CANADIAN Lawyer INHOUSE
FEBRUARY 2007

Privilege under fire

As North American securities regulators crack down on corporate fraud, a cornerstone legal principle, solicitor-client privilege, has been caught in the crossfire. Today, in-house counsel wear huge targets on their backs. While the pressure tactics are not as severe in Canada, they still exist and in-house counsel are walking a privilege tightrope.

By Geoff Kirbyson

An assault on privilege in the U.S. is forcing in-house counsel in Canada to be on their toes in case the all-important pillar of the legal profession comes under fire north of the border.

Regulators in the U.S. are increasingly demanding corporations waive their right to privilege in order to get credit — and likely lesser penalties — for co-operating with their investigations.

Susan Hackett, senior vice-president and general counsel of the Washington-based Association of Corporate Counsel, says the push for increased corporate transparency in recent years has its roots in the Enron and WorldCom accounting scandals. Regulators are hoping to show their hard-line stance is stamping out corporate fraud and that legal operations within organizations are honest and above-board. But that's making it difficult for in-house counsel to do their jobs, she says.

"If you're entitled to a lawyer, it's meaningless unless the conversations are confidential," she says. "The public has been so focused on transparency, they don't think it's important to protect people who might be indicted [and allow them] to raise the same defense as any other person who might consult with a lawyer. To the person who might go to jail or the corporation that might go out of business, it's very important."

The impact on in-house counsel in Canada could be profound, she says, particularly since many of the companies being investigated by enforcement authorities in the U.S. are multinational. The effectiveness with which they'll be able to counsel their clients, for example, could be seriously curtailed because they won't be welcomed into the most sensitive conversations.

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Marie-Andrée Vermette, a partner at WeirFoulds LLP in Toronto, says Canada isn't without its own examples of high-pressure tactics. For example, the Ontario Securities Commission (OSC) has a credit for co-operation policy. At the conclusion of an investigation, its offer to settle the matter will be affected by how much resistance the company put up, she says.

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"If you invoke (privilege), they'll see it as not being co-operative and you'll be penalized. All of these discussions with staff are happening without any supervision by the courts. The threat to privilege isn't when you go to court, it's in all these dealings with these boards because of the enormous power they have over people. They can pressure you to waive privilege and you're entitled to privilege," she says.

She says the threat to privilege can prevent lawyers from doing their job at optimal performance.

"These policies make the lawyer an instrument of the state. You can't be 100-per-cent behind your client. The OSC doesn't force you to waive privilege but you have to ask yourself, 'Do we disclose this to get a better settlement or not?' This is one step. It could become worse," she says.

She is, however, optimistic that it won't.

"My hope is at some point it will be stopped by the courts. The courts have always been very protective of solicitor-client privilege," she says.

Beware the privilege pitfalls

Protecting solicitor-client privilege is no easy task. It can easily be lost by a slip-up, notes Marie-Andrée Vermette, a partner at WeirFoulds LLP in Toronto. Here is her list of things to watch for when managing sensitive corporate information in an investigation or pending litigation.

Disclosing matters that are privileged to a regulator (or to anyone) will usually result in a waiver of the privilege attached to all documents as well as communications pertaining to the particular subjects disclosed.

Invoking reliance on legal advice — in support of an argument that the corporation or an officer was acting in good faith, for example — will often result in a waiver of privilege and you can then be compelled to disclose the legal advice in question.

If you are co-operating and/or exchanging information with co-defendants or other persons who are being investigated by an authority, seriously consider entering into a common interest privilege agreement with them and their counsel to avoid a waiver of litigation privilege.

To be protected by solicitor-client privilege, a communication must be intended to be confidential. Having a conversation with your client in the presence of other persons or using communication means that are not confidential, such as a joint email address, may well result in a finding that the communication is not privileged.

It is important to remember that advice given by lawyers on matters outside the solicitor-client relationship is not protected so advice on "business matters" is not shielded.

Solicitor-client privilege extends to communications in whatever form, but does not extend to facts that may be referred to in those communications if they are otherwise discoverable and relevant.

Silvie Kuppek, executive director of the Toronto-based Canadian Corporate Counsel Association, says regardless of the state of privilege, in-house counsel have always had to walk a tightrope between giving business recommendations and providing legal advice, while making sure the latter remains privileged.

"Those lines tend to get blurred if you have some kind of business role because many senior members also provide business advice," she says.

She says the fact its members happen to be employed by their clients shouldn't impact the sanctity of solicitor-client privilege.

"Privileged communication is privileged communication. It's the cornerstone of the legal profession. It's why you go to your lawyer, not your accountant. In order to get the best advice, you have to be able to provide all of the best information," she says.

Kuppek says there's a widespread assumption in the post-Enron environment that "everybody is doing something untoward." That's requiring companies to spend a great deal of time thinking about the potential impact of even the most innocuous communication, including email and BlackBerry transmissions.

"Everything can potentially be held against you," she says.

Richard Leipsic, vice-president and general counsel at CanWest Global Communications Corp., says it's not uncommon for in-house counsel to be holding down officerships and business positions within their companies. He says while their conversations as lawyers are privileged, discussions of business or strategic advice with others are subject to a loss of privilege.

"We could be perceived as not acting in our position as a lawyer but as a business executive," he says.

As a result, Leipsic says he makes every effort to ensure his legal communication and involvement is clearly described and there's no room for misconceptions. In fact, he says it's not uncommon for him to delete references to his business title, depending on the circumstances.

For example, Leipsic says if he gives written advice to management or executives on a legal matter, that communication is normally privileged. But if that memo gets distributed from the original recipient to members of another department, it's no longer privileged because it loses the context of being a conversation between a lawyer and a client.

"We're careful. If this advice is going to be disseminated, it will go from me to the end recipients marked 'privileged.' It's difficult. We try and impose some rigour and discipline about how our memos get disseminated. If it's giving legal advice on a strategic position, we establish a protocol on how it's going to be disseminated," he says.

Leipsic says he also tries to avoid sitting on the boards of some of CanWest's subsidiaries.

"When the directors turn to me and ask for legal advice on a particular matter, that's fine, except i t then becomes a test. Did the conversation and exchange of information come from me as a lawyer or as another director? If it's as a director, that's not privileged," he says.

"When you get called into a meeting, you can only be seen to be wearing one hat. I try to take off my vice-president's hat so nobody can confuse the fact."

Chris Martin, vice-president of corporate affairs and general counsel at Agricore United in Winnipeg, says fortunately the practise of regulators targeting in-house counsel in pursuit of their companies has not gained much momentum in Canada. He says while Canadian regulators have not adopted the "take no prisoners" approach of many of their U.S. counterparts, it doesn't mean they aren't as determined. Instead, Canadian regulators are more respectful of the underlying values and principles upon which privilege is based, he says.

"I believe Canadian counsel and in-house counsel are very aware and mindful of their ethical obligations and the code of conduct which governs them. Good in-house counsel do not condone illegal activity and have an obligation to their company to ensure the right people are aware of it and take action," he says.

He says for them to participate in such activity would be a "double whammy" because they would expose themselves to discipline from both the law society and prosecutors.

"Remember, the privilege is the client's, not the lawyer's, and the lawyer can't waive it," he says. **H**