

Court finds failure investigation records are not privileged

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In *CNOOC Petroleum North America ULC v ITP SA*, 2023 ABKB 689, the Court of King’s Bench of Alberta considered an application to produce various documents that were created during the plaintiff’s investigation of a pipeline failure, including an investigation report. The Court held that the documents were not created for the dominant purpose of litigation and were not privileged. Further, if there was any privilege, that privilege was waived when the documents were provided to the regulator. This is an important decision to consider if claiming privilege related to a post-failure incident.

Background

The Action relates to the failure of a pipeline that was owned and operated by the plaintiff, CNOOC Petroleum North America ULC (CNOOC, previously Nexen Energy ULC). The pipeline spill, which occurred in July 2015, was one of the largest ever in Alberta.

After the failure of the pipeline, CNOOC investigated the failure. In the Action, CNOOC claimed privilege over many of the investigation documents, including specifically two reports known as the “Skystone Report” and the “Nexen Report” (collectively, the Reports).

One of the defendants filed an application challenging CNOOC’s claim of privilege with respect to the Reports and the various documents related to CNOOC’s investigation.

The Honourable Associate Chief Justice D.B. Nixon made the following findings related to the investigation into the failure:

- Following the pipeline failure, CNOOC held a meeting with senior management and its general legal counsel who requested a “legally privileged and confidential investigation be undertaken”.
- The purpose of the investigation was to determine the causal factors that led to the failure of the pipeline, to determine CNOOC’s legal rights and remedies, and to prepare for civil litigation and regulatory prosecution.

- The Skystone Report was procured for the purpose of providing CNOOC's legal team with guidance on matters that would inform their provision of legal advice to CNOOC and to assist in the assessment and analysis of the anticipatory regulatory and civil litigation.
- CNOOC understood that it had a legal obligation to provide the Reports to the Alberta Energy Regulator (AER) and to the Association of Professional Engineers and Geoscientists of Alberta (APEGA), which it did.

Decision

The decision turned on whether the Reports were made for the dominant purpose of litigation. Justice Nixon made it clear that this threshold is high, and it is not enough that a "substantial portion" of a document was prepared for the purposes of litigation.

Following the leading authority on the issue, *Alberta v Suncor*, 2017 ABCA 221, even if the dominant purpose of the internal investigation was in contemplation of litigation, this does not mean that every document created or collected during the investigation is clothed with legal privilege. Further, it is not enough to merely have legal counsel declare that an investigation has commenced. This will not create a blanket of privilege over all documents created in the internal investigation. The question is always what was the purpose for the creation of the record?

Justice Nixon acknowledged that CNOOC's general counsel had declared that the investigation would be privileged and for the purposes of litigation. However, what followed was an investigation that was used for several purposes, including addressing environmental issues, business concerns, and the determination of whether to repair or replace the pipeline. Specifically, Justice Nixon found that the Reports were used to "substantially support" part of CNOOC's post incident assessments and the potential re-use or replacement of the pipelines. Justice Nixon wrote:

[64] Significant portions of [...subsequent reports] contain redactions for privilege and [... CNOOC's evidence] confirmed that those redactions were in relation to references to the findings in the Reports. Of course, subsequent reference to a document that is protected under litigation privilege in a separate document would not, in itself, put into question that it was a properly claimed privilege. **However, in the present case it solidifies my view that these Reports would have encapsulated too many other concerns to have properly been prepared with the dominant purpose of litigation.**

Further, Justice Nixon found that contemporaneous evidence did not support Nexen's position that the Reports were privileged. For example, CNOOC provided the Nexen Report to the AER and stated the Nexen Report contained commercial and technical information that would be beneficial to its competitors, but it did not mention privilege. The email stated:

For Nexen's part, it is our significant preference that the report not be made available on the AER's website, whether it be before the conclusion of any underlying regulatory matters or after. In Nexen's view, there is commercial, business, and technical information contained in the report that would [be] beneficial to our competitors and harmful to Nexen. For this reason, we'd prefer that the report not be put on the AER website.

All together, Justice Nixon found that the Reports were not created for the dominant purpose of litigation.

Lastly, Justice Nixon considered whether privilege (if any) was waived. First, CNOOC provided the Reports to the AER and APEGA and vigorously argued that it was **“compelled” to do so, and therefore privilege was not waived. While commenting that** cooperation with regulatory bodies should be encourage, Justice Nixon disagreed that either section 76 of the Pipeline Rules, Alta Reg 91/2005 [now repealed] or the Engineering and Geoscience Professions Act, RSA 2000, c E-11 compelled CNOOC to provide privileged documents to these regulators. Second, at a press conference on July 12, 2016, the CNOOC VP of Canadian Operations announced the conclusions of the investigation regarding the root cause of the failures of the pipeline, a reference to the findings of the Reports. Justice Nixon held that a reference on its own would not be enough to waive privilege, however, the press conference, along with the provision of the Reports to regulatory bodies, and reference to the Reports in subsequent produced materials and reports allowed him to conclude that the litigation privilege over the Reports (if any) was waived.

Takeaways

For an investigation to be protected by litigation privilege, the investigation must be for the dominant purpose of litigation. Combining other purposes into the investigation, such as environment, health and safety, business concerns, and decisions about whether to repair or replace the failed equipment will make an investigation vulnerable to a court finding that the investigation was not for the dominant purpose of litigation and is not protected by litigation privilege.

Second, parties should cooperate with regulators, but a careful analysis of the **regulator’s statutory powers is required to determine if the regulator is entitled to compel** documents that are protected by privileged. If a party chooses to provide a copy of privileged documents to a regulator, even with the best intentions or under the misapprehension that it compelled to do so, this act may result in a waiver of privilege.

The authors note that the CNOOC has appealed the decision.

Borden Ladner Gervais LLP acts as counsel to one of the defendants in the Action.

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