

We're Honoured

Rubin Thomlinson LLP has received an honourable mention on Canadian Lawyer magazine's list of [Top 10 Labour and Employment Law Boutiques](#) across the country. Our success is our clients' success.

Welcome Marie-Hélène Mayer

We are pleased to welcome Marie-Hélène Mayer to Rubin Thomlinson LLP to continue her work in employment law and workplace human rights.



One of Marie-Hélène's unique contributions to Rubin Thomlinson is

that she is fluent in French. She is able to advise clients in French, and has argued cases in French before various administrative tribunals. She now conducts workplace investigations and workplace investigation training in French.

Marie-Hélène provides counsel to employers and employees on all areas of employment law, including employment contracts, wrongful dismissal, constructive dismissal, workplace policies, employment standards, and workplace human rights.

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We are often asked whether investigation reports, and the communication surrounding them, are privileged. Many employers seem to believe that the answer to this question depends on who they retain to conduct a workplace investigation. If an employer retains a lawyer to conduct an investigation, it may believe that the investigation material is privileged. A recent arbitration case, *North Bay General Hospital v. Ontario Nurses' Association* illustrates that in many cases, an employer would be wrong to believe that investigation reports and communication between investigator and client, are privileged. This case is noteworthy from both the employment law and workplace investigation perspectives.

No Privilege for Workplace Investigation Report and Communication

The facts of the case are straightforward, and will ring familiar to those organizations that hire external investigators. North Bay General Hospital received a complaint from an employee alleging that she had been on the receiving end of bullying and harassment. In accordance with its policy, the Hospital retained an investigator to investigate the complaint, and make a determination of what occurred as a matter of fact. In this case, the investigator happened to be a lawyer. Following the conclusion of the investigation, the Hospital communicated to the employee against whom the allegations were made, and advised her that she had violated Hospital policies. The employee was provided with a written warning, and was demoted from her position as Charge Nurse. The employee grieved the decision, and prior to the full hearing of the matter, her union brought a

motion for pre-hearing production of not only the report, but of all communication between the investigator and the Hospital's human resources personnel and the Vice President of the unit in which the employees in question worked. The employer objected, arguing that this material was privileged.

The arbitrator rejected the employer's argument, stating that solicitor-client privilege has a specific purpose, that is, "to enable an individual to seek and obtain legal advice in a confidential manner". In this case, despite the fact that the investigator was a lawyer, the arbitrator concluded that the investigator was not fulfilling a function that had this purpose. The arbitrator stated as follows:

Some individuals who conduct these investigations as independent third parties are

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This alert is prepared as a service for our clients and other persons dealing with employment issues. It is not intended to be a complete statement of the law or an opinion on any subject. Although we endeavour to ensure its accuracy, no one should act upon it without a thorough examination of the law after the facts of a specific situation are considered, and without seeking the advice of legal counsel. No part of this publication may be reproduced without prior written permission of Rubin Thomlinson LLP. This has been sent to you courtesy of Rubin Thomlinson LLP.

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"I see no reason to attach solicitor and client privilege to a relationship which is not that of solicitor-client just because one of the parties happens to be a lawyer."
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No Privilege for Workplace Investigation Report and Communication

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lawyers; some are not. I see no reason to distinguish between these two groups if the purpose for which they were retained is the same, of investigating events to make findings of fact. I see no reason to attach solicitor and client privilege to a relationship which is not that of solicitor-client

just because one of the parties happens to be a lawyer.

The arbitrator ordered the production of the report, and also the communications surrounding the report, stating that these communications were also relevant.●

What does this mean for employers who make use of external investigators?

1. Consider whether asserting privilege over a report is ultimately in your interests. If you are satisfied that the report is solid and clearly supports the position being taken, disclosure may actually be helpful.
2. Think about the nature of the mandate given to the investigator, as well as the retainer agreement. While the case law is not entirely settled on this point, if creating a privileged process is important to your organization, you may wish to ask the investigator to make findings of fact *and* provide you with a legal opinion based on those findings of fact.
3. Similarly, if creating privilege is important, ensure that it is counsel who retains the investigator, as opposed to someone in human resources. It may be helpful to set out in the retainer that the investigator has been retained as an employer lawyer to conduct the investigation, and his or her report will be used as the basis of providing legal advice to the client.
4. Always assume that you may be required to produce all communications related to the process, as well as the ultimate report. With that in mind, your investigation-related communications should show that the organization did not interfere with the investigation process or final determination by the investigator. The report should show that the investigator engaged in a thorough and fair process, as well as also demonstrate the factual basis for the investigator's conclusions.

What's New at RT

Janice Rubin was a guest on the CBC radio program Ontario Today on November 22, 2011 where she discussed sexual harassment.

Upcoming Events

Chris Thomlinson will be chairing the Law Society of Upper Canada webcast "Client Communication in Employment Law" on January 13.

Janice Rubin will be discussing "Building Mentally Healthy Workplaces" for the Conference Board of Canada's Strategic Human Resources Management Council, on January 25.

Workplace Investigation Training 2012

Our 2012 workplace investigation training schedule is now available on our [website](#).

We offer a comprehensive workplace investigation techniques training curriculum to support professionals at all levels of skill and experience. We'll prepare you to conduct your own investigations through hands-on, practical training designed to meet the challenges facing your institution's investigators.

Our first session of **Basic Workplace Investigation Techniques and the Report Writing Workshop** for 2012 takes place February 14-16.

If you already understand the basics, join us for **Advanced Topics in Conducting Internal Workplace Investigations** taking place March 1.

Visit our [website](#) or call (416) 847-1814 for more information.