

## DOMINANT PURPOSE TEST IN SOLICITOR CLIENT PRIVILEGE HARDER TO MEET NOW

By Stanley Berger

Now that the Supreme Court of Canada has denied leave to appeal in *Suncor Energy Inc. v. Alberta* (2017) 415 D.L.R. (4th) 499 (Alta C.A.) it will be harder to establish solicitor-client privilege in relation to documentation which was used in litigation. The appeal courts have ruled that those claiming privilege must show that it is the preparing or creating of the document which must have litigation as its dominant purpose not how the document is put to use. While the case was decided in the context of health and safety legislation, it will have broad implications for internal corporate investigations in a wide variety of regulatory matters including environmental.

The Court of Appeal was not persuaded that the judge at first instance had sufficient evidence that the dominant purpose of communications the company claimed privilege over was litigation. A Suncor employee had been fatally injured at a worksite and the company, anticipating litigation, began an internal investigation. The Alberta regulatory authorities proceeded with their own investigation issuing demands for information pursuant to the *Occupational Health and Safety Act* R.S.A. 2000, c.O-2. Suncor did cooperate by providing a report of its investigation and some documentation which pre-dated or coincided with the investigation, but asserted solicitor-client privilege over materials created or collected in the course of its internal investigation. The Court of Appeal, relying on its previous decision in *Canadian Natural Resources Ltd. v. ShawCor Ltd.* (2014) 376 D.L.R.(4th) 581 focuses on whether the dominant purpose of preparing or creating the information was litigation, rather than whether the dominant purpose of putting the information to use was litigation. At par. 34 of its reasons the Court of Appeal states the following:

"Suncor cannot, merely by having legal counsel declare that an investigation has commenced, throw a blanket over all materials "created and/or collected during the internal investigation" or "derived from" the internal investigation, and thereby extend solicitor-client privilege or litigation privilege over them. This Court stated in *ShawCor*, at para 84, that "[b]ecause the question is the purpose for which the record was originally brought into existence, the mere fact that a lawyer became involved is not automatically controlling." And further, at para



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87, the Court stated that "the purpose behind the creation of a record does not change simply because the record is forwarded to, or through, in-house counsel, or because in-house counsel directs that all further investigation records should come to him or her."