Occupational Health and Safety Council

Appeal from Administrative Penalty

Suncor Energy Inc.

Appellant

and

Her Majesty the Queen in Right of Alberta

Respondent

ORDER

Panel: Peter Bowal (Chair), Andrew Smith and Rob Munro

Appeal Decision: November 21, 2016

Alberta Labour
Occupational Health and Safety Council

I. Nature of this Appeal

[1] On December 22, 2015, the Respondent ("OHS"), pursuant to its regulatory responsibility under legislative authority, issued an administrative penalty in the amount of $5000 against the Appellant, Suncor Energy Inc. ("Suncor").

[2] Suncor has appealed this administrative penalty to the Occupational Health and Safety Council ("Council") on the ground that it unlawfully punishes Suncor for asserting litigation privilege. Suncor has asked that it be revoked.

[3] OHS says Suncor has an obligation to provide an evidentiary foundation to support its claim of privilege in the context of a serious investigation under the Alberta *Occupational Health and Safety Act* ("the Act").[1] Having failed to do that, Suncor has contravened section 19(2) of the Act which states:

> 19(2) Every person present at an accident when it occurred or who has information relating to the accident shall, on the request of an officer, provide to the officer any information respecting the accident that the officer requests.

[4] OHS argues that if Suncor has contravened section 19(2), it is liable to enforcement action under the Act, including an administrative penalty. OHS asked this Council to confirm the administrative penalty.

II. Summary of Decision

[5] For the reasons which follow, Council (by majority) revokes the administrative penalty.

III. Facts

[6] The parties are largely in agreement with the material facts that underlie this appeal to Council. A workplace fatality occurred at Suncor's facility near Fort McMurray, Alberta on April 20, 2014. This was reported to OHS which issued a stop-work order and embarked upon an investigation.

[7] Suncor says it set upon an internal investigation which involved the development of some solicitor-client communications with Suncor's in-house legal counsel. On May 5, 2014, OHS requested production of Suncor records under section 19 of the Act, including "any witness statements taken in respect of the incident" and "any photographs taken of the incident prior to the arrival of investigating officers."[2]

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[1] RSA 2000, c. O-2

[8] On May 20, 2014, Suncor refused to turn over its internal witness statements to OHS, but indicated it would "continue to fully co-operate with OHS investigators and will facilitate interviews of witnesses if requested by OHS."[3]

[9] The stop-work order was removed at the Suncor site on June 12, 2014.

[10] On October 23, 2015, OHS renewed its demand upon Suncor to produce its internal records that emerged as a result of its own statutorily-mandated investigation.[4] This time the demand was slightly more detailed and included, *inter alia*:

> Copies of all notes, records, photos/videos, documents, TapRoot or other safety root cause determination process that were taken or collected by the Suncor investigators;
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> Copies of all photographs/videos taken respecting the incident; and
>
> Copies of all witness statements and interviews taken in respect of the incident.

[11] On November 20, 2015, Suncor asserted legal privilege over the documents in the above paragraph,[5] namely "over all photographs/videos taken as part of the investigation, . . . all witness statements and/or interviews, and any materials derived therefrom as part of the investigation, . . . (and) all notes, records, photos/video, documents, TapRoot . . . and any materials derived therefrom." It reasserted this privilege claim in an email on December 1, 2015[6] and again on December 10, 2015.[7]

[12] OHS issued a notice to Suncor on December 11, 2015 to the effect that it was considering the issuance of an administrative penalty to Suncor. A meeting between the parties was held on December 17, 2015.

[13] What all transpired at the December 17, 2015 meeting is a matter of some dispute. Suncor provided an affidavit of positions exchanged at that meeting. Suncor says OHS refuted Suncor's claim to privilege over its internal investigation from the time of the accident to when the section 18 report was rendered, and OHS would not extend the limited use immunity to witness

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[2] OHS brief, Tab 3, paragraphs 4 and 5.

[3] OHS brief, Suncor memo, Tab 9, at paragraph 4.

[4] Act, s. 18(3)

[5] OHS brief, Suncor memo, Tab 15

[6] OHS brief, email from Suncor, Tab 17

[7] OHS brief, email from Suncor, Tab 19

statements obtained from Suncor's internal investigation.[8]

[14] OHS says it requested a list of documents over which Suncor claimed privilege. Suncor says it was not until January 12, 2016 that OHS formally requested Suncor's list of privileged documents. In any event, no such list was tendered or promised at the December 17, 2015 meeting. Suncor did not produce any further documentation.

[15] On December 21, 2015, the deadline set by OHS, Suncor reasserted privilege but left open the possibility of waiving it on some documents. Suncor advised OHS that it would proceed to have the privilege matter decided by the Court of Queen's Bench. By this point Suncor had asserted privilege several times.

[16] On December 22, 2015, OHS issued the administrative penalty. The OHS Director stated the reasons in the penalty letter as follows:[9]

> At the December 17, 2015 [sic], I requested that Suncor provide a list of documents to which it claims privilege. It has failed to do so. Suncor Energy Inc. has been given an opportunity to provide more information to substantiate its claim of legal privilege. It has failed to do so. It simply claims a blanket legal privilege over all documents created by its investigation team.

IV. Post-Administrative Penalty Legal Processes Preceding this Appeal

[17] After issuing the administrative penalty, OHS sought to interview Suncor personnel involved in the internal corporate investigation. Suncor filed an application for injunctive and declaratory relief in the Court of Queen's Bench of Alberta. This was adjourned by consent after OHS indicated it would be bringing its own application.

[18] On January 12, 2016, Suncor acknowledges that legal counsel for OHS formally requested a list of documents over which Suncor claimed privilege.

[19] Suncor filed and served notice to appeal the administrative penalty to the Council on January 19, 2016. This was within the required 30 day appeal period.[10] The matter was set for hearing on February 8, 2016 but adjourned by consent to May 13, 2016.

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[8] The limited use immunity is found in section 19(5) of the Act: Any statement given under this section is not admissible in evidence for any purpose in a trial . . . or other proceeding except to prove (a) non-compliance with this section, or (b) [knowingly making any false statement]

[9] OHS brief, Administrative Penalty letter, Tab 1, at p. 2.

[10] Act, s. 16(2)(b)

[20] Affidavits of the parties' representatives were filed in connection with the Queen's Bench application. Cross-examinations on these affidavits took place and transcripts were generated. Various other exchanges occurred between the parties leading up to the Special Chambers application on March 22, 2016 before Manderscheid, J.

[21] In reasons[11] released on May 9, 2016, the learned judge stated three issues.[12] Below each of them is His Lordship's answer.[13]

(i) Is Suncor *entitled* to claim litigation privilege over the information collected during its internal investigation?

> Therefore, I conclude that, if Suncor establishes that the dominant purpose of conducting the subject investigation was in contemplation of litigation, it would be entitled to claim litigation privilege over the documents and other records created or collected during the internal investigation, notwithstanding the statutory obligations under the *OHS Act*, s 18.[14]

(ii) Are the documents and other records created or collected during Suncor's internal investigation privileged?

> I find that Suncor has established that the dominant purpose of carrying out its internal investigation was in contemplation of litigation. The net effect of this finding is that information, documents and records produced for the dominant purpose of supporting the contemplated litigation, and collected during the internal investigation, are also covered by litigation privilege.[15]

(iii) Has Suncor provided *sufficient* justification for its claims to litigation privilege and solicitor-client privilege regarding the Refused Information?

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[11] *Alberta v Suncor Energy Inc*, 2016 ABQB 264 (CanLII)

[12] *Id*, at para 20

[13] The parties advised Council that this decision is under appeal to the Alberta Court of Appeal.

[14] *Id*, at para 48

[15] *Id*, at para 72

> On the issue of litigation privilege, I had earlier concluded that, notwithstanding the statutory requirement of an investigation under the *OHS Act*, s 18, Suncor has established that the dominant purpose of carrying out its internal investigation was in contemplation of litigation; and that the information, documents and records created for the dominant purpose of supporting the contemplated litigation, which were collected during the internal investigation, are also covered by litigation privilege.[16]

[22] Manderscheid J. prescribed how Suncor's documents would be independently assessed on privilege claims:

> The outstanding issue regarding Suncor's claim of litigation privilege is the determination of which particular records, documents or information were created for the dominant purpose of supporting the contemplated litigation, and collected as such during the internal investigation. [para 94] . . .
>
> In the end result, I direct that within 30 days of the release of this Decision, Suncor meet with the Referee who shall act as referee vested with the authority to determine and set the process for the conduct of the directed assessment. Accordingly, Suncor shall provide the Refused Information to the Referee and identify which records, information and communications it claims are either covered by litigation privilege or solicitor-client privilege. Suncor shall then, in accordance with the process determined and set by the Referee, provide written and/or oral submissions, in a hearing as required, to the Referee explaining the evidentiary basis for such claims to the Referee. Subsequently, the Referee will make recommendations to this Court for its consideration and approval. [para 97]

[23] After another adjournment of the May 13, 2016 date, the oral hearing of this appeal by Suncor against the administrative penalty took place in Edmonton, Alberta on June 24, 2016.

V. Jurisdiction

[24] Appeals of Administrative Penalties lie to the OHS Council. Section 16 of the Act states, in relevant parts:

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[16] *Id*, at para 93

> 16(1) A person
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> . . . (b) who is given a notice of administrative penalty . . .
>
> may appeal the order, administrative penalty, cancellation or suspension to the Council.
>
> (2) An appeal under subsection (1) shall be commenced by serving a notice of the appeal on a Director of Inspection
>
> . . . (b) in the case of an appeal from an administrative penalty, within 30 days from the date that the notice of administrative penalty was given to the person making the appeal . . .
>
> (3) After considering the matter being appealed, the Council may by order
>
> . . . (b) in the case of an appeal from an administrative penalty, confirm, revoke or vary the administrative penalty . . .
>
> (4) When an appeal is made to the Council under subsection (1), the Council shall hear the appeal and render a decision as soon as practicable. . . .
>
> (7.1) When an appeal from an administrative penalty is commenced under subsection (1) (b), the commencement of that appeal operates to stay the administrative penalty until the Council renders its decision on the appeal or the appeal is withdrawn.

VI. Issue

[25] OHS frames the issue in this appeal before Council thus:[17]

> 32. The sole issue is as follows:
>
> When a party claims legal privilege over documents demanded pursuant to secton 19(2) OHS Act, is the party obligated to provide OHS with information to substantiate that claim?

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[17] OHS brief at p. 7.

[26] OHS adds that "[t]his appeal is not about whether legal privilege exists or does not exist in relation to the documents demanded."[18]

[27] Suncor's characterization of the issue is:[19]

> 32. The sole issue in this appeal is:
>
> Whether the administrative penalty for the alleged contravention of section 19(2) of the *OHS Act* between the period of December 10, 2015 and December 11, 2015 was properly imposed given Suncor's *bona fide* privilege claim?

[28] With respect, Council is of the view that both parties have structured the issue too narrowly. As in all appeals to Council, the issue is whether the conduct and decision of the regulator was reasonable and, if not, what is the appropriate remedy authorized by the Act.

[29] The issue to be determined by Council in this particular appeal is whether the administrative penalty issued by OHS against Suncor on December 22, 2015 is reasonable in the circumstances. If it is not, should it be revoked or varied?

VII. Standard of Review

[30] The standard of review is reasonableness. In *MacDougall v Occupational Health and Safety Council*, 2015 ABQB 591, (*MacDougall*), the reviewing judge wrote, at paragraph 14:

> . . . the Council was not engaged in anything more than I am engaged in. They were assessing the reasonableness of the officer's decision and the fairness of the process by which she arrived at that decision.

[31] Issued earlier today, another decision of the Court of Queen's Bench, *Procrane Inc (Sterling Crane) v. Thompson and Occupational Health and Safety Council*, 2016 ABQB 646, thoroughly canvassed this issue and confirmed the same standard of review at that level with regard to this governing legislation.[20]

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[18] *Id*, at p. 1, paragraph 2.

[19] Suncor brief at p. 17.

[20] See paras 24 to 39.

VIII. Procedural Matter re: *Post Facto* Evidence

Statement of the Issue and the Parties' Positions

[32] At the outset of the hearing, Suncor sought to introduce the affidavits and cross-examination transcripts that were produced for the Queen's Bench application admitted into evidence for the purposes of this appeal. Suncor said the regular rules of evidence do not apply to Council and it does not make any sense to have the Suncor witnesses go through all the evidence in those documents and say the same things again. This evidence was incorporated into the Queen's Bench proceeding and could be admitted into this Council appeal as well.

[33] We are breaking new ground here in this administrative penalty appeal. Credibility about what happened at the December 17, 2015 meeting may have to be weighed. OHS had access to all this evidence in its possession for months. It can argue what is and is not fresh evidence today if it wants the appeal to be decided on the merits. Suncor also cited the Council's *Rules of Procedure* which permit fresh evidence to be considered in special circumstances.[21]

[34] OHS objects to the new evidence on the basis that it is *post facto* and much of it is irrelevant to the issue in this appeal. Inordinate time would be spent sifting through it. Moreover, it says Council appeals are reviews of the record limited to what was before OHS at the time it made its decision. All new evidence now tendered by Suncor that was not before OHS – because it was not disclosed or because it did not exist – when OHS made the decision to issue the administrative penalty on December 22, 2015 should not be considered by Council in this appeal. The OHS Director issuing the administrative penalty on that date would simply not have known about much of the evidence that Suncor proposes to now introduce.

[35] OHS cited two Queen's Bench decisions in support. *Border Paving Ltd. v. Alberta (Occupational Health and Safety Council)*, 2006 ABQB 893 found at paragraph 13: "[t]his is an appeal on the record, for s. 16 does not provide for a hearing *de novo*." Likewise, the court said in *MacDougall, supra,* at paragraph 14:

> Had the Council been engaged in the *de novo* hearing, I would have concluded that the Council had acted unfairly.

[36] OHS also asserts that the new evidence which Suncor wishes to admit in this appeal, namely affidavits and transcripts of examinations in parallel proceedings, cannot be admitted because they violate an implied undertaking and the Rules of Court. Suncor has not been relieved of the undertaking.

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[21] OHS Council's *Rules of Procedure*, para VI (b)

Council Decision on the Preliminary Evidentiary Issue

[37] The evidence that was in question which Suncor sought to tender consisted of two affidavits and the transcripts of the examinations on those two affidavits and correspondence filed that post-dated December 22, 2015. As an administrative tribunal, Council is not bound by the formal rules of evidence. It has the jurisdiction to consider applications for fresh evidence. Suncor did not seek to formally make that fresh evidence application but this was the essence of this preliminary evidentiary matter. On the other hand, this not a true fresh evidence matter where the evidence in question normally is in existence, but undisclosed for some reason, when the OHS decision is made. In this case, the evidence was created after the OHS decision was made although one of the deponents was a representative of OHS and would have been in knowledge on December 22, 2015 of what he later gave testimony under oath.

[38] Council's rules on fresh evidence are largely designed to prevent a circumvention of OHS from doing its job. Parties must not be permitted to make Council the decision maker of first instance. This runs afoul of the intention of our review mandate under the legislation. Council frowns upon regulated parties withholding their evidence from the OHS investigation and presenting it for the first time at a review hearing before Council. The present appeal is not that sort of case.

[39] The evidence sought by OHS was subject to a claim of privilege. It is not the evidence that is being disclosed before Council for the first time. This appeal is also largely procedural. What is contained in the impugned evidence arises from, and is related to, the administrative penalty under review in this appeal. OHS disputes its relevance to Council's decision but this evidence would not have been collected but for the December 22, 2015 administrative penalty. One might infer there is at least some relevant and probative evidence contained therein.

[40] Counsel for OHS said the simple solution would be to toss out all the impugned evidence and start over with at least one witness being present. He was not able to identify any particular prejudice that would flow from admission of the evidence in question. OHS had an opportunity to cross-examine on most of this evidence already. The inability to cross-examine, or further cross-examine on it, was not offered as a prejudice OHS would suffer.

[41] Council is authorized only to confirm, revoke or vary the administrative penalty. It cannot send the administrative penalty back for reconsideration by the OHS Director. Council therefore strives to be effective in these appeal hearings with a focus on these three outcomes.

[42] The balance of convenience and the best use of this tribunal's resources is to admit the evidence and allow submissions by OHS to disregard parts of it or to

weigh it appropriately. There are significant economies of time and effort if these documents, were to be admitted at this stage and submissions received from both parties as to relevance and materiality on any of it. Counsel for OHS also seemed to concede that Council could do that, and he would remain at liberty to make any submission, including objection, regarding any evidence of post December 22, 2015 activity.

[43] Accordingly, Council admitted the impugned evidence in question, subject to submissions and arguments by both sides as to the weight, if any, to be given to it.

[44] As it turns out, the Council found very little of the impugned evidence relevant to the issue under consideration and placed little reliance upon it. OHS can only be held accountable for what it knew at the time it issued the administrative penalty. Much of the evidence in Mr. Chell's affidavit and examination came to light after the administrative penalty was issued. It is impossible to know precisely what evidence given by Mr. Feagan on February 26, 2016 (affidavit) and March 10, 2016 (examination) was attributable to OHS on December 22, 2015.

IX. Applicable Law

[45] Section 40.3 of the Act governs the issuance of administrative penalties. It reads:

> 40.3 (1) In this section, "regulated person" means:
> (a) a contractor;
> (b) an employer;
> (c) a prime contractor;
> (d) a supplier;
> (e) a worker.
>
> (2) If an officer is of the opinion that a regulated person
> (a) has contravened a provision of this Act, the regulations or an adopted code,
> (b.) has failed to comply with an order made under this Act, the regulations or an adopted code,
> (c.) has failed to comply with a term, condition or requirement of an acceptance issued under section 34, or
> (d.) has failed to comply with a term, condition or requirement of an approval issued under an adopted code,
> the officer may, by notice in writing given to the regulated person, require the regulated person to pay to the Crown an administrative penalty in the amount set out in the notice.

> (3) The amount set out in a notice of administrative penalty must not exceed
>
> (a) $10 000, or
>
> (b) in the case of a contravention or a failure to comply that continues for more than one day, $10 000 for each day or part of a day on which the contravention or failure to comply occurs or continues.
>
> (4) A regulated person who pays an administrative penalty in respect of a contravention or a failure to comply shall not be charged under this Act with an offence in respect of the same contravention or failure to comply that is described in the notice of administrative penalty.
>
> (5) A notice of administrative penalty may be given within 2 years after the alleged contravention or non-compliance occurs, but not afterwards.
>
> (6) Subject to the right to appeal, where a regulated person fails to pay an administrative penalty in accordance with the notice of administrative penalty and the regulations, the Minister may file a copy of the notice of administrative penalty with the clerk of the Court of Queen's Bench, and on being filed, the notice has the same force and effect and may be enforced as if it were a judgment of the Court.

The *Administrative Penalty Regulation*, Alta Reg 165/2013 sets out further requirements for Administrative Penalties issued under the Act:

> 1 In this Regulation, "Act" means the *Occupational Health and Safety Act*.
>
> 2 A notice of administrative penalty must contain the following information:
>
> (a) the name of the regulated person who is required to pay the administrative penalty;
>
> (b) an identification of
>
> (i) the provision of the Act, the regulations or the adopted code that was contravened, or
>
> (ii) the order or the term or condition of the approval or acceptance that was not complied with, whichever is applicable;
>
> (c) a brief description of the nature of the contravention or failure to comply identified under clause (b);

(d) the amount of the administrative penalty;
(e) the date the notice of administrative penalty is issued;
(f) the date by which the administrative penalty must be paid;
(g) a statement describing the right to appeal to the Council under section 16 of the Act and particulars of how the appeal is to be made and the time within which it must be made.

3(1) Subject to section 40.3(3) of the Act, the amount of an administrative penalty for a contravention or a failure to comply is the amount set in accordance with this section by the officer giving the notice of administrative penalty.

(2) In setting the amount of an administrative penalty for a contravention or a failure to comply, an officer shall consider
(a) the seriousness of the contravention or failure to comply, and

(b) the risk of harm resulting from the contravention or failure to comply and may consider any other factor the officer considers relevant.

4(1) Subject to any stay that is in effect under section 16(7.1) or (9) of the Act, a regulated person who is required to pay an administrative penalty shall pay the amount of the administrative penalty on or before the date specified in the notice of administrative penalty.

(2) The date referred to in subsection (1) must be one that is at least 30 days after the day on which the notice of administrative penalty is served.

X. Was this Administrative Penalty Reasonable?

[46] Council must decide if OHS acted with procedural and substantive reasonableness in issuing the administrative penalty to Suncor on December 22, 2015.

Position of Suncor

[47] Suncor says privilege is fundamentally important, sacrosanct actually,[22] and

[22] Suncor brief, p. 20, para 43

well established. It must be taken seriously and not be abrogated, even by OHS in the context of a workplace fatality and the duty of OHS to investigate same.

[48] It was reasonable for Suncor to claim privilege in this case. While consistently maintaining its position on privilege, Suncor tried to negotiate and comply. It offered a list of witness names and pledged further co-operation to OHS.

[49] OHS acted unreasonably from a procedural perspective in several ways. It imposed a tight deadline on production of these documents which is a major effort. The first specific request came at the meeting on December 17, 2015 and the administrative penalty was written on December 22, 2015. OHS did not inform Suncor in writing that they were not pleased with Suncor's response.

[50] OHS issued the administrative penalty before requesting or seeing Suncor's list of privileged documents. The administrative penalty letter makes it clear the offence date is between December 10 and 11, 2015. Yet OHS says it only asked for the list of privileged documents and evidentiary foundation on December 17, 2015, which is *after* the offence date. Then OHS issued the administrative penalty while it still lacked sufficient information to assess the privilege claim.

[51] Suncor's position is that OHS should have either accepted its claim to privilege, which relieved it of its section 19(2) obligations or, if unwilling to accept the privilege claim, OHS should have demanded an evidentiary record or foundation, or it should have had the matter resolved in court.

[52] This administrative penalty was assessed "simply on the basis that a party has claimed privilege over documents and communications"[23] That erodes the privilege doctrine and amounts to an abuse of process.

[53] An administrative penalty is not the proper response to a privilege claim. The OHS administrative penalty was never intended for the purpose and manner in which it was used in this case. When administrative penalties were brought into force in the context of occupational health and safety enforcement in Alberta, the government proponent stated in the legislature:[24]

> It is important to note, Mr. Speaker, that the great majority of employers and businesses in Alberta willingly and carefully comply with the rules that are in place which govern their activities. However, there are some who repeatedly and chronically choose not to do so. The provisions of this act are aimed directly at them. This act sends a clear message that they will not be able to flout the rules and put either the safety or financial security of Albertans at risk

[23] Suncor brief, p. 18, para 37

[24] Alberta *Hansard*, 28th Legislature, First Session, October 24, 2012 afternoon, p. 209

> without meaningful consequences. Administrative penalties will allow regulators to do much more than issue a warning to violators. In the past many of these warnings have been ignored, and the only way to deal with the situation was through protracted and costly suspensions or prosecutions. Administrative penalties provide for a middle ground, one which points to the seriousness of the violation in question and government's commitment to eliminating those violations . . .
>
> The amendments to this act will add maximum administrative penalties of $10,000 per occurrence per day and will provide an effective way of dealing with high-risk non-compliers.

[54] The Leader of the Opposition at the time also supported the enactment of administrative penalties in the OHS realm "as long as [they are] targeted against those who are doing wrong, those who have sloppy practices."[25]

[55] Suncor says its claim to privilege does not fit the type of serious habitual wrongs or chronic regulatory non-compliance that administrative penalties were designed to address. All administrative penalties written in Alberta to date relate to safety directly, such fall protection. They were never intended to be used for dealing with privilege around the production of documents. The matters of privilege are to be properly addressed and resolved judicially and not by the enforcement tool of the administrative penalty.

[56] Suncor cited the dissenting judgment of the Supreme Court of Canada in *Shell Canada Products Ltd. v. Vancouver*, [1994] 1 SCR 231, 1994 CanLII 115 as support of its position that OHS, in issuing this administrative penalty, had acted with an "improper purpose":[26]

> . . . it may be alleged that while the action is within the municipality's powers, the purpose for which the action was taken was outside the municipality's powers, thereby rendering the action itself invalid . . .
>
> The law governing review under this head is sometimes referred to as the "doctrine of improper purposes" . . . *Galloway v. Mayor and Commonalty of London* (1866), L.R. 1 H.L. 34, *per* Lord Cranworth (at p. 43):
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> > . . . the persons so authorized cannot be allowed to exercise the powers conferred on them for any collateral object; that is, for any purposes except those

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[25] Alberta *Hansard*, 28th Legislature, First Session, October 25, 2012 afternoon, p. 264

[26] Paras 75 – 76

> for which the Legislature has invested them with extraordinary powers.

[57] Suncor questions why the OHS investigation remained dormant for 17 months. It suggests the sudden newfound OHS concern and urgency now may not be so much for the ongoing health and safety risks at the Suncor workplace as it is for the risk of OHS itself missing the then-approaching two-year limitations period for laying charges. This urgency played out in the threatening and intimidating actions of the OHS. These included attempting to interview Suncor investigators and threatening them with personal liability if they refused, asserting a "privilege free era", and refusing Suncor's request for an extension to review its documents unless it abandoned its privilege claim.

[58] Finally, in its Reply Brief, Suncor says it *did* provide an evidentiary basis for its privilege claims.[27] It is in the form of what Mr. Chell, Suncor's corporate legal counsel, deposes he stated at the December 17, 2015 meeting. The referenced email was not produced. This affidavit evidence was accepted in the Court of Queen's Bench decision to reach the conclusion that Suncor carried out its internal investigation in contemplation of litigation.[28]

[59] For all these reasons, Suncor requests Council to revoke the administrative penalty.

Position of OHS

[60] OHS relies on sections 18 and 19 of the Act. A fatality occurred at Suncor's workplace. The company is required to investigate, prepare a report and make that report "readily available for inspection by an [OHS] officer."[29] OHS itself has a very broad grant of power, indeed duty, to investigate under section 19(2), the text of which is set out above in paragraph 3. While this investigatory power is subject to Suncor's claims of privilege, Suncor bears the burden of establishing an evidentiary foundation for the privilege it asserts. This cannot be a game of hide

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[27] Suncor Reply Brief, pp. 11 – 13

[28] Queen's Bench decision, at para 68.

[29] Section 18(3): . . . employer responsible for that work site shall
(a) carry out an investigation into the circumstances surrounding the serious injury or accident,
(b) prepare a report outlining the circumstances of the serious injury or accident and the corrective action, if any, undertaken to prevent a recurrence of the serious injury or accident, and
(c) ensure that a copy of the report is readily available for inspection by an officer.

and seek with the seeker blindfolded.[30]

[61] *Canadian Natural Resources Limited v ShawCor Ltd.*, 2014 ABCA 289 (*CNRL*) holds that blanket claims of privilege are invalid in the context of the discovery provisions in the *Rules of Court*. A party claiming must provide a sufficient description of each record over which privilege is claimed:[31]

> [6] Tension has always existed between discovery and privilege in the civil justice system. Discovery facilitates a practical and effective search for the truth by ascertaining and limiting the real issues and facts in dispute. Privilege protects the integrity of the adversarial system and shields parties from damage to legitimate interests and relationships. Despite the culture shift, both competing values remain of importance in civil litigation. Any error in the parameters of discovery or privilege may impair the fairness of the process and deter or defeat *bona fide* litigants. Discovery should not be used to undermine legitimate spheres of privilege. At the same time, privilege should not be used to turn litigation into a game of hide and seek – with the seeker blindfolded . . .
>
> [8] We have concluded that a party preparing an affidavit of records must, short of revealing information that is privileged, provide a sufficient description of each record for which privilege is claimed to assist other parties in assessing the validity of the claimed privilege. While the objective is to reduce the need for parties to seek recourse to other time-consuming and costly litigation steps, we are equally satisfied that this can be accomplished in a manner that does not injure valid privileges. In addition, where a judge is nevertheless called on to determine privilege issues, a sufficient description of records will assist the judge in determining whether a more probing assessment is required and, if so, the confines of that assessment.
>
> [9] This result is premised on a number of specific conclusions. Rule 5.7 was intended to apply to all relevant and material records, even those a party objects to produce. Thus, in an affidavit of records, a party must number all records in a convenient manner and briefly describe them (Rule 5.7(1)). The right to bundle and treat that bundle as a single record under Rule 5.7(2) applies equally to records over which privilege is claimed. Rule 5.8 imposes

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[30] Taken from *Canadian Natural Resources Limited v ShawCor Ltd.*, 2014 ABCA 289, *infra*, at para 6

[31] Paras 6, 8 – 9 and 46

> additional responsibilities on a party who objects to produce a *prima facie* producible record. The particular ground(s) of the objection must be identified with respect to each record in order to assist other parties in assessing the validity of the claimed privilege. That means the party must state the actual privilege being relied upon with respect to that record and describe the record in a way that, without revealing information that is privileged, indicates how the record fits within the claimed privilege. These requirements apply equally to a bundled record over which a party claims privilege . . .
>
> [46] In summary, the *Rules* read together indicate that a party must provide more information in describing a record subject to a privilege claim than merely parroting the nature of the various privileges listed in Schedule 2 of Form 26 in an abstract, incomplete manner, untethered to any specific record. It would be ironic, indeed, if the *Rules* were interpreted so as to allow a party not to provide at least a brief description of records where that description is most required. After all, these are the records that another party is not entitled to examine unless it successfully challenges the privilege claim.

[62] OHS also cited *TransAlta Corporation v Market Surveillance Administrator*, 2015 ABQB 180 (*TransAlta*), a similar case which most closely engages the present issue of how to assert litigation privilege over records in regulatory investigations. The decision, released on March 17, 2015, stated:

> [45] TransAlta has provided no specific evidence to support its privilege claim over any document. In its brief, it does no more than make general statements that all of the documents for which litigation privilege is claimed were prepared for the dominant purpose of litigation, namely the MSA investigation . . .
>
> [52] A party should not be able to assert privilege, even in the regulatory context, without providing some evidentiary foundation. It was an entirely inappropriate use of resources to foist upon the Court the responsibility for deciphering the basis of a privilege claim document-by-document, particularly since TransAlta bears the burden of proof. The limited index or summary TransAlta did provide was too general to be helpful to the MSA or to this Court. TransAlta should have provided information such as "documents A-M relate to the scheduling of a meeting to respond to the information request." Had it done so, the MSA would have understood the alleged basis of the privilege claim and this Court would not have been faced with adjudicating privilege claims for documents that do not even meet the relevance threshold.

[63] In the present case, to properly claim privilege, Suncor should have itemized the privileged records, described each record by the date it was created, and identified the sender and recipient, the subject matter and the nature and basis of the privilege claimed.[32]

[64] When it issued the administrative penalty on December 17, 2015, OHS had no way to identify "which records were being withheld, the volume of records being withheld, when the records were created, by whom, and for what purpose. As such, it was not possible for OHS to meaningfully assess whether the Appellant's claim of privilege was reasonable or proper."[33] Suncor merely, and repeatedly, asserted blanket privilege and did not even nuance whether they were claiming under litigation or solicitor–client privilege.

[65] OHS made the first demand for compliance on October 30 and then granted numerous extensions at Suncor's request. Suncor was not forthcoming and showed no sign of producing the requested documents. The OHS efforts and wait to obtain production from Suncor were reasonable. Suncor would not co-operate further. The administrative penalty was finally issued on December 22, 2015.

[66] OHS reasons that since Suncor failed to legally assert privilege on the documents withheld pursuant to the section 19(2) request, these withheld documents were not privileged and a refusal to produce them constituted a violation of section 19(2). Furthermore, under section 40.3 of the Act, if OHS "is of the opinion that a regulated person has contravened a provision of [the] Act" it may issue an administrative penalty.

[67] As legal counsel to OHS stated at the hearing, this appeal is not about whether legal privilege can be asserted. It is about when there is a workplace fatality, the employer just cannot put up its hands and say "legal, legal, legal" and, without more, refuse to provide a list of documents over which they are claiming privilege and the factual basis upon which the privilege claims rest.

[68] OHS asks Council to confirm the administrative penalty.

XI. Analysis and Reasons for Decision

Reasons of Andrew Smith and Rob Munro

[69] We are of the view that the administrative penalty should be revoked.

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[32] OHS brief, pp. 10 – 11

[33] OHS brief, p. 6 at para 30

[70] Section 19(2) must be interpreted and applied in the context of litigation privilege. Suncor consistently asserted privilege after the first production demand was presented in May 2014 and it remained open to resolving privilege-related issues. It readily supplied non-privileged records for the OHS investigation. In our view, the subsequent Queen's Bench decision, which is binding upon us, vindicates Suncor's approach to privilege in this case.

[71] Throughout the material time, which is between the second demand and the issuance of the administrative penalty, the parties were contesting about the *right* to privilege not the *foundation* of privilege. Once Suncor refused production on privilege grounds, OHS appears to have dug in and could not get past the refusal. It never specifically asked for details of the privilege claims. The parties just were not in that headspace, where they could get beyond the general refusal. During this time, OHS assumed Suncor did not have a good case for privilege. OHS continued to demand production and Suncor continued to deny production and assert privilege. This was a logjam that could only be resolved in court.

[72] The only evidence about laying an evidentiary foundation, which evidence was accepted and applied in the Queen's Bench decision, related to the email which Suncor's Mr. Chell said he sent out to the company's internal investigation team. The Court accepted that it laid a sufficient foundation for litigation privilege.[34]

[73] This Suncor incident involved a workplace fatality. OHS was legitimately interested and duty bound to conduct its own investigation. It had received Suncor's section 18 report on November 14, 2014. That report seems to have complied with the legislation. OHS was offered access to Suncor's witnesses other than the internal investigators and the evidence obtained by them.

[74] Instead of interviewing those witnesses, OHS chose to pursue Suncor and obtain the fruits of its broader internal investigation over which privilege had been claimed. Council did not receive representations about any specific critical evidence that may have resided in the withheld production that OHS could not obtain on its own.

[75] Simply put, OHS should do its own investigation of the workplace fatality. It cannot rely on the efforts, investigations, deliberations and findings of the regulated party, which appears to be what it was seeking to do in this case.

[76] Suncor was co-operative and compliant in ways that related to non-privileged records. It indicated that it would co-operate on the privileged records. It made a proposal to extend immunity. It identified internal investigators and those who provided internal witness statements. It made

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[34] Queen's Bench decision, paras 64 – 68

witnesses available to be interviewed by OHS. It was willing to have the issue resolved judicially. We can find little fault with how Suncor responded to the section 19(2) demand for production.

[77] We are not convinced that enforcement of a demand for documentary production in the face of a privilege claim is a proper use of the administrative penalty which was designed to address serious, habitual non-compliance. Administrative penalties have essentially no judicial oversight attached to them, unlike privilege claims. The administrative process should not pre-empt a well-established judicial process.

[78] There are other methods set out in the legislation to address such instances of non-compliance under section 19(2) where privilege has been pleaded. These may include the creative use of orders, an application to court, and enforcement under sections 40.4 *et seq*. Where Suncor did cooperate and comply in some ways, and as long as it was expressing a willingness to be engaged in resolution of the privilege question for which there is recourse to the courts, an administrative penalty should be the last resort.

[79] We find the current case to be lacking a sufficient evidentiary basis upon which to ground the administrative penalty. Accordingly, the decision of the OHS to issue the administrative penalty in the way it did was not reasonable. The administrative penalty must be revoked.

[80] Finally, we are sensitive to the frustration that OHS likely experiences in such serious cases where it investigates workplace fatalities. There are family members and workplace colleagues, not to mention members of the public throughout the province, who will seek answers and closure. We appreciate that OHS is on the challenging front lines of all of that. Nothing in our decision is intended to make those regulatory responsibilities more difficult or less important.

Reasons of Peter Bowal (dissenting)

[81] I would confirm the administrative penalty, for several reasons.

[82] The issue is the reasonableness of OHS invoking the sanction of the administrative penalty to enforce section 19(2) against Suncor in this case. I am convinced by the evidence that OHS acted within the range of reasonableness. Its actions were both procedurally fair and substantively reasonable.

[83] With respect to process, OHS issued the first section 19 demand to Suncor on May 5, 2014. It was specific and detailed. It set the date for compliance eight days later. Fifteen days later, Suncor responded with production of records. It claimed privilege only over the demanded witness statements:

> Witness statements were collected by Suncor Energy Inc. as part of its internal investigation and as such are the subject of legal privilege. Although Suncor will not be providing the witness statements that have been collected, Suncor will continue to fully

> cooperate with OHS investigators and will facilitate interviews of witnesses if requested by OHS.

[84] The section 18 report was submitted on November 14, 2014. Neither the privilege over the witness statements nor the promise of full cooperation was tested until the second OHS demand on October 23, 2015. This second demand sought the same witness statements and additional detailed records.

[85] This matter involved a workplace fatality which fell to OHS to independently investigate. There were communications and follow-ups by the parties between the two demands. Suncor cannot claim it was caught off guard by the second OHS demand on October 23, 2015.

[86] OHS then attempted to work with Suncor for almost two months to obtain section 19 disclosure compliance. Instead, despite assurances of co-operation from Suncor, it faced mostly a legal wall where OHS was told to go to court on the basis of a general assertion of privilege. Suncor's promised co-operation turned out to be an illusory balm.

[87] Parenthetically, we see the product of that defensive stance today: more than one year after the second demand and significant expenditures of resources, not one privilege claim over a single scrap of paper has been resolved. There is no idea when the status of any privilege-claimed document will be ultimately clarified. When any party can claim general privilege and force the issue into the realm of adversarial litigation, one can effectively defeat the objective of expeditious investigations into workplace safety. Section 19(2), with its broad authorization and accompanying immunity, can be effectively annulled.

[88] Suncor also objected to the short deadlines set by OHS. The first demand was early May 2014. For the second series of demands which began in October 2015, Suncor requested and received numerous extensions to its deadlines. The record shows OHS to be reasonable in its expectations.

[89] Council's only other appeal decision on administrative penalties to date is *Jayson Global Roofing Inc. v. Alberta (OHS)*.[35] In *Jayson Global*, reference was made to several technical requirements for OHS administrative penalties:[36]

> The legislation set out above creates three categories of obligation on the part of OHS in relation to Administrative Penalties. First, it confers upon OHS a broad opinion-based discretion to issue an Administrative Penalty at all. Second, it prescribes how the penalty amount is determined. There are monetary limits. Under section 3(2) of the *Regulation*, the OHS officer *shall consider* both "the

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[35] https://work.alberta.ca/documents/ohsc-jayson-global-roofing-inc-vs-ohs.pdf (January 2015)

[36] at p. 12

> seriousness of the contravention or failure to comply" and "the risk of harm resulting from the contravention or failure to comply" when setting the amount of an Administrative Penalty. It is clear from the Notice that the OHS Director did address her mind to those two factors. Jayson Global did not dispute this at the appeal hearing.
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> Third, the legislation enumerates a number technical process requirements about notice in writing, two year limitation period after the contravention(s), and a number of formal contents of the Notice of Administrative Penalty, such as time for payment and information on appealing the Administrative Penalty. These technical process requirements were all met in the letter of August 29, 2014.
>
> We conclude that the OHS Director met the requirements of all three categories under the legislation. She properly and reasonably exercised her discretion when she decided to issue, consult and adjust the penalty. She supplied adequate reasons for issuing this Administrative Penalty for how its final amount was determined. We are not convinced that Jayson Global has established any legal error in it.

[90] None of these technical issues were raised against the subject administrative penalty. OHS appears to have complied with all of these technical requirements.

[91] I now turn to the question of whether this administrative penalty was reasonable from a substantive perspective.

[92] In response to the second OHS demand on October 23, 2015, Suncor again asserted blanket privilege over a number of documents. The *CNRL* case, released over a year earlier on September 15, 2014, applied to the *Rules of Court* and regular litigation. Suncor is entitled to the benefit of the doubt where section 19, unlike Rules 5.7 and 5.8, is silent on how privilege is to be asserted in the OHS context. In other words, Suncor would not have inexorably applied the *CNRL* case to the OHS context in which it found itself.

[93] However, the *TransAlta* decision in March 2015 expressly adopted the *CNRL* reasoning to the regulatory context.[37]

[94] In any event, the *TransAlta* decision prescribed the evidentiary foundation to which OHS refers. Suncor wanted a more "formal demand" for a list of privileged documents although it does not, and cannot, claim ignorance about what the repeated OHS demands entailed. It is disingenuous to suggest that OHS

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[37] *TransAlta* at para 48: "the general principles from the Rules of Court nonetheless apply."

was under a legal duty to request a list of privileged documents and an evidentiary basis for them when those were the extant legal requirements.

[95] Suncor says the administrative penalty was not issued because of its failure to provide an evidentiary basis. It adds that the 'evidentiary basis' argument is a "misleading and factually inaccurate attempted re-characterization"[38] The answer to these contentions is that 'evidentiary basis' is the law to which Suncor is bound. It is not the role of OHS to brief Suncor on the law of how to assert its privilege claims in regulatory proceedings.

[96] Suncor's position is that the courtroom is the best forum in which to adjudicate the privilege of every withheld document. That may be an authoritative method, but it is neither efficacious nor expeditious. We are more than two years since the first claim of privilege and almost a year since the administrative penalty was issued. A superior court decision is under appeal and all undisclosed documents continue to await adjudication. It could take several years more for a definitive privilege ruling on the first Suncor record relating to this fatality. This does not serve the interests of regulatory justice. It does not advance the safety of Alberta workers. It is not the intent of the enabling legislation.

[97] The courts are challenged to sort through rafts of documents to determine privilege eligibility in the regulatory context. In *TransAlta*, a decision released almost 7 months after the case was heard, the judge expressed this exasperation:

> [52] It was an entirely inappropriate use of resources to foist upon the Court the responsibility for deciphering the basis of a privilege claim document-by-document, particularly since TransAlta bears the burden of proof. . . . All in all, the disorganized nature of TransAlta's documentary disclosure contributed to the time required to issue this decision . . .
>
> [136] In conclusion, I find that of the almost 400 documents submitted to this Court for review, less than 100 documents are properly protected by litigation privilege. This result suggests that TransAlta either took a cavalier approach to its disclosure obligations in the MSA investigation or has a misunderstanding of the concept of litigation privilege and the manner in which it should be asserted and proven.

[98] The thrust of both the *CNRL* and *TransAlta* decisions and the 2012 introduction of OHS administrative penalties is to facilitate compliance without resort to interminable and intractable litigation. Hard, deep and broad stands against production which favour the broadest privilege claims, what the OHS calls "legal, legal, legal" and what the Alberta Court of Appeal calls "hide and seek

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[38] Suncor Reply Brief, para 1

with the seeker blindfolded" can easily lead to nullification of section 19(2) and the hamstring the regulator from investigating workplace fatalities. The resolution of privilege claims must also give way to some effective and pragmatic measures. Insisting on a factual foundation to move the privilege claim forward is not only binding in the common law, but it is a reasonable expectation upon Suncor without the need for further prompting from OHS.

[99] I am not persuaded by Suncor's argument that administrative penalties were never intended to enforce breaches of section 19(2). This is the first penalty in relation to section 19(2) in some 20 months of writing administrative penalties. The fact that this is the first penalty under this section does not render it invalid.

[100] Indeed, the legislation suggests otherwise. The plain language of section 40.3 allows any OHS officer to write an administrative penalty where one "is of the opinion that a regulated person has contravened a provision of [the] Act." Sections 19(2) and 40.3, when combined, confer an unusually broad grant of discretion on OHS. In this case, OHS has determined on a reasonable basis that Suncor has not complied with section 19(2). Under section 40.3 it has discretion to issue an administrative penalty. I would not interfere with this discretion.

[101] The administrative penalty is an enforcement instrument designed to reduce time and resource-intensive prosecutions and quickly bring regulated parties into compliance. It strengthens legislative objectives. The Supreme Court of Canada has upheld the broad jurisdiction of administrative penalties in Canada: *Cartaway Resources Corp.*, [2004] 1 SCR 672, 2004 SCC 26 (CanLII) and *Guindon v. Canada*, [2015] 3 SCR 3, 2015 SCC 41 (CanLII). This is not a case of a regulator using its superior resources and statutory power to ransack the province's corporate boardrooms and file cabinets. There was a fatality here and OHS has a duty to quickly investigate and reasonably act in the public interest.

[102] In this appeal, Council does not have to decide the ultimate issue of privilege. I merely conclude that it was reasonable for OHS to expect Suncor to nuance and advance its general privilege claims, without further formal exhortations from OHS, in response to a section 19(2) demand.

[103] Not having obtained that disclosure after repeated requests for production and after considerable indulgence of time, OHS was entitled to assume on December 22, 2015 that nothing in the demanded disclosure was legally privileged and that Suncor would continue to refuse further disclosure. Accordingly, an administrative penalty in the amount of $5000 is both legally authorized and reasonable in the circumstances.

XII. Order

[104] Council revokes the administrative penalty under section 16(3)(b) of the Act.