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ONTARIO COURT RULES ON LITIGATION PRIVILEGE AND INTERNAL INVESTIGATIONS

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In a recent decision, the Ontario Superior Court of Justice has confirmed that notes taken by lawyers in the course of an investigation are privileged as long as litigation is reasonably anticipated. However, the decision in *R. v. Dunn*, released on May 7, 2012, also serves as a useful reminder that while the notes prepared by a lawyer may be protected from disclosure, a lawyer may be compelled to testify about what occurred at a meeting that he or she attended on behalf of a client, if third parties were also present.

Background

Dunn and other former senior executives of Nortel Networks Corporation are charged with defrauding the public and Nortel in connection with the events that led to the restatement of Nortel's financial statements in 2003. When the restatement occurred, Nortel's audit committee (on behalf of the company) conducted an investigation and review, including interviews of the accused executives. The executives were represented by lawyers at some of these interviews. The interviews were not transcribed, but some of the lawyers made handwritten notes.

The Court found that the lawyers had relevant evidence and issued an order compelling them to appear as witnesses at the trial and to bring all relevant documents. The executives asserted a claim of litigation privilege over the lawyers' notes from the interviews. The prosecution contested the claim of privilege, arguing that, since the notes reflected a meeting with an adverse party (in this case, representatives retained by the company to investigate the executives' actions), litigation privilege could not apply.

The Decision

The Court in *Dunn* held that the lawyers' notes were protected from disclosure on the

basis that they were created for the dominant purpose of existing, contemplated or anticipated litigation — specifically, in this case, to enable counsel representing the accused to defend actions that might be brought against them.

The Court accepted the lawyers' evidence that their notes were a blend of what the lawyers saw and heard at the interviews with what they thought was important, and not just a transcript of what occurred at the meeting. It also noted that one of the interviewers was a former Securities and Exchange Commission prosecutor, leading the lawyers to be concerned about a variety of possible regulatory and civil litigation. As a result, the Court accepted that the notes were created for the dominant purpose of anticipated litigation and to enable the lawyers to defend proceedings that might be brought against the executives. The Court noted that had the interviews been transcribed, the transcript would be plainly admissible into evidence because it would not reflect a lawyer's work in anticipation of litigation.

However, that was not the end of the matter. Although the notes were found to be protected from disclosure by litigation privilege, the content of the interviews that they purported to record was not. The lawyers would still be called to testify at the trial because the prosecution still had the benefit of a pretrial ruling requiring the lawyers to testify about, among other things, what was said at the interviews. Solicitor-client privilege did not attach to these interviews because of the presence of third-party representatives.

Because the lawyers were testifying but the notes did not have to be produced, the Court then took the unusual step of requiring the lawyers to review the notes to refresh their memory in advance of testifying. However, balancing the competing interests of truth-seeking and protecting litigation privilege, the Court ordered that the prosecution would not be permitted to see the notes, even if they were being relied on by the lawyers to refresh their memory.

Implications

This case serves as an important reminder that, while documents can be the subject of litigation privilege, "acts and facts" cannot. Both internal and external counsel should be aware that if they are attending a meeting with third parties on behalf of their clients, they may be compelled to testify as witnesses, and their notes may be ordered to be produced, unless they meet the criteria for litigation privilege. A verbatim transcript of what occurred at a meeting may not meet these criteria.

This decision also has lessons for lawyers in the context of internal investigations. When acting for the party being interviewed in an internal investigation, counsel should consider obtaining, as a condition of the interview, an agreement from the interviewer not to seek to compel testimony or documents from him or her concerning the interview. This may assist counsel to avoid being called as a witness (and having to withdraw from the case, as Dunn's lawyer was compelled to do).

On the other hand, it is clear from the Court's decision that a best practice when acting for a party conducting an internal investigation is to make arrangements to have a transcription service (such as a court reporter) present to create official transcripts of any interviews. As an alternative, counsel could prepare a memorandum summarizing the interview. While it is not clear whether such a memorandum would be admissible in later proceedings (as it constitutes a hearsay account of a meeting), the chances would be improved if the memorandum is provided to the interviewee for comments and the interviewee signs it or otherwise acknowledges that it accurately reflects the information provided in the interview.