

File No. _____

IN THE SUPREME COURT OF CANADA
(ON APPEAL FROM THE COURT OF APPEAL OF ALBERTA)

BETWEEN:

SUNCOR ENERGY INC

APPLICANT
(Respondent)

AND:

HER MAJESTY THE QUEEN IN THE RIGHT OF ALBERTA

RESPONDENT
(Appellant)

MEMORANDUM OF ARGUMENT OF THE APPLICANT (RESPONDENT)
(Pursuant to Rule 25 of the *Rules of the Supreme Court of Canada*)

OSLER, HOSKIN & HARCOURT LLP
Suite 2500, TransCanada Tower
450 – 1st Street SW
Calgary, AB T2P 5H1

OSLER, HOSKIN & HARCOURT LLP
Suite 1900, 340 Albert Street
Ottawa, ON K1R 7Y6

Colin Feasby / Sean Sutherland**Geoffrey Langen**

Tel: (403) 260-7000 Fax: (403) 260-7024
Email : cfeasby@osler.com /
ssutherland@osler.com

Tel: (613) 787-1015 Fax: (613) 235-2867
Email: glangen@osler.com

Counsel for the Applicant**Ottawa Agent for Counsel for the Applicant**

FIELD LAW
2500 - 10175 101 ST NW,
Edmonton, AB T5J 0H3

Derek Cranna / Sharon Roberts

Tel: (780) 423-3003 Fax: (780) 428-9329
Email: dcranna@fieldlaw.com /
sroberts@fieldlaw.com

Counsel for the Respondent

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PART I. OVERVIEW AND STATEMENT OF FACTS

A. Overview

1. Litigation privilege is fundamental to the functioning of Canada’s legal system. However, Canadian law remains unsettled regarding: (i) the application of litigation privilege to documents gathered or copied – but not created – for the dominant purpose of litigation (“**Collected Documents**”); and (ii) the process to judicially review documents created for the dominant purpose of an internal investigation undertaken in contemplation of litigation. Granting this application presents the Supreme Court with an opportunity to address these unresolved issues.

2. This appeal arises out of a fatal workplace accident at a Suncor Energy Inc. (“**Suncor**”) facility. As part of its investigation, Alberta Occupational Health and Safety (“**OHS**”) demanded production of all documents created or collected during Suncor’s internal investigation.

3. The Court of Appeal tasked a referee (the “**Referee**”) with a document-by-document privilege review, notwithstanding Suncor’s uncontroverted evidence that the dominant purpose of its internal investigation was in contemplation of litigation. In doing so, the Court of Appeal held that Collected Documents in Suncor’s internal investigation may not be litigation privileged.

4. Suncor submits that the Court of Appeal decision raises two issues of public importance:

(a) *Does litigation privilege attach to Collected Documents?* This Court in *Blank* noted a conflict in appellate jurisprudence on the issue but “left [it] to be resolved in a case where it is explicitly raised and fully argued.”¹ Suncor submits this is an appropriate case to resolve the persisting conflict.

(b) *Is uncontroverted evidence that the dominant purpose of an internal investigation is preparation for litigation sufficient to establish litigation privilege over information and material created or collected during the investigation?* Suncor submits that a document-by-document review is unnecessary where: (i) the party asserting privilege over documents created or collected during the investigation has adduced evidence showing that the dominant purpose of the investigation is preparation for litigation; and (ii) the party seeking production has

¹ [Blank v Canada \(Minister of Justice\)](#), [2006] 2 SCR 319, 2006 SCC 39 (“**Blank**”), ¶64.

failed to provide any evidence that the documents (A) were not created or collected for the dominant purpose of preparation for litigation or (B) otherwise do not meet the test for litigation privilege.

5. The present case has important implications for the law of privilege in the civil, criminal, and regulatory justice systems. Both lower court decisions have been the subject of significant professional commentary and coverage in the legal news across Canada.² The interest of the legal profession throughout Canada is further indicated by the Advocates' Society intervention in this case before the Court of Appeal and letters of support from the Canadian Association of Counsel to Employers, Association of Corporate Counsel and Canadian Chamber of Commerce.³

6. Accordingly, Suncor respectfully requests this Court grant leave to appeal.

B. Summary of facts

7. On April 20, 2014, a workplace accident occurred at Suncor's facility, which resulted in the death of one of its employees (the "**Accident**"). Suncor investigated the Accident internally (the "**Internal Investigation**"), under the direction of both its internal and external legal counsel.⁴

8. Suncor's Internal Investigation was conducted pursuant to a request from legal counsel who: (i) determined that litigation was a real and distinct possibility given the seriousness of the Accident; (ii) identified the potential for various criminal and quasi-criminal penalties and

² See, *e.g.*, Mathews, Dinsdale & Clark LLP, "[Privilege Claim Over Internal Accident Investigation Succeeds – Despite OHS Enforcer's Order](#)" (May 20, 2016); Alissa Demerse (Roper Greyall LLP), "[Maintaining Privilege Over an Employer's Internal Accident Investigation](#)" (October 2016); E. Jane Sidnell (Rose LLP), "[Does a Statutory Obligation to Investigate Trump a Claim of Legal Privilege in Contemplation of Litigation?](#)", Canadian College of Construction Lawyers, Legal Update #137 (September 17, 2016); Titus Totan (Rubin Thomlinson LLP), "[Unmasking the Veil of Privilege in Workplace Investigations](#)" (July 10, 2017); John Agioritis, Christina Kerby & Carolyn Wilson (MLT Aikins LLP), "[Alberta Court of Appeal Considers Legal Privilege in OHS Investigations](#)" (August 3, 2017); Scott H.D. Bower, Russell J. Kruger, Brad Gilmour, David R. McKinnon and Jaspreet Singh (Bennett Jones LLP), "[Internal Investigations and Privilege: The Alberta Court of Appeal Weighs In](#)" (July 19, 2017).

³ Affidavit of Conor Chell, dated September 26, 2017, Exhibits "A", "B", "C": Tab 4-I.

⁴ [Alberta v Suncor Energy Inc.](#), 2016 ABQB 264 ("**Chambers Decision**"), ¶¶4, 6, 63-64, 68, 89-90: Tab 2-A.

sanctions, including under the *Occupational Health and Safety Act* (“*OHSA*”)⁵ and *Criminal Code*;⁶ and (iii) understood that the Accident was being investigated by the RCMP and OHS.⁷

9. OHS conducted a thorough investigation in which it, among other things, froze the scene of the Accident by way of “stop-work” order⁸ and conducted approximately 15 witness interviews.⁹ The OHS Executive Director of Program Delivery has conceded that, aside from the privilege dispute, Suncor fully cooperated with OHS’ investigation.¹⁰ For example, the OHS Executive Director conceded that:

- (a) in response to numerous specific requests for information, Suncor provided OHS with thousands of pages of pre-existing or contemporaneous records and materials relating to the Accident;¹¹
- (b) Suncor did not make a blanket claim of privilege over pre-existing or contemporaneous records or materials;¹² and
- (c) OHS was unable to identify any specific information it was missing to understand the circumstances of the Accident.¹³

10. Suncor first communicated its privilege claim to OHS on May 20, 2014.¹⁴ OHS did not challenge Suncor’s privilege claim until 18 months later, on October 23, 2015, when it issued a new demand for a broader range of documents, including a demand for “all notes, records, photos/video, documents, TapRoot (or other such safety root cause determination process) taken/collected by the Suncor Investigation team, relating to [the Accident]”.¹⁵

⁵ RSA 2000, c O-2.

⁶ RSC 1985, c C-46.

⁷ Chambers Decision, ¶¶63-64: Tab 2-A.

⁸ *Alberta v Suncor Inc*, 2017 ABCA 221 (“**Appeal Decision**”), ¶1: Tab 2-C.

⁹ Chambers Decision, ¶9: Tab 2-A.

¹⁰ Questioning on Affidavit of Robert Preston Feagan (“**Feagan Cross**”) (March 10, 2016), page 54, lines 10-15: Tab 4-H.

¹¹ Feagan Cross, page 61, lines 11-14: Tab 4-H.

¹² Feagan Cross, page 60, line 17 to page 62, line 8: Tab 4-H.

¹³ Feagan Cross, page 62, lines 3-8, page 145, line 20 to page 146, line 11: Tab 4-H.

¹⁴ Chambers Decision, ¶8: Tab 2-A.

¹⁵ Chambers Decision, ¶11: Tab 2-A. See also: Affidavit of Conor Chell sworn December 31, 2015 (“**Chell Affidavit**”), ¶29, Exhibit “F”: Tab 4-C.

11. OHS took the position that Suncor’s statutory obligation to investigate the circumstances surrounding the Accident and prepare a report meant that litigation privilege could not apply to its Internal Investigation.¹⁶

12. Further, OHS sought copies of all witness statements taken as part of the Internal Investigation despite the fact that OHS itself interviewed witnesses and took witness statements as part of its investigation.¹⁷

13. On November 20, 2015, Suncor complied in part with OHS’ October 23, 2015 demand by providing copies of all non-privileged materials and confirming that certain of the requested records did not exist. However, Suncor declined to comply with OHS’ demand for its Internal Investigation files.¹⁸

14. Despite not being able to identify any specific documents it was seeking,¹⁹ OHS maintained its blanket demand for the entirety of Suncor’s Internal Investigation files, and took steps to execute its demand by attempting to interview the members of Suncor’s internal investigation team under threat of prosecution if the individuals refused to co-operate.²⁰

15. The gravity of the situation is underlined by the fact that during its investigation, OHS considered exercising the quasi-criminal enforcement provisions of *OHS*A against Suncor, as OHS officers had been in communication with the Crown Prosecutor’s Office by email concerning the Accident²¹ and OHS refused to delay interviewing Suncor’s internal investigation team members on the basis that the limitation period to lay charges was approaching.²²

¹⁶ Chambers Decision, ¶¶13, 26: Tab 2-A.

¹⁷ Chambers Decision, ¶¶7, 9, 11: Tab 2-A.

¹⁸ Chell Affidavit, ¶30, Exhibit “G”: Tab 4-D. See also: Chambers Decision, ¶12: Tab 2-A; Appeal Decision, ¶9: Tab 2-C.

¹⁹ Chell Affidavit, Exhibit “K”: Tab 4-E.

²⁰ Chell Affidavit, ¶¶37, 41, Exhibit “M”: Tab 4-F. See also: Chambers Decision, ¶7: Tab 2-A.

²¹ Feagan Cross, page 132, line 3 to page 133, line 18: Tab 4-H.

²² Chell Affidavit, ¶37(e): Tab 4-B. See also: Chambers Decision, ¶69: Tab 2-A. As a result of Suncor claiming legal privilege over its solicitor’s brief, OHS also issued an administrative penalty against Suncor in the amount of \$5000. Suncor appealed the administrative penalty to the OHS Council, who granted the appeal and revoked the penalty.

16. On January 4, 2016, Suncor filed the Chell Affidavit in which Conor Chell, legal counsel to Suncor, provided sworn evidence regarding, among other things, the commencement and purpose of the Internal Investigation, the roles of internal and external legal counsel in the Internal Investigation and the conduct of the Internal Investigation.²³

17. Suncor provided OHS with the following categorization of its Internal Investigation files:²⁴

- (1) Correspondences Between/Among Internal and External Legal Counsel (#1-169);
- (2) Investigation Team Members' Correspondences (#170-589);²⁵
- (3) Correspondences Between/Among Legal Counsel, Investigation Team Members and/or Suncor Senior Management (#590-1178);²⁶
- (4) Documents Created by the Investigation Team and/or Legal Counsel (Post-Incident) in Relation to Suncor's Internal Investigation (#1179-1244);
- (5) Photos Taken/Collected by Investigation Team Post-Incident (#1245-1573);²⁷
- (6) Documents Created by External Experts in Support of Suncor's Internal Investigation (#1575);²⁸
- (7) Draft Documents Provided to Legal Counsel in Relation to Requests Made by OHS Pursuant to Sections 18 and 19 of the OHS Act (#1576-1586);²⁹ and
- (8) Witness Statements and Interview Transcripts Taken or Collected by Investigation Team Post-Incident (#1587-1655).

C. Chambers Decision

18. The Chambers Judge “accept[ed] the affidavit evidence of Mr. Chell that outlined the circumstances under which Suncor anticipated the possibility of litigation.”³⁰ The Chambers Judge then went on to observe that “there was no basis in fact advanced by the Ministry to contradict Mr. Chell in order to show that the privilege was not properly claimed by Suncor.”³¹

²³ Chell Affidavit, ¶¶1-2, 6-23: Tab 4-B.

²⁴ Letter from Conor Chell to Derek Cranna (Field Law) dated March 2, 2016: Tab 4-G.

²⁵ Includes correspondence with legal counsel.

²⁶ Includes correspondence with legal counsel.

²⁷ Descriptions indicate that all of the photos were taken post-incident.

²⁸ Includes a single document titled “Third Party Expert Report” addressed to Suncor legal counsel.

²⁹ All draft documents addressed to Suncor legal counsel.

³⁰ Chambers Decision, ¶64: Tab 2-A.

³¹ Chambers Decision, ¶66: Tab 2-A.

Accordingly, the Chambers Judge found that “Suncor’s dominant purpose in carrying out its internal investigation was in contemplation of litigation, such that information, documents and records produced for the dominant purpose of supporting the contemplated litigation, and collected during Suncor’s internal investigation, are covered by litigation privilege.”³²

19. Despite accepting Suncor’s evidence without reservation and finding Internal Investigation documents to be litigation privileged, the Chambers Judge delegated review of all of the Internal Investigation documents to the Referee, whose recommendations would be provided to the Court for its consideration and approval.³³

D. Court of Appeal Decision

20. The Court of Appeal held that the Chambers Judge erred by making a general finding that the dominant purpose of the Internal Investigation as a whole was in contemplation of litigation, rather than leaving litigation privilege to be determined on a document-by-document basis.³⁴ As part of this finding, the Court of Appeal concluded that materials “taken/collected” during the Internal Investigation are “arguably” not litigation privileged.³⁵ The Court of Appeal tasked the Referee with a document-by-document privilege review.³⁶

PART II. STATEMENT OF ISSUES

21. This case raises issues of public and national importance and questions of law arising therefrom, as set out below:

- (a) Does litigation privilege attach to Collected Documents?
- (b) Is uncontroverted evidence that the dominant purpose of an internal investigation is preparation for litigation sufficient to establish litigation privilege over information and material created or collected during the investigation?

³² Order of Justice D.J. Manderscheid pronounced May 10, 2016 (“**Chambers Order**”), ¶1: Tab 2-B. See also: Chambers Decision, ¶¶63-68, 72, 93: Tab 2-A.

³³ Chambers Decision, ¶¶92, 95, 97: Tab 2-A; Chambers Order, ¶¶2, 6: Tab 2-B.

³⁴ Appeal Decision, ¶¶28, 31, 33, 35, 41: Tab 2-C; Amended Judgment of the Court of Appeal of Alberta pronounced July 4, 2017, ¶1: Tab 2-D.

³⁵ Appeal Decision, ¶¶32, 49: Tab 2-C.

³⁶ Appeal Decision, ¶¶35, 43, 53, 57: Tab 2-C.

PART III. STATEMENT OF ARGUMENT

A. Litigation privilege attaches to Collected Documents

22. The Court of Appeal allowed the appeal on, among other grounds, the fact that the Chambers Judge’s formulation of litigation privilege would capture Collected Documents, which in its view are “arguably” not subject to litigation privilege. The thrust of the Court of Appeal decision is that such records do not meet the test for litigation privilege.³⁷ Suncor submits the Court of Appeal was in error in so finding.

(i) *The application of litigation privilege to Collected Documents is a matter of “increasing importance”*

23. The applicability of litigation privilege to Collected Documents arises frequently before courts.³⁸ Professor Billingsley has described the issue as a matter of “increasing importance”.³⁹

24. Collected Documents arise in a broad range of contexts, including: (i) unrepresented individuals gathering information from public sources to assist in small claims matters; (ii) insurance companies investigating claims for loss that may give rise to civil claims; (iii) criminal lawyers or private investigators directly or indirectly investigating circumstances relating to a client’s potential or actual criminal prosecution; or (iv) corporations, with the advice and direction of legal counsel, investigating a range of potential alleged corporate malfeasance.

25. The only thing restraining a litigation adversary or enforcement agency from having an open road map to a party’s strategy for defending or prosecuting a civil, regulatory, or criminal proceeding is the law of privilege. If disclosed, Collected Documents would undermine the

³⁷ Appeal Decision, ¶¶28, 31, 32, 35, 37, 41, 49, 54: Tab 2-C.

³⁸ *Hodgkinson v Simms*, 55 DLR (4th) 577, 1988 CanLII 181, pp. 3, 21-23 (BCCA) (“*Hodgkinson*”); *General Accident Assurance Company v Chrusz*, 45 OR (3d) 321, 1999 CanLII 7320 pp. 22-24, 55-56 (ON CA) (“*Chrusz*”); *Cahoon v Brideaux*, 2010 BCCA 228 (“*Cahoon*”), ¶¶35-36; *Huang v Silvercorp Metals Inc.*, 2017 BCSC 795 (“*Huang*”), ¶210; *Bennett v State Farm Fire and Casualty Co.*, 2013 NBCA 4 (“*Bennett*”), ¶¶47-51; *Ontario (Ministry of Correctional Services) v Goodis* (2008), 290 DLR (4th) 102, 2008 CanLII 2603 (“*Goodis*”), ¶¶60-66; *R v Assessment Direct Inc.*, 2016 ONSC 8138 (“*Assessment Direct*”), ¶¶7-25.

³⁹ B. Billingsley, “‘Ingathered’ Records and the Scope of Litigation Privilege in Canada: Does Litigation Privilege Apply to Copies or Collections of Otherwise Unprivileged Documents?” (2014), 43 Adv. Q. 280 at p. 280: Tab 4-A.

privilege of a party’s investigation into matters subject to ongoing or reasonably contemplated litigation—providing an adverse party with a roadmap of its litigation position and strategy.⁴⁰

(ii) *The application of litigation privilege to Collected Documents remains unsettled*

26. The Court of Appeal decision has exacerbated the existing confusion regarding the application of litigation privilege to Collected Documents—an issue this Court recognized in *Blank* (2006) as unsettled and which to this day remains the subject of diverging authorities.

27. Justice Fish, writing for this Court in *Blank*, noted a disagreement on the question between the Court of Appeal for British Columbia (“**BCCA**”) in *Hodgkinson* and the Court of Appeal for Ontario (“**ONCA**”) in *Chrusz*.⁴¹ Justice Fish concluded, “[t]he conflict of appellate opinion on this issue should be left to be resolved in a case where it is explicitly raised and fully argued.”⁴² The present case explicitly raises the issue of the application of litigation privilege to Collected Documents and provides an opportunity to fully argue the question before this Court.

28. The Court of Appeal majority in *Hodgkinson* characterized the question of whether Collected Documents are privileged to be “a serious question of practice....”⁴³ Chief Justice McEachern (Taggart J.A. concurring) concluded that Collected Documents that satisfy the dominant purpose test are privileged notwithstanding that uncollected originals are not privileged.⁴⁴ In reaching this conclusion, Chief Justice McEachern emphasized the importance of avoiding the mischief of an adverse party “look[ing] into counsel’s mind to learn what he knows, and what he does not know, and the direction in which he is proceeding in the preparation of his client’s case.”⁴⁵

29. Justice Carthy of the ONCA in *Chrusz* came to the opposite conclusion.⁴⁶ Justice Doherty, dissenting in part in *Chrusz*, disagreed with Justice Carthy and left the matter to be determined in

⁴⁰ [Hodgkinson](#), pp. 22-23.

⁴¹ [Blank](#), ¶¶62-63.

⁴² [Blank](#), ¶64.

⁴³ [Hodgkinson](#), p. 3.

⁴⁴ [Hodgkinson](#), pp. 21-22.

⁴⁵ [Hodgkinson](#), pp. 22-23.

⁴⁶ [Chrusz](#), pp. 22-24.

a future case where the issue was squarely raised.⁴⁷ Justice Rosenberg similarly left the question open to a future case.⁴⁸

30. Some courts have endorsed the approach in *Hodgkinson* to support litigation privilege over Collected Documents,⁴⁹ while others have cited Justice Carthy’s reasons in *Chrusz* to support disclosure.⁵⁰ More recently, Justice Nordheimer suggested that the assessment is based on, among other things, whether the copy of the document collected for the dominant purpose of litigation is the only copy or from a third-party.⁵¹

31. The conflict in the jurisprudence needs to be resolved by this Court.

(iii) Litigation Privilege must protect Collected Documents

32. If granted leave to appeal, Suncor intends to argue that litigation privilege protects Collected Documents from disclosure. In particular, litigation privilege must protect Collected Documents in the context of an enforcement agency’s blanket demand for production where the potential for personal liability and incarceration exists. This is a context left unconsidered in *Hodgkinson* and *Chrusz*, both of which were decided in the context of civil litigation.

33. Justice Fish in *Blank* noted that a finding that Collected Documents are litigation privileged “does appear to be more consistent with the rationale and purpose of the litigation privilege”.⁵²

34. In *Blank*, this Court quoted with approval Professor R.J. Sharpe’s (as he then was) commentary that litigation privilege arises from the need for a “protected area to facilitate investigation and preparation of a case for trial by the adversarial advocate” (emphasis added).⁵³ Further, this Court reasoned that “parties to litigation, represented or not, must be left to prepare their contending positions in private, without adversarial interference and without fear of

⁴⁷ *Chrusz*, pp. 55-56.

⁴⁸ *Chrusz*, pp. 66-67.

⁴⁹ *Cahoon*, ¶¶35-36; *Huang*, ¶210.

⁵⁰ *Bennett*, ¶¶47-51; *Bargen v CBC et al*, 2007 NWTSC 104, ¶¶47-51. See also: Billingsley at pp. 295-300: Tab 4-A.

⁵¹ *Assessment Direct*, ¶¶19-25.

⁵² *Blank*, ¶64. See also: Chambers Decision, ¶74: Tab 2-A.

⁵³ *Blank*, ¶¶28, 40, quoting R.J. Sharpe, “Claiming Privilege in the Discovery Process”, in Special Lectures of the Law Society of Upper Canada (1984), 163, at pp. 164-65.

premature disclosure”.⁵⁴ Similarly, the Court of Appeal of Alberta has held elsewhere that litigation privilege “is intended to permit a party to freely investigate the facts at issue”.⁵⁵

35. A party cannot be required to produce Collected Documents and, in doing so, provide a roadmap to the opposing party regarding its approach and strategy to defending or prosecuting the litigation. The details of a party’s investigation of the facts in issue “is exactly the sort of information that litigation privilege is designed to protect.”⁵⁶

36. This case is particularly appropriate for this Court to provide guidance on this issue. Here, OHS issued to Suncor a demand for the entirety of Suncor’s Internal Investigation file. This suggests that OHS intended to develop its case for prosecution “on wits borrowed from the adversary”⁵⁷ despite having the resources and statutory power to conduct a comprehensive investigation of its own.

37. The target of an investigation requires a zone of privacy to conduct its internal investigation as part of its ongoing efforts to defend against possible prosecution and civil claims.⁵⁸

38. The present case is analogous to regulatory investigations under other statutory regimes and is also applicable in the context of civil litigation where adversaries routinely seek the contents of corporate internal investigations.

B. A document-by-document review is unnecessary where there is uncontroverted evidence that the dominant purpose of an internal investigation is preparation for litigation

(i) Litigation Privilege

39. The Chambers Judge found as fact that Suncor’s evidence was uncontroverted that the dominant purpose of its Internal Investigation was preparation for litigation.⁵⁹ Nevertheless, the

⁵⁴ *Blank*, ¶27.

⁵⁵ *Moseley v Spray Lakes Sawmills (1980) Ltd*, 1996 ABCA 141, ¶21.

⁵⁶ *Arcola School Division No. 72 v Hill (Litigation Guardian)*, 179 DLR (4th) 539, 1999 CanLII 12302 (SK CA), ¶10. See also *Hodgkinson*, pp. 22-23.

⁵⁷ *Hickman v Taylor*, 329 U.S. 495 (1947) at p. 516, quoted in *Blank*, ¶35.

⁵⁸ *TransAlta Corporation v Market Surveillance Administrator*, 2014 ABCA 196, ¶¶39-41; *Caterpillar Tractor Co v Ed Miller Sales & Rentals Ltd*, 90 AR 323, 1988 ABCA 282, ¶¶13-14, 19; *HMTQ v Canadian Natural Railway Co*, 2008 BCSC 1677 (“*CN Rail*”), ¶¶17, 37-42.

⁵⁹ Chambers Decision, ¶68: Tab 2-A.

Chambers Judge and Court of Appeal ordered the Referee to conduct a document-by-document review of these records.⁶⁰ Suncor submits that such an approach is an inefficient use of judicial resources and raises an issue of public importance.

40. Modern litigation frequently involves thousands or hundreds of thousands of documents. Too often, disputes over litigation privilege are resolved by a judge or other court or administrative officer being tasked with document-by-document review, wasting scarce judicial and administrative resources and prolonging discovery many months or years.⁶¹

41. The Court of Appeal of Alberta in *ShawCor*⁶² and the BCCA in *Gichuru*⁶³ adopted the approach to litigation privilege articulated in *Kefer Laundry*, which requires litigation privilege be established “document by document”.⁶⁴

42. The *Kefer Laundry* standard is an impractical one in the context of a proceeding involving hundreds or thousands of litigation privileged records. Indeed, in some cases the burden of proving litigation privilege may render the privilege illusory. Further, it is inconsistent with this Court’s directions regarding the judicial preference to resolve disputes over whether documents are privileged on the basis of affidavits rather than review of the documents by the court.⁶⁵

43. Canadian superior courts are divided regarding the proper process to determine claims of privilege. Some cases allow a claim of privilege to be made based on unrebutted affidavit evidence. For example, Justice Wilson of the Supreme Court of British Columbia in *CN Rail* held that all documents created or collected in the course of an internal investigation were privileged because the overall purpose of the internal investigation was for the dominant purpose of preparing for litigation.⁶⁶ One way to view *CN Rail* is that upon evidence being accepted that established

⁶⁰ Appeal Decision, ¶¶33, 35, 42, 50, 51, 54, 57: Tab 2-C; Chambers Order, ¶¶2, 6: Tab 2-B.

⁶¹ See, e.g.: *R v Clarke*, 2015 NSSC 26, ¶¶6, 33-56; *XCG Consultants Inc v ABB Inc*, 2014 ONSC 1111, ¶13; *MacDonald (Re)*, 2003 CanLII 71714 (AB OIPC), ¶10.

⁶² *Canadian Natural Resources Limited v ShawCor Ltd*, 2014 ABCA 289 (“*ShawCor*”), ¶87.

⁶³ *Gichuru v British Columbia (Information and Privacy Commissioner)*, 2014 BCCA 259 (“*Gichuru*”), ¶32.

⁶⁴ *Kefer Laundry Ltd v Pellerin Milnor Corp et al*, 2006 BCSC 118 (“*Kefer Laundry*”), ¶96-98.

⁶⁵ *Alberta (Information and Privacy Commissioner) v University of Calgary*, 2016 SCC 53 (“*University of Calgary*”), ¶¶67-70; *Canada (Privacy Commissioner) v Blood Tribe Department of Health*, [2008] 2 SCR 574, 2008 SCC 44 (“*Blood Tribe*”), ¶17. See also: *Kefer Laundry*, ¶¶74-75.

⁶⁶ *CN Rail*, ¶¶27-43.

the dominant purpose of the investigation was preparation for litigation, it was unnecessary and inefficient to require Canadian National Railway Company (“CN”) to adduce evidence with respect to each individual document created or collected in the course of investigation absent contrary evidence from the party challenging the privilege claim (*i.e.*, a rebuttable presumption of fact).

44. The internal investigation in issue in *CN Rail* was commenced following the collision of two trains that resulted in an explosion and a leak of dangerous goods. CN failed to provide affidavit evidence that established privilege on a document-by-document basis.⁶⁷

45. In the circumstances, the Court concluded that a document-by-document review was unnecessary to assess privilege.⁶⁸ Instead, the Court held that from the date of the incident a reasonable person with knowledge of the circumstances would conclude that litigation was “a likely consequence” and that “the dominant purpose for creating the documents, and each of them, was to promptly marshal the available evidence to defend anticipated litigation initiated by one or more regulatory agency” (emphasis added).⁶⁹ The Court concluded that CN had “established litigation privilege over the inventory of documents to which that claim of privilege is asserted.”⁷⁰

46. *CN Rail* is not the only internal investigation case in which a court relied on evidence regarding the nature and purpose of the investigation as a whole to establish privilege. In *Royal Bank*, a committee was charged with investigating internal fraud and providing a report to the General Counsel. Justice Ground of the Ontario Superior Court of Justice accepted evidence that spoke to the nature and purpose of the investigation as a whole⁷¹ and held regarding solicitor-client privilege:

I must conclude that RBC has met the onus of establishing that the Report of the Committee and the other documents generated by that Committee are subject to solicitor/client privilege ... The Committee was performing a function which was essential to the operation of the solicitor/client relationship between RBC and its

⁶⁷ [CN Rail](#), ¶35.

⁶⁸ [CN Rail](#), ¶39.

⁶⁹ [CN Rail](#), ¶42.

⁷⁰ [CN Rail](#), ¶43.

⁷¹ [Royal Bank of Canada v Société Générale \(Canada\)](#), [2005] OJ No 4383, 2005 CanLII 36727 (ON SC) (“*Royal Bank*”), ¶3.

General Counsel in that the Report was prepared for the purpose of Allgood giving legal advice.⁷²

47. Suncor submits that, as was done in *CN Rail*, where a Court is satisfied on the evidence that the dominant purpose of an internal investigation is preparation for litigation, a rebuttable presumption should arise regarding the dominant purpose (and privileged nature of) information and material created or collected during the investigation. Such an approach is consistent with this Court's guidance regarding the modern approach to efficient litigation and is consistent with the approach to solicitor-client privilege set out in *Blood Tribe* and *University of Calgary*.

48. This Court in *Blood Tribe* explained that “courts will decline to review solicitor-client documents to adjudicate the existence of privilege unless evidence or argument establishes the necessity of doing so to fairly decide the issue.”⁷³

49. Subsequently, Justice Côté, writing for the majority of this Court in *University of Calgary*, came to a similar conclusion where the Information and Privacy Commissioner failed to adduce evidence that “solicitor-client privilege had been falsely claimed by the University.”⁷⁴ Indeed, this Court has held further that under both the civil law and common law there is a rebuttable presumption of fact “to the effect that all communications between client and lawyer and the information they shared would be *prima facie* confidential in nature.”⁷⁵

50. Habitually ordering a document-by-document review runs contrary to rebuttable presumptions recognized by this Court (regarding solicitor-client privilege) and lower courts (regarding investigations and litigation privilege). Where there is uncontroverted evidence establishing that the dominant purpose of an internal investigation is preparation for litigation (as in this case), it is an inefficient use of judicial resources to task court or administrative officers with a document-by-document review of documents created or collected for the dominant purpose of the internal investigation.

51. By endorsing the approach in *CN Rail* and expressly stating that a rebuttable presumption exists where a party asserting litigation privilege has adduced evidence as to the dominant purpose

⁷² [Royal Bank](#), ¶12.

⁷³ [Blood Tribe](#), ¶17.

⁷⁴ [University of Calgary](#), ¶¶67-70.

⁷⁵ [Foster Wheeler Power Co v Société intermunicipale de gestion et d'élimination des déchets \(SIGED\) Inc.](#), [2004] 1 SCR 456, 2004 SCC 18, ¶42; [Blood Tribe](#), ¶16.

of an internal investigation, this Court would promote judicial economy by reducing the opportunities for “fishing expeditions” and limiting contests over privilege to situations where there is evidence – not, as in this case, merely suspicion or an allegation – that the privilege is improperly claimed.

52. This Court has recognized that a “culture shift is required in order to create an environment promoting timely and affordable access to the civil justice system”, which involves “simplifying pre-trial procedures”.⁷⁶ Further, this Court has emphasized that “[t]imely justice is one of the hallmarks of a free and democratic society”⁷⁷ and judges have a responsibility to improve efficiency in court processes.⁷⁸ This direction is applicable to unnecessary judicial review of privilege claims.

53. Suncor’s evidence in the present case regarding the Internal Investigation meets the standard for the rebuttable presumption regarding litigation privilege. The Chambers Judge found that:

Based on the uncontroverted affidavit evidence of Mr. Chell, I find that, in the circumstances of the Accident and the course of actions undertaken by Suncor’s legal counsel – beginning on the same day the Accident occurred – the dominant purpose for Suncor’s conduct of the subject investigation into the Accident was in contemplation of litigation. This finding invariably and logically leads to the collateral finding that, within the context of Suncor’s internal investigation that was carried out in anticipation of litigation, the information and documents created and/or collected during the internal investigation with the dominant purpose that they would assist in the contemplated litigation, are integrally covered by litigation privilege. [emphasis added]⁷⁹

54. Based on this finding, referral to the Referee was unnecessary. OHS failed to rebut the presumption that these documents were litigation privileged. The modern approach to efficient resolution of disputes demands that in such circumstances the privilege be upheld without the necessity of a document-by-document review by a judge or court official.

⁷⁶ *Hryniak v Mauldin*, 2014 SCC 7, [2014] 1 SCR 87, ¶2.

⁷⁷ *R v Jordan*, 2016 SCC 27, [2016] 1 SCR 631 (“*Jordan*”), ¶1.

⁷⁸ *Jordan*, ¶¶114, 139; *R v Cody*, 2017 SCC 31, ¶¶36-39.

⁷⁹ Chambers Decision, ¶68: Tab 2-A.

PART IV. COSTS

55. Suncor requests costs in the cause.

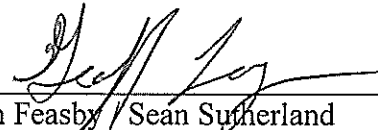
PART V. ORDER SOUGHT

56. Suncor respectfully requests that this leave application be granted.

ALL OF WHICH IS RESPECTFULLY SUBMITTED, this 28th day of September 2017.

OSLER, HOSKIN & HARCOURT LLP

Per:



Colin Feasby / Sean Sutherland
Solicitors for Suncor Energy Inc.

PART VI. TABLE OF AUTHORITIES

<u>Case Law</u>	<u>Paragraph(s)</u>
<u>Alberta (Information and Privacy Commissioner) v University of Calgary</u> , 2016 SCC 53	42, 49
<u>Arcola School Division No. 72 v Hill (Litigation Guardian)</u> , 179 DLR (4th) 539, 1999 CanLII 12302 (SK CA)	35
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<u>Foster Wheeler Power Co v Société intermunicipale de gestion et d'élimination des déchets (SIGED) Inc</u> , [2004] 1 SCR 456, 2004 SCC 18	49
<u>General Accident Assurance Company v Chrusz</u> , 45 OR (3d) 321, 1999 CanLII 7320	23, 29
<u>Gichuru v British Columbia (Information and Privacy Commissioner)</u> , 2014 BCCA 259	41
<u>HMTQ v Canadian Natural Railway Co</u> , 2008 BCSC 1677	37, 43, 44, 45
<u>Hodgkinson v Simms</u> , 55 DLR (4th) 577, 1988 CanLII 181 (BCCA)	23, 25, 28, 35
<u>Hryniak v Mauldin</u> , 2014 SCC 7, [2014] 1 SCR 87	52
<u>Huang v Silvercorp Metals Inc</u> , 2017 BCSC 795	23, 30
<u>Keefer Laundry Ltd v Pellerin Milnor Corp et al</u> , 2006 BCSC 118	41, 42
<u>MacDonald (Re)</u> , 2003 CanLII 71714 (AB OIPC)	40

<i>Moseley v Spray Lakes Sawmills (1980) Ltd</i> , 1996 ABCA 141	34
<i>Ontario (Ministry of Correctional Services) v Goodis</i> (2008), 290 DLR (4th) 102, 2008 CanLII 2603	23
<i>R v Assessment Direct Inc</i> , 2016 ONSC 8138	23, 30
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<i>Royal Bank of Canada v Société Générale (Canada)</i> , [2005] O.J. No. 4383, 2005 CanLII 36727 (ON SC)	46
<i>TransAlta Corporation v Market Surveillance Administrator</i> , 2014 ABCA 196	37
<i>XCG Consultants Inc v ABB Inc</i> , 2014 ONSC 1111	40

Other Sources

Paragraph(s)

Alissa Demerse (Roper Greyall LLP), “ Maintaining Privilege Over an Employer’s Internal Accident Investigation ” (October 2016)	5
B. Billingsley, “‘Ingathered’ Records and the Scope of Litigation Privilege in Canada: Does Litigation Privilege Apply to Copies or Collections of Otherwise Unprivileged Documents?” (2014), 43 Adv. Q. 280	23
E. Jane Sidnell (Rose LLP), “ Does a Statutory Obligation to Investigate Trump a Claim of Legal Privilege in Contemplation of Litigation? ”, Canadian College of Construction Lawyers, Legal Update #137 (September 17, 2016)	5
John Agioritis, Christina Kerby & Carolyn Wilson (MLT Aikins LLP), “ Alberta Court of Appeal Considers Legal Privilege in OHS Investigations ” (August 3, 2017)	5
Mathews, Dinsdale & Clark LLP, “ Privilege Claim Over Internal Accident Investigation Succeeds – Despite OHS Enforcer’s Order ” (May 20, 2016)	5
Scott H.D. Bower, Russell J. Kruger, Brad Gilmour, David R. McKinnon and Jaspreet Singh (Bennett Jones LLP), “ Internal Investigations and Privilege: The Alberta Court of Appeal Weighs In ” (July 19, 2017)	5

Titus Totan (Rubin Thomlinson LLP), "[Unmasking the Veil of Privilege in Workplace Investigations](#)" (July 10, 2017) 5

PART VII. STATUTORY PROVISIONS*Nil*