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Re: *Alberta v Suncor Energy Inc.*, 2017 ABCA 221

Dear Mr. Feasby:

We are writing in relation to the decision in *Alberta v. Suncor Energy Inc.*, 2017 ABCA 221, with the awareness that Suncor Energy Inc. (Suncor) is applying for leave to appeal the decision of the Alberta Court of Appeal. The Association of Corporate Counsel submits this letter in support of Suncor's request, understanding that this letter may be appended to Suncor's leave for appeal to the Supreme Court of Canada.

The Association of Corporate Counsel (ACC) is a global bar association that promotes the common professional and business interests of in-house counsel. ACC has over 40,000 members who are in-house lawyers employed by over 10,000 organizations in more than 85 countries. ACC has chapters in Alberta, British Columbia, Ontario and Quebec. To ensure that clients are able to turn to their in-house lawyers for confidential legal advice, ACC has championed the solicitor-client privilege and litigation privilege in multiple jurisdictions across the globe.

This case presents issues of extreme importance to ACC's members – both inside and outside of Canada. ACC members depend on internal investigations to identify and address allegations of mistake or wrongdoing and to ensure compliance with complex regulatory obligations. In light of the frequency and variety of internal investigations conducted by ACC members' companies, ACC and its members strongly urge the Supreme Court of Canada to hear this case and resolve the issues raised. Specifically, ACC wishes to focus the court on the following four consequences of allowing the Court of Appeal's decision to stand.

First, the Court of Appeal's decision raises the question of whether the litigation privilege can cover "the entirety" of an internal investigation file.[1] The Alberta Occupational

[1] *Alberta v Suncor Energy Inc*, 2016 ABQB 264, para. 31.

Health Safety (OHS) request specifically called for documents collected and created by Suncor's investigative team, which was led by in-house counsel. The Court of Appeal's muddled holding on this point puts at risk the confidentiality of the thoughts and impressions of in-house counsel and those who assist them in preparing their companies for potential litigation. It appears that the Court of Appeal has failed to appreciate the special nature of an investigative file and how the inclusion of documents within such a file can reveal legal strategy and theory. For example, if Suncor had focused on a particular type of pre-incident quarterly safety report created in the normal course of business and collected them in its investigative file, this would be a clear indication to a government regulator or civil adversary of the company's focus in the investigation. Moreover, the special protection due an investigative file is distinct from a holding that any individual document in that file is subject to disclosure. If the government or civil adversary requested those pre-incident quarterly safety reports standing alone, outside of the investigative file, the litigation privilege would not apply. The Court of Appeal's decision ignores this distinction, and threatens the very purpose of the litigation privilege, which is to provide "a protected area" within which counsel and clients can prepare for potential litigation.[2]

Second, the Court of Appeal's decision muddies the waters regarding the extent to which a company can claim litigation privilege over materials created or gathered during an internal investigation when an investigation may also be mandated by a regulatory obligation. While the Court of Appeal agreed that the relevant provisions of the Occupational Health and Safety Act (OHSA) do not preclude Suncor's privilege claims, it still held that the chambers judge should have considered Suncor's obligations under the statute when the same materials are also prepared for the internal investigation and claimed to be privileged.[3] Is the Court of Appeal implying that if materials are required to be provided under OHSA, they cannot also be protected by the litigation privilege? For example, employees have an obligation under section 19(2) of OHSA to provide information to an OHS officer after an accident. Does the Court of Appeal mean to say that because this obligation exists, a company's own internal interviews with employees after an accident are subject to disclosure, notwithstanding that they were prepared by the company in anticipation of litigation? This point is in need of clarification.

Third, the Court of Appeal's decision creates a burdensome framework for examination of litigation privilege claims by suggesting that courts must undertake a document-by-document analysis of whether the privilege applies. Building on its pronouncement that Suncor's regulatory obligations must be part of the privilege analysis, the Court of Appeal suggests that the inquiry requires examination "document by document" or by group of like documents to determine the purpose behind the documents' creation. This seems a momentous task in most instances of litigation, where discovery encompasses thousands of documents and claims of privilege can apply to hundreds of relevant documents. It is also an unnecessary task when the claim of privilege is supported

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[2] *Blank v. Canada (Minister of Justice)*, [2006] 2 SCR 319, 2006 SCC 39, paras. 28, 40.

[3] *Alberta v Suncor Energy Inc*, 2016 ABQB 264, para. 39.

through other evidentiary means, such as an affidavit establishing the elements of the privilege claim or a description of the document that supports the privilege claim. This document-by-document examination is impractical in the context of an investigation involving a large volume of records, adding to the administrative burdens of corporations and the courts, as well as the costs of litigation.

Finally, the Court of Appeal's decision creates confusion and inconsistencies for companies involved in cross-border business. The legal privileges existing in the United States, Canada, the United Kingdom and other common law jurisdictions have long enjoyed much commonality, which has been beneficial to businesses operating across multiple jurisdictions. While minor differences exist in the scope of the legal privileges in these jurisdictions, businesses have come to depend on the consistency that common law jurisdictions apply to the law of privilege. The Court of Appeal's decision injects inconsistency into that landscape by questioning the scope of the litigation privilege as applied to internal investigations and imposing a burdensome review process for determining the applicability of the privilege.

Left unresolved, the legal questions presented in this case create a climate of uncertainty that is detrimental to businesses and the legal departments that support them. ACC is therefore interested in the outcome of Suncor's Application for Leave to Appeal. It is important for in-house counsel to know the extent to which the litigation privilege will apply to internal investigation files and how that privilege must be proved. We urge the Supreme Court of Canada to hear the case and resolve these issues.

Sincerely,

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