Court of King's Bench of Alberta

Citation: CNOOC Petroleum North America ULC v ITP SA, 2023 ABKB 689

Date: 20231205
Docket: 1701 07427
Registry: Calgary

Between:

CNOOC Petroleum North America ULC

Applicant

- and -

ITP SA, Sunstone Projects Ltd, and Wood Group Canada, Inc

Respondent

- and -

Surerus Pipeline Inc and Stresstech Engineering Inc and Thurber Engineering Ltd

Third Party

Reasons for Judgment
of the
Associate Chief Justice
D.B. Nixon

I. Introduction

[1] The underlying action involves a pipeline failure on July 15, 2015 (the "Pipeline Failure"). In its capacity as the Plaintiff, CNOOC Petroleum North America ULC ("CNOOC") issued a Statement of Claim in this Action against a number of parties, including Sunstone Projects Ltd and Wood Group Canada, Inc (collectively, the "Wood Group") and ITP SA ("ITP").

[2] This is a complex litigation matter that I have been case managing for some years and several applications have been filed by the parties. The present applications concern claims of privilege over certain documents. A prior history of the production of documents in this Action is set out in my previous decision in ***CNOOC Petroleum North America ULC v ITP SA***, 2022 ABKB 683.

[3] A separate judgment in an application involving Wood Group and the Association of Professional Engineers and Geoscientists of Alberta based on the same factual background but in a different action that was argued concurrently with these applications has been released as ***Association of Professional Engineers and Geoscientists of Alberta v Wood Group Canada Inc***, 2023 ABKB 688. That said, there are evidentiary differences between that decision and this judgment.

II. The Applications

[4] This judgment deals with the following applications by the parties. These applications involve different Applicants and Respondents:

i) CNOOC's Application against ITP to compel answers to certain questions and undertakings;

ii) CNOOC's Application against Wood Group to compel answers to certain questions and undertakings, requesting production of certain records and revising their affidavit of records; and

iii) Wood Group's Application against CNOOC requesting production of certain records.

[5] This judgment will consider these applications in turn. My goal in this judgment is to help focus and ameliorate the production of documents so as to enable these actions to move forward.

III. Issues

[6] For the present applications I must decide the following.

i) Do the Schedule 2 Affidavit of Records have to be revised?

ii) Is ITP compelled answer to certain questions and undertakings raised by CNOOC?

iii) Is Wood Group compelled to answer certain questions and undertakings and to produce certain records as raised by CNOOC?

iv) Is CNOOC compelled to answer certain questions and undertakings and to produce certain records raised by the Wood Group?

IV. Analysis

A. Disclosure Principles

[7] To begin with, it is helpful to review briefly the principles undergirding disclosure and the production of documents in litigation. Part 5 of the *Alberta Rules of Court* ("*Rules*") is focused on the issue of disclosure of information and sets out its purpose as follows:

> **Purpose of this Part**
>
> **5.1(1)** Within the context of rule 1.2, the purpose of this Part is
>
> (a) to obtain evidence that will be relied on in the action,
>
> (b) to narrow and define the issues between parties,
>
> (c) to encourage early disclosure of facts and records,
>
> (d) to facilitate evaluation of the parties' positions and, if possible, resolution of issues in dispute, and
>
> (e) to discourage conduct that unnecessarily or improperly delays proceedings or unnecessarily increases the cost of them.
>
> **(2)** The Court may give directions or make any order necessary to achieve the purpose of this Part.

[8] As described by the Court of Appeal in ***McElhone v Indus School***, 2019 ABCA 97:

> [18] [...] The discovery provisions in Part 5 arise from the foundational principle that lawsuits should be decided on the merits. A party must disclose all relevant and material records and answer all relevant and material questions, whether helpful or unhelpful. [...]"

[9] There are, however, guardrails to ensure that there is not too much time spent searching for records in the pre-trial phase thus delaying the main action:

> [20] The Alberta *Rules of Court* set up a regime that is designed to ensure that the parties are fairly informed about the case of their opponents. The regime is designed to disclose evidence, narrow the issues, facilitate settlement, avoid surprise and unnecessary adjournments, and to preclude the suppression of relevant and material admissible evidence: R. 5.1. There are, however, limits placed on pretrial discovery to ensure that the procedures adopted are proportionate to the issues. Rule 5.1(1)(e), which summarizes the purposes of pretrial discovery, notes that conduct that unnecessarily delays or increases the cost of proceedings is to be discouraged. Rule 5.3(1)(b) permits the Court to limit the rights and powers under Part 5 where:
>
> > (b) the expense, delay, danger or difficulty in complying with the rule would be grossly disproportionate to the likely benefit.

> This is a manifestation of the general principle that where the Court exercises a discretion or grants a procedural remedy, the remedy should be proportionate to the reason for granting it: R. 1.2(4).
>
> [***CNOOC Petroleum North America ULC v 801 Seventh Inc***, 2023 ABCA 97]

[10] Records that are both material and relevant but protected under a form of privilege do not need to be disclosed. This tension is a central part of the litigation process:

> [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.
>
> [***Canadian Natural Resources Limited v ShawCor Ltd***, 2014 ABCA 289 [***Shawcor***]]

[11] To ensure that privilege claims over multiple records have been properly disclosed, the *Rules* outline the process of setting out Affidavits of Records ("AOR") with enough detail "to assist other parties in assessing the validity of the claimed privilege": ***ShawCor*** at para 8; see *Rule* 5.7.

[12] The privileges being asserted in the present case are: (i) solicitor-client privilege; and (ii) litigation privilege. These two types of privilege share some characteristics as they "serve a common cause: The secure and effective administration of justice according to law": ***Lizotte v Aviva Insurance Company of Canada***, 2016 SCC 52 at para 24 [***Lizotte***]. However, there are differences between the two types of privileges. Unlike solicitor-client privilege, litigation privilege is "neither absolute in scope nor permanent in duration" and only those documents whose "dominant purpose is litigation" are covered by the privilege: ***Lizotte*** at para 23.

[13] The party asserting privilege has the onus of substantiating it: ***CNOOC Petroleum North America ULC v 801 Seventh Inc***, 2021 ABQB 861, at para 20.

B. Do the Schedule 2 Affidavit of Records need to be revised?

[14] Most of the parties complained of the sufficiency of the Schedule 2 AORs of the other parties. What must be included within an AOR is set out in ***ShawCor,*** as touched on above. CNOOC highlighted during its submissions, correctly in my view, that "what was good for the goose is good for the gander". This echoes the common wisdom that "[d]isclosure is a two-way street": ***ShawCor*** at para 93.

[15] Based on my review of the evidence and analysis of the law, I find it appropriate for the parties to revise their Schedule 2 AORs to give a fuller description of the material over which privilege is being claimed, without, of course, revealing the privileged information asserted. The Schedule 2 AORs of the parties should therefore match, although of course, some parties have a greater number of records. I direct the parties to cooperate with one another on this matter.

C. Is ITP compelled answer to certain questions and undertakings raised by CNOOC?

[16] The CNOOC Application against ITP has been reduced substantially since that application was initially filed. As a result, there only remain eight outstanding undertakings.

i) Undertakings 64, 66 and 68

[17] Undertakings 64, 66 and 68 all involve advising of when ITP had retained its legal counsel. CNOOC argued that these answers are necessary for it to properly assess some of the claims of solicitor-client privilege and litigation privilege that ITP has made.

[18] ITP argued that such disclosure is inappropriate both as being immaterial and as being outside the scope of cross-examination on an AOR. ITP further argued that to have a retainer is not a condition precedent to asserting litigation privilege or solicitor-client privilege.

[19] Although ITP is correct that the date of the retainer is not the sole consideration in the determination of whether a claim of litigation privilege or solicitor-client privilege is appropriately made, it remains an important factor to consider. Based on my review of the evidence and analysis of the law, I find that these are appropriate questions to ask. As a result, I direct that ITP answer these undertakings but that it do so in a manner which does not reveal the privileged information which is asserted to be privileged. I make this determination because timelines often tell a story.

ii) Undertakings 91, 92, 93 and 104

[20] These undertakings are more substantive requests. CNOOC has sought from ITP: (i) previous drafts of a presentation that had been given to CNOOC: Undertaking 91; (ii) all the patent filings relating to technologies used on the pipelines between September 2011 to July 2015, alongside the supporting documentation and inventors: Undertaking 92; (iii) all documentation relating to the 2001 joint industry project: Undertaking 93; and(iv) the relevant Allianz insurance policy that relates to this project. ITP has argued that these undertakings are all irrelevant and immaterial.

[21] As mentioned above, Undertaking 91 asks for previous drafts, revisions and comments on document ITP000139 to be provided. For the reasons outlined in ***Robertson v Edmonton (City) Police Service***, 39 Alta LR (4th) 239 [2004 Alberta Queen's Bench] at para 60, I find that the drafts of the presentation need not be disclosed in this case. I make this determination because there is no indication that previous drafts of the presentation are relevant or material to the present issue. Further, there is no evidence that those earlier drafts were relied on by CNOOC.

[22] Based on my review of the evidence and analysis of the law, I find that Undertakings 92 and 93 are irrelevant and immaterial and need not be disclosed.

[23] I make this determination because I am not satisfied that Undertaking 92 related to patent filings on the technologies are relevant or material at this juncture as no argument has been made that this case turns on the proprietary nature of ITP's technology.

[24] As for Undertaking 93, I make this determination because I am not satisfied that the documentation related to the 2001 joint industry project is relevant or material at this juncture being so significantly before any of the events at issue.

[25] I find that Undertaking 104 should be produced. I make this determination because the Allianz insurance policy certificate names CNOOC as a co-insured alongside ITP. This is therefore different from the caselaw relied on by ITP which relates to private insurance agreements between only one party and the insurance company. With CNOOC also an insured under the policy, it is appropriate for ITP to disclose the actual policy to CNOOC.

iii) Undertaking 106

[26] This undertaking relates to questioning of Mr. Ollier wherein he stated that ITP likely had documentation showing that CNOOC chose ITP's system following a technical review conducted by SNC-Lavalin. ITP has argued in its statement of defence that the fact that there was a third-party review relied on by CNOOC, CNOOC cannot now seek the relief at issue in the underlying litigation. ITP asserts that it should not disclose this documentation because it goes to the heart of its defence.

[27] Based on my review of the evidence and analysis of the law, I find that it is appropriate to produce the documentation underlying Undertaking 106 because Mr. Ollier advised that he likely had that material. The fact that such material will be a part of ITP's defence does not mean it should not be produced. I make this determination because it is both relevant and material, and it is not suggested that these records are privileged. As such, if ITP possesses records relating to CNOOC's reliance on the SNC review and selection of the technology, then those reports should be produced.

D. Is Wood Group compelled to answer certain questions and undertakings and to produce certain records as raised by CNOOC?

[28] Again, the questions and undertakings under dispute have been reduced significantly.

i) Questions objected to by Wood Group

[29] During cross-examination of on the AOR, CNOOC's counsel asked Mr. Allsopp in the context of preserving relevant documents whether he had delegated to anyone tasks with respect to preserving the records and if so, what tasks and to whom. These questions were objected to by Wood Group. Also objected to was the question of whether there had been any discussion at the director level of Sunstone or Wood Group of the subject matter of the underlying litigation.

[30] Based on my review of the evidence and analysis of the law, I find that the questions objected to should be answered. I make this determination because it is appropriate for CNOOC to ask what tasks for review had been delegated and to whom. I also find it appropriate to ask if there had been discussion of the pending litigation at the board level of Wood Group. I make this determination because these are not questions about what was discussed, but instead whether such discussions had taken place. In my view, that is an important distinction.

ii) Undertakings 10 and 24

[31] CNOOC asked Wood Group to produce the handwritten notes, including notebooks and journals, of any relevant custodian in respect to this litigation. CNOOC also asked that all electronic devices issued by Wood Group to any custodian be searched, including text messages from cell phones, and any relevant documents be produced.

[32] Based on my review of the evidence and analysis of the law, I find these to be inappropriate requests. I make this determination because I characterize them as a fishing expedition. To seek a review and production of all handwritten notes and all electronic

documents of any custodian goes far beyond the scope of what would appropriately be contemplated by this litigation.

iii) Undertakings 91 and 97

[33] CNOOC has asked Wood Group to review its records and to provide to CNOOC the upheaval buckling analysis Wood Group has under its possession and control.

[34] Concerning these undertakings, there appears to be some confusion as to whether the records requested have already been produced. If they have been, then that should be confirmed. If not, then I find they are appropriate to be produced. I make this determination because Wood Group indicated that the records underlying Undertakings 91 and 97 have already been produced. In these circumstances, I infer that the Wood Group is not objecting to their production.

iv) Undertakings 93 and 94

[35] CNOOC has asked Wood Group to review its records and to provide to CNOOC the underlying calculations, should they exist, to certain key engineering work products.

[36] These undertakings have been somewhat confused because there are questions as to whether the documentations had been provided, as well as a general question of which documents exactly are being sought by CNOOC. There appears to be a suggestion by Wood Group that these undertakings have already been addressed. If so, Wood Group should clarify that this is the case. Otherwise, I find these should be produced. I make this determination because of the implication of Wood Group stating it had already been produced. If that is the case, I infer there is no objection to the production of the documentation that underlines undertakings 93 and 94.

E. Is CNOOC compelled to answer certain questions and undertakings and to produce certain records raised by the Wood Group?

[37] Much of the discussion under this application involves the question of production of the Nexen Report and the Skystone Report (collectively, the "Reports") as well as an issue regarding certain disputed records. From my understanding of CNOOC's position, the approach to take regarding the disputed records will depend on my findings regarding the Reports. That being the case, I address that issue first.

i) Production of the Reports

[38] Before entering the analysis of whether these Reports should be produced, it is important to emphasise that claims of privilege and disclosure can often involve close calls over which reasonable lawyers can disagree: ***ShawCor*** at para 63. The exercise for the Court remains an examination document by document or group of like documents: ***Alberta v Suncor***, 2017 ABCA 221 at para 29 [***Suncor***]. This is a complex area of law and all parties provided excellent legal submissions and advocacy for their positions throughout this case management.

[39] Based on my review of the evidence and analysis of the law, I find the Reports are not privileged documents in the first instance. If they were, I make the determination that that privilege has since been waived. As such, they should be produced.

a) Background of the Reports

[40] Shortly after the Pipeline Spill on July 15, 2015, CNOOC held a meeting with senior management. Present at that meeting was Ms. Marianne "Chuck" Davies, then General Manager – Assistant General Counsel and Corporate Affairs of CNOOC.

[41] Ms. Davies swore an affidavit in the APEGA Action, which was largely adopted into the CNOOC Action through an affidavit of Mr. Michael Dlugan. Mr. Dlugan was the Corporate Representative of CNOOC and he structured his affidavit to bring in the Davies Affidavit in a manner such that there was no inappropriate cross-contamination of the evidence in separate actions.

[42] Ms. Davies affirms that she requested a "legally privileged and confidential investigation be undertaken." This internal investigation is what culminated into the Nexen Report. Ms. Davies attested that the purposes of the investigation were to determine the causal factors which led to the Pipeline Failure. She pursued this investigation to determine CNOOC's legal rights and remedies, and to prepare for civil litigation and regulatory prosecution associated with it.

[43] On July 17, 2015, the CNOOC investigation team retained Skystone Engineering to conduct its own investigation of the Pipeline Failure. This resulted in the Skystone Report.

[44] Ms. Davies indicated the purpose of the Skystone Report was to "provide CNOOC's legal team with guidance on matters which would inform their provision of legal advice to CNOOC and to assist in the assessment and analysis of the anticipated regulatory and civil litigation."

[45] Part of the motivation that had been given as well, attested to in the affidavits, was the view that CNOOC understood that it was under a legal obligation: (i) under the *Pipeline Act*, RSA 2000, c P-15 to provide the Reports to the Alberta Energy Regulator ("AER"); and (ii) under the *Engineering and Geoscience Professions Act*, RSA 2000, c E-11 to provide the Reports to APEGA. There is specific reference to a request under section 76 of the *Pipeline Rules*, Alta Reg 91/2005, enacted pursuant to section 3(1), to provide the Skystone Report to the AER. No other specific provisions were cited.

[46] CNOOC has consistently maintained that these Reports are privileged and that it never intended to waive privilege when providing them to the regulatory bodies. Before commenting further, I am of the view that cooperation with regulatory bodies is proper and should be encouraged by regulated entities.

[47] However, the provision of the Reports to the regulatory bodies should not be taken to mean, just because they were provided in part to comply with regulatory requirements, that such actions will automatically make the Reports litigation privileged. The question concerning the document at issue is whether it was made with the "dominant" purpose of litigation. It is not enough that a "substantial portion" of the document was prepared for the purposes of litigation: ***Lizotte*** at para 23.

b) Is the issue of the production of the Reports *res judicata*?

[48] CNOOC argued that the issue of whether the Reports should be produced is *res judicata*. It asserted that position because Wood Group made a FOIP request in 2016 to receive the Reports from the AER. The AER denied that request on January 5, 2017.

[49] Part of the reasoning given for this denial by the AER was that the Reports were privileged. CNOOC argues that since Wood Group did not challenge, appeal or judicially review the AER decision to deny the FOIP request, it had accepted that the Reports were privileged. I dismiss this argument because the present application does not run afoul of the test for issue estoppel.

[50] The test for issue estoppel is: (i) that the same question has been decided; (ii) that the judicial decision which is said to create the estoppel was final; and (iii) that the parties to the judicial decision or their privies were the same persons as the parties to the proceedings in which the estoppel is raised or their privies: ***Danyluk v Ainsworth Technologies Inc,*** [2001] 2 SCR 460 at para 25 [***Danyluk***].

[51] A denied FOIP request does not suggest that the question has been considered in a judicial context. In my view, the denial of the FOIP request is simply an administrative decision. I make this determination because, in my view, the question has not even been addressed in a judicial context. Further, the FOIP request was made before certain additional documents were created and a press conference had occurred. As a result, the same question has never been determined.

[52] In making the above determination, I acknowledge that the AER is a quasi-judicial body. However, as noted in ***Ernst v Alberta Energy Regulator***, 2017 SCC 1, that does not mean that all decisions emanating from that body would be characterized as judicial: ***Danyluk*** at para 35. I find that the denied FOIP request in the present case was not a judicial decision as required by the test for issue estoppel.

[53] Based on the evidence before me and my analysis of the law, I find Wood Group is not precluded from seeking the production of the Reports due to *res judicata*.

c) Were the Reports made as communications between lawyer and client seeking or giving legal advice?

[54] Although not significantly canvassed by CNOOC, there was a suggestion that the Reports were protected under solicitor-client privilege. This position appears derived from the fact that Ms. Davies was involved throughout the process and had set aside a specific folder for the material related to the investigations.

[55] I am not satisfied that these Reports would be considered protected under solicitor-client privilege. There is no question that some of the emails surrounding the Reports and discussion therein would properly be classified under solicitor-client privilege and need not be produced. That is, confidential communications between lawyer and client.

[56] The investigation lead was Tom Guest, CNOOC's then Senior Manager, Process Safety Assurance. Mr. Guest is not a lawyer. Ms. Davies was also involved throughout this process but her involvement is not determinative. As stated in ***ShawCor***:

> [80] The mere fact that a lawyer directs that all records obtained or created after a certain date must first come to him or her is not sufficient to automatically place all such records within the category of solicitor-client privilege. Not every form of communication with a solicitor by a client is necessarily covered by solicitor-client privilege: ***Foster Wheeler Power Co v SIGED Inc***, 2004 SCC 18 at paras 37-40, [2004] 1 SCR 456. The privilege attaches to communications between lawyer and client designed to seek out or give legal advice. [...]

[57] As such, the fact that there were lawyers involved with the investigation and production of the Reports, even in directing parts of it, would not mean these Reports would be considered protected by solicitor-client privilege.

[58] In conclusion, based on the evidence before me and my analysis of the law, I find the Reports were not made as confidential communications between lawyer and client seeking or giving legal advice. As a result, neither of the Reports are protected by solicitor-client privilege.

d) Were the Reports made for the dominant purpose of litigation?

[59] In my view, the central question at the core of this dispute is how do we determine whether the dominant purpose of these Reports was for litigation. This is rendered more difficult because a proper procedure when initiating an investigation is for counsel to declare that it will be privileged and for the purposes of litigation, as noted in Mr. Dlugan's affidavit.

[60] This becomes even more difficult to parse when, by the nature of the investigation, questions of environmental, health and safety, business concerns and the determination of the potential for repairs all need to be addressed. As noted in cross-examination of Ms. Davies, CNOOC did not know at the commencement of the investigation whether it would perform repairs on the pipeline.

[61] These concerns have been consistently highlighted by the Alberta Court of Appeal. In ***Suncor***, the Court notes that:

> [28] […] Even if the dominant purpose of the internal investigation as a whole was in contemplation of litigation, this does not mean that every document "created and/or collected" during the investigation assumes the mantle of that overarching dominant purpose so as to be clothed with legal privilege.

[62] The Court of Appeal further elaborates that in an investigation one:

> [34] […] 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 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."

[63] It is clear that there were other significant concerns noted throughout the Reports. I make this observation because the Reports were used to substantially support portions of CNOOC's post incident assessments and the potential re-use or replacement of the pipelines in the Jacobs Repair Plan Analysis, dated April 13, 2017; the Atkins Re-Use Assessment, dated July 25, 2017; and the Concept Selection Report dated October 3, 2017.

[64] Significant portions of those documents contain redactions for privilege and Mr. Dlugan confirmed that those redactions were in relation to references to the findings in the Reports. Of course, subsequent reference to a document that is protected under litigation privilege in a

separate document would not, in itself, put into question that it was a properly claimed privilege. However, in the present case it solidifies my view that these Reports would have encapsulated too many other concerns to have properly been prepared with the dominant purpose of litigation.

[65] It has clearly been stated that a bald assertion is not enough to satisfy the test of litigation privilege. In the circumstances, I am not satisfied CNOOC has demonstrated that such was the case for these Reports.

[66] I am further convinced because, when providing the Nexen Report to AER, Ms. Davies stated in an email attached to her affidavit:

> For Nexen's part, it is our significant preference that the report not be made available on the AER's website, whether it be before the conclusion of any underlying regulatory matters or after. In Nexen's view, there is commercial, business, and technical information contained in the report that would [be] beneficial to our competitors and harmful to Nexen. For this reason, we'd prefer that the report not be put on the AER website.

[67] In my view, it is significant that there is no reference in the above communication that the Reports were viewed as privileged by CNOOC.

[68] CNOOC makes repeated reference in its argument to having been compelled to provide the Reports to APEGA. However, there is no provision cited for this, other than gesturing at the ability within the *Engineering and Geoscience Professions Act* to ask for such documents to be produced. The only clear reference to that compulsion being exercised is the aforementioned section 76 request under the *Pipeline Rules*.

[69] There is a general concern with investigatory documents such as these Reports, which would, by their nature, encompass several different requirements, such as environmental, health and safety, and for repairs, to have been declared immediately as litigation privileged. This recalls the commentary in ***Suncor***:

> [28] […] Even if the dominant purpose of the internal investigation as a whole was in contemplation of litigation, this does not mean that every document "created and/or collected" during the investigation assumes the mantle of that overarching dominant purpose so as to be clothed with legal privilege.
>
> [29] This formulation runs afoul of the approach commended by this court in *ShawCor*, albeit in the context of the *Alberta Rules of Court*, whereby each document or group of like documents must be examined. The inquiry requires examination "document by document" or group of like documents to determine the purpose behind its creation: *ShawCor* at para 87.

[70] Further, it is clear that several elements of these Reports were used for other purposes after the fact, with consistent reference in subsequent analysis documents to the Reports. That being the case, it is difficult to grasp how either of the Reports would have been prepared for the dominant purpose of litigation.

[71] In conclusion, based on the evidence before me and my analysis of the law, I find the Reports were not made for the dominant purpose of litigation. As a result, neither of the Reports are protected by litigation privilege.

e) If the Reports were litigation privileged, was that privilege waived?

[72] If I am wrong and the Reports were made for the dominant purpose of litigation privilege, then I am of the view that such privilege has been waived. I make this determination because the Reports were provided to the AER and APEGA seemingly without having been compelled to provide them.

[73] Further, at a press conference on July 12, 2016, the CNOOC VP of Canadian Operations announced the conclusions of the investigation regarding the root cause of the Pipeline Failure. A reference to the findings of a report on its own would not be enough to waive privilege on it, because the test for waiver is stringent. However, this press conference, along with the provision of the Reports to the regulatory bodies and the references to the Reports in its subsequent materials all lead me to conclude that had litigation privilege been present over these Reports, that privilege has since been waived.

[74] It is clear that a central portion of the main action at hand is derived as well from the conclusions within the Reports. That being the case, to allow Wood Group to properly respond to the claims raised by CNOOC, I find that these Reports should properly be disclosed.

f) If the Reports were litigation privileged and that privilege has not been waived, then should the emails and data used to derive those reports be produced?

[75] If I am wrong in my conclusions above, I find that some of the emails being relied upon which involve questions of raw data and the facts that were relied on for the Reports, if not the testing itself, have to be provided.

ii) Production of the Disputed Records

[76] Documents have been categorised as follows in CNOOC's Schedule 2 AOR:

(a) Correspondence between CNOOC and the AER concerning the AER investigation into the cause of the Pipeline failure;

(b) CNOOC internal correspondence concerning the AER investigation into the cause of the Pipeline failure;

(c) Third party/contractor data and records exchanged for the litigation investigation into the Pipeline failure;

(d) CNOOC correspondence with third parties/contractors concerning the litigation investigation into the Pipeline failure;

(e) Correspondence between Tom Guest, the CNOOC Investigation Lead, and other CNOOC personal concerning the litigation investigation into the cause of the Pipeline failure; and

(f) Internal correspondence regarding the litigation investigation into the Pipeline failure.

[77] As acknowledged by the parties, my decision regarding whether the Reports were privileged would determine whether CNOOC's bundle of documents would be privileged. Based on my conclusion that the Reports are not privileged, I find that these disputed records will have to be produced as well.

V. Conclusion

[78] In conclusion, I turn to address the issues that were framed above. Based on the evidence before me and my analysis of the law, I direct as follows.

a. The parties are to coordinate to revise their Schedule 2 Affidavit of Records.

b. ITP is compelled to answer undertakings 64, 66, 68, 104 and 106. They are not required to answer the remaining undertakings.

c. Wood Group is compelled to answer the objected to questions and undertakings 91, 93, 94 and 97. They are not required to answer the remaining undertakings.

d. CNOOC is compelled to produce the Nexen and Skystone Reports as well as the Disputed Records.

VI. Costs

[79] The parties may speak to costs if they cannot otherwise agree.

Heard on the 5th day of June, 2023 and the 6th day of June, 2023 and the 29th day of August, 2023.
Dated at the City of Calgary, Alberta this 5th day of December, 2023.

D.B. Nixon
A.C.J.C.K.B.A.

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