

Case In Point

Solicitor-Client Privilege Does Not Necessarily Arise Where Lawyer Copied on Internal HR Email

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Is an email sent by a human resources employee and copied to the employer's lawyer covered by solicitor-client privilege? The Ontario Superior Court of Justice recently answered this question in [Jacobson v. Atlas Copco Canada Inc.](#)

This action involved a plaintiff's claim for wrongful dismissal. His employment had been terminated for allegedly participating in a physical altercation with a fellow employee. The email in question outlined a potential course of action for dealing with the employee. The Court held that the email was *not* privileged and that it must be produced by the employer in the litigation.

The Court applied the typical three-part test required to establish solicitor-client privilege, namely, was the email:

- (1) a communication between solicitor and a client;
- (2) intended to be confidential between the parties; and
- (3) regarding the seeking or giving of legal advice?

The plaintiff conceded that the first two tests were met. The Court found, however, that the third was not met. It stated that the onus rested on the employer to establish the privileged nature of the communication; in this case, it had failed to do so. The Court specifically found that the employer had inexplicably failed to introduce any direct evidence of the email writer's intentions, and neither the circumstances in which the communication was made nor the contents of the email itself were sufficient to establish that the message was sent for the purpose of obtaining legal advice.

It is important to note that the Court's decision does *not* mean that privilege cannot apply to any communications sent simultaneously to lawyers and non-lawyers. In fact, the Court stated that there may be situations in which a communication given simultaneously to a lawyer and non-lawyer could be for the purpose of seeking legal advice (in which case it could still be privileged).

This decision demonstrates that the purpose of a communication is very important when asserting privilege. The Court's reasoning also serves as a reminder that, if the privileged nature of a communication is called into question, employers will be well-served to lead with the best evidence of the writer's intentions in order to demonstrate this purpose.