Litigation Privilege and Accident or Incident Reports

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Introduction

Defence counsel will frequently rely on the case of *Turgeon* v. *City of Edmonton*, [1986] A.J. No. 147, 72 A.R. 366 to support their position that internal accident or incident reports are covered by litigation privilege. Does *Turgeon* really give such blanket protection? Although the decision in *Turgeon* has not received much treatment in subsequent case law, it does not appear that the approach it sets out has been overruled. However, the cases invoking it, and others arising in similar contexts, emphasize that there is no blanket rule of privilege applicable to accident or incident reports. Rather, the determination of whether a privilege will exist turns on the facts in each case. Specifically, the facts must establish that, at the time of preparing the specific report or document at issue, the dominant purpose was preparation for litigation. Where some other purpose predominated, the fact that the document ultimately was supplied to counsel for litigation will not suffice to create entitlement to privilege.

Turgeon* v. *City of Edmonton

Turgeon v. *City of Edmonton*, [1986] A.J. No. 147, 72 A.R. 366 (Q.B.) held that investigative reports and witness statements prepared by city employees following a motor vehicle accident involving a municipal transit vehicle were covered by litigation privilege and disclosure could not be compelled. In that case, the City of Edmonton had in place a policy which stated that municipal employees compiling incident reports following an accident were understood to do so for the dominant purpose of providing subsequent assistance to the City Solicitor, if and when a claim should be brought against the City. Berger J. gave the following reasons:

> "I accept without hesitation the notion that a policy declaration of the Defendant, the City of Edmonton, is not determinative of the issue. On the other hand, I must be mindful of the fact that all of the documents sought by the Plaintiff were prepared by City employees. As City employees, they are bound by policy directives enunciated by their employer.

> It is acknowledged that the case at bar involved a serious accident. **It is trite to observe that members of the Alberta community have become increasingly litigious over time. In my opinion, it makes eminent good sense for a responsible City government to contemplate litigation and to instruct its employees accordingly**.
>
> In the result, I need not consider the evidence of Mr. Burwash whatsoever. **I am persuaded, in any event, on the remaining evidence before me that the documents sought were prepared in contemplation of litigation in order to instruct counsel and, as such, are privileged**." [Emphasis added]

Subsequent Authorities

The decision in *Turgeon* has been cited in only a small number of subsequent decisions. In all of those cases, litigation privilege was found to apply, and the reasons for it, as expressed by Berger J. in *Turgeon*, were generally approved of.

However, the cases subsequent to *Turgeon* also emphasize that the test for whether litigation privilege will attach to particular documents is whether the dominant purpose in the mind of the individual preparing them, at the time of preparing them, was in fact that they might be used for litigation. As such, the determination turns on factual elements; there is no rule of law providing a blanket privilege to all investigative documents in all cases.

In *Stobbe* v. *Westfair Foods Ltd. (c.o.b. Superstore)*, 1998 ABQB 267, 220 A.R. 241, Master Funduk described the applicable test, and applied it to an application seeking to compel production by a grocery store of an incident report prepared after a customer slipped and fell on the store premises. Master Funduk stated:

> 14 In Alberta the test is a one part test, not a two part test as in *Hamalainen*.[i] In *Opron Construction* the test is put succinctly in one sentence, p. 62:
>
> > The test is intent of the author or his superiors when he created the document.
>
> 17 In the present lawsuit Ms. Bloomfield [defendant employee] says that the "predominate purpose" of the report is for use in litigation. She was not cross-examined and there is no other evidence to weaken her evidence. Mr. Lister

says that this is an opinion by Ms. Bloomfield. **But why a person does something is a question of fact, not an opinion.**

18 In any event, in *Opron Construction* the witness said that the documents were prepared "for the dominant purpose of" defending litigation and instructing counsel. The chambers judge notwithstanding that, found that the documents were not privileged. In reversing him the Court of Appeal said, p. 61:

> With respect, I disagree with several points there. The affidavit contradicts the fact finding suggested there. It was not cross-examined on. I do not see how one can disregard that affidavit. Nor do the transcripts contradict the affidavit. The two are easily reconcilable, in my view.

I cannot do what the chambers judge had done.

19 **Nobody has said that *Turgeon* v. *Edmonton*, (1986) 72 A.R. 366 (Q.B.) is the wrong approach**.

20 The underlying concern is that expressed in *Opron Construction*, p. 61:

> **In another suit, certain undisputed surrounding facts might create skepticism about a bald statement that some paper was created for the dominant purpose of contemplated litigation**. For example, a department store or bus line might give every employee a pad of blank forms, each bearing a printed self-serving heading: "Incident Report in Contemplation of Litigation".

The same point is commented on in our Civil Procedure Guide 1996, vol. 1, p. 55:

> **The courts have long been suspicious of accident reports by large organizations which are claimed to be for litigation where they may well have been at least as much intended for internal management and discipline**.

No one would disagree with that but **it still comes down to the intention of the Defendant when the report was prepared**. I cannot shunt aside Ms. Bloomfield's evidence merely because Mr. Lister or myself are suspicious.

21 If *Owen*[ii] and *Hewstan*[iii] stand for the proposition that there must be litigation or threatened litigation at the time that the document is prepared I do not agree with them.

> 22 Most businesses are in business to make money. They do not create paper just for the sake of creating paper. There is a reason or reasons to do it. That is where intent comes in. Why do you do it?
>
> 23 If, for example, the unquestioned evidence is that the only reason why a business does an accident report if a customer is injured on its premises is to defend a lawsuit if the customer sues, where is the logic in saying that the report is not privileged because there was not threatened litigation at that time.
>
> 24 The problem arises where there is more than one reason for the creation of the document and one reason is to run possible litigation. **That then requires a weighting of the evidence to determine if the running of possible litigation is the dominant reason for the creation of the document.**
>
> 25 Here Ms. Bloomfield's uncontradicted and unimpeached evidence makes out a case for privilege." [Emphasis added]

The leading decision of *Opron Construction Co*. v. *Alberta*, [1989] A.J. No. 1012, 100 A.R. 58 (C.A.), cited in the above passage, arose in relation to a dispute involving a construction contract, and does not mention *Turgeon*. However, Côté J.A. makes the following useful statements concerning the factual nature of the inquiry in each case:

> "In my view, some modern Canadian cases on litigation privilege just rule on specific fact situations, and establish little or no law or principle. Citing precedent for questions of fact does little good: *The Canada* [1939] W.N. 312 (C.A.); *Smith* v. *Harris* [1939] 3 All E.R. 960, 965 (C.A.). **Some modern cases attempt to find rules of privilege for specific fact situations. For example, they suggest that an accident report not submitted to a solicitor is never privileged; or, that an insurance adjuster always investigates with an open mind; or, that the mere fact of an accident always means that litigation is contemplated; or, that the mere fact of an accident never means that litigation is contemplated. Such attempts appear to me futile; it depends on the facts of the particular case**.
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> […]
>
> In another suit, certain undisputed surrounding facts might create skepticism about a bald statement that some paper was created for the dominant purpose of contemplated litigation. For example, a department store or bus line might give every employee a pad of blank forms, each bearing a printed self-serving heading: "Incident Report in Contemplation of Litigation".
>
> But here the undoubted circumstances did nothing to contradict the facts sworn in the affidavit. There was more than just a gravel problem (which equates to

> the happening of an accident in other privilege cases). There were also two successive claims by the contractor Opron, the second under the formal procedures of the contract. The emphasized word "threatened" in the quotation above is ambiguous. Probably neither claim expressly said that Opron would sue. But if the Government did not voluntarily pay Opron enough money to satisfy Opron, obviously Opron could only sue or give up. If the Government felt that they might not pay enough to satisfy Opron, and that Opron would not give up, then the Government had to contemplate litigation. (See point (b) above.) Opron's argument in effect suggests that the GoverrLment [sic] must have treated Opron's claims as mere bluffs. The contrary facts sworn to in the affidavit are sensible and probable, almost inevitable. […]."

In *Mowat* v. *Canada Safeway Ltd*., [1991] A.J. No. 401, 119 A.R. 335 (Q.B.), Master Funduk again relies on *Opron* and *Turgeon* to find that a store policy requiring employees to prepare an accident report following an injury to a customer supports a finding of privilege over the report:

> "In *Opron Construction* v. *Alberta*, (1990) 100 A.R. 58 (C.A.) the Court states at p. 61:
>
> > In another suit, certain undisputed surrounding facts might create skepticism about a bald statement that some paper was created for the dominant purpose of contemplated litigation. For example, a department store or bus line might give every employee a pad of blank forms, each bearing a printed self-serving heading: "Incident Report in Contemplation of Litigation".
>
> It is correct that at the time the accident report was prepared that litigation had not been threatened, that an action had not been commenced and that there had not been a request by a counsel for a report.
>
> However, the answer is found in *Opron*, p. 62:
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> > The learned chambers judge did not have the benefit of our decision in Miller (Ed) Sales & Rentals Ltd. v. Caterpillar Tractor Co. et al. (No. 1) (1989), 90 A.R. 323; 61 Alta. L.R. (2d) 319 (C.A.), decided since. It also distinguishes starting a claim process from the mere existence of a cause of action. It holds that a person may contemplate litigation when a long formal process respecting that person starts. That is so even if it is only an investigation which may ultimately lead to a civil suit. This Ed Miller decision also points out the evils of denying privilege for papers created when the ultimate danger first appears (pp. 324-326). Trying to create privilege later when the confidences are all out of the stable door, is of little practical use.

…

> For merchants, and other businesses where the public regularly attends, occupier's liability is a fact of business.
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> Here the Defendant has a policy of requiring a store employee to prepare an accident report where a member of the public is injured on the store premises. The purpose of the report is to give to counsel if litigation occurs.
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> This is a *Turgen* v. *Edmonton*, (1986) 72 A.R. 366 (Q.B.) fact situation.
>
> I find that the accident report is Privileged and need not be Produced."

The decision in *Harold* v. *Marmot Basin Ski-Lift Ltd*., 1988 CarswellAlta 478, 94 A.R. 76 (Q.B.), although not making reference to *Turgeon*, is a useful example of circumstances where an accident report was held not to have been prepared for the dominant purpose of litigation. In that case, the defendant ski hill argued that three documents related to the litigation - a ski accident report, an "incident" report, and certain notes made by a witness - were not producible due to solicitor/client privilege. Master Funduk held that although the latter two documents were protected by privilege, the accident report was not. He held as follows:

> "9 Why is the accident report prepared?
>
> > One, to "collect information for general patterns in age ... general statistics related to injuries to skiers throughout western Canada".
> >
> > Two, to submit to the Defendant's insurer because it is a contractual requirement of the Defendant's insurance policy.
>
> 10 **The fact the report *may* be provided to a counsel in the event of litigation is not sufficient. *Nova v. Guelph*, (1984) 50 A.R. 199 (C.A.) makes that clear. It can safely be said that *any* document which may be relevant will be provided by a litigant to his counsel in the event of litigation. That alone is not sufficient**.
>
> 11 **It is possible that litigation may flow from anything. That possibility, using the word in its correct English sense, cannot be used to *mask* the dominant reason for the preparation of a document**.
>
> 12 Darroch's evidence that she "understood" the forms were to be given to the Defendant's legal adviser in the event litigation occurred does not advance

> the Defendant's position. No doubt they will be. As I have already said, **it can be taken as a given that any possibly relevant document will be given by a litigant to his counsel in the event of litigation. That is not sufficient**.
>
> 13 I would not *conclude* that the dominant purpose for the preparation of the accident report was for submission to a legal adviser in the event litigation occurs. The *evidence* does not justify such a conclusion.
>
> 14 The accident report is producible and will be produced." [Emphasis added]

Conclusion

Based on the foregoing authorities, it appears that while the *Turgeon* decision correctly reflects the applicable principles, it does not create a blanket rule supporting the existence of an unqualified privilege over all internal accident or incident reports. Rather, the privilege will only apply where the evidence establishes that the document in question was in fact created for the dominant purpose of preparing for litigation.

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[i] *Hamalainen (Committee of)* v. *Sippola* (1991), 62 B.C.L.R. (2d) 254

[ii] *Owen* v. *Westfair Properties* (1996), 39 Alta. L.R. (3d) 135

[iii] *Hewstan* v. *Westfair Foods Ltd*. (1997), 208 A.R. 304