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# Privilege and corporate responsibility: Are courts impeding public policy?

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Yousuf Aftab and Gerald Chan argue that recent limitations on privilege protections risk disincentivising good corporate behaviour at a time when governments want companies to investigate human rights abuses.

A dangerous fissure is emerging between legislative and judicial policy regarding internal investigations in discovery-friendly jurisdictions. Governments are increasingly willing to regulate extraterritorially the effect corporations have on human rights. The trend is reshaping the scope of corporate compliance programmes and internal investigations. At the same time, courts are ever more sceptical of the extent privilege applies in such investigations, leaving companies in the untenable position of increasing their exposure to litigation and reputational risk by complying with legislative policy.

This tension has recently come to the fore in Canada with the creation of the Canadian Ombudsperson for Responsible Enterprise (CORE), a body empowered to investigate, publicly report on and recommend sanctions against Canadian companies linked to human rights abuses abroad. CORE's mandate is defined with reference to nominally voluntary norms of corporate responsibility. Such norms, in compliance terms, are built on continuous, rigorous, and expansive internal investigations.

The challenge for companies is that Canadian law (and UK law, from which Canadian courts draw guidance) on privilege over such investigations is retreating at precisely the same time that the scope of internal probes, and attendant risks, are expanding. Left unchecked, these duelling judicial and legislative trends – which are not unique to Canada or to human rights – risk tipping the scales of reason against ethical business. The virtuous company would become the architect of its own legal, financial, and reputational risks. It is therefore critical that courts adopt a more nuanced and reasonable stance on privilege to avoid undermining the legislative policy driving corporate responsibility regulation.

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## Conflicting incentives

Three CORE features are particularly relevant and somewhat novel. First, rather than establishing specific compliance expectations of companies, CORE's substantive jurisdiction incorporates voluntary standards such as the UN Guiding Principles on Business and Human Rights (Guiding Principles) and the OECD Guidelines for Multinational Enterprises. Second, CORE has the rare authority to investigate allegations of corporate human rights abuse independently, including by compelling production of evidence. Third, CORE is mandated to report publicly and comprehensively from the outset to the conclusion of any investigation.

The structure rests on a delicate balance of potentially conflicting incentives at the nexus of due diligence and disclosure. A company that is both ethical and rational must investigate its own potential wrongdoing and transparently report on such investigations without fuelling business risk. In recent years, corporate responsibility as a discipline has evolved to alleviate this tension. The innovation of the Guiding Principles – the dominant business and human rights standard – is that ethical corporate behaviour is judged with reference to a programme of policies and procedures rather than impact alone. A good faith commitment to process defines virtue. In this way, human rights governance has come to share much in common with corporate compliance across other risk arenas, particularly corruption.

The centerpiece of human rights governance is due diligence. The term is idiosyncratically defined under the Guiding Principles, but, as with other compliance programmes, internal investigations (or "impact assessments") remain an essential ingredient. In contrast to other contexts, however, such investigations are expected to be incredibly expansive in operational, geographic, and substantive scope: they should seek to identify all human rights risks to individuals and communities affected by all the company's operations and value chain – upstream and downstream. In practice, therefore, no human rights investigation will ever be complete.

The broad scope of the Guiding Principles also means that any rigorous internal investigation will find relevant human rights impacts with which the company is involved. Indeed, for the foreseeable future the most responsible companies are likely to identify the most human rights issues because the rigour of their due diligence is the measure of their responsibility. In theory, this metric of corporate responsibility should encourage transparency as a way of proving good faith. In practice, however, companies must still be sensitive to the panoply of legal, financial, and reputational risks that human rights disclosures might create, including investor pressure, class actions and civil society campaigns. Privilege enables business to respect human rights without nourishing risk. Unfortunately, that key element seems to be in retreat just as government pressure on business to conduct human rights investigations is mounting.

## The retreat of privilege

Recent cases in the UK and Canada are at the vanguard of this retreat, particularly with respect to litigation privilege. Litigation privilege, as distinct from lawyer-client privilege, is not restricted to communications between the lawyer and her client corporation (and potentially its employees). Rather, it can extend to communications and other documents involving third parties when prepared for the dominant purpose of litigation (existing or anticipated). This makes the privilege especially useful for internal investigations, where inquiries often extend beyond the company's officers to its suppliers, customers and other third parties. The privilege is intended to provide companies and their lawyers with a zone of privacy within which to investigate, strategise and prepare for their cases.

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In *Serious Fraud Office v Eurasian Natural Resources Corporation (ENRC)*, the English High Court addressed a claim of litigation privilege in the context of an internal investigation. The SFO and ENRC were engaged in a dialogue over allegations of fraud, bribery and corruption flowing from ENRC's conduct in Kazakhstan and a country in Africa. During these discussions, ENRC was conducting an internal investigation under the supervision of a law firm. When the discussions broke off, the SFO sought to compel production of various documents generated by the investigation, including interview notes. The court rejected ENRC's claim of litigation privilege over these materials and ordered them to be produced. A criminal investigation, the court held, is not litigation because it has not yet resulted in a criminal prosecution. Therefore, documents prepared for the dominant purpose of a contemplated criminal investigation are not privileged, even if the ultimate purpose is to prepare for a contemplated prosecution. The court drew a bright line between the two stages, although most practitioners would take a considerably dimmer view of this distinction.

The Canadian case of *R v Assessment Direct Inc* narrowed litigation privilege in a different way. The Ontario Provincial Police were investigating Assessment Direct and its co-defendant corporations for fraud. It was undisputed that the defendants had prepared recorded witness statements for the dominant purpose of anticipated civil litigation (and the possibility of criminal prosecution); therefore, the defendants claimed litigation privilege over the statements. The Ontario Superior Court rejected the claim. Litigation privilege, the court held, protects only a lawyer's "observations, thoughts and opinions" and not "facts". Recorded witness statements contain the latter and not the former.

The reasoning in *Assessment Direct* can have significant consequences for the conduct of internal investigations in Canada. If recorded witness statements cannot be privileged because they contain only facts, lawyers will be incentivised to prefer notes (in which the lawyer's observations, thoughts and opinions are intermingled with the facts obtained from the witness) over more reliable records of witness interviews (such as transcripts) for fear that the latter will not attract privilege. What the Superior Court overlooks is that even a transcript of a Q&A with a witness can provide a clear window into the lawyer's thoughts by revealing the questions the lawyer chose to ask.

Neither *ENRC* nor *Assessment Direct* represents the final word on litigation privilege in the UK and Canada, respectively. An appeal from ENRC will be heard later this year. And earlier this year in *Bilta (UK) Ltd v Royal Bank of Scotland Plc*, the Chancellor of the English High Court rejected the bright line that the judge drew in ENRC between a criminal or regulatory investigation and the resulting prosecution. In *Bilta*, Her Majesty's Revenue and Customs threatened the company with an assessment for what it alleged was over-claimed VAT of £86.2 million. The company conducted an internal investigation in response to this allegation. In upholding litigation privilege over the notes and transcripts of interviews from this investigation, the chancellor found that the investigation was conducted to fend off the assessment; and "fending off this assessment was just part of the continuum that formed the road to the litigation that was considered, rightly, as it turned out, to be almost inevitable."

*Assessment Direct* is also under appeal. The defendant corporations have sought leave to appeal to the Supreme Court of Canada, and a decision on whether leave will be granted is expected this summer. In addition, the Alberta Court of Appeal decided *Alberta v Suncor Energy Inc* early last year. In that case, the lower court judge had applied litigation privilege to a series of recorded witness statements obtained in an internal investigation into a workplace accident, and the Alberta Court of Appeal did not disturb that holding. Unlike the Superior Court's decision in *Assessment Direct*, there was no mention of litigation privilege being limited to a lawyer's "observations, thoughts and opinions" in either the lower court judge's opinion or the Alberta Court of Appeal's judgment. *Suncor* is also, however, under appeal to the Supreme Court of Canada.

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## The Gordian knot for ethical business

CORE's mandate brings the privilege challenge into sharp relief because of the combined ability to compel production of evidence and the duty to report publicly. If litigation privilege is limited in the ways set out in *ENRC* and *Assessment Direct*, corporate human rights investigations risk becoming time and cost-intensive exercises that create or amplify legal, financial, and reputational risk. CORE could compel disclosure of due diligence findings – which, if the investigations are rigorous, will inevitably include adverse human rights impacts – and would then be mandated to report publicly on the investigation. Directors and officers would be caught in a quagmire: choosing between ethical behavior and their fiduciary duty to the company and its shareholders.

Set against other compliance risks, the privilege challenge is uniquely daunting in the human rights context because of the type and scope of business risks. Corruption risk can be tamed by diligent companies because the expectations of regulators are relatively clear and certain. Credit will generally be given for strong compliance programmes, including internal investigations and self-reporting. Human rights-related business risks, by contrast, are expansive, multifaceted, and interdependent. CORE investigations risk exposing companies to trial by headline, leading to investor and lender pressure, political fallout relating to concessions and permits in host countries, and reputational consequences with consumers. A reasonable business, no matter how responsible, will have to be wary of these risks.

## Untangling the Gordian knot

Rigorous internal investigations are the cornerstone of corporate responsibility, from corruption to human rights to climate change. For companies to invest in the process in good faith, however, such investigations must not themselves exacerbate the array of legal and non-legal corporate risks. Conducting privileged internal investigations is central to companies' ability to be rationally and rigorously self-critical, particularly in discovery-friendly jurisdictions. The narrowing of privilege protections while the expected scope of internal investigations expands, therefore, creates a Gordian knot of conflicting incentives for ethical and compliance-focused businesses alike.

Untangling (or slicing through) that knot is the judicial domain. The Canadian government, among others, has adopted a clear and welcome policy of encouraging corporate responsibility through risk-based due diligence. Courts need to be more attuned to the broader context of their rulings, including the implications of this policy end, if they are not to frustrate government policy in practice. Which company would willingly create the fodder for the headline that drives away investors, leads governments to be more reticent about permits, convinces consumers to shop elsewhere, and invites plaintiffs' counsel to bring exploratory class actions? While there is an intuitive allure to favouring transparency, particularly where significant public interests such as human rights are at stake, the interplay of real-world incentives – and the dissonance between them – may make enforced transparency the enemy of enduring responsibility.

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