Alberta Employers Cannot Claim "Blanket" Privilege on Materials Following a Workplace Accident

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The Alberta Court of Appeal recently released its decision in *Alberta v Suncor Inc.*, 2017 ABCA 221, which clarified an employer's ability to claim privilege over information and materials that are created or collected during an internal investigation following a workplace accident. The Court of Appeal held that while an employer can assert litigation and/or legal privilege over an accident investigation or certain parts of it, employers cannot "throw a blanket over all materials" created or collected during the accident investigation and claim that all such materials are privileged.

Background

On April 20, 2014, an employee of Suncor was involved in a fatal workplace accident at Suncor's facility near Fort McMurray, Alberta. Alberta Occupational Health and Safety (OHS) officers issued a stop-work order that day. Immediately after the workplace accident, anticipating litigation, Suncor began an internal investigation and threw a privilege blanket over all information pertinent to its investigation.

From May 2014 onward, OHS issued various demands for the release of information under Alberta's *Occupational Health and Safety Act* (OHSA). On November 14, 2014, in compliance with section 18 of OHSA, Suncor provided OHS with a report of its investigation. Suncor also produced materials that pre-dated or coincided with the workplace accident but asserted solicitor-client privilege and/or litigation privilege over materials created or collected in the course of its internal investigation after the accident.

Her Majesty the Queen in Right of Alberta (Alberta) filed an originating application on February 26, 2016, seeking an order that Suncor provide the refused materials and allow OHS to interview Suncor's internal investigators, or at least provide further particulars about the claims of privilege.

Court of Queen's Bench of Alberta Decision

The Court of Queen's Bench of Alberta considered whether Suncor was entitled to claim privilege over the information collected during its internal investigation and whether the documents and other records created or collected during Suncor's internal investigation were privileged. The chambers judge noted that while Suncor had a statutory obligation under the OHSA to conduct an investigation and prepare a report on the accident, that obligation did not foreclose or preclude Suncor's entitlement to litigation privilege. The chambers judge found that as Suncor's internal investigation was carried out in anticipation of litigation, the information and documents created and/or collected during the internal investigation were done so with the dominant purpose that they would assist in the contemplated litigation, and therefore the information and documents were covered by litigation privilege. Alberta appealed the chambers judge's decision to the Court of Appeal.

Court of Appeal of Alberta Decision

On appeal, Alberta conceded that the occupational health and safety legislation, the OHSA, did not preclude claims of privilege. Notwithstanding its concession, Alberta argued that the chambers judge erred in making a general finding that the dominant purpose of Suncor's internal investigation as a whole was in contemplation of litigation. In particular, Alberta argued that the chambers judge's conclusion was contrary to the settled principle that the dominant purpose for creating any particular record must be established on a document-by-document basis.

The Court of Appeal agreed with Alberta and found that the chambers judge had erred in finding that the dominant purpose of the internal investigation was in contemplation of litigation and therefore every document “created and/or collected” during the investigation was clothed with legal privilege. The Court of Appeal found that Suncor could not, simply by having legal counsel declare that an investigation had commenced, throw a blanket over all materials “created and/or collected during the internal investigation” so as to clothe them with solicitor-client or litigation privilege. The Court of Appeal noted that where a workplace accident has occurred and the employer has statutory duties under the OHSA and simultaneously undertakes an internal investigation, if the employer claims legal privilege over the materials derived as part of the investigation, an inquiry should be directed to a referee in order to determine the dominant purpose for the creation of each document or bundle of similar documents in order to assess the claim of privilege.

The Court of Appeal noted that Suncor was required to independently distinguish between the nature of the privilege claimed and the evidentiary basis for the claim, in order to allow for a meaningful assessment by the referee. In this case, material Suncor claimed as privileged was not sufficiently detailed to identify whether the material was created in contemplation of litigation as opposed to merely collected for that purpose.

Implications for Employers

This decision confirms that the statutory obligation under Alberta's occupational health and safety legislation to conduct an investigation and prepare a report following a workplace accident does not foreclose the employer's ability to assert litigation and/or solicitor-client privilege over the accident investigation or certain parts of it. However,

employers cannot "throw a blanket over all materials" and claim that all materials related to the investigation are privileged. In order to support a claim of either litigation or solicitor-client privilege, the employer must describe the documents in a way that indicates the basis for the claim, so that a meaningful assessment and review of each bundle of documents can be made. Even if the documents are sufficiently detailed, the inquiry may still be directed to a referee to determine the dominant purpose for the creation of each document or bundle of documents to assess the claims of privilege.

By

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