NOVA SCOTIA COURT OF APPEAL

Citation: ***Sable Offshore Energy Project v. Ameron International Corporation***, 2015 NSCA 8

Date: 20150123
Docket: CA 423135
Registry: Halifax

Between:

Sable Offshore Energy Inc., as agent for and on behalf of the Working Interest Owners of the Sable Offshore Energy Project, Exxonmobil Canada Properties, Shell Canada Limited, Imperial Oil Resources, Mosbacher Operating Ltd., and Pengrowth Corporation; Exxonmobil Canada Properties as operator of the Sable Offshore Energy Project

Appellants

v.

Ameron International Corporation and Ameron B.V.

Respondents

Judges:	Fichaud, Beveridge, Bourgeois, JJ.A.
Appeal Heard:	October 17, 2014, in Halifax, Nova Scotia
Held:	Appeal allowed in part, per reasons for judgment of Bourgeois, J.A.; Fichaud and Beveridge, JJ.A. concurring
Counsel:	Robert G. Belliveau, Q.C. and Kevin Gibson, for the appellants John P. Merrick, Q.C. and Darlene Jamieson, Q.C., for the respondents

Reasons for judgment:

INTRODUCTION

[1] This is an appeal of an interlocutory decision of Justice Suzanne Hood relating to a motion for production brought by the respondents Ameron International Corporation and Ameron B.V. (hereinafter "the respondents" or "Ameron"). That motion was opposed by the appellants Sable Offshore Energy Inc. et al. (hereinafter "the appellants" or "Sable") and several third parties, arguing that numerous documents were protected from disclosure by virtue of privilege.

[2] Without having the benefit of viewing the documents themselves, the chambers judge was tasked with determining whether categories of documents as identified and described by Sable, firstly were relevant and secondly, should be afforded protection against disclosure by virtue of being privileged. In arguing against disclosure, Sable submitted the documents were protected by one or more forms of privilege, namely: solicitor-client privilege, litigation privilege, settlement privilege, common interest privilege and statutory privilege.

[3] In advancing this appeal, Sable takes no issue with the chambers judge's findings regarding relevance, nor solicitor-client privilege. However, virtually every other determination made within the chambers judge's 122 page decision is challenged by Sable (reported at 2013 NSSC 131).

BACKGROUND

[4] The factual background giving rise to the dispute between the parties to this appeal has been canvassed on several prior occasions. It is complex. As opposed to undertaking what could easily amount to a multi-page treatise, I will endeavour to highlight only that salient background as is necessary to put this decision, and that of the chambers judge, in proper context.

[5] The appellants are the owners of the Sable Gas Project, which includes three offshore structures and two onshore gas processing facilities in Goldboro and Point Tupper, Nova Scotia.

[6] The project was constructed by virtue of an Alliance agreement between the appellants and several different contractors, responsible for various aspects of the

fabrication and coating of the facilities. Aspects of this contractual arrangement will be referenced further below.

[7] The painting system used on portions of the Sable facilities was supplied by the respondents and was intended to provide protection against corrosion. The appellants allege that wide spread paint failures arose in relation to both the onshore and offshore facilities.

[8] The present litigation commenced in 2004 with Sable naming as defendants the respondents, along with various contractors involved with the application of the paint coatings. Having settled with all others, the respondents are the remaining parties defending against Sable's claim.

[9] When Sable became aware of the alleged paint failures, it raised its concerns with the Alliance contractors, including exchanging documentation, conducting negotiations, and undertaking a finalization or "close-out" of their contractual relationship as dictated by the Alliance contract.

[10] Sable also approached the insurers of the offshore facilities and onshore facilities in relation to the paint failures, making insurance claims in relation to both. Sable settled, without commencing litigation, its claim with the Offshore Insurers in 2006. In 2009, Sable settled an action taken against the Onshore Insurers.

[11] The respondents seek to have disclosed the documentation exchanged by Sable with the Alliance Contractors, the Onshore Insurers and the Offshore Insurers, which relate to the causation of the paint failure and quantification of potential damages. There has been substantial documentary disclosure made by Sable, but it claims privilege over a number of remaining documents.

[12] Claims for production and disclosure have been ongoing between the parties, including a number of previous motions. One previous order, dated April 30, 2009 is directly relevant to the present matter. Resolved by consent, that order required Sable to produce, subject to claims of privilege: (1) all documents and portions of documents setting out any claims by Sable for compensation from the Alliance Contractors as a result of the coating failures as alleged in the Statement of Claim; and (2) any agreements between Sable and the Alliance Contractors and all documents relating to any agreements between Sable and the Alliance Contractors which would describe how claims relevant to the coating failures were addressed, and any settlement or release of such claims.

[13] The respondents were not satisfied with the disclosure made pursuant to the above order, in particular, Sable's claim of privilege over a number of documents which had been exchanged with the Alliance Contractors. The respondents were similarly dissatisfied with the disclosure received in relation to materials exchanged with the Insurers. As a result, the respondents filed the motion now subject to appeal, on April 18, 2011.

[14] Originally seeking production of nine categories of documents, this was reduced to five before the chambers judge. The remaining categories of disclosure sought were as follows:

> Ameron International Corporation and Ameron B.V., Defendants in this proceeding, move for an Order that the Plaintiffs:
>
> 1. Identify all documents relevant to the provisions of paragraphs (a) and (b) of the Order dated April 30, 2009 for which production has not been made by providing a short description of each document, by identifying the receiver and sender, their status and relationship to the parties and providing a statement of the grounds of privilege or other reason for non production sufficient to identify the justification for non production.
> 2. Produce all documents relevant to the placement of insurance coverage on the project, the scope of such coverage and the entities which came, or were intended to come, within the scope of such insurance coverage, including documents relating to coverage for any of the settled defendants.
>
> . . .
>
> 4. Produce all relevant factual evidence including surveys, interviews, reports, observations, photographs, videos, test measurements or results including all factual evidence from experts, provided to or received from any of the insurers involved in the Project and their adjusters.
> 5. Produce all documents relating to any claims by the plaintiffs for coverage or indemnity under any insurance coverage relating to the project but excluding evidence of the amount of any recovery, payout or benefits received by the plaintiffs from any insurance coverage relating to the project.
>
> . . .
>
> 9. Identify all relevant documents for which production is not made by providing a short description of each document by identifying the receiver and sender, their status and relationship to the parties and provide a statement of the grounds of privilege or other reason for non production sufficient to identify the justification for non production.

[15] Sable resisted further disclosure, arguing all of the remaining documentation and material is protected by one or more forms of privilege.

[16] The parties agreed that the 1972 *Civil Procedure Rules* applied to the motion.

The Chambers Decision

[17] On the motion, the chambers judge had before her a number of affidavits. There was no cross-examination. It is helpful at this juncture to briefly review the evidence most salient to this appeal.

[18] The respondents' motion for disclosure was supported by the affidavit of their counsel, Darlene Jamieson, Q.C., sworn June 13, 2011. Ms. Jamieson referenced numerous documents already disclosed, in support of the relevancy of the withheld documentation. Further, by referencing various exhibits, she outlined concerns with respect to the evidence provided by the appellant in relation to the privileges claimed.

[19] Sable, as well as the Offshore and Onshore Insurers, filed affidavits in opposition to the motion. These included:

a) Affidavit of Glenn Davis, sworn January 16, 2012

[20] Mr. Davis deposed that he was a Senior Insurance Advisor for ExxonMobil Canada Limited, and as such has been involved, on behalf of Sable, in all construction insurance claims brought to both the Onshore and Offshore Insurers. He described his involvement in discussions with the Offshore Insurers "commencing in mid 2003" to resolve coverage issues. Further, he described a meeting held in July of 2003 where Sable exchanged information with the Offshore Insurers in an attempt to persuade them to positively respond to the claim. The claim was settled in April of 2006.

[21] Mr. Davis further referenced ongoing discussions with the Onshore Insurers, including exchange of documentation. The claim was denied on July 7, 2003, with Sable commencing a lawsuit against the Onshore Insurers on August 11, 2003. Common Interest Privilege Agreements were entered into by Sable with each of the insurers.

[22] Exhibited to Mr. Davis' affidavit were tables describing the documents Sable exchanged with the insurers and over which privilege was claimed. Attached as Exhibit "B" was a table listing 144 documents "generated, sent or received in relation to settlement negotiations and discussions with the Offshore

Insurers, or their representatives". Exhibit "D", a list of 26 documents, purporting to be items "generated, sent or received in relation to settlement negotiations and discussions with the Onshore Insurers, or their representatives".

b) Affidavit of David Strand, affirmed January 17, 2012

[23] Mr. Strand deposed that he has acted as legal counsel for Sable, particularly in relation to issues arising from the agreement with the Alliance contractors. He described the process contemplated in the Alliance Agreement for finalizing all outstanding issues between the parties in order to close-out the agreement. This included a mandatory mediation process to assist in resolving any outstanding differences.

[24] Mr. Strand described how the coating failures impacted upon close-out discussions, eventually proceeding to mediation. After mediation efforts collapsed in May 2002, Mr. Strand asserted "the Sable Owners contemplated litigation against the Alliance Contractors, sub-contractors and suppliers, with regard to outstanding issues, including the coating failure issue". He also asserted he retained experts in June 2002, "the purpose of which was to obtain expert information and opinions concerning the coating failures on the Sable Project". These expert opinions were also utilized in relation to the claims made to the Onshore and Offshore Insurers.

[25] There are five tables attached to Mr. Strand's affidavit, itemizing documents over which various forms of privilege are claimed. They are described as follows:

- Exhibit "A" lists 420 documents and is "a list of documentation generated, sent or received, in relation to potential litigation referenced in the preceding paragraphs";
- Exhibit "C" lists 125 documents, which purport to be "documents which were received by the Sable Owners from the Offshore Insurers pursuant to the terms of the Common Interest Privilege Agreement . . . plus documents generated by or on behalf of the Sable Owners which refer to information contained within documents received from the Offshore Insurers";
- Exhibit "E", a list of three documents, is stated to be material received, or generated as stated in Exhibit "C" but in relation to the Onshore Insurers;
- Exhibit "F", a list of 44 items, purports to be "documents which were received by the Sable Owners from the Alliance Contractors pursuant to

their common interest privilege, plus documents generated by or on behalf of the Sable Owners, which refer to information contained within documents received from the Alliance Contractors"; and

- Exhibit "H", a list of 174, purports to be "documentation generated, sent or received by the Sable Owners, in relation to without prejudice settlement negotiations with the Alliance Contractors between May 2001 and July 2006".

c) Affidavit of J. Gregory MacDonald, sworn January 18, 2012

[26] Mr. MacDonald deposed that he was the Environment and Regulatory Supervisor for ExxonMobil Canada Ltd., and in that capacity has the "responsibility for interfacing with the Canada – Nova Scotia Offshore Petroleum Board (CNSOPB), and the National Energy Board (NEB) on regulatory matters".

[27] He swore that pursuant to legislation, Sable was required to provide certain documentation to both the CNSOPB and the NEB. He attached a list of 11 documents "generated, circulated internally, sent or received in relation to information documentation sent to or received from the CNSOPB and NEB".

d) Affidavit of Barry Kirkham, sworn March 9, 2012

[28] Mr. Kirkham is a lawyer. He deposed he was retained "shortly after August 9, 2002" to represent the Onshore Insurers in relation to Sable's insurance claim. He described that "after August 9, 2002" his client appointed adjusters to investigate the claim, who were instructed to report to him "as it was anticipated the claim was likely to be denied and was likely to be litigated".

[29] Mr. Kirkham advised that the Onshore Insurers denied the claim on July 7, 2003 and an action was commenced by Sable against his clients on August 11, 2003. A Common Interest Privilege Agreement was entered into with Sable on October 13, 2004.

[30] Mr. Kirkham swore that pursuant to the above agreement he "forwarded documentation to and received documentation from David Strand, of counsel for the Sable Owners". That documentation was listed in Exhibit "B" which Mr. Kirkham deposed included materials "sent, presented or received in relation to settlement negotiations" with Sable. Exhibit "B" lists 17 items.

e) Affidavit of Elizabeth Jane Andrewartha, sworn May 21, 2012

[31] Ms. Andrewartha is a British solicitor who was engaged to represent the Offshore Insurers in relation to the Sable claim. Her retainer commenced in October of 2002. Ms. Andrewartha deposed that "BCL" were appointed adjusters to investigate the Sable claims, and "given the matter was in contemplation of legal proceedings", they reported to her.

[32] Ms. Andrewartha further deposed that "[f]rom mid 2003" her clients "were engaged in discussions and negotiations with Sable concerning the nature and cause of the coating failures". She swore that litigation "seemed likely at that stage". She referenced a Common Interest Privilege Agreement entered into with Sable and her clients on August 15, 2003.

[33] She further deposed "[f]rom July 2003 forward, there were communications, presentations and discussions with the Offshore Insurers including BCL and Sable's counsel, attempting to resolve coverage issues and eventually the amount of the claim". The claim was resolved in February 2006.

[34] Attached to the affidavit was an exhibit outlining 126 items. Ms. Andrewartha deposed they are documents "currently held by the Plaintiffs . . . for which they assert privilege".

[35] It is worthy of repeating that the chambers judge did not have the actual documents in question. Given the sheer number of documents and the multiple categories of privilege being raised amongst multiple parties, the chambers judge was faced with a daunting task. Undoubtedly having only tables in which the various documents were itemized with varying degrees of specificity, added to the challenge of attempting to address whether any, all, or some were protected from disclosure.

[36] After considering the law, evidence and submissions of the parties, the chambers judge found as follows with respect to the documents exchanged between Sable and the Alliance Contractors (Category 1 on the motion):

- The evidence failed to establish that there was a reasonable prospect of litigation between Sable and the Alliance Contractors, and as such, litigation privilege was not established;
- The evidence in her view, did not establish the pre-conditions for settlement privilege;

- Because they were adverse in interest, documents exchanged during the "close-out" process would not attract common interest privilege. The chambers judge did recognize that Sable and the Alliance Contractors may have a common interest in pursuing third parties, and for a common interest privilege to apply in such circumstances, the document must first be privileged in the hands of the party providing it and must "specifically refer to the joint position [chambers judge's underlining] of the Sable Owners and the Alliance Contractors against the third parties" (paras. 243 through 252).

[37] Categories 4 and 5 on the motion addressed materials exchanged between Sable and the Offshore and Onshore Insurers respectively. With respect to the documentation exchanged with the Offshore Insurers, the chambers judge found as follows:

- No action had ever been commenced, nor was coverage denied in relation to the insurance claim made by Sable under the policy with the Offshore Insurers. Although there was evidence that litigation between the two "seemed likely", such was not sufficient to meet the onus to establish litigation privilege;

- Noting Sable's insurance claim with the Offshore Insurers settled in February 2006, it was acknowledged that a "litigious dispute", a necessary element to give rise to settlement privilege was present. Given the evidence before the court was insufficient to establish when that dispute arose, the appellant's claim of settlement privilege was rejected;

- Any documentation exchanged in relation to the insurance claim was not protected by common interest privilege, as Sable and the Offshore Insurers were adverse in interest;

- The door was kept open in relation to a common interest privilege applying to other documents exchanged between Sable and the Offshore Insurers, if they were exchanged in furtherance of a joint interest in pursuing third parties, and "[t]here must be something specific in the document which clearly shows Sable and the insurers were jointly dealing with pursuing third parties" (see paras. 268 through 287).

[38] With respect to the documentation exchanged with the Onshore Insurers, the chambers judge found as follows:

- Having found that there was no reasonable contemplation of litigation with the Onshore Insurers until July 7, 2003, documentation created and exchanged prior to that time was not protected by litigation privilege;

- Of those documents exchanged after July 7, 2003, only those created for the dominant purpose of litigation would be subject to litigation privilege;

- The court accepted that some of the documents exchanged between Sable and the Onshore Insurers may be protected by settlement privilege but three pre-conditions must exist: (1) a litigious dispute was in existence or in contemplation when the document was created; (2) the communication was made with the expressed or implied intention that it would not be disclosed to the court if negotiations failed; and (3) the purpose of the communications was to attempt to effect a settlement; and

- As with the Offshore Insurers, no common interest privilege would arise over documentation exchanged in relation to the insurance claim made to the Onshore Insurers. Exchanged documents would only attract common interest privilege if they were otherwise privileged in the hands of the party providing it, and "[t]here must be something specific in the document which clearly shows Sable and the insurers were jointly dealing with pursuing third parties" (see paras. 258 through 267).

[39] With respect to certain documents falling in Category 9, Sable argued that statutory privilege should prevent their disclosure. These documents were those purportedly provided pursuant to the *Canada-Nova Scotia Offshore Petroleum Resources Accord Implementation Act*, S.C. 1988, c. 28 and the *Canada-Nova Scotia Offshore Petroleum Resources Accord Implementation (Nova Scotia) Act*, S.N.S. 1987, c. 3. The chambers judge determined there was a lack of evidence to establish that the documents were provided pursuant to the statutory requirements and as such, no statutory privilege arose. However, she kept open the possibility that the documents could be subject to litigation privilege "if the dominant purpose for their creation was contemplated or actual litigation" (see paras. 161 and 162).

[40] The chambers judge's decision was incorporated into an order issued November 28, 2013.

ISSUES

[41] The parties have framed the issues in slightly different ways. I find it helpful to structure the issues before the Court as follows:

1. With respect to documents exchanged between Sable and the Alliance Contractors, did the chambers judge err by:
   (a) finding no litigation privilege;
   (b) finding no settlement privilege;
   (c) incorrectly defining and applying the test for common interest privilege?
2. With respect to documents exchanged between Sable and the Offshore Insurers, did the chambers judge err by:
   (a) finding no litigation privilege;
   (b) finding no settlement privilege;
   (c) incorrectly defining and applying the test for common interest privilege?
3. With respect to documents exchanged between Sable and the Onshore Insurers, did the chambers judge err by:
   (a) finding litigation privilege only arose in relation to documentation exchanged after July 7, 2003;
   (b) incorrectly defining and applying the test for common interest privilege?
4. With respect to the documents over which statutory privilege is claimed, did the chambers judge err by incorrectly applying the test for assessing such claims?

STANDARD OF REVIEW

[42] Several standards of review were proposed to the Court. The standard as outlined in **Housen v. Nikolaisen**, 2002 SCC 33 applies here. The fact that the appeal is from an interlocutory decision does not automatically trigger a different approach. In **Innocente v. Canada (Attorney General)**, 2012 NSCA 36, Fichaud, J.A. succinctly explains:

> [22] As Justice Matthews said in *MacCulloch* [*MacCulloch v. McInnes, Cooper & Robertson* (1995), 140 N.S.R. (2d) 220 (C.A.)] (para 56), the standard of review for patent injustice applies only to discretionary rulings. Non-discretionary rulings, including those that are interlocutory, are subject to the Court of Appeal's normal standard of review: correctness for extractable issues

> of law, and palpable and overriding error for issues of either fact or mixed fact and law with no extractable legal error.

[43] Whether documents are relevant is not a discretionary decision. Further, whether documents are protected from disclosure due to the existence of one form of privilege or another, is also not discretionary. It is a determination based upon applying legal principles to the facts determined from the evidence. As such, in reviewing the chambers judge's conclusions on Issues 1 through 3, they will be reviewed through the lenses of correctness and palpable and overriding error. With respect to Issue 4, the exercise of statutory interpretation is a question of law that attracts a correctness standard of review (**R. v. Carvery**, 2012 NSCA 107, para. 31).

ANALYSIS

1. Documents exchanged between Sable and the Alliance Contractors

[44] In their factum, the appellants write:

> 2. ... The Appellants appeal from the Learned Chambers Judge's decision and allege errors in the Learned Chambers Judge's statement and application of the law applying to the various forms of privilege claimed, as well as errors in the Learned Chambers Judge's fact finding process.

[45] Having carefully considered the appellants' submissions, there does not appear to be a challenge to the chambers judge's statements of the law pertaining to either litigation or settlement privilege. In several instances, the appellants quote in support of their argument, the cases and principles cited by the chambers judge. I take no issue with the principles of law as articulated by the chambers judge in relation to either litigation or settlement privilege.

[46] As her ultimate factual findings are made within the framework of these principles, it is helpful to briefly review them.

[47] At paragraph 58 of her decision, the chambers judge adopts the definition and scope of the litigation privilege rule as outlined in *The Law of Privilege in Canada*, (Canada Law Book, 2012) including the following:

> 12.10 – SUMMARY OF THE LITIGATION PRIVILEGE RULE
>
> Litigation privilege, also called work product privilege, applies to communications between a lawyer and third parties or a client and third parties, or

> to communications generated by the lawyer or client for the dominant purpose of litigation when litigation is contemplated, anticipated or ongoing. Generally, it is information that counsel or persons under counsel's direction have prepared, gathered or annotated.
>
> . . .
>
> Information sought to be protected by litigation privilege must have been created for the dominant purpose of use in actual, anticipated or contemplated litigation.
>
> . . .
>
> The elements required in order to claim work product or litigation privilege over documents or communications are as follows:
>
> - the documents or communications must be prepared, gathered or annotated by counsel or persons under counsel's direction;
> - the preparation, gathering or annotating must be done in anticipation of litigation;
> - the documents or communications must meet the dominant purpose test;
> - the documents, or the facts contained in the documents, need not be disclosed under the legal rules governing the proceedings; and
> - the document or facts have not been disclosed to the opposing party or to the court.
>
> The document in question must have been prepared for realistically anticipated litigation. While anticipated litigation does not have to be the sole purpose – as that would impose too strict a requirement – if there is more than one purpose or use for the document then the factual determination should reveal that the dominant purpose was for the anticipated litigation. The dominant purpose is to be assessed at the time at which the document is created.
>
> The anticipated litigation must be real – not a possibility or suspicion.
>
> The party claiming privilege has the onus of establishing its right to privilege. The claim should be supported by affidavit evidence providing sufficient facts and grounds for each claim of privilege.

[48] The chambers judge goes on to consider how litigation privilege has been considered in this province, including by this Court in **Mitsui & Co. (Point Aconi) Ltd. v. Jones Power Co. Ltd.**, 2000 NSCA 96. She wrote as follows:

> [70] One of the issues addressed in that case was when the litigation was contemplated. Roscoe, J.A. cited with approval the statement of Davison, J. in *Ford Motor Company, supra*. She said in paragraph 25:

> **25.** I would agree with the statement made by Davison J. in Ford Motor Company of Canada Ltd. et al v. Laconia Holdings Ltd. (1991), 108 N.S.R. (2d) 416 where he said:
>
> > ... there must be definite prospect of litigation before it can be said that litigation was contemplated. There cannot be a vague anticipation of litigation and in that respect I refer to Cross On Evidence (5th Ed.), p. 284 and Phipson on Evidence (13th Ed.), at p. 303.

[49] She further referred to the decision of Scanlan, J. (as he then was) in **Di-Anna Aqua Inc. v. Ocean Spar Technologies L.L.C.**, 2002 NSSC 138, as follows:

> [75] In *Di-Anna, Aqua, supra,* Scanlan, J. referred to the onus and the evidence necessary to support the privilege claim. He said in paragraph 6:
>
> > **6** The onus of proving privilege rests on the individual claiming privilege. In this regard I refer to Gouthro Estate v. Canadian Indemnity Company (1990), 88 N.S.R. (2d) 264 (T.D.). It is incumbent upon the Respondent in this case to produce through affidavit, evidence in support of the privilege claim. The affidavit should recite not only a claim or assertion that the communications consist of privileged materials but it must also refer to the content of the materials to the extent necessary to establish a privilege claim. In other words any affidavit should identify the nature and purpose of the communications ...
>
> [76] After stating that the question in that case was determining what was the dominant purpose in producing the documents in issue, he said in paragraph 8:
>
> > **8** The dominant purpose test applies, not only to communications as between solicitor/client but also to derivative evidence. This is noted in Manes and Silver, The Solicitor Client Privilege in Canadian Law, at page 90:
> >
> > > Derivative communications will be privileged only if made for the dominant purpose of reasonably contemplated litigation. This is particularly important where a dual purpose or multitude of purposes exists behind the creation of communications, as often occurs with a corporate client.
> > >
> > > While the communication need not specifically state that it relates to contemplated litigation, it must implicitly contemplate litigation. The intention of the actual composer of the communication is not solely relevant – the origin of the communication and accordingly the intention of the person under whose authority it was made is also relevant.

> The entire communication must be prepared for the dominant purpose of litigation.

[50] With respect to when litigation privilege ends, the chambers judge relied upon **Blank v. Canada (Minister of Justice)**, 2006 SCC 39 wherein Fish, J. noted:

> 34 The purpose of the litigation privilege, I repeat, is to create a "zone of privacy" in relation to pending or apprehended litigation. Once the litigation has ended, the privilege to which it gave rise has lost its specific and concrete purpose — and therefore its justification. But to borrow a phrase, the litigation is not over until it is over: It cannot be said to have "terminated", in any meaningful sense of that term, where litigants or related parties remain locked in what is essentially the same legal combat.
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> …
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> 38 As mentioned earlier, however, the privilege may retain its purpose — and, therefore, its effect — where the litigation that gave rise to the privilege has ended, but related litigation remains pending or may reasonably be apprehended. In this regard, I agree with Pelletier J.A. regarding "the possibility of defining . . . litigation more broadly than the particular proceeding which gave rise to the claim" (para. 89); see *Ed Miller Sales & Rentals Ltd. v. Caterpillar Tractor Co.* (1988), 90 A.R. 323 (C.A.).
>
> 39 At a minimum, it seems to me, this enlarged definition of "litigation" includes separate proceedings that involve the same or related parties and arise from the same or a related cause of action (or "juridical source"). Proceedings that raise issues common to the initial action and share its essential purpose would in my view qualify as well.

[51] With respect to settlement privilege, the chambers judge relied heavily upon the principles outlined by Justice Bryson in **Brown v. Cape Breton (Regional Municipality)**, 2011 NSCA 32, in which the theoretical foundation for the privilege was explored in detail. She specifically noted and adopted the requisite conditions to give rise to settlement privilege, as outlined by Bryson, J.A. at paragraph 30 of **Brown**, as follows:

> [30] It is generally accepted that there are three conditions that must be met to attract settlement privilege:
>
> (1) A litigious dispute must be in existence or in contemplation;
>
> (2) The communication must be made with the express or implied intention that it would not be disclosed to the court in the event that negotiations failed;

> (3) The purpose of communication must be to attempt to effect a settlement.
>
> (per *Sopinka*, at para. 14.322)

Did the chambers judge err by finding no litigation privilege?

[52] As noted above, I am satisfied the chambers judge identified the correct legal principles with respect to how litigation privilege arises. In her decision, she instructed herself as to those principles, and applied them to the evidence before her, most notably that provided by Mr. Strand.

[53] The chambers judge noted his evidence that litigation was contemplated against the Alliance Contractors in May, 2002 after mediation talks ended and that efforts aimed at resolving outstanding issues continued "off again on again" until 2006, when settlement was ultimately reached.

[54] The chambers judge noted that the discussions taking place were in the context of Sable's and the Alliance Contractor's contractually mandated obligation to utilize mediation efforts to close-out the agreement. She noted that settlement agreement reached in 2006 with the Alliance Contractors specifically references in its recitals to "closing out the Alliance Agreement ...".

[55] The chambers judge was, after this evidentiary review, not satisfied that there was a reasonable prospect of litigation between Sable and the Alliance Contractors at any time, rather the above efforts were part of the contractually mandated conclusion of their obligations to each other. As such, no litigation privilege arose over documentation exchanged between them.

[56] The factual determinations made by the chambers judge are to be afforded deference. She considered the evidence, assessed it in light of the entirety of the context, and reached a conclusion. The appellant has not satisfied me that her finding amounts to a palpable and overriding error.

Did the chambers judge err by finding no settlement privilege?

[57] I am satisfied the chambers judge identified the correct legal principles with respect to how settlement privilege arises, most notably the three pre-requisites as set out in **Brown**.

[58] In considering the evidence, the chambers judge again referenced the existence of the contractual relationship and the terms between Sable and the Alliance Contractors, which "required them to agree upon the deficiencies at the end of the contract". She found that although there was a dispute being negotiated, it was being done within the context of their contractual obligations. She was not satisfied that the dispute had risen to a "litigious dispute", a necessary pre-requisite for settlement privilege to arise.

[59] The chambers judge made a finding that the negotiations between Sable and the Alliance Contractors was not "litigious" in nature based upon the evidence before her. Given the entirety of the materials before me, I am not satisfied that such constitutes a palpable and overriding error.

Did the chambers judge err by incorrectly defining and applying the test for common interest privilege?

[60] The appellants' position in relation to the chambers judge's determinations regarding the claims of common interest privilege is succinctly set out in their factum as follows:

> 64. The Learned Chambers Judge incorrectly applied the test for establishing common interest privilege by ruling that the *content* of the document was determinative of whether common interest privilege could be established, rather than the *relationship* of the parties exchanging it. The Learned Chambers Judge's ruling is inconsistent with the purpose of common interest privilege and the test for establishing it set down by the authorities, and should be set aside by this Court. (Emphasis by appellant)

[61] With respect to the test for establishing common interest privilege, the appellants submit as follows:

> 65. With respect to each claim of common interest privilege made by the Appellants, the Learned Chambers Judge ruled that common interest privilege could only be established if the document in question was already the subject of a claim of privilege in the hands of the party providing it.
>
> . . .
>
> The Appellants submit that the basic test for establishing common interest privilege is simply stated as follows: common interest privilege will apply where parties with a common interest in actual or contemplated litigation exchange privileged information regarding the matter in which they have a common interest. Where common interest privilege applies, the privileged document will retain its protected status notwithstanding the exchange.

[62] The chambers judge undertook a thorough review of the case authorities outlining the creation and nature of common interest privilege. The foundation of her analysis arises from a definition provided by Lord Denning. At paragraph 116 of her decision the chambers judge writes:

> [116] As Denning, L.J. said in *Buttes Gas and Oil Co. v. Hammer* (No. 3), [1981] Q.B. 223 (C.A.) at p. 243:
>
> > . . . There is a privilege which may be called a 'common interest' privilege. That is a privilege in aid of anticipated litigation in which several persons have a common interest. It often happens in litigation that a plaintiff or defendant has other persons standing alongside him – who have the self-same interest as he – and who have consulted lawyers on the self-same points as he – but these others have not been made parties to the action. Maybe for economy or for simplicity or what you will. All exchange counsel's opinions. All collect information for the purpose of litigation. All make copies. All await the outcome with the same anxious anticipation – because it affects each as much as it does the others. Instances come readily to mind. Owners of adjoining houses complain of a nuisance which affects them both equally. Both take legal advice. Both exchange relevant documents. But only one is a plaintiff.
> >
> > An author writes a book and gets it published. It is said to contain a libel or to be an infringement of copyright. Both author and publisher take legal advice. Both exchange documents. But only one is made a defendant.
> >
> > In all such cases I think the courts should – for the purposes of discovery – treat all the persons interested as if they were partners in a single firm or departments in a single company. Each can avail himself of the privilege in aid of litigation. Each can collect information for the use of his or the other's legal adviser. Each can hold originals and each make copies. And so forth. All are the subject of the privilege in aid of anticipated litigation, even though it should transpire that, when the litigation is afterwards commenced, only one of them is made a party to it. No matter that one has the originals and the other has the copies. All are privileged.

[63] The above passage has been previously endorsed by this Court (see **Mitsui** at para. 51). I find no fault with the chambers judge's articulation of the law.

[64] Turning to the matter before her, the chambers judge found that documents exchanged between Sable and the Alliance Contractors as part of the close-out process which had been otherwise privileged, could not be afforded protection from disclosure by way of common interest privilege. This determination was

based upon the chambers judge's conclusion that Sable and the Alliance Contractors were adverse in interest in that process. As such, when documents were disclosed between the two, any pre-existing privilege had been waived. Given the law and evidence before her, I see no reason to interfere with the chambers judge's conclusion in this regard.

[65] The chambers judge did not however, end her analysis at that point. She was mindful that Sable and the Alliance Contractors may have a joint interest in pursuing third parties for their losses, and that documentation may have been exchanged in relation to those pursuits. She writes:

> [252] Therefore, where any documents otherwise to be disclosed relating to the close-out of the contract specifically refer to the joint position of the Sable Owners and the Alliance Contractors against the third parties, those documents are protected by a common interest privilege. (Emphasis by chambers judge)

[66] While I do not take issue with the chambers judge's recognition of the potential for common interest privilege to arise where Sable and the Alliance Contractors have exchanged documents in the shared pursuit of a third party, with respect, her requirement that the document itself reference the joint endeavour in order to be protected by common interest privilege, is unduly restrictive and constitutes an error of law. If applied, the chambers judge's requirement could result in documents entitled to being considered privileged, being disclosed.

[67] I will provide an example which may illustrate the type of problem which could arise with the application of the chambers judge's document based approach. In 2008, two adverse parties settle a litigious dispute. They together now decide to seek recovery from a third party to re-coup their respective losses. To facilitate that effort, one party shares with the other a previously undisclosed opinion it had received in 2005 from an expert for the purposes of the now settled litigation. Clearly, one would not necessarily expect to see in that 2005 report statements which "specifically refer to the joint position [chambers judge's underlining]" of the then feuding parties, against their now common foe.

[68] The chambers judge's requirement that the privilege be founded in the content of the document itself, would in some instances, create an injustice. Although shared documents may very well reference a joint position against a common adversary, such is not a determining factor to finding a common interest privilege. Rather, the law, properly applied, would require the party claiming common interest privilege to establish that the document was shared for the clear

intent of pursuing a common adversary. It is the *reason* the document is exchanged which should be determinative as to whether a common interest privilege arises, not its particular contents.

[69] In my view, the chambers judge's direction must be modified to reflect the above purposive approach to determining whether a common interest privilege arises over documents Sable and the Alliance Contractors exchanged in their joint pursuit of third parties. The correct approach is to direct that only where it is clearly established that the documents were exchanged in furtherance of a joint interest against a third party, and the documents were also otherwise privileged, does a common interest privilege arise.

2. Documents exchanged between Sable and the Offshore Insurers

Did the chambers judge err by finding no litigation privilege?

[70] As noted earlier herein, I take no issue with the legal principles stated by the chambers judge in relation to litigation privilege.

[71] In considering the evidence before her, the chambers judge noted that no legal action had been commenced by Sable against the Offshore Insurers. She further found that the claim for coverage was not denied by the Offshore Insurers.

[72] The chambers judge observed, correctly, that the "onus is on the party asserting privilege to establish it". She reviewed the statements contained within the affidavits of Mr. Strand and Ms. Andrewartha, and concluded as follows:

> [275] There is nothing in the evidence which satisfied me that litigation was ever reasonably contemplated against the Offshore Insurers. Coverage was not denied. There were negotiations with respect to coverage issues and with respect to the amount claimed.
>
> [276] Elizabeth Jane Andrewartha says litigation must be in reasonable contemplation for there to be litigation privilege but does not say that was the case. She simply says it "seemed likely" after mid 2003. In my view, that is insufficient. I do not accept the two phrases to be synonymous.
>
> [277] Nor has counsel for Sable at the relevant times, David Strand, been more helpful. He refers to contemplated litigation in para. 13 of his Affidavit, quoted above, but does not mention contemplated litigation against the insurers.
>
> [278] I conclude the onus has not been met to satisfy me that litigation privilege applies.

[73] The appellants submit that the chambers judge erred in not accepting the unrefuted evidence of counsel that litigation was reasonably contemplated, arguing their affidavits are abundantly clear that such was the case. With respect, the fact that an affiant is not challenged, does not require a trier of fact to accept their evidence or the submitted interpretation of their evidence. The trier of fact is entitled to accept some, all, or none of the evidence offered by a particular witness.

[74] Here, the chambers judge was entitled to consider the evidence presented as to whether litigation was reasonably contemplated, and determine whether she was satisfied such was the case. She determined the onus was not met by the appellants based on her consideration and weighing of the evidence. It is not the function of this Court to re-consider and re-weigh the evidence considered by the chambers judge. I am not satisfied the chambers judge committed a palpable and overriding error justifying appellate intervention.

Did the chambers judge err by finding no settlement privilege?

[75] I take no issue with the chambers judge's articulation of the legal principles relating to settlement privilege. I do, however, have concern with how such were applied to the case at hand.

[76] The chambers judge noted that a settlement had been reached between Sable and the Offshore Insurers in February 2006. She accepted that based on the fact that a settlement had been reached, there must have been, at some point earlier, a "litigious dispute". As the chambers judge was unable on the evidence before her to determine when that litigious dispute arose, she dismissed the claim of settlement privilege.

[77] Unlike in other aspects of the decision where the chambers judge found insufficient evidence to give rise to a privilege, here, it appears as if she were prepared to accept by virtue of a settlement having been achieved, that settlement privilege would have arisen at some point. In dismissing the claim for privilege because the evidence was insufficient to establish when it arose, with respect, the chambers judge erred.

[78] Settlements of course, do not simply materialize. There is always the advancing of positions, negotiations and often, the sharing of information in pursuit of the deal. Such information would be protected against subsequent disclosure by settlement privilege. As a result of the chambers judge's decision on this issue, it is likely that documents which would fall into the type described

above, will be disclosed. Such is an outcome which, in my view, justifies appellate intervention.

[79] After reviewing the record, I agree with the chambers judge's conclusion that there was insufficient evidence to establish when the litigious dispute arose. But clearly, as accepted by the chambers judge, a litigious dispute did arise at some point. I am mindful that a party claiming privilege clearly has the onus of establishing it. I am also of the view that the evidence offered by Sable was deficient to pinpoint **when** the privilege arose, but it was sufficient to establish that a privilege **had** arisen. With respect, the chambers judge should have considered other options to resolving this issue, as opposed to rendering an order that would serve to permit disclosure of privileged documentation. Her failure to do so when the privilege had been established, constituted an error of law.

[80] The dismissal of the claim of settlement privilege should be set aside, and returned to the chambers judge for re-consideration.

> *Did the chambers judge err by incorrectly defining and applying the test for common interest privilege?*

[81] As noted earlier, the chambers judge correctly identified the legal principles whereby a claim of common interest privilege may arise.

[82] The chambers judge concluded that because Sable and the Offshore Insurers were adverse in interest, documents exchanged between them dealing with the insurance claims were not protected by common interest privilege, and as such, if privileged documents had been exchanged, the privilege was waived. Nothing before the Court convinces me such a determination constitutes an error of law or gives rise to a palpable and overriding error.

[83] The chambers judge however, again went further with her analysis. She wrote:

> [284] Any documents which clearly deal with the common position of Sable and the insurers against third parties can be protected by common interest privilege. The distinction may be difficult to draw. That does not mean it is not to be done. As I said above, with respect to the common interest privilege between Sable and the Alliance Contractors, vague references to third parties are not sufficient. There must be something specific in the document which clearly shows Sable and the insurers were jointly dealing with pursuing third parties. The documents, as I have said above, must be documents which are first privileged in the hands of the

> party providing them. Waiver of privilege would therefore not occur. Non-privileged documents provided do not obtain privileged status by virtue of providing them to another party, even one with whom there is a common interest against third parties.

[84] In my view and as explained earlier, the chambers judge erred by focusing on the content of the document, as opposed to the purpose of its exchange (see paras. 66-69). The correct approach is to direct that only where it is clearly established that documents were exchanged in furtherance of a joint interest against a third party, and the documents are otherwise privileged, does common interest privilege arise.

3. Documents exchanged between Sable and the Onshore Insurers

Did the chambers judge err by finding litigation privilege only arose in relation to documentation exchanged after July 7, 2003?

[85] The evidence before the chambers judge established that Sable commenced legal action against the Onshore Insurers on August 11, 2003. That action followed the Onshore Insurers denying a claim made by Sable for coverage on July 7, 2003. That claim under the policy had been made on August 9, 2002.

[86] The chambers judge considered the evidence of Sable's legal counsel Mr. Strand that litigation had been contemplated in "early 2002", noting:

> [261] Although David Strand would have me accept a date sometime in early 2002 as the date on which litigation was contemplated, a claim on the policy with the Onshore Insurers was not even made until August 2002. I conclude that until that claim was denied in July 2003, there was no reasonable contemplation of litigation.

[87] Sable carried the onus of establishing litigation privilege as claimed. Clearly, the chambers judge did not accept Mr. Strand's blanket statement that litigation was contemplated in early 2002 as sufficient to meet that onus. She was entitled to weigh and consider that testimony within the context of all the evidence. I am not satisfied that the chambers judge's conclusion that documents exchanged between Sable and the Onshore Insurers prior to July 7, 2003 were not subject to litigation privilege, constitutes a palpable and overriding error.

> *Did the chambers judge err by incorrectly defining and applying the test for common interest privilege?*

[88] The chambers judge instructed herself as to the correct principles of law. She also correctly, in my view, found that as Sable and the Onshore Insurers were adverse in interest as it related to the insurance claim, documents exchanged in relation thereto could not be protected by common interest privilege.

[89] As with the previous two parties, the chambers judge recognized Sable may have a shared interest with the Onshore Insurers in pursuing third parties which could give rise to common interest privilege over documents exchanged for that purpose. She writes:

> [266] Documents exchanged, the dominant purpose of which was pursuit of claims against third parties, including these defendants, are protected by common interest privilege. As with the Alliance Contractors document exchange, a vague reference to third parties is not sufficient. There must be evidence of a joint position against third parties.

[90] By focusing on the content of the exchanged documents as the determining factor to establish common interest privilege, as opposed to the purpose of the exchange, the chambers judge erred (see discussion earlier at paras. 66 through 69). Again, the correct approach would be to direct that only where it is clearly established that the documents were exchanged in furtherance of a joint interest against a third party, and the documents were otherwise privileged, does a common interest privilege arise.

> *4. With respect to the documents over which statutory privilege is claimed, did the chambers judge err by incorrectly applying the test for assessing such claims?*

[91] There are only 11 documents over which statutory privilege is claimed. Perhaps that is why little attention was paid to this particular category of document when the matter was argued both before the chambers judge and in this Court.

[92] Sable asserts that the documents are protected from disclosure by virtue of identical provisions contained in the federal and provincial versions of the Canada-Nova Scotia Offshore Petroleum Resources Accord Implementation acts. Sections 121(2) and (3) of the provincial legislation provides:

> **(2)** Subject to this Section and Section 19, information or documentation provided for the purposes of this Part or Part III or any regulation made pursuant to either Part, whether or not such information or documentation is required to be provided pursuant to either Part or any regulation made thereunder, is privileged and shall not knowingly be disclosed without the consent in writing of the person who provided it except for the purposes of the administration or enforcement of either Part or for the purposes of legal proceedings relating to such administration or enforcement.
>
> **(3)** No person shall be required to produce or give evidence relating to any information or documentation that is privileged pursuant to subsection (2) in connection with any legal proceedings, other than proceedings relating to the administration or enforcement of this Part or Part III.

[93] The only legal authority cited by the parties in relation to statutory privilege is **Yellowbird v. Lytviak**, 1998 ABQB 272. This is a decision of an Alberta Master relating to prohibitions against disclosure of certain hospital committee reports contained in that province's *Evidence Act*. The chambers judge relied on that sole authority cited to her for the proposition that the wording of a statute purporting to create a statutory privilege must be construed narrowly.

[94] It is curious the parties did not refer either the chambers judge or this Court to more recent authorities from this province. Most notably, this Court addressed the issue of statutory privilege in **Nova Scotia (Securities Commission) v. Potter**, 2006 NSCA 45. There, the Court had to consider s. 29A of the *Securities Act*, R.S.N.S. 1989, c. 418 (as it was then) which provided:

> 29A No person or company, without the consent of the Commission, shall disclose, except to that person's counsel, any information or evidence obtained or the name of any witness examined or sought to be examined pursuant to Section 27 or Section 29. 1990, c. 15, s. 30.

[95] Mr. Potter, who was the subject of an investigation before the Securities Commission, sought for the purposes of a judicial review, all materials collected in the course of its investigation. The Commission argued the material should not have been ordered released by the lower court, one reason being it was statutorily protected from disclosure.

[96] Writing for the Court, Cromwell, J.A. (as he then was) provided the following guidance with respect to balancing a superior court's authority to order production of relevant material against legislative direction purporting to keep such materials confidential. He wrote at paragraphs 45 and 46 as follows:

> [45] The question of whether the court may order production is one of statutory interpretation. The applicable principle of statutory interpretation is that any limitation on the authority of a superior court to order production must be clearly expressed in the statute: **Glover v. Glover et al. (No. 1)** (1980), 113 D.L.R. (3d) 161 (Ont. C.A.), aff'd [1981] 2 S.C.R. 561; **R. v. Snider**, [1954] S.C.R. 479; **Cook v. Ip** (1986), 52 O.R. (2d) 289 (C.A.). As Cory, J.A. (as he then was) put it in the latter case at p. 293: "There is an inherent jurisdiction in the court to ensure that all relevant documents are before it. ... On the other hand, it is quite clear that the Legislature may by statute prohibit [potential witnesses] from giving testimony [or an agency from] producing its records at trial... If the Legislature is to achieve that result, it must specify the restriction in clear and unambiguous terms." (Emphasis added by Justice Cromwell)
>
> [46] In my view, s. 29A does not clearly take away the power of the superior courts to order production of relevant evidence. The section is directed to a person or a company, not to a court. There is no reference to legal process and nothing which expressly or by necessary implication detracts from the court's power to compel evidence. The language of s. 29A is markedly different from that of provisions which have been held to take away the courts' power to order production. For example, the provisions considered in **Glover** expressly prohibited persons from giving evidence or producing records in legal proceedings. In **Swinimer v. Canada (Minister of National Defence)** (2005), 231 N.S.R. (2d) 129 (S.C.), the statute under consideration provided that the investigators were not compellable witnesses: see para. 24. No comparable language is present in s. 29A. In short, there is no express language and no clear legislative intention in s. 29A to take away the inherent authority of a superior court to compel documents and testimony.

[97] The above would have undoubtedly been of assistance to the chambers judge.

[98] The chambers judge referred to the evidence of Mr. MacDonald, the only evidence offered in support of the claim of statutory privilege, and ss. 121(2) and (3) of the provincial legislation, noting an identical provision was contained in its federal counterpart. After citing **Yellowbird**, the chambers judge concluded:

> [159] The defendants in their written submissions say there is no evidence to establish that the documents to which Mr. MacDonald refers were prepared or provided pursuant to the statutory requirements.
>
> [160] In fact they say they appear to be documents related to the litigation. They say therefore that statutory privilege is not established.
>
> [161] According to *Yellowbird, supra*, I am to construe the wording of the statutory privilege narrowly. Doing so and having regard to the lack of evidence

> that these documents have the confidentiality protection provided by the Acts, I conclude they are not privileged . . .

[99] Before this Court, Sable submits in its factum:

> 72. The Learned Chambers Judge correctly stated that the test for establishing a claim of statutory privilege requires a narrow construction of the source of the privilege, namely the wording of the legislation (Decision, paras. 157-158). However, the Learned Chambers Judge misapplied that test by instead taking an unreasonably narrow interpretation of the *evidence*, rather than the legislation. In the result, the Learned Chambers Judge determined that there was a lack of evidence that the documents listed in Exhibit "A" of the MacDonald Affidavit were covered by the statutory privilege claimed by the Appellants.

[100] I disagree with Sable's position that the interpretation of the statutory provisions giving rise to the privilege must be narrow.

[101] The direction in **Potter** that requires the provision giving rise to a statutory privilege to be clear and unambiguous does not mean that the provision must be construed narrowly. Further, nothing has been presented to this Court to suggest that the modern approach to statutory interpretation, that requiring a purposive approach based upon the ordinary and grammatical meaning of the words read in the entire context of the statutory scheme, ought to be displaced (**Bell ExpressVu Limited Partnership v. Rex**, 2002 SCC 42). In my view, applying the correct interpretative approach to the provisions in question may result in a different outcome than that reached by the chambers judge. By applying a narrow construction to the statutory provisions in question, the chambers judge erred in law. Accordingly, the claim of statutory privilege should be returned to the chambers judge for re-consideration.

CONCLUSION

[102] Two matters have been returned to the chambers judge for re-consideration. Her conclusions and resulting directions may have been more determinative of the various claims of privilege if she had reviewed some or all of the documents in dispute. Given how the motion was presented, the chambers judge was forced to give directions about whether documents would be privileged in a vacuum. This will likely result in further dispute between the parties as to how those directions should be applied.

[103] This Court considered directing the chambers judge to review the remaining documents in dispute on those matters to be re-considered. A judge clearly has the ability to review documentation to resolve claims of privilege: see Sidney N. Lederman, Alan W. Bryant, Michelle K. Fuerst, **Sopinka, Lederman & Bryant: The Law of Evidence in Canada**, 4th ed. (Markham, Ont: LexisNexis Canada, 2014), at § 14.37. But that is not the only option. For example, under the 1972 *Rules*, which governed this motion, a referee may be appointed (Rule 35.01) to undertake that task. This is complex litigation, and although examining the documents seems to make sense, it is the chambers judge who ultimately should determine how the matters returned to her should be addressed.

[104] I would grant leave, allow the appeal in part and order that:

- With respect to documents exchanged between Sable and the Offshore Insurers over which settlement privilege were claimed, the issue of when the privilege arose shall be returned to the chambers judge for determination;

- With respect to common interest privilege, the directions provided by the chambers judge as to when such privilege may arise, are to be modified to reflect that it is not the contents of the documents which must be examined to determine whether a joint interest in pursuing a third party is established, but rather the purpose and intent of the documentation being exchanged;

- With respect to the claim of statutory privilege, that matter shall be returned to the chambers judge for re-consideration;

- In all other respects, the decision of the chambers judge and resulting order are confirmed.

[105] Given the divided success in this matter, each party shall bear their own costs on this appeal.

Bourgeois, J.A.

Concurred in: Fichaud, J.A.

Beveridge, J.A.