

## **Practice to Protect Privilege: Royal Bank of Canada’s Retainer Letter for Conducting Internal Investigations**

*Insights of Emily Jelich, Assistant General Counsel, Royal Bank of Canada*

The Law Group at the Royal Bank of Canada implements a multi-prong approach to help protect solicitor-client privilege in connection with conducting internal investigations. Key components of the approach include: (1) a retainer letter, and (2) training to sensitize internal personnel on the importance of privilege and the steps to take to help protect it in connection with internal investigations. In an [October 2005 decision](http://www.canlii.org/eliisa/highlight.do?text=allgood+%2Fp+affidavit&language=en&searchTitle=Ontario&path=/en/on/onsc/doc/2005/2005canlii36727/2005canlii36727.html) ([www.canlii.org/eliisa/highlight.do?text=allgood+%2Fp+affidavit&language=en&searchTitle=Ontario&path=/en/on/onsc/doc/2005/2005canlii36727/2005canlii36727.html](http://www.canlii.org/eliisa/highlight.do?text=allgood+%2Fp+affidavit&language=en&searchTitle=Ontario&path=/en/on/onsc/doc/2005/2005canlii36727/2005canlii36727.html)) of the Superior Court of Justice Ontario, the court found that retainer of RBC’s Internal Audit Group and the resulting report were protected by privilege as a result of the manner in which the retainer was effected.

This article shares insights of Emily Jelich, Assistant General Counsel for Royal Bank of Canada, on practices implemented by RBC Law Group to help protect solicitor-client privilege in connection with internal investigations. As part of these efforts, Jelich emphasizes the need to “sensitize those groups within the organization that may have an investigatory role on the importance of privilege and steps they can take to help protect it.”

### **Step 1: Identify Corporate Functional Groups that Play a Regulatory or Fact-Gathering Role**

As part of the RBC Law Group’s efforts to help sensitize the appropriate corporate groups, the legal team identified several functional corporate groups that undertake regulatory or review/fact-gathering functions, including: Internal Audit, Compliance, Operational Risk, Human Resources, Corporate Communications and Finance]. As a threshold inquiry, functional group leaders were asked to consider potential regulatory or litigious ramifications in any situation - would a regulator be interested in what you are doing / would a third party or someone internal potentially bring a claim because of what you are dealing with?

### **Step 2: Sensitize Corporate Functional Groups on How to Help Protect Privilege and Why it is Important**

Once the corporate players are identified, invite them to participate in a training session designed to help sensitize them on: situations in which the need to protect privilege might arise, how to spot issues and steps they should take to help protect privilege.

***Demonstrate Why Protecting Privilege is Important Through Scenario-Based Training.*** RBC Law Group designed a 30-minute scenario-based training session. The session was structured as a role-play, and showed how a situation might play out if privilege was protected and if it wasn’t. In-house lawyers led these sessions.

### ***Train Functional Groups on Steps to Take Once They are Involved in Conducting an Investigation.***

Part of the training includes helping to sensitize functional group members on types of scenarios or situations or investigations for which privilege should be protected. “The idea is that not every investigation may involve issues of privilege. Instead, by sensitizing functional group members on types of situations where protecting privilege should be considered, these professionals can play a more active gate-keeping role in determining which investigations should be conducted using the retainer letter,” explains Jelich.

Steps for functional team members involved in internal investigations include:

- *Determine whether protecting privilege may be important*
- *Contact the RBC Law Group lawyer on point* for supporting the group so that a retainer letter may be issued to conduct the investigation
- *Define and remain sensitive to the groups that will be involved* in the investigation so that the scope of the retainer will include relevant groups
- *Follow the requirements of the retainer letter* (discussed in more detail below)
- *Send results of the investigation and/or any report to the RBC Law Group lawyer* on point for the engagement; the lawyer has the sole right of distribution for the report

***Be Sensitive to Discussions In Connection with the Issue.*** Jelich emphasizes, “it is important that a tight rein be kept on discussions. Who is involved in discussions and how they occur must be managed with the guidance of the legal team.”

### **Step 3: Retainer Letter**

A key step in the process to help protect privilege in connection with internal investigations is issuing the retainer letter. Specifically, once contacted by a functional group conducting an investigation, the RBC Law Group lawyer on point for working with that group prepares a ‘retainer letter.’ Jelich shares that the internal retainer letter is “similar to what you might see if an external law firm is retaining an outside external forensic professional.”

A sample retainer letter used by the RBC Law Group can also be accessed at [www.acc.com/advocacy/upload/RBC-Sample-Int-Invstign-ltr.pdf](http://www.acc.com/advocacy/upload/RBC-Sample-Int-Invstign-ltr.pdf). Some core provisions in the retainer letter include:

- ***Retainer clause:*** within the introductory paragraph, the letter includes language stating that the RBC lawyer is retaining the assistance of the investigator and that of selected members of his/her team to review the circumstances surrounding the matter, and to assist the lawyer and the Law Group in assessing and advising upon the legal and regulatory risks, if any, which the organization has in that regard.
- ***Statement regarding results of investigation:*** statement that results of the review will form the basis of advice to senior management.
- ***Confidentiality Acknowledgement:*** the retainer letter provides that the lead investigator and additional members on the investigative team need to sign confidentiality acknowledgements (sample included as part of the broader RBC Sample Retainer Letter referenced above).
- ***Request to keep RBC lawyer informed:*** letter includes a statement requesting that the investigator keep the RBC lawyer advised of the progress of the review, and of the information obtained as a result, and to provide to the lawyer copies of any reports that are prepared in connection with the investigation.
- ***Statements to be included on documents created in connection with the investigation:*** the letter requires that all working papers, reports, communications and other materials prepared during the course of the investigation should include the following statement in all capital letters:

“PRIVILEGED AND CONFIDENTIAL  
**PREPARED AT THE REQUEST OF COUNSEL**  
 SOLICITOR-CLIENT COMMUNICATION  
 SUBJECT TO LITIGATION AND LEGAL PRIVILEGE”

- ***Request regarding disclosure and role of the RBC Law Group:*** the letter asks the lead investigator (and all others who sign confidentiality acknowledgements) to ensure that copies of working papers, reports, communication and other materials prepared during the course of the

engagement are not provided to anyone outside the group working on this engagement without the prior concurrence of RBC Law Group.

**Closing Insights**

“Key to the success of any practices designed to help protect solicitor-client privilege is the need to sensitize business personnel on why this matters, what their role is and how to deal with communications, findings and documents that are created,” emphasizes Jelich. She describes the process for creating the retainer letter as an “evolution,” and encourages legal leaders to consider who is involved in conducting internal investigations and how they interact in designing a retainer letter that works well for their organization. In addition, Jelich shares that, “this is all very jurisdictionally sensitive. Legal leaders should consider their own legal jurisdiction when choosing the words and the approach used in the retainer and whether external counsel need to be involved as well. This is also an important point in regard to distribution - be careful where the report is sent as that may introduce another set of laws applying to privilege into play.”