

**WORKPLACE INVESTIGATIONS:
A MANAGEMENT PERSPECTIVE**

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INTRODUCTION

In what is an increasingly litigious business environment, there is no shortage of situations arising on a day to day basis that may require a workplace investigation to be conducted. The legal requirement for the investigation itself may differ from one scenario to the next, depending upon the precise nature of the issue, the applicable regulatory framework and the degree of potential legal exposure that needs to be managed.¹

Indeed, given the infinite number of potential variables involved, there is rarely a “one size fits all” approach when it comes to workplace investigations, and the nature and extent of any investigation, as well as the potential strategies used when conducting it must be tailored to the individual situation.

Large organizations will often have several types of investigations taking place at any given point in time, each with its own focus, and requiring a special skillset or professional expertise for the investigator involved. Although the primary topic of this paper deals with workplace investigations involving labour and employment issues (and in particular, human rights), there is often a significant degree of overlap with other areas within an organization, both business and legal, requiring cross functional cooperation across various departments.

Functional areas where workplace investigations are common include:

- Human Resources (job performance, disciplinary situations, harassment and discrimination allegations);
- Disability Management and Workers Compensation (human rights accommodation, return to work and discrimination issues);
- Occupational Health & Safety (workplace accidents, work refusals and injuries);
- Environmental Protection (spills, emissions, proactive compliance);
- Corporate Security (physical security for employees, customers and the public, workplace violence, border & transportation security, CTPAT, etc.);

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- Information Technology (compliance with internet and email policies, protection of corporate reputation and trade secrets, protection from external third party cyber attacks);
- Internal Audit (financial and accounting controls, preventing internal fraud, theft and ensuring that internal checks and balances are in place);
- Privacy Issues (ensuring that personal information gathered about employees, customers and clients is maintained in a secure manner and utilized only for permissible purposes); and
- Securities Law and Corporate Compliance (ensuring that a corporation, and its officers, directors and employees comply with applicable securities legislation in terms of public disclosure of information, investigation of whistleblower complaints and maintenance of ethical business practices).

No one of these functional areas of responsibilities can be considered a self contained silo. In large organizations, many workplace investigations will involve a significant degree of overlap and cooperation between one or more of these areas.

1. Common Law Procedural Fairness Obligations

Insofar as the issue of procedural fairness goes, Canadian Courts have generally accepted the notion that no investigative process is perfect.

The Ontario Court of Appeal in *Gonsalves v. Catholic Church Extension Society of Canada* (1998), 164 D.L.R. (4th) 339 acknowledged this in a case dealing with serious sexual harassment allegations against a senior long service employee that resulted in only a cursory investigation. In the process of overturning a trial award in favour of the Plaintiff in the amount of \$200,000, the Court of Appeal overlooked the lack of a comprehensive investigation, noting that the Plaintiff's initial denial of the harassment allegations left the employer with little alternative but to terminate (at para 19):

Yet another feature of the circumstances of this case which the trial judge ignored is the difficulty presented to the employer by a flat denial of complaints. The initial reaction to a denial should be a careful investigation and analysis of the complaints to be assured that they are not false complaints motivated by some collateral grudge. Here, Father Coughlan conducted a very limited investigation but, as it turned out at trial, his assessment was correct - the complaints were valid and the denial was false. Once the employer is satisfied that the complaints are well-founded, the denial has a significance in limiting suitable choices open to the employer. There is no opening for an apology to clear the air if employment is to be continued.

In *Leach v. Canadian Blood Services*, [2001] 5 W.W.R. 668, the Alberta Court of Queen's Bench recognized that while there are divergent views in the jurisprudence with respect to whether there ought to be a duty to provide a fair investigation and hearing in the common law employment context, the traditional view is that the right to natural justice and procedural fairness does not apply to ordinary employment (master-servant) relationships (see also *Knight v. Indian Head School Division No. 19* (1990), 69 D.L.R. (4th) 489 (S.C.C.)).

The Supreme Court's decision in *Knight, supra*, is also frequently cited for the principle that procedural unfairness by an employer does not necessarily constitute an independent actionable wrong.

While many cases have noted the importance of procedural fairness when conducting internal investigations, failure to do so is not necessarily fatal to an employer's defence, nor will procedural fairness concerns in and of themselves generally invalidate an employer's decision to terminate. Ultimately, everything will hinge upon the employer's ability to prove its case at trial, regardless of how comprehensive or cursory the investigation was.

In *McIntyre v. Rogers Cable T.V. Ltd.*, [1996] 18 C.C.E.L. (2d) 116, the British Columbia Supreme Court noted that despite the clear inadequacy of an employer's investigation "...it remains open for the court to determine whether [the employee] was guilty [and if so] whether the discipline imposed was proportional".

Similarly, in *Leach v. Canadian Blood Services (supra)* it was held that "... any concerns about the fairness or impartiality of the employer's investigation is effectively removed by the complete and impartial assessment of the facts undertaken by this court at trial".

This is not to say that investigations are not important. As recognized in *Leach*, at least one study of Canadian "wrongful dismissal" cases concluded that there appears to be a direct correlation between employer success at trial and providing an opportunity to respond to allegations as part of an investigative process, prior to dismissal (see Echlin and Certosimo, *The Law of Summary Dismissal in Canada* at p.1-6).

Therefore, despite the general reluctance of Canadian Courts to impose a common law duty of procedural fairness in the context of the traditional master-servant relationship, there are clear

advantages to doing so, not least of which is improving the employer's chance of successfully defending itself at trial.

Moreover, apart from any common law considerations involving traditional employment relationships and potential civil liability, significant developments have been made in the area of administrative law, where substantive contractual obligations often exist in collective bargaining agreements providing procedural fairness rights to unionized employees – as well as an expanding network of procedural fairness and investigative obligations which increasingly flow out of various pieces of regulatory legislation. These are discussed in further detail below.

2. So Why Investigate?

Responsible employers have a keen interest in providing employees with a safe and healthy working environment, not only from a risk management perspective, but also because when left unchecked, poisoned workplace environments can have a detrimental impact upon employee morale, productivity, disability and benefit costs, loyalty, retention and turnover rates, as well as corporate reputation.

Simply put, ensuring that working conditions adhere to the highest possible expectations when it comes to promoting mutual respect, dignity and tolerance among co-workers is good for everyone, including the bottom line.

In the decades following the introduction of human rights legislation across Canada, most sophisticated employers introduced internal complaint and investigation procedures dealing with harassment and discrimination issues, both in non-union workplaces, and in those policies codified within collective agreements.

Often, these policies have been backstopped with proactive education and training programs for employees that address harassment and discrimination issues, and increasingly, formal complaint and internal dispute resolution procedures designed to promptly investigate and remedy a variety of workplace issues in the early stages, before the underlying employment relationship is irreparably damaged, or external litigation arises.

One of the first cases to motivate this change in mindset was the Supreme Court of Canada's decision in *Robichaud v. The Queen* (Treasury Board), [1987] 2 SCR 84, where the Supreme Court recognized that an employer can be held vicariously liable for harassment conducted by its employees, even where the employer had no direct knowledge of the situation, and where the Court further recognized that the employer is often in the best position to stop further recurrences.

In encouraging a proactive approach to investigations, the Supreme Court of Canada further recognized that an employer may be able to successfully mitigate its risk of legal exposure by acting promptly to remedy complaints of this nature:

...an employer who responds quickly and effectively to a complaint by instituting a scheme to remedy and prevent recurrence will not be liable to the same extent, if at all, as an employer who fails to adopt such steps. These matters however, go to remedial consequences, not liability (at p. 96).

In *Bannister v. General Motors of Canada Ltd.*, [1998] O.J. No. 3402, the Ontario Court of Appeal considered an appeal from a finding of a trial judge that the employer was responsible for paying significant damages for wrongful dismissal to an employee who had been discharged for committing acts of sexual harassment. In allowing the appeal, the Court at pp. 585-6 made the following comments:

In my view, General Motors acted with care, responsibility and sensitivity to the initial complaint. When further complaints were unearthed and the respondent replied with a general denial, they were entitled, as they did, to make a credibility assessment. Having been satisfied that the complaints had substance, they could not meet the responsibility of an employer by keeping their agent in his employment as a supervisor. They had no reason to believe that his conduct would change and, on any alternative to termination, would be leaving the female employees exposed to the continued abuse.

Similarly, in *Re IKO Industries Ltd. and United Steelworkers of America, Local 8580* (2002), 104 L.A.C. (4th) 97, Arbitrator Starkman observed that while an employer may have civil liability or liability under human rights legislation for harassment on the part of its employees, in order to avoid civil liability, an employer is not required to automatically discharge all employees who engage in harassing behaviour; but rather, the obligation is on the employer to take positive steps to provide an environment free of harassment, by having a harassment policy, providing appropriate training, investigating complaints, and taking such actions against employees who engage in harassing behaviour that are appropriate in all the circumstances.

Although the initial impetus for many employers to become increasingly proactive with respect to workplace investigations flowed out of the Supreme Court's decision in *Robichaud (supra)* and the lines of decisions that followed, new and more comprehensive investigative requirements continue to emerge, including those that are increasingly being embedded in statute.

For example, Ontario's Bill 168 recently amended the provincial *Occupational Health & Safety Act* to create significant new obligations for employers to implement increasingly detailed policies and procedures designed to address workplace violence and harassment, including requirements to conduct training, implement risk assessments, control programs, and to create complaint and investigative mechanisms designed to remedy these types of issues.

The Ontario legislation goes so far as to require employers to create policies and take reasonable measures to address issues of domestic violence brought to their attention, an issue that many employers are not well suited to address, in that concerns of this nature often deal with personal relationships largely outside the employer's scope of control.

Even legislation from outside of Canada has an impact upon how many large Canadian based organizations conduct their internal investigations. Flowing out of the U.S. corporate scandals involving Enron and WorldCom, the United States Congress passed the *Sarbanes Oxley Act* in 2002, designed to address corporate governance issues for publicly traded companies. For large multinational organizations with operations in the United States, the *Sarbanes Oxley Act* has resulted in the need to implement comprehensive whistleblower procedures designed to encourage the reporting and investigation of corporate fraud complaints and allegations of unethical business practices, with significant legal consequences for reprisal claims.

Whatever the underlying source of the legal requirement, be it common law and the desire to mitigate potential vicarious liability by demonstrating due diligence, a strategic desire to be in the best position possible to litigate a defence of "just cause", or the increasing number of statutory obligations that require investigations to be conducted in certain situations, it is clear that sophisticated employers are devoting more time and resources to the role of investigations within their organizations, in what is an increasingly litigious business environment.

3. The Applicability of Legal Privilege

In situations where a workplace investigation is being conducted, it is often desirable for an investigation to be protected by the doctrine of legal privilege. However, the availability of that protection is sometimes subject to debate.

In *Pritchard v. Ontario (Human Rights Commission)*, 2004 SCC 31 (CanLII), [2004] 1 S.C.R. 809, the Supreme Court of Canada considered a request by a complainant to disclose the internal legal opinion of the Ontario Human Rights Commission's in-house counsel, recommending that the complaint not be dealt with.

While concluding that the mixed nature of work often performed by "in-house" legal counsel does not remove the privilege attached to the advice they provide, Major J., on behalf of the Supreme Court of Canada, described solicitor-client privilege as "*all-encompassing*" and held that it applies to a broad range of communications between lawyer and client "*...as long as the communication falls within the usual and ordinary scope of the professional relationship.*"

The Supreme Court confirmed that solicitor-client privilege is "*nearly absolute*" and that "*exceptions to it will be rare*".

Despite this rather broad pronouncement, the reality is that the protection afforded by legal privilege is not automatic, and privilege can be easily lost if not managed carefully.

When it comes to determining whether a particular investigation is subject to privilege, much will depend upon the underlying purpose of the investigation itself, as well as who is conducting the investigation on behalf of the organization. Obviously, investigations conducted by legal counsel are more likely to benefit from this protection.

The two main types of privilege that apply to workplace investigations include general "solicitor-client" privilege, and the more narrow "litigation" privilege.

The Ontario Court of Appeal in *General Accident Assurance Company v. Chrusz*, 1999 CanLII 7320 (ON CA), 1999 CanLII 7320, identified the primary distinction between the doctrines of solicitor-client privilege and litigation privilege as follows:

R. J. Sharpe, prior to his judicial appointment, published a thoughtful lecture on this subject, entitled “Claiming Privilege in the Discovery Process” in *Law in Transition: Evidence*, L.S.U.C. Special Lectures (Toronto: De Boo, 1984) at 163. He stated at pp. 164-65:

It is crucially important to distinguish litigation privilege from solicitor-client privilege. There are, I suggest, at least three important differences between the two. First, solicitor-client privilege applies only to confidential communications between the client and his solicitor. Litigation privilege, on the other hand, applies to communications of a non-confidential nature between the solicitor and third parties and even includes material of a non-communicative nature. Secondly, solicitor-client privilege exists any time a client seeks legal advice from his solicitor whether or not litigation is involved. Litigation privilege, on the other hand, applies only in the context of litigation itself. Thirdly, and most important, the rationale for solicitor-client privilege is very different from that which underlies litigation privilege. This difference merits close attention. The interest which underlies the protection accorded communications between a client and a solicitor from disclosure is the interest of all citizens to have full and ready access to legal advice. If an individual cannot confide in a solicitor knowing that what is said will not be revealed, it will be difficult, if not impossible, for that individual to obtain proper candid legal advice.

Litigation privilege, on the other hand, is geared directly to the process of litigation. Its purpose is not explained adequately by the protection afforded lawyer-client communications deemed necessary to allow clients to obtain legal advice, the interest protected by solicitor-client privilege. Its purpose is more particularly related to the needs of the adversarial trial process. Litigation privilege is based upon the need for a protected area to facilitate investigation and preparation of a case for trial by the adversarial advocate.

In other words, litigation privilege aims to facilitate a process (namely, the adversary process), while solicitor-client privilege aims to protect a relationship (namely, the confidential relationship between a lawyer and a client).

Moreover, when it comes to the more narrow brand of litigation privilege, the Ontario Court of Appeal in *Chruzs (supra)*, adopted a dominant purpose test. For the privilege to apply, the dominant purpose for the creation of the document (not one of the purposes or a substantial purpose) must be the contemplation of actual or anticipated litigation. See also *Blank v. Canada*, [2006] 2 S.C.R. 319, which is now the leading case on litigation privilege holding that the intent is to create a “zone of privacy” to allow parties to prepare for pending or apprehended litigation.

A good example of the potential limitations of litigation privilege is the decision of the Ontario Human Rights Tribunal in *Lastella v. Oakville Hydro Corporation*, 2009 HRTO 1806 (CanLII) (Muir) (“*Oakville Hydro*”). This interim decision dealt with a surveillance report prepared by an external investigative firm subsequent to the Applicant’s termination of employment.

The Respondent employer in *Oakville Hydro* argued that there is always a reasonable prospect of litigation when an employer terminates the employment relationship, particularly where just cause for the termination is asserted. The Respondent employer also claimed that the decision to retain a security firm to conduct surveillance of the Applicant was on the advice of counsel as a result of the Applicant's alleged misconduct in the days leading up to his termination.

Despite these arguments, the claim of litigation privilege was rejected. The Tribunal concluded that litigation privilege cannot be presumed, and the onus to establish the privilege rests with the party asserting it.

In *Oakville Hydro*, no evidence other than the investigative notes themselves was submitted. In the absence of any other evidence, the Tribunal was left to determine the issue of privilege on the basis of only the notes tendered. There was no evidence before the Tribunal to prove that the decision to retain an investigator was made on the advice of counsel or that the investigation was conducted for the purpose of anticipated litigation or for the purpose of obtaining legal advice.

The notes themselves gave no direct indication with respect to the underlying reason why an investigator was retained in the first place, other than a suggestion that locating the Applicant was important because he had missing computer passwords belonging to the employer.

- ***The Investigative Terms of Reference Actually Matter!***

When it comes to asserting a claim of privilege over an investigative report, the initial terms of reference or retainer authorizing the investigation are crucial. In other words, how you paper the file at the outset, is every bit as important as the substantive content of the investigation itself. In scrutinizing claims of privilege, Courts and Tribunals will carefully review the initial communications and constituting documents created at the outset of the investigation in order to determine the true purpose and intent of the inquiry. Was the dominant purpose the investigation of facts in order to provide legal advice on the matter? Was there actually a reasonable contemplation of litigation at the time the investigation was initiated?

To the extent that a claim of privilege is going to be considered legitimate, there needs to be a clear document trail at the commencement of the investigation establishing its purpose and intent. Simply stamping the investigative materials as "privileged and confidential" may not be enough.

For example, in *R. v. Polystar Rubber*, (1994) O.J. No. 3226 (Ont. S.C.J.), an industrial employer was charged under the Ontario *Environmental Protection Act* after a discharge of benzene into the environment. Within hours after the initial spill, a Company employee was assigned to investigate the incident and make recommendations regarding any remedial action that might be necessary. Corporate in-house counsel believed that regulatory charges were likely, and issued detailed written instructions to the employee directing him to investigate and prepare a report for legal counsel, which would be used for the purposes of providing legal advice. The report was clearly marked “solicitor-client privileged”.

Pursuant to its broad statutory powers of regulatory search and seizure, Ministry investigators attempted to seize the report, to use against the Company for prosecution purposes. The Company objected to this, claiming that the report and its contents were protected by privilege. The Court agreed with this argument, finding the entire report, and the advice and recommendations contained therein to be privileged and confidential. The Ministry of the Environment was however, still entitled to disclosure of the basic facts regarding the cause of the incident and details of any remedial action taken, in accordance with Section 156 of the Ontario *Environmental Protection Act*.

In a similar case involving a serious workplace incident at Hydro One, in-house legal counsel expressly requested Company health and safety employees to prepare a report for the purposes of providing legal advice regarding the incident. The Ministry of Labour (“MOL”) proceeded to lay regulatory charges pursuant to the Ontario *Occupational Health and Safety Act*, and entered the workplace pursuant to the terms of a search warrant in an attempt to seize the report.

Company officials identified the report as being subject to “solicitor-client privilege” and placed the document into a sealed envelope prior to giving it to MOL investigators. Hydro One then proceeded to promptly initiate a judicial application to have the report returned and was successful in doing so (see *Hydro-One v. Ontario Ministry of Labour*, (2002) O.J. No. 4370 (Ontario S.C.J.)).

Similarly, in *Gower v. Tolko Manitoba Inc.*, [2001] 196 D.L.R. (4th) 716, the Manitoba Court of Appeal considered an appeal by the plaintiff Gower from a decision that a report prepared by a lawyer was protected from disclosure on the basis of legal advice privilege. Gower was employed by the defendant Tolko Manitoba. Tolko received a complaint that Gower had sexually harassed

another employee. As a result, Tolko retained a lawyer to investigate the complaint. There was a formal agreement which mandated the investigator to prepare a report stating findings of fact, and to provide legal advice based on those findings.

The investigator interviewed Gower, the complainant, and other witnesses, then prepared a report. Following receipt of the report, Tolko fired Gower. Gower commenced an action for wrongful dismissal, and brought a motion to produce the investigator's report. Initially, a Master ordered production of much of the report, but on appeal to a motions judge it was held that the entire report was subject to legal advice privilege.

In dismissing the employee's appeal, the Court concluded that although the lawyer was retained to investigate a complaint, the investigation was inextricably linked to the provision of legal advice and was therefore protected from disclosure.

Situations where a lawyer has been retained to investigate with a view to providing legal advice should be contrasted with those where a lawyer has simply been retained to investigate and report on facts.

For example, in *Wilson v. Favelle*, [1994] B.C.J. No 1257, a lawyer was retained to conduct an investigation regarding an allegation of misconduct by a provincial employee and to provide advice to the Ministry of Health. While the affidavit from the Ministry stated that the lawyer had been hired to "provide legal services" and to "provide legal advice", the Court found that under the express terms of the contract, no solicitor-client relationship had been established.

The terms of retainer stated the following:

...investigate allegations and unravel the full details by interviewing the complainant and by following up with other persons identified as having knowledge of this matter;

...prepare a confidential report to the Deputy Minister which documents the facts relating to the allegations and provides advice to the Deputy Minister as to any violations of standards of conduct for public service employees, (attached), or which impair the Ministry's ability to perform its function or damages the reputation of either the Crown or its employees.

In rejecting the claim of privilege, the British Columbia Supreme Court concluded that solicitor/client privilege can only arise in the context of a solicitor and client relationship.

Notwithstanding the statement in the affidavit provided, the independent evidence of the lawyer was clear that she had been hired as an investigator and not as a solicitor. Her duties were described as investigating and reporting. She was asked to "provide advice" but the advice was to deal with "any violations of standards of conduct for public service employees" and was not specifically "legal advice".

- ***Be Cautious About "Joint Investigations"***

In unionized environments, it is not uncommon for workplace parties to negotiate joint investigative procedures whereby an investigative team or committee is charged with investigating a matter, with both management and union representatives involved.

While these arrangements can sometimes work well, they are often fraught with complications, with a tendency to descend into an *ad hoc* negotiation process as opposed to a true investigation. Further complications arise when the parties reach an impasse with respect to factual conclusions and/or recommendations for remedial action, and significant conflicts of interest can arise when the union involved has legal obligations to represent both the complainant and alleged harasser, while at the same time attempting to play a neutral investigative role.

More problematic still is the ability to maintain legal privilege over the investigation or its conclusions, when the investigative results are potentially being circulated to a wide array of workplace parties, including union officials. In situations where privilege has been found to be waived, it is more often than not the client who waives it, through the reckless reproduction or circulation of confidential communications intended for a extremely limited audience with a "need to know".

An example of such a complicated scenario is the case of *R. v. Bruce Power*, [2009] 98 O.R. (3d) 272, where the Ontario Court of Appeal considered the privileged nature of an internal health and safety investigative report flowing out of a serious workplace accident. Following the accident in question, the employer proceeded to conduct an internal investigation in anticipation of regulatory charges being laid. The report was circulated to an internal investigative team with specific instructions to keep it confidential and to destroy the draft copies. The team included a union official who was a member of the Company's Joint Health and Safety Committee.

Despite providing an undertaking that he would destroy his personal copy of the report, the union official took the report home with him, where coincidentally, the Crown later came into possession of the report during a visit to the union member's house. The Crown then sought to use the internal report against the Company for prosecution purposes.

Notwithstanding the disclosure that had taken place, the Company was able to successfully challenge the disclosure of the report on the basis of solicitor-client privilege, the prosecutor's conduct, and violations of sections 7 and 11 of the *Charter of Rights and Freedoms*, which ultimately resulted in a stay of proceedings.

While the employer was successful in preventing the disclosure and use of its investigation in this particular case, the decision highlights the inherent risks involved when investigative findings are circulated too widely, especially to individuals who may not share the same litigation or business interests. As confirmed by the Supreme Court of Canada in *Lavallee, Rackel & Heintz v. Canada*, [2002] 3 S.C.R. 209, privilege "belongs to the client" and can be easily waived when privileged materials are disclosed to unrelated parties.

- ***Powers of a Tribunal to Deal with Claims of Privilege***

While it goes without saying that Courts have the authority to deal with claims of privilege, the question occasionally arises with respect to various regulatory tribunals, who in most cases have the jurisdiction to determine their own internal procedures.

The Ontario Court of Appeal has determined that as a trier of fact and law, Human Rights Tribunals have the full panoply of power as the civil or criminal courts to deal with the issues of privilege. Support for that proposition may be found in *Ontario Human Rights Commission v. Dofasco Inc.* 2001 CanLII 2554 (ON CA), (2001), 57 O.R. (3d) 693 (C.A.) ("*Dofasco*"), at para. 57.

Several decisions have held that Tribunals are empowered to order remedies to protect the document(s) for which a claim of privilege has been asserted. Such remedies include the ordering of a further affidavit of documents, cross-examination or further cross-examination on the

documents in question, as well as inspection of the impugned documents themselves (see *Hogan v. Ontario (Health & Long Term Care)*, 2003 HRT0 16 (CanLII)).

4. Best Practices for Conducting an Investigation

(A) Preliminary Assessment

It is always advisable to first conduct a preliminary assessment of the complaint and determine what it is about. Is this primarily a workplace issue between coworkers; are there allegations of criminal wrongdoing; are there imminent concerns regarding violence or safety; is it a theft, fraud or business ethics issue; are customers or the public involved?

The nature of the complaint and the parties involved will dictate a number of secondary considerations and responses, in terms of how urgently the complaint must be dealt with, whether external law enforcement should be involved, whether an internal or external investigator is appropriate, the amount of resources that should be allocated to the investigation, and what specialized expertise may be required.

(B) Understand the Legal and Policy Context

Before proceeding, it is important to have a clear understanding of the legal framework that underlies the investigation. Determine whether there is a legal obligation to investigate and where that obligation arises. Is this a human rights matter where the organization is attempting to meet its obligation to investigate and remedy workplace harassment or discrimination? Are there specific statutory obligations to investigate what may be a regulatory breach which could result in prosecution? Has there been a threat of litigation?

Understanding where the obligation to investigate arises will help to frame the scope of the investigative response, in terms of defining its primary purpose and goals, which will in turn help to determine how expansive the investigation needs to be.

In addition to understanding the legal obligation to investigate, it is also important to be aware of any applicable workplace policies, or collective agreement requirements. To the extent that these exist, it is important that the investigation proceed in a manner that complies with the

organization's policies, which may impose various procedural requirements, including the need to meet certain deadlines, disclosure obligations, mediation or arbitration requirements, etc.

Failure to meet these requirements may undermine the credibility or even validity of the investigation itself, as well as void any disciplinary or remedial action flowing out of the investigation.

Moreover, in a unionized context, collective agreements will almost certainly impose substantive procedural fairness requirements upon the parties, which may include:

- **Union Representation** – is generally considered a fundamental right stemming from the union's role as exclusive bargaining agent. The nature of the representation provided, and at what stage of the process that right is triggered will depend upon the specific terms of the collective agreement. While it is generally accepted that union representation is a right when there is a reasonable possibility of disciplinary action arising (see *Flamboro Downs Ltd.* (2010), 194 L.A.C. (4th) 416), several decisions have held that there may not necessarily be a right to representation when an investigation is still at an initial fact finding stage or where witnesses are being interviewed (see *Canada Treasury Board – Border Services Agency* (2007), 164 L.A.C. (4th) 182).

While the right to representation may be well established in unionized environments, it is far less so when it comes to the traditional master-servant relationship. In the context of managing a complicated disability management and accommodation related issue, the Supreme Court of Canada recently held that the employer was under no obligation to deal with the employee's lawyer, recognizing that the contractual relationship was between the employer and the employee, and that the workplace parties were entitled to deal directly with each other (see *Honda Canada Inc. v. Keays*, (2008) S.C.C. 39).

- **Disclosure** – many collective agreements will contain provisions requiring the employer to provide varying degrees of notice and disclosure to both the employee and/or union officials. In most situations, such provisions will require the employer to provide sufficient information to allow the employee to adequately understand the allegations against him and provide a meaningful response, but generally do not go so far as to require full disclosure of everything. Having said that, some collective agreements go further, with specific

provisions requiring disclosure of “all the evidence”, including dates, times and locations of infractions. Where the agreement contains mandatory provisions of this nature, failure to comply with them may invalidate any disciplinary action imposed (see *Farwest Transit Services Inc.* (2003), 123 L.A.C. (4th) 413). In the absence of mandatory contractual requirements, many arbitrators have considered the degree to which an employee has been prejudiced by the oversight, and in the absence of there being significant prejudice have been reluctant to void the resulting disciplinary action (see *Hamilton Health Sciences* (2010), 194 L.A.C. (4th) 393).

(C) Determine Who Should Investigate

There is no easy answer to this question. The choice of investigator will depend upon the nature of the complaint or issue being investigated. The prevailing view often voiced within the legal community is that investigations should be conducted by independent external counsel. While this may be appropriate in certain situations, it is not always practical or cost effective, recognizing that large organizations may have many workplace investigations being conducted at any given time, dealing with a myriad of employment and business issues. If external counsel were retained for every investigation conducted, the monetary costs involved would be crippling.

Given this financial reality, for most organizations the decision to retain an external investigator is often limited to situations considered to be “high risk” in terms of potential legal exposure, situations where confidentiality and the need to maintain legal privilege is considered to be a significant priority, where having the enhanced credibility of an external investigator is desirable, or where the organization itself lacks certain specialized expertise required for the purposes of the investigation.

There are often numerous individuals within an organization that are routinely called upon to investigate workplace matters, including: human resources personnel, health and safety professionals, information technology staff, corporate security officials, internal auditors, as well as in-house counsel.

Regardless of who is ultimately selected to investigate a matter, there are a number of basic considerations that should be taken into account:

- **Neutrality** – it is essential that that the investigator be perceived by all parties as being fair and unbiased. Ideally, the investigator should not have any prior work history with either party, should have no direct involvement in the matters being investigated, and should not be in any direct line of reporting with either party, either as a subordinate (potentially susceptible to pressure or influence), or as a direct superior (with preconceived opinions and beliefs). To the extent there is the possibility of a real or perceived conflict or apprehension of bias, another investigator should be considered.
- **Expertise** – the investigator should have the necessary skills and experience to conduct the investigation, both in terms of a general awareness of applicable law and policy, as well as practical investigative skills. Certain matters requiring investigation may require technical expertise, such as forensic accounting skills (e.g. fraud allegations), or a background in information technology (e.g. email harassment or internet defamation). Just as important, however, are the “soft” skills of an experienced investigator, including the ability to cross examine potential witnesses, which is often more art than science.
- **Credibility** – it is important that the investigator have the necessary authority and credibility to make findings and recommendations that will be acted upon by the organization. This is particularly important where the parties involved hold senior leadership roles. There are few things more damaging than investigative findings that are not acted upon because the investigator lacks the necessary “clout” within an organization to motivate the necessary change.
- **Availability** – the investigator must be available to promptly investigate the matter at hand. While delays are sometimes inevitable due to the personal schedules of both parties and witnesses, any failure to investigate and respond within a reasonable period of time may be fatal to an organization’s efforts to mitigate its legal exposure. Certain external investigators may have scheduling conflicts that extend weeks and months into the future, and few organizations have the luxury of time to wait for who may be their preferred choice as an investigator, given the need to move forward in an expeditious manner.

(D) Impose Specific Terms of Reference

On the basis of many of the individual considerations discussed above, it will be necessary to make an early determination with respect to the stated goals and objectives of the investigation. Is the primary purpose of the process to investigate facts pursuant to an internal complaint procedure and to report findings and recommendations to the parties involved? If so, the nature of what is essentially a factual inquiry should be clear from the outset, as there will be certain expectations with respect to transparency when it comes to the investigative results.

Alternatively, to the extent that the need for an investigation has been prompted by a desire for legal advice, or where there is a reasonable expectation of litigation, there may be a legitimate need to protect the investigative process and its results under the doctrine of privilege.

In either case, the initial terms of reference or retainer agreed upon with the investigator should be made clear and express at the very beginning of the relationship, so that all parties involved fully understand their roles and responsibilities. As discussed in detail above, to the extent an organization wishes the protection of solicitor-client privilege, there is a good chance that the initial communications and terms of reference for the investigation will be subjected to significant scrutiny, to determine whether the parties really did contemplate litigation at the time the investigation was first commenced, or alternatively, whether the investigation itself was primarily geared towards gathering facts essential to providing legal advice.

(E) Conduct the Investigation Promptly

It is trite to say that an investigation should be carried out as soon as reasonably possible, but what that actually means will differ from case to case. There is no bright line test to apply. The scope of any particular investigation will depend upon the issues involved, the availability of witnesses and evidence, and even the need for specialized experts to become involved. In some situations a standard of “days” may be appropriate, and in other cases it may be “months”.

Ultimately it will be important to demonstrate that the issue was taken seriously, and that efforts were made to conduct the investigation within a reasonable timeframe. Even where the investigation itself may continue for a lengthy period of time, it is often possible to at least commence the investigation promptly, by confirming to the parties involved that an investigation

has been initiated and explaining what steps are being taken. This will help to manage the expectations of those involved.

Failure to investigate in a timely way can result in various consequences. From a human rights perspective, failure to promptly investigate a complaint can undermine the credibility of the employer's response, and make it less likely that the employer will escape potential vicarious liability by demonstrating that it acted with due diligence. From an employment perspective, failure to investigate and initiate disciplinary powers within a reasonable timeframe can undermine an employer's ability to defend a disciplinary or discharge decision, resulting in a perception that the conduct under investigation was condoned. Many unionized collective agreements contain specific provisions imposing time-limits on an employer's ability to investigate and initiate disciplinary sanctions, which if violated, can potentially void the resulting disciplinary action.

In *Toronto (City) v. C.U.P.E. Local 79*, [2003] L.A.C. (4th) 362, a grievor objected to an employer's attempts to change dates upon which an alleged act of harassment occurred. Due to a typing error, the alleged incident was recorded as August 3, instead of August 31. The employer failed to notify the union of this error for several months. In upholding the employee's grievance, the arbitrator concluded that the employer's mistake, coupled with the delay in reporting the error, deprived the grievor and the union of an opportunity to investigate and search for exculpatory evidence while the case was still fresh, resulting in significant prejudice.

Even government agencies are not immune from this scrutiny. In *Sudbury Mine, Mill & Smelter Worker's Union, Local 598*, [1996] O.O.H.S.A.D. No. 49, the Ontario Labour Relations Board considered a complaint from an employee who alleged that the Ministry of Labour had taken too long to investigate a work refusal complaint under the *Occupational Health and Safety Act*. The Board noted as follows:

The second question is whether the Ministry's failure to attend at the workplace for seven weeks was a breach of the statute? The answer to that question seems obvious to me. It is. If the Employer had failed to do a first stage investigation for 7 weeks, can there be any doubt that the Ministry would have issued orders finding the Employer to be in violation of the Act? There can be no doubt. Is there any reason to treat the inspector, the agent of the Ministry and, pursuant to ss. 61(3), one of the parties before me, differently than the Employer, one of the other parties before me? No. The Ministry has a statutory duty to investigate and resolve work refusals in a timely fashion

The reasons for that kind of delay can never be compelling and to find short staffing, due to either a strike or cut-backs, a reasonable excuse for not properly investigating a work

refusal would be akin to oiling a slippery slope. Either the Ministry carries out its statutory duties or it does not. For those reasons, I find that the Ministry violated section 43 by not investigating the work refusal at the workplace in a timely fashion and by not issuing a decision, on the merits, as soon as practicable. Whatever "as soon as practicable" means, it does not mean 7 weeks without a reasonable excuse.

In the majority of cases, arbitrators have allowed employers a reasonable amount of time to investigate a situation, and in deciding these cases, tend to balance the reasons for delay against the adverse effects suffered by the employee (see *Canadian Labour Arbitration*, Brown & Beatty (4th ed) at 7-9)).

In *Re: AFG Industries Ltd. and Aluminum Brick and Glass Workers Union* (1998), 75 L.A.C. (4th) 336, Arbitrator Herlich described the analysis in the following manner (at pp. 340-345):

While there is no ready pronouncement regarding the quantum of time which will be sufficient to trigger further arbitral scrutiny, a certain range can be inferred from the cases. Thus, it would appear that while a delay measured in days may not give rise to concern, one that is measured in weeks (see the *Air Canada* case, *supra*) and, certainly, months (see, for example, the *National Grocers (Re National Grocers Co. and Teamsters Union, Local 419)* (1983), 11 L.A.C. (3d) 193 (Langille)) and *Via Rail* cases (*Re Vial Rail Inc. and C.B.R.T.*, unreported, October 14, 1988 award of M.G. Picher) most definitely will.

Once the quantum of delay is sufficient to require further examination, attention will be directed to the reasons for the delay. For example, a frequent and easily understandable reason for the delay may arise where the employer is simply, and through no fault of its own, unaware of the facts giving rise to the need for discipline.

Finally, will be a consideration of the prejudicial effect of the delay. This may manifest in various different ways but undoubtedly central to this concern is the effect the delay may have on the ability of the grievor to answer the charges leveled against him. Where the allegation related to a specific event at a specific time and date, prolonged delay will tend to undermine the grievor's ability to recollect his conduct or even whereabouts at the prescribed time. It can effectively deprive him of the ability to defend himself. The nature of the specific allegations may be a factor as well in the grievor's ability to answer the charges. Where (as in the *Air Canada* case) the allegation relates to the nuances of one of some 60 daily employee-client conversations, delay may have a disproportionately greater deleterious impact than in other situations.

Thus, and described more broadly, the factors to be considered include the length of the delay, the reasons for delay and its prejudicial effect.

(F) Crystallize the Complaint – Get It in Writing

It is generally well established that once an employee comes forward with a complaint, there is an obligation to investigate. However, conducting an investigation on the basis of verbal complaints (or worse yet, anonymous complaints), can give rise to serious challenges.

As a best practice, it is always desirable to get the complaint in writing. This can be accomplished in a number of ways. Many organizations utilize internal complaint forms, which prompt the employee lodging the complaint to provide detailed specifics in terms of the nature of the complaint, the dates that certain incidents occurred, who they are complaining about, potential witnesses or evidence, and what their desired resolution might be.

Where a complaint form does not exist, the Investigator can request the Complainant to provide written details about the nature of their allegations in a letter – either typed or handwritten. The Investigator should ensure that the Complainant signs and dates their complaint.

In certain situations, the ability (or willingness) of the Complainant to submit his/her complaint in writing may be limited. For example, the Complainant may face certain personal limitations in terms of literacy or language skills. In those cases, the Investigator may ultimately need to conduct a detailed verbal interview with the Complainant, and record the Complainant's story in writing, later asking the Complainant to review the notes taken by the Investigator to ensure their accuracy by signing and dating them. At times, it may be necessary to involve either a translator or some form of trusted representation for the Complainant to ensure that he/she understands what has been recorded on his/her behalf.

There are clear advantages to committing the complaint to writing at the immediate outset of the investigation. First and foremost, there may be applicable time limits either pursuant to legislation, workplace policy or in a collective agreement, which may have an impact upon the obligation to investigate, and upon the employer's liability.

It is not uncommon for some employees to raise workplace issues from years before, which were either previously dealt with, or given the passage of time, make further investigation either impractical or impossible. Moreover, it is also common for the severity and scope of initial allegations to expand over time, especially if the results of the initial investigation are determined to be unfounded.

Ensuring that the initial complaint is promptly recorded in writing will help to address any potential timeliness issues, as well as possible concerns regarding credibility. This is especially

important if the Complainant's story later begins to evolve and expand. Most importantly, the written complaint helps to crystallize when the duty to investigate first arises.

In many cases, allegations of harassment and discrimination will involve patterns of behaviour that take place over a period of time as opposed to a single incident. In those situations it is relatively common for an employee to suggest that they verbally advised a member of management or their union about the inappropriate conduct, but that no action was taken as a result of their verbal complaint. Having a well-established workplace policy with a formal complaint procedure helps to avoid this uncertainty, by creating the types of formal documentation and evidence trail that clarifies roles and responsibilities, reporting requirements and applicable deadlines that might apply.

The potential problem with a purely verbal complaint is the very real possibility that the Complainant will not be able to prove that the complaint was ever made – thereby never triggering a duty to investigate in the first place.

In *Caldeira v. 2068006 Ontario*, 2010 HRTO 2305 (CanLII), the Human Rights Tribunal of Ontario dismissed such a claim after determining that the Applicant never informed her direct supervisor about harassing behaviour that had allegedly taken place over a two year period, on the basis that no evidence was adduced capable of establishing that any member of management had independent knowledge of the unwelcome behaviour. Consequently, no duty to investigate arose.

Although Human Rights Commissions and Tribunals expressly require complaints to be submitted in writing (see Section 34 of the Ontario *Human Rights Code* and the “approved form” referred to therein) it is ironic that the same requirement does not necessarily apply to employers. Regardless of whether or not a workplace complainant is prepared to go “on record” with their allegations, there is still likely an obligation to act on the basis of verbal or even anonymous complaints.

For example, see *Harriot v. National Money Mart*, (2010) HRTO 353 (CanLII), where the Human Rights Tribunal of Ontario suggested that initial complaints of sexual harassment made verbally by a number of individuals should have been investigated, prior to the formal complaint later being received.

- ***Anonymous Complaints*** – it is not uncommon for employers to receive anonymous complaints. These can be received in the form of an unsigned letter, telephone call, email, suggestion box or an employee opinion survey.

These situations can be extremely difficult to deal with, and the lack of any credible information may preclude a full blown investigation in the typical sense. However, employers ignore these anonymous complaints at their peril, because although the complainant may be fearful of coming forward, there can sometimes be a degree of substance behind the allegations. The level of response taken by the employer will largely depend upon the level of detail provided and the severity of the allegations. To the extent that the anonymous allegations are sufficiently particularized, it is still recommended that the employer make a reasonable attempt to investigate the situation, especially if the allegations raise serious concerns about issues such as harassment, safety or workplace violence, which may trigger liability under the *Human Rights Code* or the *Occupational Health and Safety Act*.

In these situations, the employer needs to approach the investigation in a sensitive manner, being cautious to ask extremely broad and open ended questions, so as not to inadvertently damage anyone's professional reputation. To the extent that compelling and objective evidence arises that might corroborate the initial anonymous complaint, the employer may proceed with a more fulsome inquiry. Even if the initial "abbreviated" investigation is closed out as being unfounded, at least the employer will have documented evidence that it took reasonable steps to respond, should the matter later arise as a formal complaint (for a further discussion of this point, see *Sexual Harassment: a Guide to Conducting Investigations*, Neena Gupta, Butterworths, (2004)).

- ***The Uncooperative Complainant*** – it is also relatively commonplace for organizations to encounter complainants who refuse to cooperate in the investigation that they have triggered. One of the nightmares faced by human resource professionals is the complainant who arrives at the office to make serious allegations about a coworker, but who proceeds to advise "I don't want you to do anything about this...I just thought you should know".

Conducting an investigation without a cooperative complainant can be extremely difficult; however, the employer may have no choice but to proceed, given the potential liability involved, especially if the safety and well-being of others may be at risk.

Moreover, even if there is one uncooperative complainant, there still may be other victims in the workplace who are afraid to come forward. Indeed, it is also quite likely that today's "uncooperative" complainant will become tomorrow's "litigious" complainant, later alleging that they previously told someone in authority who failed to do anything about it.

Accordingly, even in situations where the complainant refuses to fully cooperate, the employer has little option but to proceed with the investigation. Even if the complainant refuses to provide his/her story in writing or sign interview notes, the Investigator should carefully write down an account of what was initially told to them and proceed on that basis. In certain situations, it may even be advisable to request the complainant to confirm in writing that they consider the matter to be closed and that they do not wish the matter to be dealt with further, to provide evidence that the employer made reasonable attempts to take action.

(G) Consider Early Mediation

Before launching into a full blown investigation, consider the possibility and appropriateness of early mediation between the parties. Most Human Rights Commissions and Tribunals, and virtually all regulatory agencies and courts, now incorporate mediation into some part of their dispute resolution processes. A significant percentage of workplace complaints and disputes involve petty grievances and personal misunderstandings that can be easily rectified with early intervention.

An increasing number of organizations are including a mediation option into their workplace complaint procedures – whereby aggrieved parties can voluntarily opt for mediation at the time they file their complaint. To the extent that both parties are willing to consider this, and there is no overriding concerns with respect to safety or a power imbalance that might make it inappropriate, attempting to mediate and resolve the conflict can sometimes result in a mutually agreeable resolution that maintains the sustainability of a working relationship, while avoiding

the significant monetary and organizational costs that a formal investigation entails. To the extent that a mediated settlement is reached, document the agreement in writing so that both parties are bound to the resolution and have a clear understanding about the parameters of their working relationship in the future.

(H) Initiate Precautions to Preserve Evidence

Depending upon the nature of the issue requiring investigation, there may be a need to promptly initiate actions to safeguard and preserve evidence. This is especially important in situations involving regulatory breaches such as workplace accidents, and where there is a reasonable contemplation of litigation.

For example, the Ontario *Occupational Health and Safety Act* (section 51) prohibits workplace parties from interfering with, disturbing, destroying, altering or removing anything at the scene of an accident giving rise to a death or critical injury.

Separate from any statutory obligations, there has been significant focus in recent years on the preservation of evidence (particularly electronic documents) and the e-Discovery process, with various provinces developing guidelines as part of their *Rules of Civil Procedure* (see Rule 29.1 of the Ontario *Rules of Civil Procedure* and the *Sedona Canada Principles Addressing Electronic Discovery*).

Canadian courts have traditionally held that a party to litigation is under a duty to preserve evidence that it knows, or ought to know, is relevant. To the extent that litigation is likely to flow out of the investigation being conducted, and to avoid any potential allegations of intentional spoliation that might later arise, it may be necessary to promptly issue Litigation Hold Memos to relevant individuals throughout the organization to ensure that documents, emails and physical evidence are secured.

(I) Determine the Interim Status of the Parties

In certain situations, it may be necessary to remove certain parties from the workplace temporarily, because they pose a potential threat to coworkers, stand to interfere in the investigative process, or potentially impact upon the business and/or reputation of the employer.

This practice is relatively common in serious harassment cases, especially where there is a risk of workplace violence or reprisal.

Short of removing an employee entirely, it may also be possible to transfer a worker to a different location, department or shift, in order to eliminate any potential interaction between parties who may be adverse to one another.

Generally speaking, removing an employee from the workplace is considered to be an “administrative suspension” pending investigation. To varying degrees, the practice is recognized in both the unionized and non-union contexts. Prior to placing an employee off work on administrative suspension, it is important to make the employer’s intention clear, so as to avoid any possible confusion that the administrative suspension is disciplinary in nature. Also, the administrative suspension should be with pay, to avoid any potential claim of constructive dismissal.

In *King v. Deputy Head (Correctional Service of Canada)* (2011), P.S.L.R.B. 45, the Grievor was suspended without pay from his position as a correctional officer when the Correctional Service of Canada received information that he had been observed associating with persons who allegedly had gang connections. He was also accused of misusing his employer identification by showing his correctional officer badge to the police when asked to identify himself. The employer conducted a fact-finding investigation, and later conducted a disciplinary hearing. The Grievor alleged that the initial suspension was in fact disciplinary in nature. At arbitration, it was found that the employer’s intent was non-disciplinary in nature and that the employer was legitimately concerned that the Grievor’s presence in the workplace posed the possibility of a serious or immediate risk to staff, inmates, the public and its reputation.

In *Cabiakman v. Industrial Alliance Life Insurance Co.*, [2004] 3 S.C.R. 195, the Supreme Court of Canada considered whether an employer can impose an administrative suspension on a non-unionized employee.

The employee was charged with attempted extortion of a securities broker. The employer suspended him without pay, and without conducting an investigation of the matter.

It took approximately two years for the criminal matter to get to trial, and the employee was ultimately acquitted. He sued his employer for damages arising during his period of unpaid suspension, totaling almost a half million dollars.

The Supreme Court later confirmed that employers have the power to impose administrative suspensions. However, the Court imposed limits on this right, which includes the following requirements:

- the suspension must be necessary to protect legitimate business interests;
- the employer must be guided by good faith and the duty to act fairly;
- the suspension must be for a relatively short period; and
- the suspension must, other than in exceptional circumstances, be with pay.

In relation to the third element, the Supreme Court cautioned that, "the initial suspension could turn into a constructive dismissal or be regarded as one because of its length or because of an indefinite or excessive extension" (para. 71).

The Ontario Superior Court of Justice came to a similar conclusion in *Carscallen v. FRI Corporation*, [2005] O.J. 2400, where Justice Echlin held that a suspension without pay of a non-unionized employee did constitute constructive dismissal, while at the same time suggesting that such a practice may be permissible where the terms and conditions of employment provide for the possibility of a suspension – such as by inclusion in an employment contract or policy manual.

(J) Conducting Witness Interviews

Witness interviews are the most important part of the investigation. Ideally, these are conducted in person – and not over the telephone, or by electronic correspondence. Much can be gleaned from a witness from their demeanor, speech patterns and body language, and ultimately, an investigator may need to make a finding of credibility where first hand interaction with the witness could be relevant.

The location selected for the interviews is important. It should be a private and confidential location, which will not result in unwanted workplace gossip or rumour. If necessary, the witness interviews should be conducted offsite. Where appropriate, the investigator should have someone present to assist in taking notes, allowing the investigator to focus on actively listening to the

witness's responses. In certain situations, the identity of this person can be important, particularly if it is necessary to put a nervous witness at ease, or in what may be a sensitive harassment situation, to have an assistant who may be the opposite gender of the investigator.

In the vast majority of situations, the Complainant will be interviewed first. A written complaint may have already been received, in which case the interview can be used to further explore the written allegations and fill in any information gaps.

If no written complaint has been provided, the Investigator can use the initial interview to prepare a written summary of the complaint, which the Complainant should be asked to sign and date. The Investigator should explore with the Complainant what potential witnesses may be capable of corroborating the complaint, and also what the Complainant's desired outcome is. Understanding what the Complainant's expectations are can be of significant assistance in later resolving the complaint.

While there is no "right" or "wrong" order when it comes to conducting witness interviews, it can often be useful to first interview all of witnesses that the Complainant has relied on in terms of having a full understanding of the allegations. The Investigator will then be in a position to interview the Respondent, offering sufficient information to allow the Respondent to provide a meaningful explanation, while also testing credibility using corroborating evidence provided by witnesses other than the Complainant.

It is not necessary to provide the Respondent with all of the evidence in the possession of the Investigator, or to even necessarily disclose the identity of all witnesses interviewed; however, the Respondent is entitled to know the substance of the allegations against him/her, in sufficient detail to allow a fair opportunity to respond. Much like the process used for the Complainant, the Respondent should be invited to provide his/her own written response, and to the extent they are unable to do so, the Investigator can prepare a written summary based upon interviews with the Respondent, who can be asked to review, sign and date the document.

- ***Establish Ground Rules for Witnesses*** – explain to witnesses at the outset that an investigation is being conducted, and summarize what the investigative process will entail. Advise them that they have an obligation to be cooperative and honest – and that any dishonesty in the investigation may result in disciplinary action, up to and including

termination. Emphasize that with any investigation, confidentiality is essential because professional reputations may be at stake. While confidentiality is important, be cautious not to make blanket guarantees of confidentiality, because it may be necessary to disclose certain information to others in order to provide them with a fair opportunity to respond. Make it very clear that the Company will not tolerate any acts of reprisal or attempts to interfere with the investigation.

- ***Take Written Statements*** – several decisions have critiqued the quality of investigations on the basis of there being a lack of background documents like investigative notes or witness statements. At the very least, the Investigator should ensure that he/she has high quality and legible notes taken during witness interviews, setting out the evidence provided by each individual. Ideally, it is suggested that witnesses be afforded the opportunity to review those notes, and then asked to sign and date them to confirm that they agree with the content. It is extremely common for witnesses to provide a particular account of events, and then subsequently come down with a case of “litigation amnesia” when the case proceeds to a hearing months or even years later. Ensuring that a witness’s account is properly recorded can be essential to later proving a case. In certain situations, formalizing these notes into actual Witness Statements, or even a sworn Affidavit, can be helpful in terms of preserving evidence.

(K) Assessing Credibility

The Investigator is entitled to assess credibility. In doing so, the Investigator must be astute to considerations such as the plausibility of a witness’s story, inconsistencies in evidence, supporting evidence from other sources that corroborates and supports a particular account, and consistency of witness evidence. While all of these are important, consistency is often one of the most telling. It is often useful for an Investigator to hold additional follow-up interviews with key witnesses in order to test the consistency of their evidence against conflicting accounts provided by others. It is always interesting to see the accounts that change and evolve over time, with new facts, excuses and more serious allegations being added with each re-telling.

In assessing credibility, investigators should be guided by the well-established principles set out by the British Columbia Court of Appeal in *Faryna v. Chorny*, [1952] 2 D.L.R. 354, which provides that a witness's demeanor, power of observation, opportunity for knowledge, judgment

and memory, and ability to describe clearly what was seen and heard are all elements of the concept of credibility. As stated in *Faryna, supra* at p. 357:

The credibility of interested witnesses, particularly in cases of conflict of evidence, cannot be gauged solely by the test of whether the personal demeanour of the particular witness carries conviction of the truth. The test must reasonably subject his story to an examination of its consistency with the probabilities that surround the currently existing conditions. *In short, the real test of the truth of the story of a witness in such a case must be its harmony with the preponderance of the probabilities which a practical and informed person would readily recognize as reasonable in that place and in those conditions.* [Emphasis added.]

(L) Dealing with Dishonesty

It is a well established concept in Canadian law that the employment relationship is based upon trust, and that employees owe a duty of fidelity and good faith to their employers. Flowing out of this implied duty of good faith is recognition that a significant act of dishonesty will constitute a fundamental breach of the employment contract, giving rise to just cause for termination.

The Supreme Court of Canada in *McKinley v. B.C. Tel*, [2001] 2 S.C.R. 161 has advocated the use of a “contextual approach” in these situations, suggesting that a single act of dishonest may not be sufficient to warrant cause for dismissal without taking into account how the particular circumstances of the dishonesty impacted upon the overall relationship. As held by the Court:

...[T]he test is whether the employee’s dishonesty gave rise to a breakdown in the employment relationship. This test can be expressed in different ways. One could say, for example, that just cause for dismissal exists where the dishonesty violates an essential condition of the employment contract, breaches the faith inherent to the work relationship, or is fundamentally or directly inconsistent with the employee’s obligations to his or her employer.

Notwithstanding the finding in *McKinley (supra)*, Courts in general have been far less sympathetic to situations where employees engage in dishonesty during the course of a workplace investigation, particularly when that dishonesty reveals a deliberate and ongoing attempt to conceal or deny their previous wrongdoing.

For example, in *Kinch v. Amoco Canada Petroleum*, (1998) A.J. No. 38, the Alberta Court of Queen’s Bench considered a wrongful dismissal action involving serious allegations of racial harassment and sexual assault, in which the plaintiff employee was found to have lied during the

course of the employer's investigation. In dismissing the claim, the Court concluded that the employee had shown a "...repudiation of his obligation to be honest with his employer", and suggested that the employee might have actually kept his job had he answered truthfully in the first place and taken responsibility for his actions.

In a similar finding, theft allegations and dishonesty during the investigative process was found to be cause for dismissal in *Obeng v. Canada Safeway Ltd.*, (2006) 50 C.C.E.L. (3d) (Alta Q.B.).

For a contrary conclusion, see *Petit v. Insurance Board of British Columbia*, (1995) 13 C.C.E.L. (2d) 62 (B.C.S.C.), where notwithstanding an initial act of dishonesty during an investigation, the employee made a prompt recantation and apology, demonstrating a willingness to cooperate, leading the Court to view his initial lack of truthfulness as a serious lack of judgment.

(M) Prepare Final Report and Recommendations

Once the investigator has gathered all of the relevant evidence, weighed the facts, and assessed any issues of credibility, the Investigator must reach a factual conclusion, and provide any advice and/or recommendations that have been requested as part of the initial terms of reference. Preparing a professional written report will go a long way to helping establish the credibility of the investigative process and demonstrate that the organization dealt with the issue in a professional manner, helping to bolster any due diligence defence that may be available.

The final report should reconfirm the initial terms of reference applicable to the investigation, particularly if there is any need or desire to assert legal privilege over the document and its contents. Again, in assessing any claim of privilege, the underlying purpose of the investigation will likely be scrutinized, so addressing the possibility of litigation, or the intent to provide legal advice in the body of the report is helpful.

In addition to describing the scope of the retainer and purpose of the investigation, it is also advisable for the investigator to summarize the methodology and process used to conduct the investigation, the time spent on the process, the number of witnesses interviewed, documents reviewed, etc. This too will help to enhance the credibility of the investigation should it be questioned by third parties.

While not always possible to do, given the intermingling of facts and law, it is sometimes useful to divide the final report into separate and distinct sections, such as: (i) process and methodology, (ii) summary of the complaint, (iii) summary of the response, (iv) facts and evidence gathered, (v) factual conclusions, and (vi) legal advice and recommendations. In a number of cases before federal and provincial privacy tribunals, individuals have been successful in requesting access to portions of investigative reports, particularly where the contents deal with personal information about themselves. Segregating the report into different sections provides an opportunity to argue that portions of the report providing legal advice and analysis should be severed and exempt from disclosure on grounds of privilege.

- **Standard of Proof** – the standard of proof that applies in a typical workplace investigation that seeks to establish cause for dismissal will be the civil standard of proof, on a balance of probabilities (see *Mattheson v. Matheson International Trucks Ltd.*, (1984) 4 C.C.E.L. 271 (Ont. H.C.J.). However, where the employer is investigating wrongdoing that is criminal in nature “*more cogent evidence than ordinarily required in a civil action is necessary*” (see *Kong v. Oshawa Group Ltd.*, (1993) 46 C.C.E.L. 181 (Ont. Gen. Div), and *Murphy v. Williams Operating Corp.*, (1997) 30 C.C.E.L. (2d) 90 (Ont. Gen. Div.).

5. When to Involve the Police

In certain situations, the nature of the workplace issue being investigated will disclose potential criminal behaviour, which may warrant police investigation. Examples can include incidents of fraud or theft, workplace violence and sexual assault.

There is no clear answer with respect to when police assistance may be appropriate. Much will depend upon the nature and severity of the allegations, whether or not there is risk of harm to employees or the public, and whether or not the employer has the necessary expertise to conduct an investigation into what has been alleged.

Separate from these considerations is the practical reality of the situation. Many employers voice frustration over the fact that even in cases where they request police intervention, they often find police forces reluctant to intervene in work related matters that are not considered a priority, or the requested assistance is not forthcoming in a timely way.

However, should the police eventually become involved, the employer must carefully consider its options, in terms of continuing with its own independent internal investigation to the best of its ability, or deferring exclusively to the criminal investigation being conducted by police.

Choosing to completely delegate the investigative burden to the police can have potential consequences – both positive and negative.

Live by the Sword...Die by the Sword

In situations where an employer entirely defers to an investigation conducted by police, it may later lose its ability to assert a defence for any employment related decisions, where the police investigation fails to result in a successful prosecution. For example, in *Clarendon Foundation (Cheshire Homes) Inc. and O.P.S.E.U., Loc. 593*, (1995) 50 L.A.C. (4th) 17 (Solomatenko), the Grievor was a personal care worker providing assistance to the disabled. A client of the Grievor raised serious allegations of sexual assault resulting in criminal charges being laid.

The employer placed the Grievor off work on unpaid administrative suspension pending resolution of the charges, which the employer argued had negatively impacted the Company's reputation, while also creating a safety concern for other clients.

The employer chose not to conduct its own independent investigation into the matter, and relied solely on the police investigation.

After approximately a two year delay, the criminal charges were withdrawn, and the employee initiated a grievance seeking a return to work and back pay.

In awarding the grievance, arbitrator Solomatenko observed:

In my view, there is a sound basis for the principle that where the employer in cases of this nature chooses to abdicate both the investigation and decision of even possible guilt to the police function, then it must live with the result.

Any other approach would result in the situation of the employer being risk-free for the entire period of the suspension without having to exercise its managerial obligation to make an employment-based decision.

The opposite result was reached in *B.L. v. Marineland of Canada Inc.*, [2005] O.H.R.T.D. No. 30 (Garfield), a case where a sixteen year old summer student working at a theme park alleged that she was sexually touched by the brother of the park owner. In her complaint to the Human Rights Tribunal of Ontario, she claimed that Marineland did not reasonably respond to her internal complaint of sexual harassment.

The Tribunal applied Vice-Chair Laird's statement in *Moffatt v. Kinark Child and Family Services*, [1998] O.H.R.B.I.D. No. 19, to the effect that “...*human rights jurisprudence has established that an employer is under a duty to take reasonable steps to address allegations of discrimination in the workplace, and that a failure to do so will itself result in liability under the Code*”, recognizing that the duty to investigate is the “means” by which employers achieve their statutory obligation to provide a workplace free from harassment.

Human resources staff at Marineland initially attempted to investigate the matter. Within minutes, they arrived on the scene, ensuring that steps were taken to care for the Complainant. In the opinion of the Tribunal, Marineland handled the initial stages of the investigation in a "textbook" manner, but park staff quickly came to the conclusion that the situation was too politically sensitive to be investigated internally, choosing to transfer responsibility for the investigation to Niagara Regional Police.

The transfer of investigative responsibility to the police required the Tribunal to determine whether the passing of the investigation itself and the inconclusiveness of Marineland's own internal investigation triggered any liability on the part of Marineland. The question of employer liability was further complicated by the fact that the alleged harasser later died, and the resulting criminal charges were dropped, without formal resolution to the case.

Ultimately, the Tribunal concluded that Marineland was not liable. Given the nature of the alleged conduct and the familial relationship with the owner of Marineland, it was imperative that the investigation be transparent and not suspect. According to the Tribunal, Marineland had other reasonable choices: it could have completed the investigation internally or hired an outside investigator. The legal test, in the opinion of the Tribunal “...*is not what was the correct thing to do, but what was a reasonable course of action*”.

The Tribunal held that it was reasonable for Marineland to have handed over the investigation to Niagara Regional Police, wait for the police to investigate, lay any charges and to allow the criminal justice process to run its course.

Moreover, the lack of a suitable conclusion did not render Marineland liable. It was reasonable for them to have called the police to investigate and wait for the conclusion of the criminal justice system, including the courts.

These decisions highlight the potential uncertainty of relying solely on the police to conduct a work related investigation. In certain scenarios, delegating investigative responsibility can play to the employer's advantage, and in others, not – with much being left to the potential unpredictability of the criminal justice system.

- ***Abuse of Process*** – one area where the law is relatively settled deals with the doctrine of abuse of process. In *City of Toronto v. C.U.P.E. Local 79*, [2003] 3 S.C.R. 77, the Supreme Court considered a judicial review of a grievance award, involving a case where a City employed parks and recreation instructor had been criminally convicted of sexually assaulting children in the City's care. The City did not conduct its own investigation of the matter, and relied solely on the criminal justice system in making its decision to terminate the employee. C.U.P.E. grieved the dismissal, successfully arguing that the arbitrator had independent jurisdiction to re-litigate the case in order to make an independent decision on the employment issues. The Supreme Court rejected this, holding that the City was entitled to rely on the criminal conviction itself as proof of the misconduct and that any attempt to launch a collateral attack on a decision of a superior court of competent jurisdiction through the arbitration process constitutes a clear abuse of the legal process.
- ***Potential Cost Recovery*** – in a growing number of cases, Courts and Tribunal have allowed employers to successfully claim damages against former employees engaged in criminal wrongdoing, including not only damages to compensate for goods stolen, but also the costs associated with conducting the investigation itself. For example, see *Canada Safeway Ltd. v. Brown*, [2007] B.C.J. No 2400 (B.C.S.C.) where the plaintiff employer was awarded \$6,000 in damages for cash stolen and a further \$24,512 for criminal investigation and prosecution costs, intended to compensate the employer for the use of its corporate resources to investigate theft and assist in the prosecution. In addition, see *TFI Transport 7 L.P.*, [2008]

C.L.A.D. 187, where \$29,285 was awarded to an employer to compensate for the costs of investigating stolen industrial equipment, as well as a further \$5000 in punitive damages. On the basis of these decisions, it is recommended that employers maintain a clear accounting of all costs associated with conducting an investigation, to the extent that there is a desire to seek reimbursement.

- ***Be Cautious About Threatening Criminal Charges***

When dealing with workplace investigations involving incidents of theft and fraud, employers are often pre-occupied with ensuring the prompt return of their stolen property or assets. While this is a legitimate concern, employers need to be cautious with respect to how they approach these scenarios, because the interplay between an aggressive pursuit of civil remedies or reparation and the criminal justice system can potentially have unintended consequences.

In particular, several courts have commented unfavourably on situations where employers have threatened or initiated criminal charges for the primary purposes of advancing a civil remedy against a current or former employee. Generally speaking, courts have considered threats of this nature to be an inappropriate use of the state's prosecutorial power.

Where criminal charges have actually been laid, several decisions have resulted in a stay of proceedings against the accused, where the threat of prosecution was being used as a tool to leverage reparation, and thereby considered to be an abuse of process.

For example, in *Regina v. Janvier*, [1985] 5 W.W.R. 59 (Sask Q.B.), a complainant town council used the threat of criminal proceedings to intimidate an employee into repaying monies apparently stolen by her. The accused started to make payments, but charges were laid when she defaulted. The Court held that while no person specifically threatened the accused with criminal prosecution if she did not repay the money, there was an implied threat of such a consequence. Had she not agreed to pay, the matter would most certainly have been turned over to the police with a view to having her investigated and prosecuted. The proceedings were therefore stayed.

Similarly, in *Regina v. Van Holland* (1984), 13 C.C.C. (3d) 225, (Ont. County Ct.) an employee of a trust company was confronted about misappropriated funds and told no charges would be laid if restitution were made. However, charges were laid in the midst of his taking steps to liquidate assets in order to effect restitution. The accused was arrested on

charges of theft and the complainant, while aware of the arrest, said that his head office had wanted the charges laid and that he had nothing to do with it. An order was made staying the prosecution.

Apart from jeopardizing the chances of a successful prosecution against a malfeasant employee, employers also need to be concerned about avoiding potential criminal charges against themselves. Some courts have commented that attempting to threaten or bargain away criminal charges in exchange for exacting a monetary benefit could itself constitute the crime of extortion pursuant to the *Criminal Code of Canada*.

In R. v. Bristow, [1990] B.C.J. No. 2218 the British Columbia Supreme Court suggested (in obiter):

The mere laying of a charge can cause great harm to a person's reputation, occupation and family even if it later turns out that the accused was innocent. The fear of being charged may induce a person to do things he would not otherwise do.

No person should be permitted to use such a threat for any personal purpose or gain. The policy of the criminal law is to protect the public interest in seeing that justice is done and any attempts to 'use it for personal purposes must be stopped without hesitation.

The Criminal Code contains a provision regarding extortion. Section 346 (now Section 340) of the Criminal Code provides as follows:

Section 346.

(1) Every one commits extortion who, without reasonable justification or excuse and with intent to obtain anything, by threats, accusations, menaces or violence induces or attempts to induce any person, whether or not he is the person threatened, accused or menaced or to whom violence is shown, to do anything or cause anything to be done.

(1.1) Every one who commits extortion is guilty of an indictable offence and liable to a maximum term of imprisonment for life.

(2) A threat to institute civil proceedings is not a threat for the purposes of this section. R.S., c. C-34, s. 305; R.S.C. 1985, c. 27 (1st Supp.), s. 46. "

The Section makes it clear that a threat to institute civil proceedings is not a threat for the purposes of this section. I think it can be inferred that a wrongful threat to institute criminal proceedings for the purpose of obtaining something could be extortion. My purpose in referring to this section is to demonstrate that threats of criminal proceedings in certain circumstances can themselves be a crime.

Legal counsel involved in conducting investigations on behalf of their clients should also exercise caution in these situations. Several provincial Law Society Rules of Professional Conduct expressly provide that it is improper to threaten or advise a client to threaten criminal or quasi-criminal charges for the purpose of securing advantage in a civil claim (see Ontario's Law Society of Upper Canada's *Rules of Professional Conduct* Section 2(4)).

6. Investigate Facts Objectively, Don't Engage in "Case Building"

There is also a growing body of decisions where Courts have been critical of organizations and lawyers who engage in "case building" on behalf of their clients, as opposed to objectively investigating the facts. While there is no doubt that legal counsel have certain obligations to act as a forceful advocate on behalf of their clients, this should not taint efforts to conduct a fair and impartial investigation.

In *Buchanan v. Geotel Communications Corporation*, [2002] 18 C.C.E.L. (3d) 17, an employee was discharged for cause following allegations about a potential business conflict. No effort was made on the part of the employer to investigate prior to discharging the employee, despite the involvement of legal counsel.

The Court distinguished this case from other situations where employers have acted precipitously without knowing any better, concluding that *Geotel* was fully aware of the need to investigate, but intentionally opted to terminate because it was simply more expedient to do so, and the employer was otherwise "indifferent" to any consequences faced by the employee.

Ultimately, the trial judge rejected the defence of just cause and concluded that the allegations against the employee were entirely "speculative", commenting unfavorably on the complete lack of any meaningful investigation.

The nature of the complaint was never shared with the employee, he never knew the name of his accuser, and otherwise was shown no procedural fairness, which resulted in a finding of bad faith, and the award of additional damages.

Similarly, in *Chapell v. Canadian Pacific Railway Co.*, [2010] A.J. No. 763 (Alta. Q.B.), a Railway Yard Superintendent with 27 years of service was discharged for cause following allegations of expense fraud.

The resulting investigation, conducted by the company's Director of Labour Relations and in-house counsel, was found to be seriously flawed.

In particular, the trial court was extremely critical of the lack of objectivity demonstrated by the investigator. The accused employee was summoned to a meeting without adequate notice about the purpose of it, and was expected to provide detailed explanations for approximately 37 account irregularities going back some time.

The investigator was found to be dismissive of possible evidence and witnesses that might have explained the irregularities, and attempted to obtain personal information about the accused employee from the company's Employee Assistance Plan (EAP), as well as information about his personal finances.

Ultimately, the Court concluded that the investigation was not "...*the fact finding mission [they] indicated it was, but rather an exercise in case building*".

The accused employee was awarded \$288,499 in damages for wrongful dismissal, including damages resulting from the bad faith nature of the investigation and resulting discharge.

7. Potential Liability for Negligent Investigations

Individuals impacted by a negligent investigation have several potential grounds of redress. In the traditional realm of wrongful dismissal law, many cases have addressed claims for an extension of the reasonable notice period due to bad faith conduct associated with the investigation itself (*Wallace* damages) – an approach that has since been modified by the Supreme Court's decision in *Honda Canada Inc. v. Keays* (*supra*). Following the Supreme Court's *Honda* decision, the more recent focus seems to be on traditional claims for both aggravated and punitive damages.

Although Courts have been getting increasingly creative in awarding new headings of damages in cases that are truly egregious, the majority of decisions dealing with mediocre and botched investigations have resisted the temptation to award additional damages.

In *Foerderer v. Nova Chemicals Corp.*, 2007 ABQB 349 (CanLII), a senior employee was dismissed following an investigation into allegations of sexual harassment. The plaintiff

employee argued that the investigation was flawed because the employer did not interview all members of the plaintiff's team, did not take notes during the investigation, did not investigate other members of his team whose conduct had also been complained of, and so on. The Court held that neither *Wallace* nor punitive damages were appropriate because, in spite of its alleged shortcomings, the investigation was not conducted in a bad faith, high-handed or arrogant fashion.

In *Dupuis v. Edmonton Cellular Sales Ltd.*, 2006 ABCA 283 (CanLII) a manager was dismissed for sexual harassment immediately upon his return from vacation without notice. The employer did not allow the employee to respond to the complaints of harassment, and refused to accept a letter of resignation from the employee or provide a reference letter. The employee suffered shock when he came to realize that it was practically impossible for him to find similar employment elsewhere. The Court held that none of these factors amounted to the kind of bad faith conduct in the manner of dismissal that would warrant an award for *Wallace* damages.

- ***Potential Damages for Defamation***

The case of *Elgert v. Home Hardware Stores Limited*, 2011 ABCA 112 (CanLII) underscores how important it is to maintain the confidentiality of workplace investigations, particularly where the nature of the allegations potentially impact upon an individual's personal and professional reputation. Elgert was a 17 year Home Hardware employee who was discharged following allegations of sexual harassment. The resulting investigation was found to be wholly inadequate, and the employee was never provided an opportunity to respond to the allegations against him.

At trial, the jury concluded that two co-workers had lied about the sexual harassment and did so maliciously. The allegations were then spread throughout the workplace to co-workers, superiors and throughout the small town in which the plaintiff lived, causing significant distress.

In addition to damages for wrongful dismissal equal to a 24 month notice period, the Alberta Court of Appeal upheld rather high damages for defamation in the range of \$60,000 as well as punitive damages in the range of \$75,000 (reduced from \$400,000 at trial).

It should be noted that this case is somewhat of an anomaly. The general trend recognizes that workplace investigations are protected by the defence of qualified privilege, which in the majority

of situations defeats any claim of defamation. In *McLoughlin v. Kutasy*, (1979) 8 C.C.L.T. 105, the Supreme Court recognized that proof of actual malice is required to rebut the defence of qualified privilege.

Similarly in *Korach v. Moore and Board of Education for the City of Windsor*, (1991) 1 O.R. (3d) 275, the Ontario Court of Appeal confirmed that where qualified privilege arises, the parties making the defamatory statements are entitled to be wrong in reaching their conclusions, as long as they have an honest belief in the statements they are making.

- ***False Imprisonment***

In *Jatinder v. Greater Vancouver Associate Stores Ltd.*, (2008) B.C.S.C. 287, the British Columbia Supreme Court dealt with a wrongful dismissal action involving a 16 year employee of Canadian Tire who had been falsely accused and discharged for stealing a light-bulb. In what largely amounted to an overzealous investigation complicated by poor communication and a misunderstanding as to the employee's intent, the employer physically detained the employee in a room for over two and a half hours, denied access to his lawyer, failed to particularize the allegations, and delayed calling the police, until the employee was left "shaking and crying". In awarding the employee 16 months notice, the B.C. Supreme Court found no basis for *Wallace* damages and refused to award aggravated or punitive damages. However, the Court did allow a secondary claim for the tort of false imprisonment, and awarded the employee further damages in the amount of \$6500.

- ***The Evolving Tort of Negligent Investigations***

In *Hill v. Hamilton-Wentworth Regional Police Services Board*, [2007] 3 S.C.R. 129, the Supreme Court of Canada recognized the tort of negligent investigation as applied to police officers. Speaking for the majority, McLachlin C.J.C. held that the police owe a duty of care to suspects being investigated.

In the process of developing this tort related claim, the primary consideration is whether or not the investigator owes a duty of care to the individual they are investigating. The test for determining whether a person owes a duty of care to another is laid down in *Anns v. Merton London Borough Council*, [1978] A.C. 728 (H.L.). The test involves two questions:

- (i) Does the relationship between the plaintiff and the defendant disclose sufficient foreseeability and proximity to establish a *prima facie* duty of care?
- (ii) Are there any policy considerations that should nevertheless negate or limit that duty of care?

While the tort of negligent investigation is now well established in terms of its applicability to the police, the Ontario Court of Appeal recently considered whether to expand this tort to employers, their agents, and in particular, private investigative firms, in relation to claims arising out of workplace investigations.

Specifically, in *Correia v. Canac Kitchens*, [2008] O.J. No. 2497, the Ontario Court of Appeal reviewed a case involving a situation where a long-standing employee had been discharged for cause following allegations of theft. The employer (Canac) had been suffering from a series of thefts and drug use in its factory of 800 employees. In response to these issues, Canac retained a private security firm (Aston) who placed an undercover operative in the plant for the purposes of identifying those responsible. Correia was one of the employees identified. He was summoned to the Human Resources office and discharged for cause by Canac's Human Resources Director.

Correia was then immediately taken to an adjoining office where police were waiting, where he was arrested and charged with theft. The police relied exclusively on the investigation performed by Canac and Aston, and completed no independent investigation of their own. The problem was that Correia was innocent and his identity had been confused with another worker.

- ***Duty of Care on the Part of Private Investigators***

The initial dismissal of the claim for negligent investigation against the private investigation firm was set aside. With respect to the tort claim for negligent investigation, the Court of Appeal applied the Supreme Court's test in *Hill (supra)* concluding that there was a triable issue as to whether the relationship between Correia and the defendants disclosed sufficient foreseeability and proximity to establish a *prima facie* duty of care. Aston did a complete investigation. The firm gathered all of the information of the criminal offences and handed a completed case to the police. To the knowledge of Aston and Canac, the police did not intend to do any further investigation. To the contrary, the identified employees were to be dismissed and then immediately turned over to the police.

Furthermore, the Court of Appeal was of the view that it was reasonably foreseeable in the circumstances that negligence on the part of the private investigator in identifying the real perpetrator of the crime could cause harm to others.

In terms of public policy considerations, the Court noted that private investigation firms routinely perform public policing functions but with limited oversight or clear lines of redress to those injured by their activities, which strongly favoured extending the applicability of tort liability. The Court of Appeal concluded that where private firms perform functions analogous to the public police, they ought to be subject to similar liability.

- ***Duty of Care on the Part of Employers***

In contrast, in reviewing potential tort liability on the part of the employer for conducting a negligent investigation, the Ontario Court of Appeal went on to conclude that there was no legal duty of care on the employer, Canac. The Court observed that the fundamental premise of the employer-employee relationship in Canada is the right, subject to contractual terms to the contrary, of either party to terminate the relationship.

In the *Wallace* case, the Supreme Court of Canada rejected the submission that there could be an independent action or head of damages for breach of such alleged duty of good faith, either in contract or in tort. Given the Supreme Court's previous finding in *Wallace*, the Ontario Court of Appeal concluded that it would be inconsistent to impose a duty of care on employers not to conduct a negligent investigation regarding an employee.

The second reason behind the Court refusing to recognize a duty of care on the employer was due to the potential chilling effect on reports of criminality by honest citizens to the police. Unlike the private security firm, Canac was not in the business of investigation. It was in many ways in the same position as any other citizen who reports criminal activity to the police. Public policy favours encouraging the reporting of criminality to the police. Someone not in the business of private investigation who honestly, even if mistakenly, provides information of criminal activity should be protected: see *Mirra v. Toronto Dominion Bank*, [2004] O.J. No. 1804 (S.C.J.).

- ***Personal Liability for Employees Conducting Investigation***

The Court of Appeal also considered the possibility of a claim for intentional infliction of mental distress against the Human Resources Director responsible for the discharge. Canac's Human Resources Director was the person who terminated Correia and facilitated turning him over to the police to be charged with criminal offences. She herself made the error that caused blame to be falsely cast on him. The Court of Appeal considered and applied its previous decision in *Prinzo v. Baycrest Centre for Geriatric Care* (2002), 60 O.R. (3d) 474 at paras. 41-43, which summarized the three part test required to establish the tort of intentional infliction of mental distress:

- (i) flagrant or outrageous conduct on the part of the defendants;
- (ii) which is calculated to produce harm or in circumstances where it is known that harm will ensue; and
- (iii) actual damage to the plaintiff as a result of the conduct.

In applying these considerations, the Court of Appeal concluded that the Human Resources Director could be held personally liable for her conduct. She was the person who terminated Mr. Correia and facilitated turning him over to the police to be charged with criminal offences following the negligent investigation, in which she herself made the factual error that caused blame to be falsely cast on him. Accordingly, the Court concluded that she could be held personally liable in tort law for her conduct.

8. Examples of Investigations Done Poorly

The case of *Murchie v. JB's Mongolian Grill*, [2006] H.R.T.O. 33 (CanLII) (Hendrik) dealt with a complaint of workplace sexual harassment initiated by a restaurant worker against one of her supervisors, who allegedly had engaged in inappropriate and unwelcome physical contact. The case centred around a single incident where the supervisor allegedly "flicked" the Complainant's breast with his finger, after she allegedly "flicked" him on the waist.

The Respondent employer had a workplace sexual harassment policy in place; however, the policy itself was one imposed by an American parent company that was not entirely consistent with Canadian law. Pursuant to this policy, the Respondent employer attempted to investigate the harassment allegations, but made several errors in doing so, which further exacerbated the situation.

First and foremost, the Tribunal was critical of who the Respondent employer selected to conduct the investigation. Neither of the Managers selected to conduct the investigation had been given any prior human rights training. Moreover, each of them had a friendship with the Complainant, and so neither of them was considered to be neutral. The first Manager who initiated the investigation was later replaced by the second, creating a great deal of confusion and uncertainty about the process.

The Tribunal noted that the Respondent employer ought to have been more careful in its choice of investigator, and in the manner in which the investigation was conducted, citing with approval a passage from *How to Conduct a Workplace Human Rights Investigation*, (see M. MacKillop, Knight, J. and Taylor, P, Thomson Canada Limited, Toronto: 2004. at page 56):

It is very important that the investigator understand human rights legislation and the concept of harassment in particular. This will ensure that the investigation is conducted and the questions are asked in a manner that accords with statutory requirements. The investigator should also have experience and sensitivity in dealing with employees and employment issues.

The perception of neutrality and a lack of bias to both the complainant and the alleged harasser are key qualities the investigator must possess. Therefore, the person chosen should not be in a position of influence over these individuals, and should not make decisions regarding their compensation, discipline, demotion, opportunities for advancement, or any other terms or conditions of their employment.

Care should be taken to select an investigator to suit the situation. For example, if the complaint is one of sexual harassment and the allegations warrant it, the employer should consider having both a man and a woman conduct the investigation. This will ensure a gender-balanced investigation. Similarly, if the complaint involves harassment based on race or religion, having a person from a similar background, who can offer insight into the meaning of events and comments, conduct the investigation may be preferable.

The Tribunal further relied on six elements from the “*Wall*” test used to assess the reasonableness of the employer’s response (see: *Wall v. University of Waterloo* (1990) 27 C.H.R.R. D/44 (Ont. Bd. Inq.)), at paragraph 160, which are summarized as follows:

- There is an obligation of promptness in dealing with a harassment complaint.
- There is an awareness by the employer that sexual harassment is prohibited conduct.
- The issue must be dealt with seriously.
- The employer must demonstrate that there is a complaint mechanism in place.
- The employer has an obligation to provide a healthy work environment.
- There is an obligation for management to communicate its actions to a complainant.

The Tribunal did conclude that the Respondent employer dealt with the matter promptly (within a matter of days) and that the employer did have an awareness that sexual harassment is prohibited conduct. However, it was clear from the evidence that the sexual harassment policy in place was not followed, and that from an objective perspective, the manner in which the investigation took place was not reasonable.

In terms of specific deficiencies with the investigation, it was noted that there was no complaint mechanism in place that was functional, and the approach taken to address the Complainant's internal complaint was unsatisfactory.

Why the Investigation Was Flawed

As previously mentioned, the investigators were not adequately trained, and the first investigator was replaced with a second investigator part way through the investigation. In the Tribunal's view, this created unnecessary confusion in the workplace.

When the Complainant retained legal counsel, the attitude of Management towards her became hostile on the basis that they did not like her "adversarial demeanor".

Management met with the Complainant in a public dining area to obtain her version of events which lacked privacy. There seemed to be a general ambivalence about responding to the complaint in a sensitive manner.

Further actions were taken against the Complainant, which were later determined to be a "reprisal" against her. First, both the Complainant and the alleged harasser were suspended from work pending investigation. The Complainant's keys and pass-codes were taken from her because Management was suspicious that she would take the management logs without permission.

Second, the alleged harasser was notified of the outcome of the investigation days prior to the Complainant and the alleged harasser was permitted to return to work before her, while the Complainant was left languishing at home without pay.

Management's decision letter to the Complainant had an accusatory and diminishing tone, which was found to be another form of reprisal for asserting her right to be free from discrimination in the workplace. The Tribunal took note of Marshall McLuhan's famous quotation, "the medium is the message." The message in Management's letter was that the Complainant was at fault; "*this whole situation was started by you when you were trying to get Nic's attention in the kitchen,*" and that it was time that she went back to work and stopped complaining because her rights had not been violated.

To make matters worse, Management failed to handle the matter in a confidential way, proceeding to post a public memorandum on the staff bulletin board regarding the complaint, which was found to be another incident of reprisal. The memorandum violated the Respondent's own sexual harassment policy in terms of confidentiality; was contrary to Management's instructions to her not to discuss it with anyone; identified the Complainant by name but not the alleged harasser, and also made an example out of her to all of the staff for attempting to assert her legal rights, creating a chilling effect in the workplace.

The Tribunal ultimately concluded that the underlying allegations of harassment and unwelcome physical contact were well founded – and that the majority of the Respondent employer's liability arose due to the shortcomings of its own investigation, which resulted in the Complainant suffering from additional discriminatory acts, including reprisal, culminating in her being unable to return to the workplace.

After careful consideration of the facts of this case, the Tribunal ordered the Respondent to pay \$15,000 in general damages, and an additional \$4,329 for the Complainant's loss of income, recognizing that she was unemployed for a total of nine weeks.

The individually named Respondent who had committed the single act of harassment was ordered to pay \$1000 in damages personally.

An Investigation Done Poorly #2

Frolov v. Mosregion Investment Corporation, [2010] H.R.T.O. 1789 (CanLII) (Renton) is a further example of a case where an employer failed to conduct an adequate or timely investigation.

The Complainant (Frolov) was a Project Manager employed to deal with certain financial aspects of the Respondent employer's property business. In an interesting twist, the Complainant was a male, who claimed that he had been subjected to sexual harassment and extortion attempts at the hands of a female co-worker. The female co-worker was initially a personal Respondent to the Complainant, but was later dropped pursuant to a settlement between the parties. She was not called as a witness by either party, so ultimately there was no finding of fact with respect to the underlying allegations of harassment. However, the case proceeded without her dealing solely with the adequacy of the employer's investigation.

In doing so, the Tribunal confirmed that an employer can attract liability for its failure to investigate notwithstanding that a violation of the *Code* has not been made out (see *Nelson v. Lakehead University*, [2008] H.R.T.O. 41 (CanLII), 2008 HRTO 41 (CanLII)).

The Complainant proceeded to make no fewer than three complaints of harassment to the owner of the Respondent Company, specifically citing the employer's harassment policy and requesting that an investigation be conducted.

The owner of the Company failed to act upon the Complainant's initial allegations, largely on the basis that he was not otherwise aware that men can also experience sexual harassment. The Tribunal held that a Respondent's ignorance of its *Code* obligations did not excuse the Respondent or act as a defence to its *Code* obligations (see *Torrejon v. 114735 Ontario*, [2010] H.R.T.O. 934 (CanLII)).

In addition to failing to address the allegations in a timely way, the Company owner was dismissive towards the Applicant, making comments such as "*stop complaining*", "*be a reasonable man*" and "*you should be pleased that she pays attention to you*".

The Company owner had no training in human rights or investigative matters, and failed to take any action until 18 days after receiving the initial complaint. There was no evidence that he sought any professional guidance, and made no effort to comply with the Company's own harassment policy despite the fact that it had been specifically cited in the complaints themselves.

He failed to provide the alleged harasser with the substance of the complaints against her for the purposes of enabling her to provide a meaningful response, and made no effort to separate the parties from each other until such time as the issue could be resolved.

On the issue of timeliness, the Respondent employer claimed that the investigation commenced 18 working days after receiving the first written complaint, and that it was precluded from starting its investigation earlier, in part, because the co-worker against whom the allegations had been made was on vacation.

The Tribunal noted that in other circumstances, an 18 working day delay in commencing an investigation may be reasonable. However, in the circumstances of this particular case, there was an unreasonable delay, noting that the workplace itself only had four employees in it, and the serious and detailed nature of the allegations would have permitted an investigation to have taken place after the first complaint was received, while the co-worker was still actively at work.

When the Company owner finally did meet with the alleged harasser, he failed to raise the specific allegations with her, and instead only discussed the vacation issue. He later sent her an email suggesting that it was she who had been the victim of sexual harassment and not the Complainant.

The Company owner then contacted former employees and asked all of them three general and open ended questions pertaining to workplace harassment at the workplace. The questions posed did not address or refer to any of the allegations made by the Complainant about the co-worker. Not only were the owner's actions at odds with the allegations raised by the Complainant, but they suggested that he was not neutral in his investigation towards the Complainant's allegations.

In the view of the Tribunal, the Company owner's inaction demonstrated a complete lack of understanding of the seriousness of sexual harassment complaints and the legal obligations placed on the employer that receives such a complaint to proceed promptly with an investigation before drawing any conclusions about the validity of the complaint (see *Harriott v. National Money Mart*, [2010] H.R.T.O. 353 (CanLII)).

Furthermore, the Company owner's willingness to dismiss the possibility that a male complainant could be harassed by a woman also established a basis for a finding that the Complainant's right to a workplace free from discrimination on the basis of gender (sex) had been violated (see *Smith v. Menzies Chrysler*, [2009] H.R.T.O. 1936 (CanLII)).

While the Complainant sought damages of \$95,000, the Tribunal concluded that in the circumstances of this case, and in light of the fact no actual findings of sexual harassment were made, damages of only \$7,500 were appropriate to address the Respondent's failure to conduct a reasonable investigation.

9. Example of an Investigation Done Well

In the recent case of *Toronto Community Housing Corp. v. O.P.S.E.U.*, [2010] O.L.A.A. No. 426 (Herman) a significant investigation was undertaken with respect to allegations that a community housing employee (a community patrol officer) had sexually harassed a guest of one of the employer's tenants and improperly threatened to arrest her.

The employee was discharged as a result of the allegations and he grieved his dismissal. The Union challenged the employer's investigation on a number of grounds, resulting in an extensive review of the investigative process by the arbitrator.

After reviewing in detail virtually every step of the process followed by the employer, Arbitrator Herman dismissed the grievance and upheld the termination, concluding favourably that the "...employer's investigation was sufficient to substantiate its conclusions, [and] the employer followed its own disciplinary process properly".

In reaching this conclusion, Arbitrator Herman took favourable note of the following positive aspects of the employer's investigation:

- The Investigator reviewed an initial written complaint prepared by the Complainant, and later discussed it with her at length. The Investigator then prepared a detailed written summary of the allegations based upon what the Complainant had told him, which he then forwarded to her to confirm that it was accurate, asking her to sign the document to verify that she agreed with it;
- The Investigator advised the Respondent in writing that a complaint had been received about him, confirming that an investigation would be conducted;

- The Investigator met personally with the Complainant, the Respondent and the Union for the purposes of explaining the investigative process that would be followed;
- The Investigator obtained all relevant documents and evidence, including personal notes and logs for those officers that might be involved, as well as conducting interviews of witnesses at the location in question;
- During the course of the investigation, the Respondent was temporarily re-assigned with pay to another location;
- The Investigator made the Respondent fully aware of the allegations made against him, and allowed him to submit a lengthy written response setting out his side of the story. The Respondent was advised that the Investigator would review his findings with him prior to preparing the final investigative report; and
- The Investigator provide a copy of the Respondent's response to the Complainant, allowing her to comment on his submissions.

During the course of the subsequent arbitration that followed, the Union critiqued the employer's investigation, in an effort to undermine its findings and recommendations. In particular, the Union was critical of the fact that the Investigator had assisted the Complainant in drafting her written complaint, had failed to allow the Grievor to comment on the Complainant's rebuttal submissions. The Union further argued that the Grievor had only been provided with a summary of the investigation's findings, but not the full report.

Arbitrator Herman ultimately rejected these criticisms. The Investigator's assistance in preparing the written complaint only summarized information provided verbally to him, which he later arranged to have the Complainant verify and sign. In addition, there was no procedural unfairness resulting from the Investigator's failure to share the Complainant's rebuttal with the Respondent, since no new allegations were raised which required a response.

Ultimately, the grievance was dismissed with Arbitrator Herman concluding that the investigation process followed by the employer was procedurally fair and that none of the procedural concerns identified by the Union had a material impact upon the conclusions reached.

10. CONCLUSION

As can be seen from a review of applicable jurisprudence dealing with workplace investigations, no two investigation scenarios are entirely the same. Each investigation is unique in its own way, with any number of variables that need to be actively considered by the investigator in the course of mapping out a comprehensive strategy to conduct a work related inquiry.

What is abundantly clear is that no investigation is perfect, and luckily, that is generally not the standard they are measured by. The appropriate standard is one of reasonableness, and experienced investigators will be expected to make countless process-related, evidentiary, credibility and legal determinations during the course of an investigation, which may later be scrutinized by third parties seeking to challenge the appropriateness of the process used or the conclusions reached.

To a large extent, the entire topic of workplace investigations defies the application of a standard “cookie cutter” approach. Each investigator has their own personal style, further reinforcing the fact that effective investigations are more art than science. While some of the tips and recommendations contained in this paper may work well for some, they may not be universally applicable in all situations.

At the very least, one can only hope that the topics covered in this paper will help to identify some of the common pitfalls that frequently befall investigators, allowing them to better structure their own investigative process in a way that increases their own credibility as an investigator, while making their reports and recommendations less prone to external criticism and attack.