

Corporate Limits to the Claim of Solicitor-Client Privilege

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The law of privilege in Canada affords broad protection for confidential communications emanating from an employee of a corporation regardless of the position in the corporation, provided the objective is to obtain legal advice. The corporation and the employees within it are treated as a monolithic whole with little to no consideration to the issue of whether the employee has authority to receive or request legal advice on behalf of the corporation. The jurisprudence in the United Kingdom and the United States have circumscribed the application of solicitor-client privilege to only those employees within the corporation that are entitled to receive or request legal advice. All other employees are treated like third parties. While Canadian jurisprudence has yet to fully evolve on this issue, it is just a matter of time before an enquiring legal mind challenges an approach where all employees are deemed to be agents of the corporation. The recent jurisprudence from the United Kingdom and some of the established legal principles that stem for the US jurisprudence on how to identify the “client” within a corporation should inform corporate counsel in Canada on how to best manage legal advice in order to safeguard the privilege claim.

The issue of whether all employees in a corporation constitute a client for the purposes of asserting a solicitor-client privilege claim was recently discussed in *RBS Rights Issue Litigation* [2016] EWHC 3161 (Ch) (“*RBS Rights Issue*”), where the High Court held that the notes taken in an interview conducted by in-house counsel were not covered by legal advice as the employees in question did not form part of the client for privilege purposes. The *RBS Rights Issue* decision makes reference to the Court of Appeal decision in *Three Rivers District Council and others v Governor and Company of the Bank of England (No 5)* [2003] QB 1556 (“*Three Rivers (No 5)*”), where the Court of Appeal adopted a very narrow view of who is the “client” for the purposes of legal advice privilege. On the facts of that case, only the three-member committee formed by the Bank of England to coordinate communications with its external lawyers in relation to the Bingham Inquiry into the collapse of BCCI constituted the client. Privilege was restricted to communications between that committee and the lawyers. This meant that any documents or communications prepared by others within the bank were denied the benefit of the privilege, even if they were prepared for the benefit of the lawyers. The conclusion in *Three Rivers (No 5)*, was that information gathered from an employee is no different from information obtained from third parties, even if the information is collected by or in order to be shown to a solicitor in the corporation for the purposes of providing legal advice. The case stands for the proposition that the “client” may be restricted to some limited group of employees. While the decision at some point suggests that only employees singly or together constituting part of the directing mind and will of the corporation can be treated for the purpose of legal advice privilege as being, or being a

¹ The views expressed by the author are not those of his employer the Department of Justice.

qualifying emanation of, the 'client', the decision leaves the issue unresolved. Until the *RBS Rights Issue* was decided, there was some legal uncertainty in the United Kingdom on whether *Three Rivers (No 5)* was a fact specific case and whether the narrow reading of what constitutes a "client" could be sustained in other cases. The *RBS Rights Issue* confirms that mere employee status in a corporation is not enough to fall within the confines of a "client". Instead, the notion of client is limited to those who are authorised to seek and receive legal advice on behalf of a client corporation.

The jurisprudence in the United States has taken the analysis one step further than the United Kingdom and has tried to articulate guidelines on what is required in order to show that a given employee has the authority to request or receive legal advice on behalf of the corporation. There are three approaches, namely: (a) Corporate Control Test, (b) the Subject Matter Test, and (c) the Upjohn Test. The Corporate Control Test provides that the privilege extends only to the corporation's controlling executives and managers. This approach is similar to what is suggested in the *RBS Rights Issue* case but has taken a back seat to the Subject Matter Test and the Upjohn Test, which are far more prevalent in the case law. The Subject Matter Test looks at subject matter of the employees' communications. Under this approach, communications to the corporation's lawyer are privileged if the employee communicates with counsel at the direction of his superiors and the subject matter of that communication relates to the performance by the employee of the duties of his or her employment. The scope of duties becomes relevant in making the assessment. The Upjohn Test extends privilege to the corporation's employees if the following five conditions are met: (a) corporate employees must have made the communication to corporate counsel for the purpose of providing legal advice to the corporation; (b) the substance of the communication must involve matters that fall within the scope of the corporate employee's official duties; (c) the employees themselves must be sufficiently aware that their statements are being provided for the purpose of obtaining legal advice for the corporation; and (d) the communications also must be confidential when made and must be kept confidential by the company.

Within the Canadian context, there is little case law that deals with the issue of who is the "client" in a corporation. For the most part, the issue has been treated as one coming within the agency theory of privilege; that is, any employee can be engaged by the corporate client to pass on information to solicitors for the purpose of receiving legal advice: *General Accident Assurance Co. v. Chrusz*, 1997 CanLII 12164 (ON SC). The Canadian approach lacks rigour and makes assumptions about a corporation that should not be made. Not all employees are authorized to request or receive legal advice on behalf of a corporation and litigation counsel should be entitled to defeat the privilege unless a corporation can prove otherwise. The *RBS Rights Issue* case should cause in-house counsel to reconsider the manner in which legal opinions are sought and align corporate practices to the Upjohn Test as it appears to be the most robust test and one that aligns well with the agency approach taken thus far in Canadian jurisprudence.