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REPRINTED FROM:
CORPORATE DISPUTES MAGAZINE
OCT-DEC 2023 ISSUE

www.corporatedisputesmagazine.com

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Published by Financier Worldwide Ltd
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PERSPECTIVES

WAIVING PRIVILEGE IN REGULATORY INVESTIGATIONS: A LOOK AT CANADA AND ENGLAND

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Over the past 10 years, global regulatory and anti-corruption scrutiny, as well as enhanced interjurisdictional cooperation between law enforcement authorities, has steadily intensified. Due in part to limited resources and the desire to encourage good corporate citizenship, opportunities for corporations to cooperate and negotiate alternative agreements with regulators have increased in tandem.

As a result, corporations are increasingly cognisant of the value of conducting thorough internal investigations, and the benefits of meaningful cooperation with regulators and law enforcement. However, investigations – both internal and external – can often result in the discovery, creation and disclosure of highly confidential and legally privileged material. The question, then, is how corporations can effectively cooperate with regulators, assist with investigations and negotiate resolutions, while maintaining privilege over their material as against third parties and other authorities.

With a focus on Canada and England, this article examines the risks and consequences for corporations that may be the subject of an investigation.

Assisting with an investigation without waiving privilege

While they differ in their approach, both the Royal Canadian Mounted Police (RCMP) and UK Serious Fraud Office (SFO) strongly encourage companies to assist with investigations that concern them, including self-disclosure, and sharing documents and information. In this context, corporations may need to decide whether to disclose privileged materials. Knowing the legal consequences of doing so prior to making that decision is crucial.

Canadian and English law take similar approaches to the broad principles of legal privilege. In both jurisdictions, the main types of privilege engaged in investigations are solicitor-client privilege (known as legal advice privilege in England) and litigation privilege. Solicitor-client privilege protects confidential communications between a lawyer and a client where the dominant purpose of the communication is the seeking or providing of legal advice, while litigation privilege protects documents created for the dominant purpose of existing or contemplated litigation. Litigation may be reasonably contemplated where a company has been targeted by a dawn raid, contacted by a regulator or there is a pending criminal or regulatory investigation.

In both jurisdictions, privilege can be waived in several ways, expressly or impliedly. Implied waiver can occur where, for example, a privilege holder, the company, for instance, puts its legal advice in issue

as a way of strengthening its position in defending against potential liability.

Canadian and English law also recognise the concept of limited waiver – disclosure of privileged documents to a person for a limited, specified purpose where the material remains confidential. For example, it is widely recognised in both jurisdictions that when corporations disclose privileged documents to their external auditors (as required by law), they are doing so for the limited purpose of enabling their auditors to discharge their statutory and professional duties. In such a case, privilege is not waived as against other third parties.

In certain circumstances, a corporation may also disclose privileged documents to law enforcement authorities for the limited purpose of assisting with a criminal investigation without waiving privilege. Canadian courts have extended this principle to the disclosure of privileged documents by a party to assist in the conduct of a regulatory investigation, but only where the investigation is against that same party. Conversely, privilege is not maintained over documents disclosed to assist a regulator in its investigation against an individual or another corporation, for example. The rationale is that disclosure of privileged documents by a corporation is far less 'voluntary' where it is that very entity that is being investigated. This distinction, of course, may or may not be known by the corporation at the time that it is contemplating disclosure (and could change as the authority's investigation progresses).

"Practically speaking, it appears that disclosure of privileged material to law enforcement and regulators is a key factor in assessing whether a compliance agreement or plea deal may be available."

A recent Quebec Court of Appeal decision applied the 'voluntariness' principle and referred to a corporation's 'moral obligation' to provide a privileged report to assist with an investigation conducted by Quebec's anti-corruption agency regarding that corporation's activities. The court found that privilege had not been lost as against third parties. Only a small number of internal persons had viewed the report, and it had always been treated as confidential. The court found there was no clear, unequivocal intention to be deprived of solicitor-client privilege.

As this case shows, however, waiver is always considered on a case-by-case basis. As such, the

potential consequences of disclosing privileged material to law enforcement authorities or regulators for any purpose should be carefully considered.

Negotiating a compliance agreement: waiving privilege goodbye?

Practically speaking, it appears that disclosure of privileged material to law enforcement and regulators is a key factor in assessing whether a compliance agreement or plea deal may be available.

For example, the SFO's Corporate Cooperation Guidance notes that cooperation by a company means "providing assistance to [it] that goes above and beyond what the law requires". In turn, waiving privilege that may subsist in witness accounts is listed as one of the 'factors' against prosecution and evidence of an organisation's cooperation. At the same time, the guidance also states that an organisation will not be penalised for refusing to waive privilege. As a baseline, if a company asserts privilege over any material, it should be clear on what basis privilege is asserted and be prepared to have this tested by independent counsel. Notably, the guidance also provides no assurance that an organisation that waives its right to assert privilege will be offered a deferred prosecution agreement (DPA), nor does it explain what form any leniency may take. This is a deterrent to organisations considering whether to self-report in England. It also puts significant pressure on corporations when considering issues around privilege.

Under Canadian law, privilege is deemed to have been waived where documents or information are disclosed to the Crown or another adverse party in order to reach a plea deal. In *R v. Nestle Canada Inc*., two other chocolate manufacturers provided information to the Competition Bureau concerning a price fixing investigation that also involved Nestle. The Crown disclosed privileged information from these manufacturers to Nestle as part of its prosecutorial obligations. The Court found the material was no longer privileged: a fundamental purpose of the leniency programme was to obtain information that could be used to prosecute another corporation or an individual. The corporations were assumed to have understood that this material would be disclosed to a defendant and therefore privilege was presumed to be waived.

English courts have come to similar conclusions. In *R(AL) v. SFO*, the High Court found a company had waived privilege during its negotiations with the SFO when it gave the SFO an oral summary of interviews with its employees who were suspected of taking bribes. The Court found the company must have known it was very likely that that the defendants would be prosecuted, and the interview summaries would have to be disclosed to the defendants.

Information-sharing between law enforcement authorities

There are two common concerns with disclosing privileged documents or information to one law enforcement authority: (i) to what extent the material will be shared with other domestic or international authorities; and (ii) if so, whether the material shared remains privileged. The extent of cooperation between authorities will not be known by corporations and can change during the lifetime of an investigation. There are also routes for formal (i.e., mutual legal assistance requests) and informal information sharing that can be used and which may impact how privileged material is treated or protected by the receiving authority.

Some commentators argue that, under Canadian law, if a foreign authority comes into possession of a privileged document (whether lawfully or not), it might be able to produce it in the context of a legal proceeding, even if privilege has not been waived. Corporations must therefore be extremely vigilant where an investigation involves or may involve multiple jurisdictions, as Canadian courts have found that, if privilege is deemed to have been waived abroad, it is also deemed to have been waived in Canada. In *United States of America v. Levy*, the Ontario Superior Court found that documents inadvertently produced by the defendant to American authorities as a result of a US discovery order were no longer privileged in Canada. The documents had found their way into the material relied on by the US District Court in granting judgment. The Superior Court assumed that privilege had been waived, since the issue was not raised before the District Court.

Although the position under English law is more nuanced, English courts will likely find that privilege has been lost if a foreign law enforcement authority shares otherwise privileged material with another authority. In *Property Alliance Group v. Royal Bank of Scotland*, the High Court found that a litigant could assert privilege in civil proceedings over documents that had been shared with US regulators on a limited waiver basis. The documents were disclosed to US authorities, but on the express agreement that they were provided on a confidential basis and privilege should be preserved against third parties. However, if the US authorities exercised their rights under certain carve-outs to share the documents with other law enforcement agencies, privilege was lost.

We note that it would be unlikely for the SFO to routinely accept limits on a proposed waiver of privilege, since this may hinder the SFO's cooperation duties with other international law enforcement authorities. This is an important point of difference with the RCMP's practice, as it has been known to engage with corporations on the issues of disclosure and confidentiality.

Of course, a corporation would likely not know that its privileged documents and communications had been shared by an authority until it is too late, and

they have been shared onward with another authority. These considerations may encourage a corporation to not share privileged materials with an authority.

Practical points: how to protect privilege in investigations

There is always a chance that disclosing privileged material to law enforcement authorities or regulators can result in a loss of privilege. If choosing to cooperate with criminal or regulatory investigations into their activities, corporations should consider the following points prior to disclosing any material.

First, restrict internal access. Courts are more likely to maintain privilege over a document that has been treated as confidential and privileged within the corporation.

Second, think about the future. Disclosing material to assist with an investigation may not affect privilege today, but that status may change tomorrow if the same material is used for another purpose.

Third, less is more. Does the entire document have to be produced or can it be redacted? Is it possible to produce a high-level summary of the document's contents or conclusions? It is very difficult to retreat when too much has been revealed. Law enforcement and regulators cannot 'un-see' what they have already been shown.

Fourth, watch what you say in communications with law enforcement authorities, including before a prosecution is reasonably anticipated. Be careful when explicitly relying on legal advice to justify a position or argument, as this can lead to waiver of privilege over the legal advice itself.

Lastly, make it official. Where possible, take steps to ensure the confidential and privileged status of the material prior to disclosure, including entering into an understanding or protocol with the investigating authority. CD

The authors would like to thank Ailsa Robertson, a knowledge lawyer at Norton Rose Fulbright Canada, and Naomi Miles, a senior associate at Norton Rose Fulbright LLP, for their contribution to this article.

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