CROSSING THE BORDER OR CROSSING THE LINE: HOW REPRESENTING CLIENTS MAY HARM THEM

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Lawyers who represented Nortel's former executives were compelled to act as witnesses during criminal proceedings

Although lawyers know and understand that it is always possible to be called as a witness in proceedings, few lawyers imagine that they will be a witness against their client within the ambit of the proceedings that they were called upon for help. Even more disconcerting is the possibility that your lawyer's notes may be compellable evidence. This maladroit situation is precisely what happened in the Ontario criminal proceedings against Nortel Networks' former executives.

In 2011, the Ontario Superior Court held in *R. v. Dunn*, [2011] O.J. No. 6363 that the lawyers who represented the ex-executives could be compelled by the Crown to act as witnesses in the criminal proceedings. Subsequently, in May 2012, the court was asked in *R. v. Dunn*, 2012 ONSC 2748 to rule on whether lawyers' notes of an investigation interview were compellable evidence against their clients. In a much-anticipated ruling by the Ontario legal community, Justice Frank Marrocco determined that the notes were protected by litigation privilege and therefore were not compellable. However, litigation privilege could not prevent the lawyers from reading their notes to refresh their memory prior to testifying, and in fact, they were ordered to do so.

The Cross-border Interviews

In October 2003, Nortel announced that it would be making a restatement of its consolidated financial statements; this restatement resulted in an estimated $948 million of liabilities (see *R. v. Dunn*, [2011] O.J. No. 2221 at para. 4). Prior to the restatement, Nortel released approximately $500 million in excess reserves, which allegedly resulted in an increase in earnings and a return to profitability. This return to profitability allegedly allowed Nortel to pay millions of dollars in bonuses to dozens of executives.

As part of Nortel's audit committee's mandate, an independent review of the events and procedures that led to the restatement was initiated. The audit committee retained the US law firm Wilmer Cutler Pickering LLP (now Wilmer-Hale LLP) to conduct the independent review. Wilmer Cutler retained Huron Consulting Services LLC to provide it with expert forensic accounting analysis. As part of the review, Wilmer Cutler interviewed Nortel employees, including chief executive officer Frank Dunn, chief financial officer Douglas Beatty and controller Michael Gollogly. More than 50 current Nortel employees were interviewed, some on more than one occasion. The review did not examine the role of Deloitte & Touche LLP, the external independent auditors of Nortel.

Two interviews of Frank Dunn were conducted, one on February 19, 2004, and the other on March 31, 2004. Dunn only had counsel at the second interview. Two of his lawyers were from Toronto and the other two were from a US law firm. Similarly, Beatty had two interviews; the first interview in which he was not represented by counsel and the second interview on April 23, 2004, where he had six counsel representing him — three from Toronto and the other three from a US law firm. Gollogly was interviewed in January 2004 and was not represented by counsel.

The lawyers at Wilmer Cutler and the accountants at Huron questioned the executives by showing them documents and asking them for an explanation on various accounting decisions. The interview process entailed the taking of notes during each interview by the Wilmer Cutler and Huron representatives. Following each interview, a memorandum was prepared by one of these representatives and then the draft memorandum was circulated to all individuals from Wilmer Cutler and Huron who attended the interview. Each reviewer was to examine the draft memorandum against his or her notes and make edits as required. Each person from the law firm and Huron who attended was asked to approve the final draft of the interview memorandum. No further changes were made after approvals were received. None of the former executives interviewed were asked to review the accuracy of the interview memoranda.

There was no audio or video recording of the interview, a fact that later becomes significant for a myriad of reasons. The only evidence that could later be derived from the interviews was witnesses' *viva voce* evidence and notes or memorand a that were prepared by the witnesses, including the executives' lawyers.

As a result of the investigation, Wilmer Cutler concluded that the former executives had manipulated the books to produce desired earnings targets (Wilmer Cutler's Summary of Findings, Nortel Networks Form 10-K, at para. 7). In particular, the report alleged that former corporate and finance management "... endorsed and followed accounting practices related to the recording and release of provisions that were not in compliance with US generally accepted accounting principles [in the last two quarters of 2002 and the first and second quarters of 2003]." The former executives maintain that all the accounting entries were justified and done according to the rules. It would appear that the conclusion in the report forms the basis for the fraud charges against the former executives. The evidence of exactly what was said or not said in the interviews, and by whom, is not readily apparent in the report. The US law firm has refused to turn over its notes regarding the contents of those interviews.

At Nortel's audit committee's direction, Wilmer Cutler provided the interview memoranda to Nortel's outside counsel in Canada and the United States who in turn provided access to the memoranda to regulators and criminal authorities.

At the end of April 2004, Nortel terminated Dunn and nine colleagues. Also, in 2004, the Royal Canadian Mounted Police began an investigation into the alleged financial irregularities of Nortel for the years 2002 and 2003. The investigation resulted in the fraud charges against Dunn, Beatty and Gollogly, for which the trial was before the Ontario courts in 2012. Similarly, in April 2004, the US Securities and Exchange Commission launched an investigation into the accounting at Nortel. In 2007, charges were laid against four former executives. The SEC has since stayed its case against the former executives pending the criminal proceedings in Canada. On the civil side, in 2006 Nortel paid $2.5 billion in cash and shares in order to settle several class-action law suits. In October 2007, Nortel paid $35 million to settle civil charges filed by the US Securities and Exchange Commission related to the alleged fraud.

The Ontario Decisions

Refusing to Compel the US Attorney

How did the criminal proceeding in Canada result in the Canadian lawyers being witnesses, with no lawyers from Wilmer Cutler or the consulting firm testifying and no notes or memoranda being admitted into evidence? It took three Ontario Court decisions to get there.

In May 2011, Justice Ian Nordheimer, the Ontario case management judge in the criminal proceedings, was asked to decide whether the memoranda created by the US interviewers were admissible evidence as business records in the criminal proceedings. If not, the court was asked to consider whether one of the US attorneys who conducted the interviews could testify and therefore introduce the memoranda into evidence. In his ruling, Justice Nordheimer decided that because the memoranda were not made in the usual and ordinary course of business, they were not admissible under the business record exception. He also decided that the US lawyer who conducted the interviews would not be permitted to give evidence as to what the former executives said during the interviews. In making its decision, the Ontario court considered that the US law firm refused to produce any of the notes that were taken during the interviews. The law firm asserted "opinion work product privilege" over the notes, which privilege belonged to the US firm and could not be waived by the client. This specific type of privilege is not generally recognized in Canada (although, arguably, in Canada the notes could be considered litigation privilege, which can be waived by the client).

Most importantly, the US attorney who conducted the interviews did not have an independent recollection of the interviews and she took no notes. Therefore, the attor-

ney would need to rely on the interview memoranda to refresh her memory; this reliance would result in her testimony being a reiteration of the memoranda. Because there were no underlying notes available, defense counsel could not effectively cross-examine the witness. In sum, Justice Nordheimer commented in *R. v. Dunn*, [2011] O.J. No. 2221 (at para. 54):

> There is something fundamentally wrong, as a matter of principle, with permitting the prosecution to call a witness where that witness refuses to divulge the very information that an accused person needs to properly cross-examine that witness. The basic unfairness reflected in that scenario reinforces my view that the evidence should not be received.

This decision was not the end of the matter.

Compelling the Canadian Lawyers to Testify

A month or so later, Justice Nordheimer was asked to decide whether the Canadian lawyers who attended the interviews could be compelled as witnesses in the criminal proceedings. The Canadian lawyers had material evidence to provide to the court. They were not acting as counsel in the prosecution proceedings and there was no evidence that such a retainer was intended. The defense lawyers' position was that the information received during the interview was for the purpose of giving legal advice and was therefore subject to solicitor-client privilege. The judge rejected this argument and instead compelled the Canadian lawyers' testimony. In doing so, he denied that solicitor-client privilege reached such a situation and delineated between communication and facts that are otherwise discoverable and relevant. Justice Nordheimer also commented that although the interview memoranda were not reliable evidence as set out in his previous ruling, this point did not mean that the memoranda could not be relied on for "all purposes." Rather, the memoranda could be used to refresh the memory of the witnesses. Lastly, Justice Nordheimer weighed the impact of calling the lawyers as witnesses on the administration of justice versus the impact of not calling them on the court's access to significant and relevant evidence. In the end, he determined that the court could not be denied relevant evidence. In *R. v. Dunn*, [2011] O.J. No. 6363, at para. 35, Justice Nordheimer recognized:

> ...the possibility of a "chilling effect" on a person's right to counsel that theoretically arises from the prospect that their counsel might subsequently be compelled to give evidence at a trial. ...It [compelling lawyers] should only be resorted to and permitted where there are extraordinary circumstances that preclude any other option.

The Canadian Lawyers' Notes

Less than a year later, in April 2012, the Crown also sought to compel the notes of the Canadian lawyers for use at the criminal proceeding. Justice Marrocco, the presiding judge in the criminal matter, was asked to determine this issue. He decided that the notes were protected by litigation privilege and therefore were not compellable.

As set out in *Blank v. Canada,* [2006] 2 S.C.R. 319 and *Kennedy v. McKenzie*, [2005] O.J. No. 2060 (S.C.), at para. 20, in Canada, to establish litigation privilege, a party must show that the documents created were:

- for the dominant purpose of existing, contemplated or anticipated litigation; and
- in answer to inquiries made by an agent for the party's solicitor; or
- at the request or suggestion of the party's solicitor; or
- for the purpose of giving them to counsel in order to obtain advice; or
- to enable counsel to prosecute or defend an action or prepare a brief.

The Canadian lawyers' notes were created for the dominant purpose of anticipated litigation. The notes were taken in order to advise the respective clients on a go-forward basis and the purpose of the Wilmer Cutler interview was to determine why Nortel had to restate its consolidated financial statements. According to the Canadian lawyers, there was also an aggressive and accusatory tone to, at least one of, the interviews. In the end, litigation and SEC proceedings did result. Therefore, it was clear that the notes were created for the dominant purpose of anticipated litigation.

However, despite deciding that the notes were not compellable, Justice Marrocco said that the lawyers could and must refer to their notes in order to refresh their memory. In his reasons, Justice Marrocco stated:

> Barristers are not ordinary witnesses; they are also officers of the court. They do not cease to be barristers because they become witnesses in a proceeding.
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> ...
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> For a barrister to deliberately refrain from taking reasonable steps to refresh his or her memory prior to testifying and thereby deliberately deprive the court of his or her best evidence is conduct that obstructs the court's truth-finding function. It is, therefore, conduct unbecoming a member of the profession. ...
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> It is equally unacceptable to require a barrister, who is required to testify, to jeopardize a lawful privilege to which a present or former client is entitled.

Justice Marrocco tried to establish a careful balance between two very important tenets of the Canadian justice system. In doing so, he did not compromise the court's ability to obtain the best evidence available nor the protection afforded to lawyers to keep their thoughts and theories to themselves during litigation.

However, critics have lauded the last motion of the case trilogy as a decision with long-term consequences. The requirement that the lawyers testify and use their notes to refresh their memory translates, for some, as lawyers sharing their thoughts

and perspective at the time as reflected in their notes. However, that reasoning does not reflect the uniqueness of the circumstances in this case, nor the ability of individuals to decipher the facts of what actually happened from their legal thought processes.

A Note on Litigation Privilege in Canada

Litigation privilege, as it is known in Canada, is not an absolute privilege. (In the United States, this type of privilege is referred to as "attorney work product privilege." Attorney work product privilege has different characteristics than litigation privilege in Canada, such as it does not end at the termination of the litigation.) Unlike solicitor-client privilege, litigation privilege ends on the termination of the litigation. It protects documents and information that is created for the dominant purpose of anticipated, actual or contemplated litigation. The privilege exists in order to protect a lawyer's ideas, strategies, theories and impressions. Litigation privilege does not, however, protect the disclosure of relevant facts. As seen in this case, there is always a balance between the interest of protecting documents as part of the adversarial process and the necessity to disclose relevant evidence in order to ensure a fair trial.

Protect Your Cross-Border Clients From You

The delicate balance between a client's rights and a lawyer's duty to the court was at the forefront in all of these decisions. In the circumstances of the case, with no evidence available from the American side and no transcript of the interviews available, the Ontario judges had little choice but to compel the Canadian lawyers to testify against their clients. Notably, these decisions are missing consideration of whether the US counsel for the former executives could be compelled to testify. We know that Dunn and Beatty had US attorneys present at their second interviews. Presumably, the Crown thought it best to focus their efforts on the "home-grown" lawyers who are subject to the Canadian jurisdiction before seeking to compel US counsel. Although this article does not delve into the various types of privilege in the United States or the defenses that could be raised by a lawyer who is in such a precarious position, it would seem that the US lawyers would be faced with the precise problem as their Canadian counterparts — that is, the presence of a third party whose purpose at the interview was to interrogate the client in an adversarial manner. That fact excludes the protection of the communication by way of attorney-client privilege. So consider how to best avoid these situations altogether. Below are a few suggestions.

The existence of a transcript of the investigation or meeting will eliminate the possibility of being compelled as a witness. The requirement that a court reporter be present could be made a term of an agreement to be interviewed. However, although it may be in the best interest for the lawyer to have the meeting recorded, it may not be the ideal solution for the client. Alternatively, if the interview or meeting is not transcribed, it is preferable to have your client attend without the presence of a lawyer. If it is known that a transcription will occur, the presence of a lawyer will not harm the client. It is the careful balance between your client's right to counsel and ensuring that you are not prejudicing your client through your presence or lack thereof that must be made.

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