

On September 8, 2016, several amendments to Ontario's *Occupational Health and Safety Act* came into effect under Bill 132, including the introduction of an employer duty to investigate workplace harassment. Although the potential ramifications of this new duty are many, this month's Alert will focus specifically on the impact of this statutory requirement on claims of litigation privilege by taking a closer look at *Alberta v. Suncor Energy Inc.*, 2016 ABQB 264.

## Court decides that litigation is the “dominant purpose” of workplace investigation despite statutory duty to investigate; litigation privilege granted

On April 20, 2014, an employee of Suncor Energy Inc. (“Suncor”) incurred a fatal injury while working at one of the employer's facilities in Alberta. As required by law, Suncor reported the fatality to the Ministry of Labour's Occupational Health and Safety (“OHS”) office which, in turn, launched an investigation into the incident. At around the same time, Suncor constituted an internal team to conduct its own investigation into the accident. The team was instructed to endorse “all documents as being privileged and confidential”.

Shortly after Suncor's internal investigation began, the OHS issued a letter demanding access to evidence collected by its investigation team, including, copies of witness statements and interviews. Suncor refused to disclose the material citing legal privilege over its investigation. This assertion was promptly rejected by the OHS.

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The decision considers whether or not the internal investigation conducted by Suncor was subject to “litigation privilege” and whether this privilege flowed to the documents sought by the OHS.

### **1. Can a party claim contemplation of litigation as the “dominant purpose” for an investigation if it is required to conduct the investigation by law?**

In order to establish litigation privilege over documents generated in the course of an investigation, the claimant must prove that:

1. The document was made specifically with existing or contemplated litigation in mind; and
2. The dominant purpose for its creation was to assist in litigation.

In this case, the OHS rejected Suncor’s assertion of litigation privilege outright on the basis that the investigation which produced the documents was required by law (i.e. the OHS Act). The OHS argued that, because of this statutory requirement, it could not be argued that the “dominant purpose” for this investigation was the anticipation of litigation.

The Court reviewed the jurisprudence on the subject and concluded that it is possible to have a single investigation with dual purposes – regulatory and litigation – and that the presence of a statutory obligation to investigate does not automatically vitiate a claim of litigation privilege. Instead, the main focus of the inquiry should be which of the two purposes is the dominant one.

### **2. Are the documents produced as part of Suncor’s internal investigation subject to litigation privilege?**

Once the Court confirmed that Suncor was not precluded

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from claiming litigation privilege by the presence of the statutory requirement, it needed to decide whether or not the dominant purpose of Suncor’s internal investigation into the April 20th incident was litigation or the fulfilment of a statutory obligation.

In order to come to a conclusion on this point, the Court considered the broader context surrounding the investigation, including:

- The seriousness of the accident;
- The potential for penalties and sanctions under the OHS Act, the RCMP investigation and the OHS investigation;
- The likelihood of regulatory prosecution by the OHS, laying of criminal charges or civil litigation;
- The fact that Suncor’s legal counsel initiated the investigation on the same day as the accident;
- The fact that the OHS had referenced the potential for prosecution in its communications with Suncor;
- The fact that the legislation only requires employers to make a report available to the OHS and does not speak to a need to provide information on the process used in conducting the investigation; and
- The presence of the “limited use immunity” provisions of the OHS Act which suggest an intention to extend some form of litigation privilege to internal investigations.

In light of the factors above, the Court concluded that Suncor had successfully established contemplation of litigation as the dominant purpose for its internal investigation. It flowed from this conclusion that any documents collected during the investigation would be subject to litigation privilege.

**3. Did Suncor provide the OHS with enough information to justify its claims of privilege?**

Finally, the Court considered whether or not Suncor had

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provided the OHS with enough information and detail about the documents over which privilege was being claimed, to determine that Suncor was not required to disclose the materials.

Because of the volume of documents over which privilege was being claimed, the Court decided to remit this issue, and the task of determining which documents in particular are covered, to a third-party.

### **Conclusion<sup>1</sup>**

Many Ontario employers subject to the OHSA amendments under Bill 132 may feel that they no longer have autonomy over the investigation of complaints and incidents of workplace harassment that occur in their workplace. While this may be true in some respects, particularly if the challenge is to prove that the workplace investigation conducted was “appropriate in the circumstances” as required under the Bill, this case suggests that – even where investigations are required by statute – there are still mechanisms in place that enable employers to successfully claim privilege over reports and other work products which stem from the investigations they conduct. 

<sup>1</sup> Thank you to fellow employment lawyer Jaime Hoopes for bringing this case to our attention.

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