

R. V. BRUCE POWER: BREACH OF SOLICITOR-CLIENT PRIVILEGE RESULTS IN THE DISMISSAL OF WORKPLACE SAFETY CHARGE

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Solicitor-client privilege is recognized in Canadian law as a principle of fundamental justice protected by the *Charter of Rights and Freedoms*. The basis for the principle is rooted in the constitutional guarantee of procedural fairness for companies and individuals who are under investigation by a law enforcement agency or have been charged with offences. In order for a potential defendant or defendant to properly exercise its rights to retain and instruct counsel and to be presumed innocent, it is essential that the defendant have the right to communicate information to counsel on a confidential basis without fear that the communicated information and legal advice be disclosed.

Recently, the Ontario Court of Appeal had occasion to review the principles governing privilege within the context of an Ontario Ministry of Labour (MOL) prosecution. In *R. v. Bruce Power*, a subcontractor's employee had been seriously injured when he fell at the defendant's facility in Tiverton, Ontario. Shortly after the accident occurred, on the advice of external counsel, in-house counsel created an internal investigation team tasked with the responsibility of investigating the accident and preparing a confidential written report for use by the company's lawyers in defending the company in the anticipated prosecution of offences by the company and its employees for offences contrary to the *Occupational Health and Safety Act* ("OHSA"). Written terms of reference were created for the investigation, which expressly provided that the investigation was undertaken in contemplation of litigation and that documents created *during the investigation*, including the investigation report, were to be placed in the custody of the company's legal department to ensure the report's continuing confidentiality.

The investigation team interviewed a number of people who were all informed that, prior to the interview, any report of the interview would remain confidential for use by the company's legal team and that information obtained during the interview would not be disclosed to any third party, including the MOL.

After the company was charged for offences contrary to the OHSA, the MOL Inspector who had laid the charges and the Crown prosecutor obtained a copy of the investigation report from an employee who had represented the bargaining unit on the investigation team. Both the Inspector and Crown, in addition to the employee, understood that the report was subject to a claim of privilege. Yet, the Crown advised the company that at trial it intended to call the authors of the report and to tender the report as a Crown exhibit.

At trial, the company succeeded with its application to have the charges against it stayed (or dismissed) as an abuse of process. The trial court agreed that the Crown had illegally accessed the report causing irreparable prejudice to the company's fair trial right. This finding was subsequently upheld by the Court of Appeal.

Corporate internal investigations can be an essential tool for external and/or in-house counsel providing legal advice to companies who are concerned they and their employees may have committed regulatory or criminal offences. Reports can be highly prejudicial to the corporate interest, however, if they are not

completed in a manner that ensures confidentiality a claim of privilege cannot be successfully sustained. Absent written terms of reference stressing the confidential nature of the investigation and its purpose, the outcome for *Bruce Power* may not have been as favourable.

It should also be stressed that reports like that in *Bruce Power* can only be used to protect documents created during the investigation. A claim of privilege cannot be used to prevent the disclosure of routine business documents generated as part of an alleged illegal act or transaction which may be material in proving elements of the suspected offences.

Privilege is available to legal communications between both internal and external counsel and their corporate clients. In order to sustain a privilege claim, therefore, it is not necessary that external counsel be retained from whom the request for a completed report originates. What is important, however, is that:

1. the request for a confidential investigation and report originate from counsel;
2. confidential terms of reference are drafted for the investigation stressing its confidential nature and purpose to assist the company in obtaining legal advice;
3. the investigation team acknowledge receipt of the terms in writing;
4. employees who meet with the team are advised as to the confidential nature of the process; and
5. all copies of the report, marked Privileged and Confidential, are provided to counsel.

Following these basic rules will go a great distance in protecting confidentiality and sustaining claims of privilege.