Are Documents Created During Required Investigation of Fatality Protected by Privilege?



The legal concept of privilege is intended to protect the confidentiality of certain communications and documents. There are two kinds of privilege that can arise in the context of workplace safety. Litigation privilege applies to information that has been gathered or documents that have been created in contemplation of litigation, such as an OHS prosecution. Solicitor-client privilege was created to protect the confidentiality of communications between lawyers and their clients. But can either kind of privilege apply to documents created during a mandatory investigation of a workplace fatality' An Alberta court recently tackled this issue. Here's a look at its decision.

THE CASE

What Happened: A worker suffered an electrical contact, which caused serious injuries and led to his death. His employer reported the incident to the Alberta Ministry of Labour (MOL) and conducted an investigation as required by the OHS law. The MOL demanded that the employer provide information and various records related to the fatality and its subsequent internal investigation. Although the employer provided some of the

requested documents, it refused to produce many others, claiming they were protected by both litigation privilege and solicitor-client privilege. The MOL imposed a $5,000 administrative penalty on the employer for refusing to provide the requested documents, arguing that because the investigation was mandated by OHS law, the dominant purpose for the collection of the information was to comply with that statutory requirement’not to prepare for litigation’and so privilege didn’t apply. The employer asked a court to bar the MOL from compelling the production of the privileged documents.

What the Court Decided: The Alberta Court of Queen’s Bench ruled that privilege could apply to the contested documents.

The Court’s Reasoning: The court said there were three related issues to be decided:

Is the employer entitled to claim privilege over the information collected during its internal investigation’ The court found that the fact that a single investigation has a dual purpose’regulatory and litigation’doesn’t eliminate an employer’s right to legal privilege if it’s able to establish that the *dominant* purpose for conducting the investigation was in contemplation of litigation. So although this employer had a statutory duty under the *OHS Act* to conduct an investigation into the fatality, that duty didn’t preclude its entitlement to litigation privilege, particularly if the evidence shows that it took ‘deliberate steps to cloak documents and information collected in the process of the investigation with the garb of privilege in anticipation or contemplation of litigation,’ explained the court.

Are the documents created or collected during its internal investigation privileged’ The employer argued that the dominant purpose for undertaking the fatality investigation was in contemplation of litigation *and* in order for legal counsel to provide legal advice, noting that it took various

steps to establish privilege over its investigation. The court found that based on the seriousness of the incident, the potential for various OHS penalties and sanctions, and the police and OHS Officers' investigations, it was reasonable for the employer to have believed there was 'a very good chance' that various forms of litigation were possible. So it concluded that the employer had proven that 'the dominant purpose of carrying out its internal investigation was in contemplation of litigation.'

Did it provide sufficient justification for its claims to privilege over the refused information' The last issue was determining whether privilege applied to each of the documents, records and information the employer refused to provide. Given the volume of documents over which the employer claimed privilege, the court concluded that a court-appointed referee should assess whether a document, record or information fell under either litigation or solicitor-client privilege and make appropriate recommendations to the court [*Alberta v. Suncor Energy Inc.*, [2016] ABQB 264 (CanLII), May 10, 2016].

ANALYSIS

Privilege is an important concept to understand because you can use it to shield internal safety records from disclosure to the government. But ensuring that documents are privileged isn't easy. And even after privilege has been created, it's very fragile and can easily be lost if you don't handle the documents correctly, such as by widely disclosing them to third parties. The *Suncor* decision is important because it confirms that, if the proper steps are taken, privilege can apply to documents created as part of an internal investigation into a safety incident'even if you were required to conduct that investigation by the OHS laws.