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OUR INVESTIGATIONS PRACTICE

We conduct internal investigations for boards of directors, special committees, and management when they are confronted with critical and sensitive situations, including where investigations have been ordered by regulators. Our team is relied upon to conduct investigations with efficiency, discretion, and the utmost capability. We have an unparalleled understanding of the law, including the practical considerations courts and regulators apply in assessing an investigation.

Internal Investigations

“Mitra v Royal Bank of Canada will be a highly significant ruling for financial sector clients in the wrongful dismissal context.”

What was the most interesting development of 2023, and why?

In 2023, the Ontario Superior Court rejected an employee’s novel argument in the ongoing battle regarding the scope and impact of claims of privilege over investigations conducted by counsel.

In [Mitra v Royal Bank of Canada](#) (reported in 2024 following a three-week trial in Spring 2023), RBC asserted that the plaintiff deliberately misled investigation counsel. During the discovery phase of the litigation, RBC produced typed “attendance notes” factually summarizing investigation interviews but claimed privilege over the investigators’ handwritten interview notes and other work product. Rather than challenge RBC’s privilege claim, the plaintiff sought at trial to prevent the investigator from testifying on

the basis that he was prejudiced by RBC’s claim of privilege over the original notes. The Court rejected this argument, the investigator testified, and the Court ultimately held that RBC had cause to dismiss the plaintiff for dishonesty. The Court made two important related rulings:

- The Court “accepted that there may be a legitimate basis, supported by jurisprudence” for an employer to assert privilege over the original notes and other work product of investigation counsel.
- In support of finding just cause on the basis of (among other things) misleading investigators, the Court held that “in the banking sector, a senior employee such as [the Plaintiff] is subject to an exceptionally high level of integrity and honesty”, relying on British Columbia decisions from 1991 and 2003. This is the first time that an Ontario court has accepted this principle of law, and we expect it to be a highly significant ruling for financial sector clients in the wrongful dismissal context.

Lenczner Slaght represented RBC.

What’s the primary takeaway for businesses from the past year?

Not all investigation files will be protected from disclosure on the basis of privilege. If the goal is to maintain privilege over an investigation file, businesses should consider:

- Retaining a lawyer or law firm at the beginning of the investigation to investigate the facts and to provide legal advice on the results of the investigation. Courts have held that privilege will not attach to an investigation that is limited to

factual inquiries, even when the investigation is conducted by counsel.

- Drafting the engagement letter to make clear that the scope of the lawyer’s retainer includes providing legal advice. Courts often rely on the engagement letter itself as strong evidence when considering a challenge to a privilege claim over an investigation.
- Maintaining confidentiality over the investigation report and investigation file. Instruct, in writing, all employees with access to the investigation that the investigation is privileged and confidential, mark all documents as privileged and confidential, and do not share documents with third parties (with certain exceptions).