

# **Workplace Investigations**

## **Part 4:**

### **Investigate with confidence: Legal trends, risks, and best practices**

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# **Can you claim privilege over a workplace investigation?**

**Cristina Wendel**

# Claiming privilege in workplace investigations

## Primary types of privilege in workplace investigations

- **Solicitor-client privilege**
  - Applies to communications:
    - between a solicitor and client;
    - given in the context of seeking or giving legal advice; and
    - intended by the parties to be confidential.
- **Litigation privilege**
  - Applies to records where the dominant purpose for their creation was, at the time they were made, for use in contemplated or pending litigation.
- **Statutory privilege**
  - Section 33(8) of the *Occupational Health and Safety Act* (Alberta).

# Claiming privilege in workplace investigations

*Prosser v Industrial Alliance Insurance, 2024 ABKB 87*

## Facts

- Wrongful dismissal action.
- The Plaintiff employee sought disclosure of records relating to the Defendant's decision to terminate his employment for cause.
  - The records were obtained by a human resources consultant who had been retained by the Defendant to investigate harassment allegations made against the Plaintiff.
- The Defendant refused to produce the records, claiming solicitor-client and litigation privilege attached to the records.

# Claiming privilege in workplace investigations

*Prosser v Industrial Alliance Insurance, 2024 ABKB 87*

## Facts

- Almost immediately after receiving the harassment allegations, the Defendant commenced an internal investigation and retained legal counsel to provide advice on the allegations.
- One of the complainants issued a demand letter very soon after making the harassment complaint against the Plaintiff. The following day, the Defendant retained the external human resources consultant to investigate the matter.
- The Defendant terminated the Plaintiff about 3 weeks after the external investigation was completed.



# Claiming privilege in workplace investigations

*Prosser v Industrial Alliance Insurance, 2024 ABKB 87*

## Issues

- The Plaintiff sought disclosure of parts of the investigation file, including transcripts, notes and recordings of interviews, as well as information about allegations of misconduct gathered during the external investigation.
- The Plaintiff was not seeking disclosure of the investigation report.
- The issues were whether the records and information were privileged and if so, whether the Defendant waived privilege by pleading matters concerning the external investigation in its statement of defence.

# Claiming privilege in workplace investigations

*Prosser v Industrial Alliance Insurance, 2024 ABKB 87*

## Solicitor-Client Privilege

- Solicitor-client privilege does not have to be in contemplation of litigation.
- Not every form of communication between a solicitor and client will be covered by the privilege. It attaches to communications designed to seek out or give legal advice.
- Where a lawyer is retained to conduct a factual investigation or provide non-legal advice, the communications will typically not be subject to this privilege.
- With third-party investigations, where one of the purposes of the investigation was to learn facts to provide to the client's lawyer for legal advice, the investigation file will generally be subject to solicitor-client privilege.
- The question is whether the investigation was related to the delivery of legal services.



# Claiming privilege in workplace investigations

*Prosser v Industrial Alliance Insurance, 2024 ABKB 87*

## Litigation Privilege

- The test is the dominant purpose test, where the focus is on the purpose for which the records were prepared or created, not the purpose for which they were obtained.
- Pre-existing records will not automatically fall under litigation privilege.
- Litigation privilege is not a blanket privilege. It must be determined in a record-by-record assessment.

# Claiming privilege in workplace investigations

*Prosser v Industrial Alliance Insurance, 2024 ABKB 87*

## Defendant's arguments and evidence on privilege

- The Defendant argued that the investigation information was assembled by the investigator for the purpose of providing it to the Defendant's lawyers to enable them to provide accurate legal advice.
- The Defendant also argued that the records were created for the dominant purpose of anticipated litigation.
- One of the affidavits submitted on behalf of the Defendant stated that the investigation was conducted in accordance with the Respectful Workplace Policy and the Defendant's obligations to its employees to ensure a safe workplace.
- A second affidavit stated that the Defendant started an internal investigation under the Respectful Workplace Policy but then shifted to the external investigation with the sole purpose to prepare for litigation and obtain legal advice.

# Claiming privilege in workplace investigations

*Prosser v Industrial Alliance Insurance, 2024 ABKB 87*

## Decision

- The court found that the conflicts in the evidence were problematic.
- The court held that the Defendant had not met the onus of proving that the information in question was subject to privilege.
- The purpose of the investigation was not to obtain legal advice; it was to discharge the Defendant's obligations as set out in the Respectful Workplace Policy.
- The Respectful Workplace Policy served an important function to protect the Defendant's employees and "should not be lightly assumed to be an unimportant operational process."
- The affidavits did not establish that the dominant purpose for creating the records and acquiring the information in question was in contemplation of litigation. The court was not prepared to make this assumption.



# Claiming privilege in workplace investigations

*Prosser v Industrial Alliance Insurance, 2024 ABKB 87*

## Decision

- The evidence did show that the purpose of the investigator's final report was to inform counsel and the Defendant to obtain legal advice. Thus, the court noted that the investigation report was probably subject to solicitor-client privilege.
- Further, if the records had been found to be privileged, the court would have found that the privilege was waived.
- Reliance on privileged information in a pleading may constitute a waiver of privilege.
- Here, the Plaintiff argued that the Defendant waived privilege by relying on the investigation report and on the underlying investigation information and materials in its defence.
- The court ordered the Defendant to disclose the information and investigation materials sought by the Plaintiff.

# Claiming privilege in workplace investigations

## Takeaways

- Employers should assume that investigation materials will not automatically be considered privileged.
  - Engaging counsel to conduct an investigation will not automatically make it privileged.
  - Consider separate investigations.
- Employers who intend to assert privilege over an investigation should make that clear at the outset.
- Privileged materials should be marked privileged, although that will not be determinative.
- Care should be taken when sharing or providing access to materials over which privilege will be claimed to ensure it is not inadvertently waived.
- Care should be taken in drafting pleadings to avoid inadvertently waiving privilege.



# **Assessing credibility: Who to believe?**

**Victoria Merritt**



# Credibility Assessments

- Credibility does not always have to be assessed: consider – are there are **conflicts in the evidence** that must be resolved to make your findings?
- You can accept **some, all or none** of a witness's evidence.
- Distinction between honesty/veracity/credibility and reliability/accuracy:
  - **Honesty**: is the witness telling me the truth?
  - **Reliability**: is the witness accurate?
- A witness can be **honest but not reliable** (for example, a witness who is answering honestly but is having difficulty recalling information).

# Golden Rule

“In short, the real test of the truth of a story of a witness in such a case must be its harmony with the preponderance of the probabilities which a practical and informed person would readily recognize as reasonable in that place and in those conditions.”

*Farnya v Chorney*, 1951 CanLII 252 (BCCA)

[But what does this mean?]

# Credibility Assessments: Key Factors

- the capacity and opportunity of the witness to observe the events at issue;
- the witness's ability to remember those events;
- the ability of the witness to resist being influenced by their interest in recalling those events;
- internal and external inconsistency in the witness's evidence;
- admissions against one's own interests;
- whether the witness's evidence harmonizes with or is contradicted by other evidence, particularly independent or undisputed evidence; and
- whether their evidence seems unreasonable, improbable or unlikely.



# ***Sarba v. Ruskin Construction Ltd. and others (No. 2), 2025 BCHRT 74***

- Former employee alleged he had been subject to racial harassment at work.
- “Because the parties fundamentally disagree on the facts, this case turns in large part on the credibility of the witnesses’ evidence.”
- Complainant’s “version of events” was “consistent with the contemporaneous documentary evidence.”
- Inability to recall details:

“I do not agree that Mr. Sarba and Mr. Auriat’s inability to recall certain details makes their evidence less credible. I find that witnesses’ fading memories of events that occurred four years earlier is to be expected. In my view, the circumstances in which Mr. Sarba and Mr. Auriat provided their written statements is a detail that does not undermine their credibility about the central issue: whether Mr. Ross made discriminatory comments. On this issue the testimony of Mr. Sarba and Mr. Auriat were consistent with each other.”

# ***Sarba v. Ruskin Construction Ltd. and others (No. 2), 2025 BCHRT 74***

- Inconsistency in initial reporting versus reporting in HR complaint:

“Viewed in context I do not agree that Mr. Sarba’s evidence is not credible. Mr. Sarba explained in his testimony that, when completing his witness report, he believed it was more important to detail who initiated the physical altercation. I also find the context of this altercation in Mr. Sarba’s tenure at Ruskin significant. This was the third instance where an employee of Ruskin spoke the N-Word. The evidence before me is that Mr. Sarba made two earlier complaints of racism and felt his complaints were not handled appropriately. Mr. Sarba testified that by this point in his employment, he felt disheartened and upset that the workplace would not be a safe space for him as a racialized employee. He says he felt scrutinized by co-workers as a “snitch.” I find Mr. Sarba’s explanation of why he did not specifically mention that the N-Word had been used by Mr. Chauvin at the time of the altercation reasonable when viewed in context of the other complaints.”

# ***General Teamsters, Local Union No. 362 v Inland Concrete, 2024 CanLII 127093 (AB GAA)***

## ***What happened in the lunchroom?***

- Grievor was suspended pending the outcome of an investigation – he grieved this suspension and the alleged delay in the investigation. The Grievor was dismissed following the investigation and grieved his dismissal.
- The complaint was based on racist comments allegedly made by the Grievor in the lunchroom, most egregiously “I hate blacks, I am a racist” and then raising his fist while saying “white power.”
- Several witnesses gave evidence about what they had heard the Grievor say in the lunchroom.
- The Grievor denied saying anything racist or even “anything at all” to the group in the lunchroom. He said he felt he was the subject of a “witch hunt”.
- “We heard extensive evidence from four witnesses as to what occurred in the lunchroom. This evidence was in direct contradiction to the testimony of the Grievor and as a result the decision as to whether the incident occurred as alleged will require determination as to the credibility of the witnesses.”

# ***General Teamsters, Local Union No. 362 v Inland Concrete, 2024 CanLII 127093 (AB GAA)***

## ***What happened in the lunchroom?***

- “In assessing the credibility of the witnesses, one of the crucial determinations is whether there was any motive or reason for the four witnesses who testified in the hearing to falsely accuse the Grievor of making either the racist statement or the white power salute. The Grievor attempted to suggest that Mr. Shriver had been the architect of what he referred to as a “witch hunt” and had orchestrated the evidence of the other three witnesses, however he conceded that there was no evidence to support his theory. In fact, the evidence established that the Grievor and Mr. Shriver had a civil work relationship as demonstrated through not only the testimony of both gentlemen, but in the text exchanges between them prior to June 2022.”
- All four of the Employer witnesses found to be credible:
  - clear and compelling evidence
  - testimony was consistent with the interviews they provided at the time of the initial investigation
  - with minor variations in recollection they all shared a very similar version of what occurred in the lunchroom
  - their actions subsequently support their testimony



# ***General Teamsters, Local Union No. 362 v Inland Concrete, 2024 CanLII 127093 (AB GAA)***

## ***What happened in the lunchroom?***

- Evidence of the employer witnesses not “perfect” but “none of these differences were substantive or impacted on the significance of what they witnessed. In fact, the differences in the respective recollection of the witnesses belies the assertion by the Grievor that there was collusion or coordination between them.”
- “It is noteworthy that while there were minor differences based on the perceptions of each of the witnesses, none of the versions of what occurred as relayed by the Employer witnesses was in fact very different. Slight variations in the evidence of witnesses is to be expected as people perceive and filter their experience through their own lens. Whether the incident in the lunchroom took one minute or five minutes has no bearing on what was actually said by the Grievor and in that the witnesses were consistent.”

# ***General Teamsters, Local Union No. 362 v Inland Concrete, 2024 CanLII 127093 (AB GAA)***

## ***What happened in the lunchroom?***

“Having reviewed the evidence of the witnesses and the allegations against the Grievor, the witnesses of the Employer were universally honest and forthcoming. Where there was a conflict in the evidence and a denial by the Grievor I could find no legitimate argument that the witnesses were motivated to make up such egregious accusations. Having regard for the factors to consider when assessing the relative credibility of the witnesses, their demeanor, the consistency of their evidence to each other, their sincere recall and consistency with the statements provided during the investigation and lack of motivation to engage in a witch hunt as suggested by the Grievor, in all cases I prefer the evidence of the Employer witnesses.

The Grievor on the other hand was **evasive**, his story was **inconsistent** in key areas with what he told the investigator and even during his statements and testimony. This is not a case where there are versions of the events that unfolded, instead in most of the more serious allegations it is a denial of any actions on his part and there is no basis upon which his evidence should be preferred over that of his co-workers.”

# Credibility Assessments: Final Tips

- Use caution when considering “personal demeanor”
- Be informed on the impacts of trauma on recall & of myths/stereotypes
- Not a “vibes check” – need to be able to explain why and how you reached your conclusions (avoid statements like the witness “seemed trustworthy”, they had an “honest face”, their evidence had the “ring of truth” or they seemed “smug”).
- Failing to assess the credibility of both parties, if you assess the credibility of one
- Failing to review all the relevant factors
- Making a blanket credibility assessment
- Watch for unconscious bias



# **Procedural fairness updates from Ontario and Quebec**

**Stephanie Lewis**

# Workplace Investigations

The latest and greatest in procedural fairness clarifications

Two new decisions have rocked the world of workplace investigations in 2024:

- *Toronto Metropolitan Faculty Association v. Toronto Metropolitan University*, 2024 CanLII 109523
- *Syndicat du personnel enseignant du campus de Saint-Lawrence et Cégep Champlain - St. Lawrence (Lisa Birch)*, 2024 QCTA 180

**For consideration:** These are great stories, but are the conclusions actually surprising?



# Workplace Investigations

The latest and greatest in procedural fairness clarifications

## *Toronto Metropolitan Faculty Association v. Toronto Metropolitan University*

- Ontario arbitral decision
- The Backstory:
  - One university, so many investigations
  - Retainers and timing
  - Services Rendered
  - One really unhappy faculty association

# Workplace Investigations

The latest and greatest in procedural fairness clarifications

## *Toronto Metropolitan Faculty Association v. Toronto Metropolitan University*

- **Independent Investigations:**

- Reasonable investigations must be independent, balanced, fair, unbiased, and free of arbitrariness and discrimination

- **Issues with the retainer:**

- Legal services relationship
- Rendering reports as legal counsel so that privilege will attach
- Joint retainer language talking about the Rules of Professional Conduct associated with conflicts that arise during client representation

# Workplace Investigations

The latest and greatest in procedural fairness clarifications

*Toronto Metropolitan Faculty Association v. Toronto Metropolitan University*

- Conflicts between solicitor client obligations and investigator obligations

Obligations as Counsel	Obligations as Investigator
Duty of loyalty	Statutory duty to investigate
Duty of candour	Confidentiality
Duty to act in accordance with client's instructions	Obligation to remain independent
Advocacy	Neutrality

# Workplace Investigations

The latest and greatest in procedural fairness clarifications

## *Toronto Metropolitan Faculty Association v. Toronto Metropolitan University*

- **Lawyer's duty of loyalty includes:**
  - Duty of zealous representation
  - Duty to put client's interests before all others
- **Client interests go beyond complying with obligations to investigate and may include:**
  - Avoiding legal liability
  - Suppressing or downplaying certain adverse facts
  - Reputational interests

# Workplace Investigations

The latest and greatest in procedural fairness clarifications

## *Toronto Metropolitan Faculty Association v. Toronto Metropolitan University*

- **Other points of note:**
  - Arbitrator did not take issue with:
  - Lawyer acting as investigator, just cannot be legal counsel
  - Investigator conducting initial analysis: difference between finding that allegations would constitute a breach if true and weighing the evidence to determine whether they are true
  - Investigator preparing statement of allegations: difference between acting as advocate for complainant and neutrally and accurately summarizing their allegations



# Workplace Investigations

*The latest and greatest in procedural fairness clarifications*

***Syndicat du personnel enseignant du campus de Saint-Lawrence et Cégep Champlain - St. Lawrence (Lisa Birch)***

- Quebec arbitral decision
- Arbitrator found that investigation had been handled so poorly by employer that it constituted psychological harassment of the alleged harasser

For discussion:

- What is psychological harassment?
- What made the investigation that bad?

# Workplace Investigations

The latest and greatest in procedural fairness clarifications

## *Some of the issues were:*

- Term unique to Quebec
- Substance may look familiar however:
  - *‘psychological harassment’ means any vexatious behaviour in the form of repeated hostile or unwanted conduct, verbal comments, acts or gestures that are unwanted, which affects the dignity or the psychological or physical integrity of the employee and which results in a harmful work environment for the employee. For greater clarity, psychological harassment includes such conduct when it takes the form of words, acts or gestures of a sexual nature*
- Sounds like...

# Workplace Investigations

The latest and greatest in procedural fairness clarifications

What made the investigation that bad?

## *Some of the issues were:*

- Complaint was not against the employee, made a vague allegation to management and the employer identified her as the respondent based on suspicion and presumptions
- There were no detailed allegations or serious allegations
- There was not identified complainant
- In the absence of these things, they still instituted an investigation
- The respondent was not provided with a list of allegations until 2 months after the investigation had begun
- The investigation was not provided until well after the interview and she said they were inaccurate
- Respondent was isolated at work

# Workplace Investigations

## Takeaways

*The basics of procedural fairness remain unchanged.*

*For third party investigators, employers should hire investigators under an independent investigation retainer, not as counsel.*

*It remains the employer's responsibility to ensure that everyone's rights are respected, including those of alleged harassers.*



# Thank you



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