Disclosure of investigation reports to the regulators was a waiver of privilege

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In *CNOOC Petroleum North America ULC v ITP SA*, 2024 ABCA 139, the Court of Appeal of Alberta held that post-failure investigation reports were not privileged as they had been provided to the Alberta Energy Regulator (AER) and the Association of Professional Engineers and Geoscientists of Alberta (APEGA) following the incident.

This is a follow-up article to our publication titled "Court finds failure investigation records are not privilege", where the Honourable Associate Chief Justice D.B. Nixon ordered disclosure of thousands of records related to a post-failure investigation, including specifically two reports known as the "Skystone Report" and the "Nexen Report" (collectively, the Reports).

Litigation privilege

In its decision, the Court of Appeal first considered whether CNOOC could claim privilege over the Reports. The Court reminded that litigation privilege is designed to create a "zone of privacy" around pending or apprehended litigation and allows each litigant to prepare its case without concern that its strategies will be disclosed to its opponent(s). Importantly, litigation privilege is a "class privilege". The test for litigation privilege is one of dominant purpose, at the time the record was created, and is determined on a record-by-record-basis.

The Court held that the post-failure investigation served serval different purposes. However, the Court noted that the analysis below made it was difficult to ascertain whether the case management judge had followed the proper approach and made a finding as to the purpose for the creation of the Reports. In particular, the Court noted that the case management judge did not review the Reports when determining when the Reports were privileged and held that "[j]udicial inspection of contested records has long been the recognized approach, now confirmed by R. 5.1(2)(a)."

Waiver

Regarding waiver of litigation privilege, the Court of Appeal held that litigation privilege can be intentionally waived or lost by operation of law (absent an intention to waive

privilege). Regarding the latter, the Court held that there is no fixed test for when voluntary disclosure of a privileged record to an unrelated third-party results in an unintentional loss of privilege.

The Court explained that loss of privileged by operation of law occurs when a record is used in a manner that is inconsistent with maintaining privilege. In this case, CNOOC had voluntarily provided both Reports to the AER and APEGA. The Court found that this was inconsistent with maintaining privilege because, reasonably, the regulators could use the Reports for their own purposes, which could include the disclosure of the Reports in their own regulatory proceeding.

Takeaways

There are three major takeaways from this case:

- Post-failure investigations will rarely be protected by litigation privilege. Regardless, it is possible that some records generated from the investigation are created for the dominant purpose of litigation.
- The question of whether a record was indeed created for the dominant purpose of litigation is a determination that is based on the specific record in question.
- A party is not required to provide a document protected by litigation privilege to regulator, unless compelled by law. Voluntarily providing a record, such as an investigation report, to a regulator can result in a loss of privilege.

BLG acted as counsel to one of the defendants in the Action and on the Appeal.

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