilling effect on the willingness of honest citizens to report criminal activity to the police.

The head of the employer's human resources department was also named as a defendant in the action. The plaintiff had sued this senior employee for the tort of intentional infliction of mental distress, and the court allowed this claim to proceed to trial. It appears from the court's description of the plaintiff's claims that the senior employee was also being sued for negligent investigation, but the court's discussion of the *Anns/Kamloops* test does not refer to this employee.

The court held in **Correia** that there was a triable issue as to whether the relationship between the employer and the terminated employee disclosed sufficient foreseeability and proximity to establish a *prima facie* duty of care (i.e., the first part of the *Anns/Kamloops* test). Similarly, in this case, it is not plain and obvious that the relationship between Mr. Fox and Ms. Hildebrand fails to disclose sufficient foreseeability and proximity to establish a *prima facie* duty of care.

It is also my view that, unlike the situation in **Correia**, it is not plain and obvious that policy considerations should negate the *prima facie* duty of care...Neither of the policy considerations relied upon in **Correia** is present in this case. Mr. Fox did not raise on this appeal any other policy considerations that would negate a *prima facie* duty if one were found to exist (but he is at liberty to do so at trial if he wishes) (paras. 34-39).

It appears that: (1) the BC Court of Appeal's decision has not been cited in any subsequent reported decision, and (2) that no further decisions have been issued in this case since leave to appeal was denied by the Supreme Court of Canada in March 2009.

⁷ Note: The court engaged on a lengthy discussion in this decision concerning whether employees could be held personally liable in negligence and concluded that there was no "clear consensus at what the law is or should be..." at this time (at para. 70).

iv. **Against a provincial government employee who has statutory obligations**

In *Harrison v. British Columbia (Children and Family Development)*, 2010 BCCA 220, the court determined that a BC Ministry of Children and Family Development (“MCFD”) child protection worker did not owe a duty of care to an individual employed by an agency under contract to the MCFD.

The basis of the plaintiff’s claim was that his employment with the agency had been terminated because of information that the MCFD child protection worker had provided to the agency after doing a background check on the plaintiff.

The court dismissed the claim on the basis that, pursuant to statute, the child protection worker’s primary obligation was the safety and well-being of children and that imposing a duty of care on the child protection worker (in relation to those whose background she was required to review), could interfere with her statutory obligation, which was paramount.

F. Human Rights Legislation

Under human rights legislation, employers have a duty to investigate allegations of workplace discrimination and harassment, and remedy the situation, in order to avoid being held liable for the acts or omissions of its employees: see *Gough v. C.R. Falkenham Backhoe Services*, 2007 NSHRC 4 (CanLII) at paras. 70-75.

In some cases, human rights tribunals have also concluded that there is a general duty on employers to investigate allegations of discrimination and harassment, as part of the duty on an employer to provide a discrimination/harassment free workplace: see for example:

- *London v. New Brunswick Aboriginal Peoples Council*, [2008] C.H.R.D. No. 49 at para. 99
- *Murchie v. JB's Mongolian Grill*, [2006] O.H.R.T.D. No. 36;
- *Laskowska v. Marineland of Canada Ltd.*, [2005] O.H.R.T.D. No. 30;
- *Hill v. Air Canada*, [2003] C.H.R.D. No. 3 at paras. 136-138.

Tribunals have also held that the adequacy of an employer’s investigation will be considered when: (1) assessing whether a decision to dismiss an employee is an act of reprisal against an employee, or tainted by reprisal, for asserting her rights under human rights legislation; and (2) determining the quantum of damages to award: *Jones v. Amway of Canada, Ltd.* [2001] O.H.R.B.I.D. No. 9.

For a more detailed review of human rights legislation and investigations, see the presentation by Sandra Guarascio and Gabrielle Scorer for the Canadian Bar Association dated February 3, 2010.⁸

⁸ “Employer Investigations of Alleged Human Rights Violations: Legal Considerations”. Ms. Guarascio and Ms. Scorer are lawyers at Roper Greyell LLP. They also presented on this issue at the Employment Law Subsection meeting on February 8, 2010.

G. Canada Labour Code – Part III

The impact of the employer’s failure to investigate, or investigate properly, as it relates to the “unjust dismissal” provisions in the *Canada Labour Code* – Part III, is not entirely clear.

For example, it appears that an unjust dismissal adjudicator will take the employer’s investigation into consideration when determining if the dismissal was just: see for *Achneepineskum v. Henry Coaster memorial School/Marten Falls First Nation* (January 29, 2000 (Can Adj.) at paras. 65 & 72. Further, adjudicators have stated that in order to be “just”, an employer’s decision to dismiss must be made in a “procedurally fair” manner: *Greyeyes v. Ahtahkakoop Cree Nation* [2003] C.L.A.D. No. 205.

However, in other cases adjudicators have held that “procedural injustice” – which included a flawed investigation in this case – should not alter the disposition: *Fehr v. Canadian Pacific Railway Co.* [2000] C.L.A.D. No. 47. Further, the Federal Court has held that it would likely be an error of law for an unjust dismissal adjudicator to consider whether an employer’s own internal investigation policies were followed in an unjust dismissal matter: *Jennings v. Shaw Cablesystems Ltd.*, 2003 FC 1206 at para. 6.

IV. CONDUCTING THE INVESTIGATION

A. What are the hallmarks of a fair or thorough investigation?

In *Leach, supra*, at para. 155, the court pointed to the following as evidence that the investigation was fair and thorough:

- The employee was notified about the complaint;
- The employee was given a copy of the Harassment Policy to review;
- The employee was given time to ponder about his position before the next meeting;
- The employee was given a copy of the complaint;
- The employee was given an opportunity to respond to the written complaint, and an associated email;
- The employee was asked, from the outset, whether he wanted to have his legal counsel attend the meetings; and
- Detailed minutes of the meeting were kept.

The court further suggested in that case that it would be useful if the employer had tape recorded its meetings.

B. What are the hallmarks of a flawed investigation?

In *van Workens, supra*, at paras. 142-144 the court pointed to the following to support its conclusion that the investigation was flawed:

- The employer relied on a previous "letter of expectations" that had been provided to the plaintiff to support the decision to terminate. However, under the employer’s policy, the

letter "was not a written warning" and, even if it was, the policy stipulated that such warnings expired after one year and could not be used to support a termination recommendation at a later date.

- The senior manager who took responsibility for the decision to terminate the plaintiff's employment did not read the plaintiff's written statement nor the initial complaint made by the subordinate. Rather, he relied on the information received from the investigators. The court noted that given that "the career and the reputation of a long-term, senior employee" was on line, it would have been more prudent and fairer for the senior manager to read the documents so that he could draw his own conclusions.
- The plaintiff was not invited to respond to the other allegations of misconduct (i.e. those not related to the sexual harassment allegations) before the decision was made to terminate his employment for cause.

In *McIntyre v. Rogers Cable T.V. Ltd.* [1996] B.C.J. No. 3252, a case in which the employee was terminated for allegedly failing to apologize to a colleague who had accused him of racially and sexually harassing her, the court, at para. 44, pointed to the following to support its conclusion that the investigation was "inadequate" and "inherently unfair":

- As already stated, separating the harassment complaints and the principal complaint for all purposes;
- Conducting only telephone interviews of important witnesses, Mr. Nikl and Mr. Yau;
- Taking no witness statements in writing, including from Mr. McIntyre and Ms. Chang;
- Conducting no interview of Mr. Gallacher;
- Making no enquiry as to the working relationship between Mr. McIntyre and Ms. Chang generally;
- Maintaining a poor record of the investigation;
- Deciding in advance of the meeting with Mr. McIntyre on March 15th what the discipline would be;
- Not questioning Ms. Chang's credibility at any time despite the obvious concern that she might be making spurious allegations to further her own ambition and not addressing Mr. McIntyre's repeated assertions that she was doing just that;
- Failing to establish that there was a pattern of harassment to justify discipline as extreme as that meted out; and
- Failing to have Ms. Gibson, the final judge of Mr. McIntyre's conduct, interview any of the witnesses, and not providing her with a record of witness statements sufficient to permit her to make a fair and thorough decision in the absence of personal interviews by her of the witnesses.

V. THE USE OF LAWYERS AS EXPERT WITNESSES ON WORKPLACE INVESTIGATIONS

The issue of using a lawyer as an "expert witness" concerning workplace investigations in a wrongful dismissal matter was before the court in *Elgert v. Home Hardware Stores Limited*, 2010 ABQB 43 and

2010 ABQB 50. Although this action was heard by a jury, the judge issued 13 written decisions, including two concerning this issue.

The plaintiff intended to call the lawyer as an expert witness and tender an expert report on the subject of “whether the investigation conducted by Home Hardware with respect to the allegations made against [the plaintiff] was fair and appropriate in the circumstances having consideration for due process and the elements of natural justice.”

The defendant objected to certain aspects of the expert’s proposed oral testimony and to the entire substance of her written report.

The court concluded that:

- the lawyer could provide oral testimony as an expert witness in her field of special expertise in the area labour relations, development and implementation of harassment policies, investigative protocols, and investigations of harassment allegations based on her experience in these matters; but
- her written report could not be entered because *inter alia* it improperly included an opinion on the law, and was critical of the defendant’s investigation based on assumptions and facts not in evidence in the trial.

VI. RECOVERY OF COSTS ASSOCIATED WITH INVESTIGATING CRIMINAL WRONGDOING

In *Canada Safeway Limited v. Brown*, 2007 BCSC 1619, Safeway filed a lawsuit against its former employee seeking damages for the cash she had stolen from one of its stores and the costs associated with its investigation and criminal prosecution for theft. Safeway sought damages for the costs it incurred for travel time, meetings, setting up its surveillance, and reviewing the surveillance and analyzing documentation to identify and prove its loss.

After ruling that an award of damages in this instance for these costs would be “fair, appropriate and not too remote”, the court awarded Safeway \$24,512.26 “for its criminal investigation and prosecution costs” (at para. 32). The court rejected Safeway’s claims for damages for items relating to the civil litigation.

This case/issue was the subject of paper prepared by James Kondopulos for the 2008 Employment Law CLE.⁹ It appears that this case has not cited in any subsequent case. It is not clear if this holding applies only to cases involving theft, or whether to any investigation of alleged criminal wrongdoing (or perhaps even more broadly).

⁹ “Recovery of Investigation and Prosecution Costs”. Mr. Kondopulos is a lawyer at Roper Greyell LLP.

VII. WHAT DUTIES DO EMPLOYEES HAVE IN RELATION TO WORKPLACE INVESTIGATIONS?

A. The Duty to be Honest

Employees have of a general implied duty of faithfulness and honesty, and dishonesty during an investigation, coupled with the underlying misconduct or on its own, will often result in just cause for termination.

i. Just Cause - Dishonesty in Conjunction with the Original Misconduct

For examples of cases in which the employee's dishonesty during the investigation, coupled with the underlying misconduct, resulted in just cause for dismissal. See:

- *van Woerkens, supra*;
- *Poirer v. Wal-Mart*, 2006 BCSC 1138;
- *Chisamore v. Molson Brewery of Canada Ltd.*, [1991] B.C.J. No.3668 at (S.C.)

ii. Just Cause - Dishonesty on its Own

There is authority that if an employee is "dishonest, unresponsive or provides an unsatisfactory explanation" for alleged misconduct, what would otherwise constitute insufficient cause may constitute just cause: *Foerderer v. Nova Chemicals Corp.*, 2007 ABQB 349 at para. 194; *Poirer v. Wal-Mart, supra*, at paras. 59-60). See:

- *Obeng v. Canada Safeway Limited*, 2009 BCSC 8;
- *Di Vito v. MacDonald Dettwiler & Associates Ltd.*, 1996 CanLII 3165 (BC S.C.);
- *Marshal v. Pacific Coast Savings Credit Union* (unreported) 7 February 1995, Victoria Registry No. 3963/92 (Drake J.).

iii. The Obligation to Cooperate in the Face of Possible Criminal Charges

The above noted statement that just cause may be found where an employee is "dishonest, unresponsive or provides an unsatisfactory explanation" for alleged misconduct, should be considered in light of the decision in *British Columbia Ferry and Marine Workers' Union v. British Columbia Ferry Services Inc.*, 2008 BCSC 1464, and the cases reviewed therein.

The issue before the court in that case was whether two unionized employees could be disciplined for refusing to answer questions in a workplace investigation, where there was the prospect of criminal charges being laid against them.

This case stemmed from the sinking of the *Queen of the North* ferry in March 2006, which resulted in presumed death of two passengers, and the role that two employees - Mr. Lilgert and Mr. Hilton - played in the sinking.

Following the sinking, four different investigations were undertaken by: (1) the Federal Transportation and Safety Board's ("TSB"); (2) the employer's insurance carrier; (3) the police; and (4) the employer, which took the form of a "Divisional Inquiry".

Mr. Lilgert and Mr. Hilton participated in the investigation by the TSB and the insurer, including answering questions about events at the critical time of the sinking. By statute, their testimony in front of the TSB was privileged and confidential and could not be disclosed without their consent. The evidence they provided in the insurance investigation was also privileged and confidential, as it was prepared in the contemplation of litigation.

Mr. Lilgert and Mr. Hilton also testified in the employer's Divisional Inquiry but refused to testify, on advice received from their lawyers, concerning events at the critical time of sinking. They took this position because their testimony would not be protected by privilege and thus could be compellable in any future court proceeding dealing with criminal charges.

The employees had attempted to reach an agreement with the employer that their testimony would be privileged, kept confidential and deemed not compellable in any future proceedings, but the employer refused to provide such assurances. The employer's view was that a Divisional Inquiry was of a public nature and that its mandate included the completion of a report that would be made available to the public.

The employer ultimately suspended the employees without pay until they agreed to testify about critical events at the Divisional Inquiry, or until the employer had otherwise completed its investigation.

The employees' union filed a grievance on their behalf. The arbitrator dismissed the grievance and upheld the dismissal (March 22, 2007, Ministry No. A-33/07 Foley), applying the decision of the BC Industrial Relations Council in *Tober Enterprises Ltd. and United Food and Commercial Workers International Union, Local 1518*, IRC No. C54/90 ("*Tober*").

Tober stands for the proposition that an employee's failure to explain his actions or conduct, considered by itself and aside from any actual employee misconduct, does not normally constitute cause for discipline (at least in the unionized context). However, an exception was recognized in *Tober* that allows an employer to impose discipline in response to an employee's refusal to explain his conduct and tell what he saw or did, if that silence damages the legitimate business interests of the employer.

In this instance, the arbitrator held that the *Tober* exception applied, stating *inter alia*:

The Company has a compelling legitimate business interest in determining what all crew members saw and did at all times during the vessel's voyage, including during the critical period, to allow the Company to take whatever remedial action is necessary to deal with any human errors made or with any shortcomings in safety and operating procedures (at para. 71).

The arbitrator further stated that by refusing to testify before the Divisional Inquiry about the critical events without privilege protection, the employees:

... put themselves in the position of violating one of the basic elements in an employer-employee relationship, that is, compliance of an employee with unequivocal directions/instructions from his/her employer. The two employees put themselves in the position of being insubordinate by refusing to comply with clear and unambiguous Company instructions to testify before the Divisional Inquiry about events during the critical period (at para. 72).

The arbitrator's decision was upheld by the BC Labour Relations Board (BCLRB No. B5/2008). The union's application for leave for reconsideration of the Board's original decision was denied (BCLRB No. B23/2008).

The BC Supreme Court dismissed the application for judicial review (of the Board's original decision) on the basis that it was not patently unreasonable or clearly irrational. In doing so, the court stated *inter alia* that the issue before Board (and the arbitrator before that), and thus the subject of the judicial review, was not whether employees have the right to remain silent at common law or under the *Charter*, but rather whether the arbitrator had misapplied one of the exceptions articulated in *Tober* (at para. 71).

It appears that this narrow issue – whether employees have a right to remain silent in such circumstances - has not been considered by the courts in BC in any other cases in the employment context.

VIII. PRIVILEGE CONCERNS AND WORKPLACE INVESTIGATIONS

The need or desire to assert privilege over workplace investigation reports, and the associated documents, arises commonly in two general arenas: (1) disclosure obligations in civil litigation; and (2) access requests made pursuant to privacy legislation. In relation to the latter, see for example:

- sec. 9(3)(a) and Principle of 4.9 of the *Personal Information Protection and Electronic Documents Act*, S.C. 2000, c. 5 (“*PIPEDA*”);
- sec. 23(3)(a) of the BC *Personal Information Protection Act* (“*PIPA*”); and
- sec. 14 of the BC *Freedom of Information Protection of Privacy Act* (“*FOIPPA*”).

Privilege is typically asserted on the basis of “solicitor–client” privilege, which encompasses both: (1) legal advice privilege and (2) litigation privilege.

Set out below is a selection of topics of interest that have been addressed by the court and privacy commissioners, in dealing with assertions of privilege as it relates to workplace investigations.

A. Is an entire investigation report prepared by a lawyer protected by legal advice privilege?

In *Gower v. Tolko Manitoba Inc.*, 2001 MBCA 11, the area manager at a mill received a complaint from a female employee that she had been sexually harassed by another employee.

The employer's policy required it to investigate all complaints of sexual harassment, either by an internal or external source. The area manager solicited advice from a lawyer in BC and then retained her to conduct an investigation. A formal retainer agreement was executed prior to the lawyer commencing her work.

Specifically, the area manager testified that he instructed the lawyer to travel to Manitoba:

- to gather the facts.
- based on those facts, make recommendations and provide advice in respect to the legal implications of any of those recommendations.
- examine the possibility of litigation including a wrongful dismissal action; a grievance under the complainant's collective agreement or a human rights complaint.
- advise Tolko how to act to avoid, if possible, litigation.
- advise that if litigation did happen, what would be the probabilities of the success.

Following her investigation, the lawyer delivered a report to the employer that consisted of six parts: 1) Introduction; 2) Witness Statements; 3) Credibility; 4) Findings of Fact; 5) Legal Analysis; and 6) Legal Advice.

Following receipt of the report, the company terminated the plaintiff's employment. As part of the plaintiff's wrongful dismissal action, he brought an application for the production of the report. The master ordered production of the report except for the final two sections on the basis that they were protected by legal advice privilege. On appeal, the motions judge ruled that the entire report was the subject of legal advice privilege and was therefore protected from disclosure. The Manitoba Court of Appeal upheld the motions judge decision stating *inter alia*:

- The fact finding component of the investigation was "inextricably linked" to the second part of the tasks, the provision of legal advice;
- The retainer letter was a strong piece of evidence that the investigation was related to the rendering of legal advice (however, it would not be determinative in the face of evidence pointing to the opposite conclusion).
- The fact that the lawyer was not called to the bar in Manitoba was not relevant to the analysis of whether the lawyer was retained to provide legal advice.

See also *Richmond (City), Re*, 2005 CanLII 48297 (BC I.P.C) (Order F05-35), where, in relation to an access request under FOIPAA, it was determined that an investigation report that had been prepared by a lawyer for the City of Richmond was privileged and thus need not be disclosed.

B. Do privilege protections in privacy legislation import the common law?

In *College of Physicians of British Columbia v. British Columbia (Information and Privacy Commissioner)*, 2002 BCCA 665 ("*College of Physicians*"), the BC Court of Appeal held that Section 14 of FOIPPA imports all the principles of solicitor client privilege at common law and that solicitor client privilege at common law includes both legal advice and litigation privilege. Specifically, the court stated:

Solicitor client privilege at common law, and thus for the purposes of s. 14 of the *Act*, includes the privilege that attaches to confidential communications between solicitor and client for the purpose of obtaining and giving legal advice...and the privilege that attaches to documents gathered and prepared by a solicitor for the dominant purpose of litigation... (at para. 26).

Further, in *Canadian Union of Public Employees, Local 1004*, 2010 BCIPC 10, the BC Office of the Information and Privacy Commissioner (“BCOIPC”) confirmed that:

- section 23(3)(a) of PIPA has the same meaning as section 14 of FOIPPA; and
- the principles applied in section 14 FOIPPA decisions, including court decisions in judicial review proceedings involving FOIPPA decisions, are relevant under PIPA.

C. When will reports prepared by third parties to assist in an investigation be protected by legal advice privilege?

In *College of Physicians, supra*, the BC Court of Appeal considered whether third party reports obtained by in-house counsel in the course of an investigation were protected by solicitor-client privilege and thus need not be disclosed under FOIPPA.

The complainant laid a complaint of professional misconduct against her employer, a physician. The College’s in-house lawyer obtained the opinions of four medical experts to assist the College in assessing the complaint, namely to assist in determining whether hypnosis had been performed on the complainant.

There were five documents in question: (1) two expert opinions that were obtained in writing; and (2) two expert opinions that were provided orally at meetings and which in-house counsel summarized in memos (together, the “Reports”); and (3) one follow-up email from one of the experts who provided his opinion orally.

The Reports were eventually provided to the College’s Sexual Conduct Review Committee (“SMRC”). The SMRC decided not to proceed with an inquiry to determine if disciplinary action should be taken.

The complainant was provided with a summary of the Reports and a copy of the email. She requested disclosure of the Reports under FOIPPA. The College refused on the basis, *inter alia*, that they were subject to solicitor-client privilege and thus protected from disclosure under section 14 of FOIPPA. The College was concerned about protecting the confidentiality of the experts’ names and full opinions.

The BCOIPC held that the Reports were not subject to solicitor-client privilege and ordered them disclosed. The chambers judge upheld the BCOIPC’s decision on judicial review.

The BCOIPC and the chambers judge had noted that the *Medical Practitioners Act*¹⁰ required the College to investigate and make recommendations to the SMRC concerning complaints of sexual misconduct,

¹⁰ R.S.B.C. 1996 c. 285

and factored this into their decisions that the lawyer was acting as an investigator, not a lawyer, in obtaining the Reports.

The Court of Appeal concluded that the lower bodies had erred on this point, stating: (1) the lawyer was acting in her capacity as a lawyer when she investigated the complaint; and (2) that, “the fact that an investigation is mandated by statute is irrelevant to the functional analysis of a lawyer’s role” (para. 39).

The Court of Appeal summarized the law on third party communications and legal advice privilege as follows: “third party communications are protected by legal advice privilege only where the third party is performing a function, on the client’s behalf, which is integral to the relationship between the solicitor and the client” (at para. 50). Applying the law to the facts in this case, the Court of Appeal concluded:

... The experts were retained to act on the instructions of the lawyer to provide information and opinions concerning the medical basis for the Applicant’s complaint. While the experts’ opinions were relevant, and even essential, to the legal problem confronting the College, the experts never stood in the place of the College for the purpose of obtaining legal advice. Their services were incidental to the seeking and obtaining of legal advice (para. 51).

Further to this analysis, the Court of Appeal then concluded that the following documents were not protected by privilege and must be disclosed: (1) the two written experts’ reports; (2) the email; and (3) one memo written by in-house counsel in which she recorded information she obtained from the expert in a meeting with the expert.

The second memo written by in-house counsel had two parts: (1) a summary of the information and opinions obtained by in-house counsel in the meeting with the expert, and (2) in-house counsel’s comments concerning that information. The BCOPIC had determined that this memo should be disclosed with the exception of the portion with the lawyer’s comments, which could be severed. The Chambers judge upheld this decision. The Court of Appeal agreed with the lower bodies finding that the two parts of the memo were not “intertwined” and that the non-privileged part of the memo could be “reasonably severed” from the part of the memo that recorded the lawyer’s comments, and that was privileged.

More recently, in *Bank of Montreal v. Tortora*, 2009 BCSC 1224, the court addressed whether the employer was required to produce, in the course of litigation, documents that had been prepared by a certified fraud examiner as part of an investigation.

The bank had dismissed two employees on December 3, 2008 and filed a lawsuit against them shortly after, claiming that the employees had secretly and improperly split commissions and had been grossly negligent in arranging and approving 10 mortgages in Ontario (the “Papas Mortgages”).

The bank’s law firm had retained a certified fraud examiner (“the CFE”) in September 2008 to investigate other mortgages related to the Papas Mortgages.

The former employees brought an application seeking *inter alia* that the bank produce the following documents in the CFE’s files: (1) communications between the CFE and the law firm; (2) documents

created by the CFE to report to the law firm on his opinions and assessments; and (3) the CFE's personal working papers and notes prepared in the course of his investigation.

The court rejected the bank's argument that legal advice privilege was engaged because the CFE assisted in advising the law firm on how to prepare the case. Specifically, the court stated that the bank had not met the evidentiary burden to establish that the CFE's role was essential to the maintenance or operation of the solicitor-client relationship.

D. When will reports prepared by third parties to assist in an investigation be protected by litigation privilege?

In *College of Physicians, supra*, the BC Court of Appeal also considered whether the Reports in question were protected by litigation privilege.

The College argued *inter alia* that: (1) "when a "regulatory agency undertakes an investigation that may result in the imposition of penalties or sanctions, litigation has commenced"; and (2) from the outset of the investigation of one of its members, it was in an adversarial relationship with that member because of potential sanctions that may follow (paras. 73 and 78).

The Court (upholding the decisions of the lower bodies) disagreed, pointing *inter alia* to the fact that:

- the College's "interest in the outcome" of the investigation was not adversarial in relation to the parties, but rather mandated by statute in the public interest;
- the College was not seeking to impose sanctions at the investigative phase, but rather to make findings on which to base a recommendation to the SMRC;
- on receipt of the Reports, the SMRC has a range of actions available to it, including not taking action;
- the vast majority of the complaints investigated by the College do not result in disciplinary action.¹¹

In *Bank of Montreal v. Tortora, supra*, the court also considered whether the certified fraud examiner's ("CFE") documents in question were protected by litigation privilege.

The court rejected the bank's first argument that litigation privilege applied on the basis that the CFE was an expert witness. Rather, the court stated that his role was more analogous to that of an adjuster, and that the well recognized two part test for litigation privilege applies to adjuster's files.

In relation to the first question - was litigation in reasonable prospect at the time the file material was produced - the court stated, "...It is likely that shortly after [the CFE] was asked to look at the B.C. connection to the Papas Mortgages, it could be concluded that there was a reasonable prospect of litigation involving the defendants" (para. 25). However, the problem with undertaking the analysis was

¹¹ Although the Court concluded that the College could not assert solicitor-client privilege over the Reports, the Court overturned the lower bodies decisions and ruled that the College was not required to disclose the Reports because they constituted "advice" pursuant to section 13 of FOIPPA.

that it couldn't tell from the bank's materials "when litigation went from being a possibility to a reasonable prospect..." (para. 25).

As it relates to the second question – the dominant purpose - the court noted that while at the early stage of the investigation the CFE was gathering evidence to support a possible claim by the bank, that was not the sole or dominant purpose of the work he was doing. That is, the CFE's investigation went through a phase where he was initially attempting to determine if the employees had engaged in the misconduct and whether the bank's policies needed to be revamped or revised.

The court noted that a difficulty it faced again in determining when the dominant purpose was litigation was that the Bank had not provided evidence that allowed the court to determine this on an individual basis for each document. The court further noted that:

- the grounds for privilege must be established for each document, but the bank had taken the CFE's file as a whole and treated it as one document.
- as a result, the bank had confused the issue and created the risk that the bank could not show when the continuum shifted and the dominant purpose of the information gathering process became the furtherance of the litigation (para. 31).

Despite these concerns, the court concluded that at the time the bank decided to dismiss the employees, it was possible to conclude that the dominant purpose became the furtherance of litigation that was within reasonable prospect. As such, the bank was required to produce the documents in the file that were created between when the CFE was first retained up until the date the employees were dismissed, but not thereafter.

E. Are an employer's communications with regulatory and other agencies investigating the employee's misconduct protected by litigation privilege?

The decision in *Thomson v. Berkshire Investment Group*, 2007 BCSC 50, involved an application to obtain reports, emails, notes and other documents concerning Berkshire's investigation of one of its financial advisors. The plaintiff had filed a lawsuit against Berkshire in relation to the financial advisor's activities.

Berkshire's position was that the documents pertaining to its investigation of the financial advisor were not producible on the basis of *inter alia* litigation privilege, in that legal or regulatory proceedings were anticipated when the investigation commenced.

Approximately two months after it started its investigation, Berkshire was contacted by the BC Securities Commission ("BCSC"), and subsequently a number of orders for production were made by the BCSC pursuant to the *BC Securities Act*¹². On the same day, Berkshire reported the complaints it had received about the financial advisor to the Mutual Fund Dealers Association ("MFDA"), its primary regulator.

¹² R.S.B.C. 1996, c. 418

The MFDA subsequently made many requests to Berkshire for information about the situation. In-house and external counsel provided legal advice to Berkshire in how to respond to these requests. Based on this advice, draft responses were drafted by Berkshire and then revised before being finalized. Berkshire's representatives also deposed that the information was provided to the MFDA "in the expectation it would be held in confidence and under no expectation it would be required to be produced in civil litigation" (para. 37).

Berkshire also provided information to the RCMP in respect to the financial advisor's activities, as part of the RCMP's criminal investigation.

The plaintiff argued that:

- privilege was lost over the documents in question when they were submitted to the MFDA.
- Berkshire's obligations pursuant to its internal policies and bylaws and the directives and policies of the MFDA to investigate and respond to complaints and report the complaints to the MFDA negates the suggestion that the documents were created for the dominant purpose of litigation.
- Berkshire has not satisfied the onus with respect to the dominant purpose of the documents.

The court rejected the plaintiff's argument, stating that the litigation privilege extended to Berkshire's response to the MFDA and other entities investigating the activities of the financial advisor. The court went on to say, however, that the fact that Berkshire may be entitled to claim privilege over the documents in its possession, did not necessarily mean that other parties in possession of the same documents – such as the MFDA - may not be compelled to produce them.

F. When will litigation privilege be reasonably invoked in a wrongful dismissal action?

In *Poirier v. Wal-Mart* 2004 Carswell BC 2948 (BC Master), aff'd 2004 BCSC 1592, the plaintiff's employment was terminated for just cause on October 6, 2003.

The employer's position was that all of the witness statements and interview notes prepared after August 1, 2003 were protected by legal advice privilege on the basis that:

- the employer had commenced its investigation into the alleged misconduct in July 2003,
- as of July 2003, in-house counsel had been providing direction and advice in respect to the terms and conduct of the investigation.

The master agreed with the employer's position that the documents were protected by legal advice privilege. The judge upheld the master's decision, thereby determining the issue.

However, in *obiter*, the judge addressed the employer's other argument that the documents in question were also protected by litigation privilege as of mid-August 2003. The judge rejected that litigation privilege could apply to documents prepared at that time, stating that he could not "imagine how the defendant could consider litigation as a reasonable prospect before it had even decided to terminate Mr. Poirier" (at para. 24).

For a similar result, see *Bank of Montreal v. Tortora, supra*.

IX. CONCLUSION/RECOMMENDATIONS

There are many existing resources that provide guidance/checklists on how to conduct a proper workplace investigation. Based on the above cases, the following are some additional issues that should perhaps be considered.

Drafting Employment Contracts

1. Consider whether there is any value to your client – particular an employee client – of including language in the employment contract concerning issues of procedural fairness.

Conducting Interviews

2. Warn the employee suspected of wrongdoing, at the outset of the interview, that if he is “dishonest, unresponsive, or provide unsatisfactory explanations” that alone could result in just cause for dismissal.
3. Ensure that investigatory meetings are conducted in a reasonable time frame, and advise the employee who is being questioned/investigated that: (a) she is free to leave at any time; but (b) if she leaves without answering the questions, it could adversely effect her continued employment.
4. Where an employee refuses to participate in an investigation/answer questions because of the prospect of criminal charges, fully assess the implications of *Tober, supra*, before taking any disciplinary action based solely on that refusal.

Conducting Investigations Generally

5. Ensure that the *McKinley* contextual factors are properly explored during the investigation: see the checklist in *Corso v. Nebs Business Products Limited*, [2009] O.J. No. 1092 (Ont.S.C.J.) and the statement in *Strauss, supra* at para. 41, for assistance in this regard.
6. Ensure that a more vigorous investigation is undertaken in cases where there are allegations of serious misconduct (i.e., fraud, theft, criminal conduct, etc.).
7. Ensure that the decision maker not only reads the final investigation report, but also the initial complaint and other key documents, including key witness statements.
8. Where the investigation could be potentially long/costly, and could result in a criminal prosecution, especially for theft, keep track of related expenses/costs/time spent.

Retaining third parties

9. When retaining a third party to assist in the investigation, particularly a private security firm, consider the terms of the retainer and whether language should be included to expressly and fully insulate the employer from a situation where the third party is found liable for conducting a negligent investigation.
10. When retaining a third party to assist in an investigation, assume that it is unlikely that the reports/documents they prepare will be protected by legal advice privilege.
11. Ensure that there are written terms of reference when retaining counsel to conduct a workplace investigation. See *Gower, supra*, for a sample letter.
12. In wrongful dismissal matters, assume that litigation privilege cannot be invoked until the decision is made to terminate the persons' employment, or at least impose discipline.