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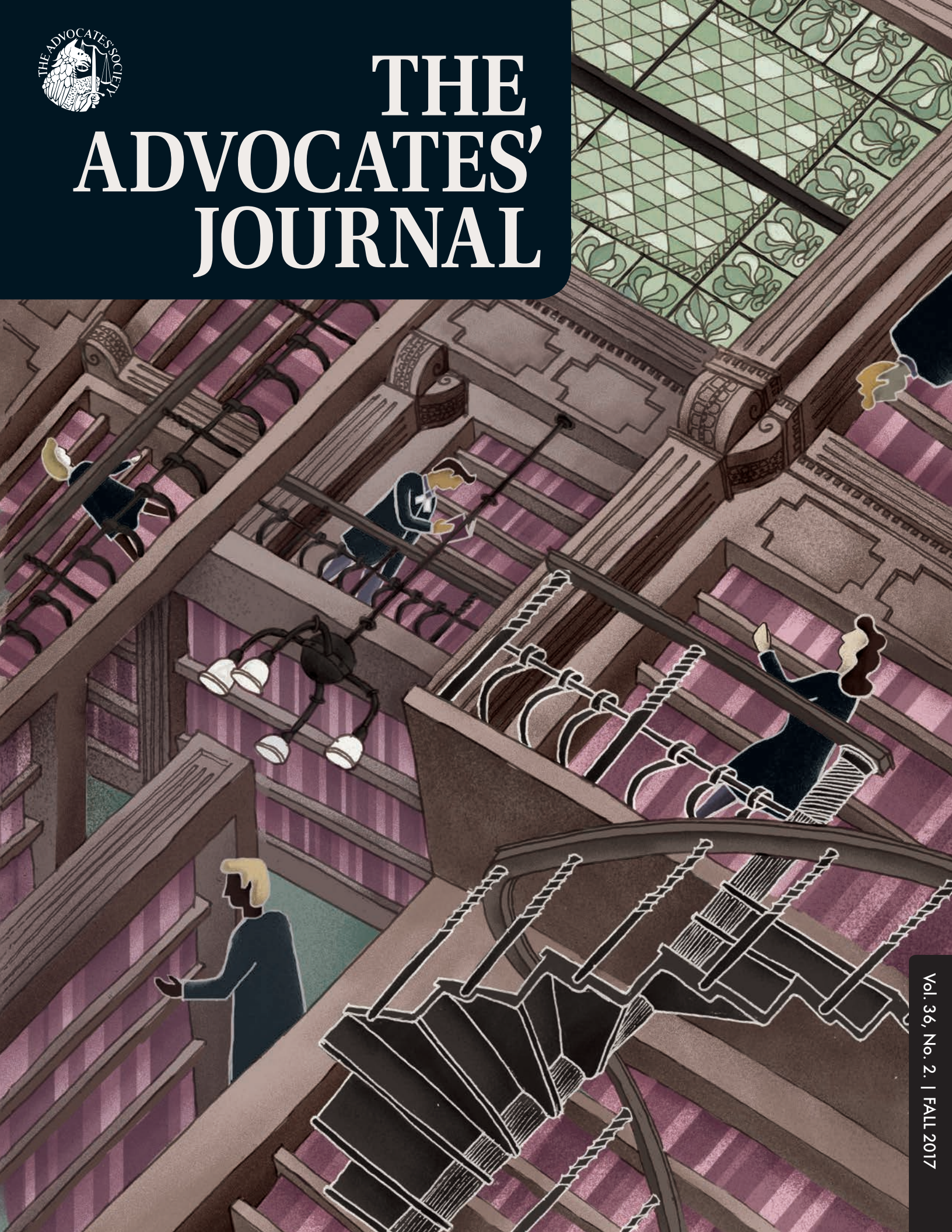

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The Honourable Justice Jasmine T. Akbarali
Justice Jasmine Akbarali sits on the Superior Court of Justice in Toronto. Prior to her appointment she was an appellate lawyer in Toronto.

The Honourable Justice David M. Brown
Justice David Brown sits on the Court of Appeal for Ontario. When the mysteries of final and interlocutory orders become too impenetrable, he retreats to outport Newfoundland to seek wisdom from the cod.

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Lara Draper is an associate at *Dentons Canada LLP* in Edmonton, practising commercial insolvency law and civil litigation. She has appeared before the Provincial Court of Alberta and the Alberta Court of Queen's Bench and is secretary of the Board of Directors and member of the Advisory and Human Resources Committee of the Kids Kottage Foundation.

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Matthew Milne-Smith
Matthew Milne-Smith is a partner and the Litigation Practice Group Coordinator at *Davies Ward Phillips & Vineberg LLP* in Toronto. He practises commercial litigation and is already regretting writing an article that advocates for fewer trials.

The Honourable Joseph W. Quinn
The Honourable Joseph Quinn took an early retirement from the Ontario Superior Court of Justice in 2016, following which he and his wife acquired a lively puppy. His Honour is now seeking a reappointment to the bench. He needs the rest.

Internal investigations and privilege:

Encouraging voluntary provision of impressions, explanations and interpretation of events

Alexander M. Gay and Kenneth Jull

The views expressed in this article are those of the authors and do not necessarily represent those of Mr. Gay's employer, the Department of Justice, or those of Gardiner Roberts, where Mr. Jull is counsel, or those of the Competition Bureau, where Mr. Jull is presently on an interchange.

In this article, we propose a dichotomous approach to privilege in internal investigations by a corporation. The proposed dichotomy respects the division between factual evidence versus impressions, explanations or interpretation of events.

If the company chooses to reveal the results of the internal investigation to the authorities, it may benefit from this disclosure by way of a deferred prosecution agreement in the United States, or a reduced sentence in Canada. The government benefits from the resources spent by the corporation on the investigation, which saves the government money. In some cases in the "zone of non-discovery," the government benefits from discovery of the event itself. For this process to work, it is essential that the investigation be thorough and that it explore the causes of non-compliance and alternative versions or explanations for it. Privilege allows for a comprehensive and objective investigation.

When serious non-compliance or violations of the law are discovered internally, the simple fact is that the reason for the violation is often not that simple. There are often complex reasons and potential alternative views of the reasons for the non-compliance or even debate about the legalities of the issue. To take a hypothetical example, suppose the expenditure of $5 million for a capital project is a smokescreen for a bribe to a foreign public official. It is easy to see this is an illegal act. What may be unclear is whether senior officers in the organization were aware it was a disguised bribe, or whether they were unaware of a scheme to hide the bribe by those within the organization who created the scheme. Complex levels of analysis are required to determine corporate criminal liability and to determine whether senior officers may have failed in their due diligence by missing red flags. Moreover, timeline analysis is important to evaluate when senior officers became aware of the non-compliance and what steps they took and when.

Our proposed approach would take a broad view of privilege as covering the impressions, explanations or interpretation of events by individuals interviewed in internal investigations by legal counsel.

We recognize that privilege claims may be overbroad. Document review by junior lawyers who have little experience may result in overbroad claims, as younger lawyers may err on the side of caution by claiming privilege. In some rare cases, corporations may attempt to hide embarrassing documents or emails by claiming litigation privilege or attempting to cloak them with solicitor– client privilege by copying counsel routinely. Accordingly, our proposed approach would take a much stricter stance in evaluating claims of privilege associated with factual evidence and documentary evidence, including emails.

In our view, the mechanism of a third-party referee to assess the records, who would then report to the court, is a good hybrid solution that balances the values underlying privilege but at the same time ensures that claims for privilege are not overbroad or not substantiated by the proper legal tests.

Canadian cases on privilege in internal investigations: Grey areas

The Alberta Court of Queen's Bench ruled in *Alberta v. Suncor Energy Inc.* (*Suncor*) that an internal investigation into a workplace accident was privileged, and thus protected from disclosure. The court found that, notwithstanding an Alberta *Occupational Health and Safety Act* (OHSA) requirement to carry out an investigation and prepare a report, certain information and records created or collected during the investigation were protected by litigation and legal advice privilege.

In *Suncor*, an employee was killed in a workplace accident. On the day of the accident, Suncor reported the incident under the OHSA. It also began an internal investigation under the direction of in-house counsel. Occupational Health and Safety (OHS) staff also conducted an investigation, during which they collected records and interviewed approximately 15 witnesses. Under the OHSA, Suncor itself had a statutory obligation to "carry out an investigation into the circumstances surrounding" the accident and prepare a report outlining these circumstances and the "corrective action, if any, undertaken to prevent a recurrence." Notwithstanding the furnishing of the report to OHS and the provision of the names of all persons interviewed as well as those making up Suncor's internal investigation team, OHS demanded additional records from Suncor, including copies of witness statements and records taken or collected by Suncor's investigative team. Suncor refused, citing litigation and legal advice privilege.

The court held that Suncor could assert that the "dominant purpose" for the collection of information was to prepare for litigation, stating at paragraphs 45–46:

> [A]lthough Suncor has a statutory obligation under the *OHS Act* to conduct an investigation and prepare a report on the Accident for the Ministry/OHS, that obligation does *not* foreclose or preclude Suncor's entitlement to litigation privilege for all purposes, particularly if the evidence demonstrates that

> Suncor had taken deliberate steps to cloak documents and information collected in the process of the investigation with the garb of privilege in anticipation or contemplation of litigation.
>
> Denying Suncor its entitlement to claim litigation privilege over information created and/or collected during an investigation, because of an overlapping statutory obligation to investigate and report, would prejudice Suncor's right to defend itself against any potential civil actions, criminal prosecutions or regulatory claims. That result would defeat the policy justification and purpose of the law in relation to litigation privilege. … [Italics in original.]

With respect to legal advice privilege, the court found that Suncor demonstrated it sought and received legal advice from internal and external counsel. In considering whether the specific records over which Suncor asserted litigation and legal advice privilege were in fact protected, given the volume of records at issue, the court ordered Queen's Bench case management counsel to act as a referee in assessing the records. The court would then consider the referee's recommendations in finally adjudicating on the records.

In our view, the mechanism of a third-party referee to assess the records, who would then report to the court, is a good hybrid solution that balances the values underlying privilege but at the same time ensures that claims for privilege are not overbroad or not substantiated by the proper legal tests. Law firms will typically assign more junior lawyers to perform document review and claims of privilege, with elevation to senior lawyers only at later stages. The process of review by a court ensures that the proper legal tests are being applied in a transparent manner.

Commentators have argued that *Suncor* broadens and strengthens the ability of companies to keep internal investigations privileged, even in the face of a statutorily mandated investigation.

On July 4, 2017, the Alberta Court of Appeal upheld the privilege found in *Suncor* and endorsed the mechanism of a referee, but required a more detailed document by document analysis and review:

> The chambers judge erred in finding that the dominant purpose of the internal investigation was in contemplation of litigation and therefore every document "created and/or collected" during the investigation is clothed with legal privilege. Suncor cannot, simply by having legal counsel declare that an investigation has commenced, throw a blanket over all materials "created and/or collected during the internal investigation" so as to clothe them with solicitor-client or litigation privilege. Where a workplace accident has occurred, and the employer has statutory duties under sections 18 and 19 of the *OHSA* and simultaneously undertakes an internal investigation, claiming legal privilege over all materials derived as part of that investigation, an inquiry is properly directed to a referee under Rule 6.45 to determine the dominant purpose for the creation of each document or bundle of like documents in order to assess the claims of legal privilege. Moreover, the Court of Appeal required that Suncor must independently distinguish the nature of the legal privilege claimed, and the evidentiary basis for the claim, and granted Alberta the right to make submissions before the referee.

A quick review of Canadian cases reveals a balancing test applied to individual fact situations. Canadian courts have been reluctant to recognize a self-audit privilege. With respect to solicitor–client advice in the context of business decisions, the Canadian courts have developed a balancing test as set out in *Pritchard*.[1] Each case is of course factually driven, but in some cases Canadian courts have protected lawyers' interview notes as created for the dominant purpose of anticipated criminal litigation, such as reviewed in the *Dunn* case.[2] The Ontario Court of Appeal reaffirmed the importance of solicitor–client

privilege in reports prepared in anticipation of litigation in the case of *R. v. Bruce Power Inc.*[3]

The grey areas of interpretation of privilege are a temptation to suggest a bright-line test that would be easier to apply. The UK courts have recently attempted to create a bright-line test that has created some considerable controversy.

Recent developments in the UK

On May 8, 2017, the English High Court of Justice handed down judgment in *The Director of the Serious Fraud Office v. Eurasian Natural Resources Corporation Ltd* ("*SFO v. ENRC*"), which could significantly limit the application of litigation privilege in criminal investigations.[4] The judgment is the first judicial consideration of litigation privilege in the context of voluntary disclosures to the Serious Fraud Office (SFO). Commentators have warned that, if upheld and broadly applied, the judgment could significantly limit the circumstances in which a company conducting an internal investigation prior to initiation of formal criminal proceedings could successfully claim litigation privilege over work product generated during the investigation.[5]

Between August 2011 and April 2013, the SFO and Eurasian Natural Resources Corporation Ltd (ENRC), a multinational natural resources company headquartered in the UK, were engaged in a dialogue over allegations of fraud, bribery and corruption in Kazakhstan and an African country. During this period, ENRC was conducting internal investigations and transactional due diligence into the allegations under the supervision of an external law firm. In April 2013, the SFO terminated the discussions and began a criminal investigation into the activities of ENRC. Under section 2(3) of the *Criminal Justice Act 1987*, the SFO issued notices against ENRC and various other third parties to compel the production of documents. On receipt of the notices, ENRC contended that four categories of documents were privileged and would not produce them.

Category 1: Interview notes prepared by ENRC's external legal counsel of interviews of numerous individuals, including former and current employees of ENRC, and the officers of ENRC and its subsidiaries and suppliers, relating to the events being investigated. The notes were created before the SFO began the criminal investigation in April 2013. ENRC claimed these documents were subject to litigation privilege, as the dominant purpose of the interviews was to enable ENRC's external legal counsel to obtain relevant information to advise ENRC in connection with the anticipated adversarial criminal litigation. Alternatively, ENRC claimed the documents could be characterized as lawyers' work product, and disclosure of such would reveal the trend of legal advice being provided to ENRC.

Category 2: Documents generated by forensic accountants during the same period as part of a books and records review that sought to identify systems and controls weaknesses and potential improvements. ENRC claimed the documents were protected by litigation privilege as the "dominant purpose of the reports was to identify issues which could likely give rise to intervention and prosecution by law enforcement agencies, with a particular focus on books and records offences, and to enable ENRC to obtain advice and assistance in connection with such anticipated litigation."

Category 3: Documents indicating or containing the factual information presented by ENRC's external legal counsel to the ENRC board in relation to the investigation. ENRC's primary case was that these documents were subject to legal advice privilege.

Category 4: Documents referred to in a letter sent to the SFO, including forensic accountant materials as outlined in Category 2 and two emails between ENRC's head of mergers and acquisitions (M&A) and senior ENRC executives. The head of M&A was a qualified Swiss lawyer. ENRC claimed that litigation privilege applied to the forensic accountant materials and that the head of M&A, as a qualified lawyer, was acting in the role of a lawyer and therefore subject to legal advice privilege.

The court held that privilege applied only to the Category 3 documents, which were subject to legal advice privilege. ENRC's other claims of privilege were rejected.

Litigation privilege

In rejecting ENRC's claims for litigation privilege, Justice Andrews considered the early stage of the investigation such that a mere suspicion of a potential compliance problem, even where the company has opted to engage external experts to conduct an internal investigation, is insufficient to give rise to a reasonable contemplation of prosecution. At this early stage, the court was of the view that it cannot be concluded that the real risk of an investigation translates to a real risk of a prosecution.

The court rejected the argument that litigation privilege should extend to third-party documents created to obtain legal advice on how best to persuade the SFO to decline prosecution.

Moreover, the court held that, even if ENRC could satisfy the requirement that prosecution had been reasonably in contemplation, the documents over which litigation privilege was claimed were not created with the dominant purpose of being used in the conduct of the litigation.

Legal advice privilege

Justice Andrews accepted that, regarding the Category 3 documents, the presentations prepared by ENRC's external legal counsel for the specific purpose of giving legal advice to ENRC were privileged, even if they referred to factual information or findings. However, in rejecting ENRC's claims that legal advice privilege applied to the other disputed documents, Justice Andrews honed in on the factual nature of the investigation, in the following respects:

- Fact-finding interviews by external legal counsel were not part of the confidential lawyer–client relationship.
- There was no evidence that any of the people interviewed were authorized to seek and receive legal advice on behalf of ENRC and the communications between the individuals and ENRC's external legal counsel were not communications in the course of conveying instructions to counsel on behalf of the corporate client.
- Regarding the communications involving ENRC's head of M&A, at the time these documents were created, he was acting as a "man of business" as opposed to a lawyer. Substantial weight was put on the nature of the head of M&A's role, which was primarily focused on strategic planning and the execution of transactions, as opposed to being legally focused.

The judgment in *SFO v. ENRC* has generated a lot of discussion. Commentators have predicted the judgment could have a dramatic impact on the practice of internal investigations in the UK, particularly those undertaken to address whistle-blower allegations or compliance concerns absent a formal inquiry from an external regulator.[6]

Some Canadian commentators[7] have described the decision in *SFO v. ENRC* as "both surprising and of concern to corporations who may find themselves subject to potential regulatory investigation."[8]

The documents generated during investigations of ENRC included notes from interviews of 85 individuals undertaken by ENRC's counsel. Best practice for companies that become aware of allegations of wrongdoing has long been to conduct an internal investigation into the allegations. Canadian commentators have noted the distinction between facts and lawyers' notes with privileged information:

> In Canada, most legal experts who pursue internal investigations on behalf of clients agree that facts learned or documents gathered in the course of an investigation are not privileged even if the investigation is pursued by counsel. However, lawyers' contemporaneous notes and work product that contain or reflect bona fide privileged information ought to be protected. For this reason the way an investigation is structured at the outset, and the purpose for that setup, is crucial. The High Court's decision is currently under appeal. Companies and practitioners (both in the UK and Canada) will be monitoring the decision closely on appeal. Should it be upheld, companies will have to be prepared for the possibility that their counsel's work product in carrying out internal investigations may make its way into the public record. This could have significant consequences for the manner in which such investigations are carried out going forward.[9]

If counsel's work product and interview notes in an internal investigation will become public, this development will create a new risk dynamic. A company may decide it is not worth doing an internal investigation if the results are automatically turned over to the authorities. On the flip side, the government may offer fewer deferred prosecution agreements if it can obtain information of internal investigations without making that offer. In short, the decision in *SFO v. ENRC* may put a chill on dialogue with the regulator, which we think would be unfortunate for both industry and the government.

Other Canadian commentators have viewed the decision in *SFO v. ENRC* from the lens of the government regulator.[10] A prosecution cannot be started unless and until the prosecutor is satisfied there is a sufficient evidential basis for prosecution and the public interest test is met. The challenge for the prosecution as it relates to litigation privilege is in establishing the date on which it can be said it had sufficient evidence to begin a proceeding.[11] It is speculated that corporations may decide to wait until there is an actual criminal prosecution before conducting an internal investigation in order to receive the benefit of litigation privilege.

There is some recognition in Canadian courts of the need for a "zone of privacy" when a party or parties are facing an investigation in a regulatory context where the potential penalty is an administrative monetary one. This point was made in *TransAlta Corporation v. Market Surveillance Administrator*,[12] where the Alberta Court of Appeal held there is an obvious need for legal advice and a zone of privacy contemplated by litigation privilege, when a party or parties are facing an investigation that could result in an administrative monetary penalty (AMP).

A dichotomous approach

In this section, we propose a dichotomous approach to privilege in internal investigations. The proposed dichotomy respects the division between factual evidence versus impressions, explanations or interpretation of events.

The need for candid impressions, explanations or interpretation of events

One of the authors of this article has experience with internal investigations that may provide insight into the process.

If senior officers or employees fear that

everything they say in an internal investigation interview will be provided to the authorities, they are not likely to volunteer impressions, explanations or interpretation of events. They may discuss the bare facts, but they may not volunteer nuances or their own thoughts and impressions that are important for providing insight into the reasons for a failure of non-compliance.

During a corporate internal investigation, employees will be advised that the interview is privileged, but the privilege is held by the corporation (or audit committee) performing the internal investigation. The privilege protects communications between client and lawyer, but does not protect the facts underlying the communications.[13]

The employee is told the corporation (or audit committee) may choose to waive this privilege and disclose the results of the investigation to authorities. This warning is commonly referred to as an "Upjohn" warning.[14]

If employees or senior officers believe the results of internal interviews will be turned over to the authorities, it is likely they will be much more circumspect in interviews or may seek legal advice and choose not to co-operate at all.

Any good investigator knows that a basic version of the facts tells only the first layer. Multiple layers and explanations arise only from insight into subjective factors such as motive, personality, opportunity and self-reflection. The truth may require an employee or senior officer to be critical of persons in authority above them, or of the systems in place in the organization. If early impressions, thoughts and insights into these factors are not privileged in an internal investigation, it is not likely individual officers will be forthcoming. The result will be an incomplete picture of what really happened.

A contrary argument might be that employees will be reluctant to tell the whole truth once they hear the Upjohn warning and realize it is not their decision about whether privilege may be waived. It might be asked, from the employees' point of view, what is the difference between the notes being turned over to authorities voluntarily by the company and the notes being compellable and available to the authorities? The answer, in our view, is that a deferred prosecution agreement may also protect individuals from prosecution (subject to the Yates memo approach[15]), and counsel for an employee will likely advise them to co-operate if they intend to remain employed. If the results of the interview will not be protected in any way, counsel for the employee may give different advice.

The risk of documents being hidden under the cloak of privilege

We recognize that privilege claims may be overbroad. Document review by junior lawyers who have little experience may result in overbroad claims, as younger lawyers may err on the side of caution by claiming privilege. More senior lawyers are not immune from pressures from clients to make broad claims of privilege and force government regulators to challenge those claims. In some rare cases, corporations may attempt to hide embarrassing documents or emails by claiming litigation privilege or attempting to cloak them with solicitor–client privilege by copying counsel routinely.

Accordingly, our proposed approach would take a much stricter stance in evaluating claims of privilege associated with factual evidence and documentary evidence, including emails. Regulators should not be afraid to challenge claims of privilege in a court. There must, however, be a transparent mechanism to ensure that the court is not tainted by the privilege review.

A referee

As noted, in *Alberta v. Suncor Energy Inc*.[16] the court ordered Queen's Bench case management counsel to act as a referee in assessing the records. The court would then consider the referee's recommendations in finally adjudicating on the records. The challenge is in devising a mechanism where a third-party referee will be able to assess the documents without necessarily waiving privilege. A court may order a party to provide the information to an independent judge of the same court, who will then be able to report to the presiding judge on the bona fides of the claims. The parties may also come to an agreement, with the blessing of the court, to allow a third party to review the documents for privilege claims, without destroying privilege claims. A limited waiver to serve a specific requirement is always possible. The challenge for counsel is in devising a process that will allow the privilege claims to survive the review. Also, counsel has to keep in mind that there are some privilege claims, such as cabinet confidences or national security claims, that cannot be viewed by the court and for which a third-party referee may not be a solution.

In our view, the mechanism of a referee to assess the records, who would then report to the court, is a good hybrid solution that balances the values underlying privilege but at the same time ensures that claims for privilege are not overbroad or not substantiated by the proper legal tests.

Notes

1. *Pritchard v Ontario (Human Rights Commission)*, [2004] 1 SCR 809 at para 19.
2. *R v Dunn* (2012), 101 WCB (2d) 264, 2012 ONSC 2748 (Ont SCJ).
3. *R v Bruce Power Inc* (2009), 245 CCC (3d) 315 (Ont CA).
4. Gary DiBianco & Elizabeth Robertson, "English Court Questions the Application of Litigation Privilege in Criminal Investigations," Skadden Arps Slate Meagher & Flom LLP (London, UK: memorandum, 17 May 2017). (*Serious Fraud Office (SFO) v Eurasian Natural Resources Corporation Ltd* [2017] EWHC 1017 (QB).)
5. *Ibid*.
6. *Ibid*.
7. Lawrence E Ritchie, Kevin O'Brien & Malcolm Aboud, "UK Court Holds Counsel's Interview Notes During Internal Investigation Are Not Privileged"; online: <http://www.lexology.com/library/detail.aspx?g=001830df-1de6-43d9-81c6-d4550d46c337>.
8. *Ibid*.
9. *Ibid*.
10. Alexander Gay, "Does Litigation Privilege Always Apply to Internal Investigations?" (19 May 2017) CBA National Magazine.
11. *Ibid*.
12. *TransAlta Corporation v Market Surveillance Administrator*, 2014 ABCA 196 (CanLII) at para 40.
13. Grace M Giesel,"Upjohn Warnings, the Attorney–Client Privilege, and Principles of Lawyer Ethics: Achieving Harmony," 65:109 University of Miami Law Review at 127.
14. *Ibid*.
15. In the "Yates Memo," the US Attorney General stated that, absent extraordinary circumstances, no corporate resolution will provide protection from criminal or civil liability for any individuals: United States Department of Justice, Office of the Deputy Attorney General, "Individual Accountability for Corporate Wrongdoing," memorandum by the Deputy Attorney General, Sally Quillian Yates (Washington: Department of Justice, 9 Sept 2015); online: <https://www.justice.gov/dag/file/769036/download>.
16. *Suncor*, *supra* note 3.