NOVA SCOTIA COURT OF APPEAL

Citation: *Hatch Ltd. v. Factory Mutual Insurance Company*, 2015 NSCA 60

Date: 20150624
Docket: CA 429986
Registry: Halifax

Between:

Hatch Ltd., a body corporate, formerly known as SGE Acres Limited

Appellant

v.

Factory Mutual Insurance Company, a body corporate, Martin Marietta Materials Canada Limited, a body corporate, Bermingham Construction Limited, Atlantic Sub-Sea Construction and Consulting Incorporated, Beaver Marine Limited, a body corporate, and Dywidag Systems International, Canada, Ltd., a body corporate

Respondents

Judges:	MacDonald, C.J.N.S.; Beveridge and Scanlan, JJ.A.
Appeal Heard:	January 26, 2015, in Halifax, Nova Scotia
Held:	Appeal dismissed per reasons for judgment of Scanlan, J.A.; MacDonald, C.J.N.S. concurring; Beveridge, J.A. dissenting.
Counsel:	Gordon Proudfoot, Q.C. and Douglas Schipilow, for the appellant David A. Cameron and Leon S. Tovey, for the respondent Factory Mutual Insurance Company Murray Ritch, Q.C., for the respondent Atlantic Sub-Sea Construction and Consulting Incorporated (Watching Brief only)

Reasons for judgment:

[1] This is an appeal of an interlocutory decision of Justice Denise Boudreau on a motion related to the issue of litigation privilege. In her decision, the motions judge determined that work done by an engineering firm was for the dominant purpose of litigation and that the materials and reports they produced were protected by litigation privilege. The appellant asks this Court to set that decision aside and order that the materials in question be disclosed. For the reasons set out below, I would dismiss the appeal and confirm the decision of the motions judge.

Standard of Review

[2] The standard of review that I apply was set out in this Court in *Sable Offshore Energy Project v. Ameron International Corporation,* 2015 NSCA 8, ¶42-43:

> [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).

[3] I apply the standard of correctness to issues of law, and the standard of palpable and overriding error for issues of either fact or mixed fact and law with no

extricable legal error. In the context of this appeal, the judge must therefore correctly articulate and apply the legal principles surrounding litigation privilege. However, whether the impugned documents were for the dominant purpose of litigation is a question of fact (or at least mixed law and fact) for which the motions judge is entitled to deference.

Leave Application

[4] This is an appeal of an interlocutory decision and as such leave is required. The general test for leave on an appeal of an interlocutory motion is whether an appellant has raised an arguable issue (see: *Sydney Steel Corporation v. MacQueen*, 2013 NSCA 5). This is a low threshold which I am satisfied has been met by the appellant.

Background

[5] The respondents Martin Marietta Materials Canada (Marietta) Limited had a multi-million dollar wharf built for them at Auld's Cove, Nova Scotia in 2005. Approximately three years later, starting on November 14, 2008, a large portion of the wharf collapsed. The structure was insured by Factory Mutual Insurance Company ("FMI"). They assigned an adjuster, Mike Lodge, to deal with the claim arising from the collapse. On November 15, 2008, Mr. Lodge in turn hired SDK and Associates ("SDK"), an engineering firm to come to Nova Scotia to investigate the collapse. Mr. Lodge and an SDK engineer visited the site on November 16. By November 17, a letter was written to two of the companies involved in the construction and engineering of the structure, inviting them, along with their insurers, to participate in the site investigation. On November 18, FMI retained counsel to pursue litigation against the party or parties responsible for the collapse. SDK was then advised to report to those lawyers. SDK had not prepared a report as to the cause or extent of the damage at the time the motions judge heard the matter.

Analysis

[6] The appellant suggests there are six substantive issues in this appeal. I condense and restate them as follows:

1. Did the motions judge err in relying upon an affidavit of the claims adjuster filed in support of the respondent's position instead of relying on the Loss Memo dated November 26, 2008?

2. Did the motions judge err by misstating or misapplying the general principles of litigation privilege in finding litigation to be the dominant purpose for preparing the impugned documents?

[7] I refer first to the issue of the affidavit evidence the motions judge considered. The appellant did not object to the introduction of the affidavit now at issue. I am satisfied the motions judge was entitled to consider all of the evidence presented to her including the affidavit presented by the respondent. The motions judge was then entitled to decide how much weight to place on any part of the evidence and to accept all, some or none of the evidence presented to her at the time of the hearing. It is apparent that the motions judge was not satisfied that the Loss Memo of November 26, 2008 told the whole story as it related to the issue of litigation privilege. She committed no error in law by referring to and relying upon additional affidavit evidence so as to determine the facts related to the issue of litigation privilege. It would be inappropriate for this Court to attempt to usurp the fact-finding role of the motions judge by limiting the evidence she could consider. It is for the motions judge to determine what evidence was reliable and what weight to attribute the evidence that came before her. It would appear the appellant does not like the result and is now objecting saying the affidavit should not have been relied upon. I do not see any merit in that position.

[8] I now turn to the remaining issue raised in this appeal. After considering all the evidence the motions judge said:

> [100] The affidavit indicates, and I accept, that a subrogated claim was immediately being considered. The issue of pursing this type of a claim appeared in print as early as the loss memos of November 25, 2008. These memos reference engineers being hired to investigate cause, under the heading "subrogation" specifically. Factory Mutual hired counsel on November 18 to pursue these possibilities. I accept that the issue of litigation being commenced by Factory Mutual was either an immediate, or practically immediate, concern on their part.
>
> [101] Having considered all of the evidence and the caselaw before the Court, I accept that litigation was the dominant purpose for the seeking of this SDK report (as to cause).

[9] The fact the failed structure was relatively new influenced the motions judge's view of the facts. She said:

> [98] The situation is to be assessed objectively, from the perspective of a reasonable person within the circumstances. This commercial wharf was only

> three years old when it partially collapsed. In my view, it was reasonable in those circumstances to believe that someone was responsible for this loss, and to seek any possible responsible parties.

She accepted that, for FMI, there was never an issue as to coverage for the loss. She determined that it was quite reasonable for FMI to believe that some malfunction had caused the failure and that it was reasonable to believe that some third party was responsible for the loss. All of these factors suggest the motions judge's reasoning was sound. There is nothing in the record that speaks of any palpable error in the motions judge's findings of facts.

[10] The facts as found by the motions judge are the basis upon which she then considered the dominant purpose test and the issue of whether there was a reasonable prospect for litigation when SDK was retained.

[11] The motions judge found that a subrogated claim was contemplated "immediately or practically immediately" after FMI learned of the collapse of this large commercial structure. These are findings of fact which this Court should not interfere with absent a palpable and overriding error.

[12] Litigation privilege was discussed at length by Hood J. in *Sable Offshore Energy Inc. v. Ameron International Corporation*, 2013 NSSC 131. Justice Boudreau referred to the comments of Hood, J. Although parts of the *Sable* case were reversed on appeal, *supra* (at para. 104), I am satisfied that the motions judge did not err in relying upon the law as set out by Hood J., in relation to the test for "dominant purpose". I refer to some comments of Hood J. in *Sable* where she discussed litigation-privilege:

> [58] Litigation privilege is claimed for many documents. In *The Law of Privilege in Canada, supra*, the authors summarize the rule at pages. 12-3 and 12-4 as follows:
>
> > **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.
> >
> > Litigation privilege is not a class or absolute privilege and, unlike solicitor-client privilege, has not evolved into a substantive rule of law.

Information sought to be protected by litigation privilege must have been created for the dominant purpose of use in actual, anticipated or contemplated litigation.

Litigation privilege can protect documents that set out the lawyer's mental impressions, strategies, legal theories or draft questions. These documents do not have to be from or sent to the client. This is the first broad category of documents that are most often protected by litigation privilege as part of the lawyer's brief. The second broad class of documents records communications by the lawyer, client or third party, brought into existence for the purpose of litigation, for example, witness statements, expert opinions and other documents from third parties.

Litigation privilege allows a lawyer 'zone of privacy' to prepare draft questions and arguments, strategies or legal theories.

Litigation privilege has its origins in the adversarial system. It arises from the concept that lawyers control the information that gets presented to the court about their case. It is based on the proposition that counsel must be free to make investigations and do their research without risking disclosure of their opinions, strategies and conclusions.

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.

[59] In *Blank, supra*, in paragraph 27, Fish, J. distinguished litigation privilege from solicitor/client privilege. He said:

> 27 Litigation privilege, on the other hand, is not directed at, still less, restricted to, communications between solicitor and client. It contemplates, as well, communications between a solicitor and third parties or, in the case of an unrepresented litigant, between the litigant and third parties. Its object is to ensure the efficacy of the adversarial process and not to promote the solicitor-client relationship. And to achieve this purpose, parties to litigation, represented or not, must be left to prepare their contending positions in private, without adversarial interference and without fear of premature disclosure.

[60] In paragraph 28, he quoted from an article, Claiming Privilege in the Discovery Process (1984), Special Lectures of the Law Society of Upper Canada 163 by Professor Robert J. Sharpe (as he then was). He then said (as quoted above):

> 31 Though conceptually distinct, litigation privilege and legal advice privilege serve a common cause: The secure and effective administration of justice according to law. And they are complementary and not competing in their operation. ...

[61] Fish, J. said in paragraph 32:

> 32 Unlike the solicitor-client privilege, the litigation privilege arises and operates even in the absence of a solicitor-client relationship, and it applies indiscriminately to all litigants. ...

[62] He continued in that paragraph:

> ... Confidentiality, the sine qua non of the solicitor-client privilege, is not an essential component of the litigation privilege. In preparing for trial, lawyers as a matter of course obtain information from third parties who have no need nor any expectation of confidentiality; yet the litigation privilege attaches nonetheless.

[63] There are a number of issues which arise in determining if a document is protected by litigation privilege. The first is whether the dominant purpose for its creation was litigation or anticipated litigation. Related to this, the second issue (if litigation has not been commenced) is whether there is a reasonable anticipation of litigation. The third issue is when the litigation privilege ends.

(i) Dominant Purpose and Anticipated Litigation

[64] In *Blank, supra*, Fish, J. said at paragraphs 59 and 60:

> 59 The question has arisen whether the litigation privilege should attach to documents created for the substantial purpose of litigation, the dominant purpose of litigation or the sole purpose of litigation. ...
>
> 60 I see no reason to depart from the dominant purpose test. Though it provides narrower protection than would a substantial purpose test, the dominant purpose standard appears to me consistent with the notion that the litigation privilege should be viewed as a limited exception to the principle of full disclosure and not as an equal partner of the broadly interpreted solicitor-client privilege. The dominant purpose test is more compatible with the contemporary trend favouring increased disclosure.

[65] Although he briefly addressed the issue of whether documents "gathered or copied - but not created - for the purpose of litigation" are protected by litigation privilege (para. 62), he concluded in paragraph 64:

> 64 The conflict of appellate opinion on this issue should be left to be resolved in a case where it is explicitly raised and fully argued. Extending the privilege to the gathering of documents resulting from research or the exercise of skill and knowledge does appear to be more consistent with the rationale and purpose of the litigation privilege. That being said, I take care to mention that assigning such a broad scope to the litigation privilege is not intended to automatically exempt from disclosure anything that would have been subject to discovery if it had not been remitted to counsel or placed in one's own litigation files. Nor should it have that effect.

[66] The dominant purpose criterion is closely tied to the issue of whether a document was created for anticipated litigation.

[67] In *Mitsui & Co. (Point Aconi Ltd.) v. Jones Power Co.*, 2000 NSCA 96, Roscoe, J.A. dealt with the issue of litigation privilege. She described litigation privilege in paragraph 17:

> 17 Litigation privilege, sometimes referred to as 'contemplated litigation privilege', provides protection for communications between a party and third parties or the party's solicitor and third parties so long as they were made in contemplation of litigation. Communications created by the party or its employees are also subject to litigation privilege if made in contemplation of litigation and for the dominant purpose of reasonably contemplated litigation. (Manes and Silver, Solicitor-Client Privilege in Canadian Law, (Butterworths, 1993)).

[13] The motions judge correctly noted that she had to determine whether the document or material was produced for the dominant purpose of litigation. She also had to decide whether there was a reasonable prospect for litigation at that time. She correctly noted these are fact-based inquiries to be determined by examining the circumstances of each case. I adopt what I consider to be a succinct

statement of the test for litigation privilege as enunciated in *Raj v. Khosravi*, 2015 BCCA 49:

> [20] In summary, to succeed in a claim of litigation privilege over a document the person seeking to invoke the privilege has the onus of establishing that: (i) litigation was "in reasonable prospect" when the document was produced; and (ii) that the "dominant purpose" of the document was to obtain legal advice or was to conduct or aid in the conduct of the litigation.

This statement is in accord with the test as applied by Justice Hood in *Sable* and as relied upon by the motions judge. The issue of dominant purpose is fact-based determination and should not be disturbed absent a palpable and overriding error.

[14] The motions judge correctly pointed out that whether a party has retained counsel is relevant but not an end to the analysis. (See *Mitsui& Co. (Point Aconi) Limited v. Jones Power Co. Ltd.*, 2000 NSCA 96). The primary litigation in this case involves complex multi-party claims dealing with allegations of failure in the construction, design or engineering related to a multi-million dollar facility. Many of the parties, as would be expected, lawyered up soon after they learned of the collapse of the recently built wharf. Retention of counsel is but one consideration when determining the issue of litigation privilege as I have already noted from the comments of Justice Fish in *Blank v. Canada (Minister of Justice)*, 2006 SCC 39, ¶32.

[15] As noted in *Di-Anna Aqua Inc. v. Ocean Spar Technologies L.L.C.*, 2002 NSSC 138, the onus of proving privilege rests on the individual claiming privilege. The motions judge assessed the issue of whether there was a reasonable prospect of litigation independent from the issue of retention of counsel. She accepted that the issue of coverage was not in dispute between FMI and the insured. She found that

> [92] … "Clearly a subrogated claim for damages was being contemplated, as against third parties. I accept that it was reasonable to have contemplated such at that time."

[16] In *Raj*, Smith, J.A. said the threshold for determining whether litigation is a "reasonable prospect" is a low one. It is an objective test based on reasonableness. It does not require certainty but the claimant must show something more than speculation. I again refer to ¶98 of the motions judge's decision. She said she was required to objectively assess the situation from the perspective of a reasonable person. She concluded that it was reasonable to believe that FMI would seek to recover from those responsible. I agree with her conclusion that a reasonable

person aware of the circumstances of this case would conclude the claim would not be resolved without litigation.

[17] The present case is somewhat distinct from *Sable* where the parties did not anticipate litigation from the beginning. The parties in S*able* did not contemplate litigation until insurance coverage was denied. In the present case the motions judge determined that litigation was reasonably contemplated immediately.

[18] The loss memo of November 21, 2008 suggests SDK was retained to investigate the failure and scope of the damages. SDK staff, according to the loss memo, were on site by November 16 to investigate as to the cause of the collapse. In this same loss memo of November 21, 2008, Mr. Lodge writes:

> …Preliminary investigations point towards design and/or construction errors as a possible cause of the collapse. … Legal counsel has been retained to pursue subrogation potential.
>
> …
>
> Based on preliminary information gathered so far, there are indications that the wharf construction does not match As-Built drawings and contract specifications…
>
> This wharf was constructed in 2005-2006.

[19] The loss memo of November 21, 2008 makes it clear that by that date FMI had sufficient information as to the cause of the wharf failure to put the contractors and engineers on notice.

[20] The motions judge considered a number of factors specific to this case. For example, there was no evidence of a dispute between the insured and insurer in terms of coverage, unlike the situation in *Sable* where denial of coverage was the triggering event in terms of when the parties reasonably expected they would be involved in litigation.

[21] The motions judge was satisfied that FMI's primary focus was on reimbursement of its own loss by way of subrogated claim against those responsible for the failure of the structure. She found that it was reasonable to contemplate litigation against third parties to recoup this payment. Any subrogation claim would, of necessity, require verification as to the cause of the collapse, quantification of repair costs and mitigation of the losses.

[22] The motions judge said the issue of dominant purpose was more problematic for her. She correctly pointed out that adjusters and experts they hire are often hired for multiple reasons. As she noted at ¶94, litigation does not have to be the only reason for hiring experts and consultants but for litigation privilege to attach to their work product, litigation must be shown to have been the dominant purpose for retention. In some cases no single purpose is dominant.

[23] In the present case, experts were required to determine the cause and extent of the collapse, to mitigate damages and to assess the extent of the damages. This included investigation as to how operations could resume using parts of the structure. There was also a need to estimate the cost of remediation. These are all issues likely to arise in the context of the ongoing litigation and it was not unreasonable for the motions judge to conclude that the dominant purpose for hiring SDK was to prepare the subrogation claim. That was a factual determination that should not be interfered with absent palpable and overriding error. I see no such error.

[24] I again refer to the fact that the age of the wharf was found to have informed what FMI (the adjuster) had in mind as its dominant purpose in hiring SDK. It is for the motions judge to make this factual determination which should not be interfered with, absent a palpable and overriding error. Mr. Lodge stated in his 2014 affidavit that the reason for hiring these experts, was to determine how to proceed with litigation against those parties who were found to be at fault by this investigation. I have already alluded to the motions judge's finding that "… a subrogated claim was immediately being considered." (¶100) This was further evidenced by the loss memo of November 25, 2008 wherein there was reference to engineers being hired and this appeared under the heading "subrogation". All of the above led the motions judge to conclude that the dominant purpose for retaining SDK was to prepare for litigation.

[25] Each case must be assessed on an individual basis to determine when litigation becomes the dominant purpose for retaining experts such as SDK. Reports obtained in the immediate aftermath of an event are often not prepared for the dominant purpose of litigation. It would be inappropriate to cloak such reports in privilege absent the dominant purpose being litigation. In this case the evidence supports the motions judge's finding that FMI determined very soon after the discovery of the collapse it would be involved in litigation on this file. The evidence supports the motions judge's conclusion that preparation for litigation

started almost immediately after the loss was first detected and that the dominant purpose for the SDK reports would be to prepare for expected litigation.

[26] I am satisfied that the motions judge properly set out the law on the issue of litigation privilege and she properly applied that law to the facts as she determined them to be.

[27] Before concluding, let me note that I have had an opportunity to review my colleague's draft dissenting reasons. He expresses concern that the respondents failed to prepare a proper Affidavit Disclosing Documents (ADD) in accordance with Rule 15.03. Specifically he was troubled that Schedule B of its ADD, did not contain a proper list, itemizing each and every document over which FMI claimed privilege.

[28] In my respectful view, my colleague's concerns are unfounded. Instead, as I will now explain, the motions judge adequately addressed this issue and, in any event, the appellant has not raised this as a ground of appeal before us.

[29] I begin by acknowledging that this relief was originally requested as part of the Appellant's disclosure motion. It formed part of its list itemizing "certain particular" documents being sought.

27	September 27, 2013 email of GP to DC	Request for a detailed Schedule B of FMI's ADD, and to enumerate anything that is being withheld with details, description and dates

[30] However, this was one of many items (representing hundreds of documents) being sought by the Appellant. So during oral submissions, the motions judge sought a pragmatic solution to what would obviously be an arduous task. She zeroed in on the exact relief being sought by the Appellant. In the process, she suggested that it might be better for her to first review and rule on the Appellant's entire list. With that out of the way, any lingering need for a more detailed Schedule B could then be more appropriately addressed. As revealed in the following lengthy exchange, the Appellant agreed:

> THE COURT: Well, I'm going to ask you this first and I'm not sure if you want to respond or ... your ... your motion at item 27 talks about request for a detailed Schedule B ...
>
> MR. SCHIPILOW: M-hmm.

THE COURT: ... of the Affidavit. Enumerate anything that's being withheld. So ... this may sound ... you already have listed here, presumably, everything that they've already listed in their Affidavit of Documents as deleted privilege, deleted privilege, deleted privilege. You've got 26 of them here, 24 of them I should say. So are you seeking in addition to the Court reviewing these and determining whether each of them is privileged or not or whether some portion of them is privileged or not, are you still seeking a detailed Schedule B with respect to each of those again, even though the Court is going through them? Is ... is that what's being asked or ... just so that I understand clearly what's being asked of me to do because I'm assuming ... assuming I never did anything, I guess what you are saying is Schedule B should say more than privileged. It should say privileged because of that; privileged because of that. So I take ...

MR. SCHIPILOW: Correct.

THE COURT: ... your point on that but with respect to the ... the motion before the Court today ...

MR. SCHIPILOW: M-hmm.

THE COURT: ... let's assume that I was to go through all this and I'll say yes to this one and no to that one and yes to this one and no to that one, then is ... is your request for a detailed Schedule B then moot to some extent? I mean has it been ... do you wish to respond?

MR. SCHIPILOW: Yeah, Your Honour, I will defer to Mr. ...

THE COURT: I'm just wondering if that's still being ...

MR. SCHIPILOW: I guess what we're saying is what you alluded to My Lady is that yeah, if you look through it all and it's dealt with, the ones that are not dealt with in the sense of being given to us ...

THE COURT: Right.

MR. SCHIPILOW: ... or ... then we'd ... we'd want to have some detail from our Friends so we know what we are dealing with so it's in compliance with our understanding of Schedule Part B. So at the end of it you ... say you get ... this stuff has been released. The rest has not but we would ask counsel for FMI to detail ... give more detail of the reason for your ... for your ...

THE COURT: By that point though the Court would already have decided that it is privileged. I mean presumably ...

MR. SCHIPILOW: Yes.

THE COURT: ... solicitor/client privilege and so ... so let's say just theoretically ... let's say I were to say okay, the letter of January 5th, 2009, the Court's decision is that this is solicitor/client privileged. You're looking for more than that?

MR. SCHIPILOW: No, that's good.

THE COURT: That's ... I guess what I am getting at is where are we going to be at the end of the day ...

MR. SCHIPILOW: Yeah, I guess that might be duplicitous.

THE COURT: It might be a waste of everyone's time to go that route. I don't know. I'm not ...

MR. SCHIPILOW: Well, you ... you ...

THE COURT: I'm just trying to get a sense of where we are going to be at the end of the day.

MR. SCHIPILOW: Well, you make a good point. Yes, I think ... I think ... yeah, that would be wasteful because you've already ruled that ...

THE COURT: Well ...

MR. SCHIPILOW: ... it is what it is.

THE COURT: ... it kind of is what it is. That's the problem ...

MR. SCHIPILOW: Yeah, so that ...

THE COURT: And you can disagree but I mean at the very least it's been looked at and a decision has been given ...

MR. SCHIPILOW: Yes.

THE COURT: ... so it seems to me that perhaps that seems to answer the question on that end.

MR. SCHIPILOW: You know what, absolutely. No, once you logic it through there, I ...

THE COURT: Assuming that it happens that way. I mean I'm assuming that it would ...

MR. SCHIPILOW: Yes, we don't know what's going to happen yet but ...

THE COURT: Exactly.

MR. SCHIPILOW: ... no, that makes sense to us. Is there anything you want to add there?

MR. PROUDFOOT: Nothing I want to add.

THE COURT: Okay. Just ... and I just raise that because it seemed to me that if I was going to be going through them item by item, presuming I did that, then it seems to me that okay, well then the detail is going to be there. It's going to be done so ... and if not, if that doesn't happen, then I take your point that you do wish more detail about them and I understand that.

MR. SCHIPILOW: Oh yes.

THE COURT: Okay. Thank you. Sorry if I took you off your ...

> MR. SCHIPILOW: No, no ...
>
> THE COURT: ... off your flow there. Go ahead.
>
> MR. SCHIPILOW: No, not a problem and, in fact, that addresses our concern so I'll ... I'll just move on to the law,…

[31] As far as I can tell from this record, there was never a subsequent request for a more detailed Schedule B and that may explain why it is not included as a ground of appeal. In any event, through this process, the essential issue giving rise to this appeal became crystalized - whether FMI satisfied the dominant purpose test as it related to the work product prepared by its expert. An itemized document list did not appear necessary to resolve that aspect of the Appellant's motion (which is the only one before us on appeal).

[32] More importantly, none of the Appellant's grounds of appeal come close to raising this as an issue before us. For that reason alone, we should be hesitant to become involved. For example, the following advice from *Civil Appeals*, loose-leaf (Toronto: Carswell, Last Updated: April 2015), Donald J.M. Brown, Q.C., (at 13:3310), in my view, is equally persuasive in the context of appeals:

> Deciding on a ground that was not put before an adjudicator or not contained in pleadings deprives parties of a decision that is responsive to their proofs and argument. In the words of Doherty J.A., "it is fundamental to the litigation process that lawsuits be decided within the boundaries of the pleadings." In terms of adjudicative decision-making, the parties will have been deprived of presenting their cases as they have chosen and of making submissions in relation to the ground upon which the case was decided.

[33] Then, albeit in a criminal law context, the Supreme Court of Canada, in *R. v. Mian*, 2014 SCC 54, suggested (at ¶40-41) that the discretion to raise new issues on appeal should be exercised rarely, and only when, failing to do so would risk an injustice. Before doing so, the court must also address whether there is sufficient record to raise the issue and whether raising it would result in a procedural prejudice to any party.

[34] Here the record is clearly insufficient to consider this issue. In fact, the record (limited as it is) suggests, if anything, that a more detailed Schedule B might have been in the works. For this, I rely on two references in the record. Firstly, I refer to the Respondents' pre-motion brief where they offered to prepare a more detailed Schedule B. It would be modelled after one prepared by a co-party, since that format appeared to satisfy the Appellant:

63. In its pre-hearing brief to the Court in this matter, Hatch has expressed its satisfaction with the form of the Affidavit Disclosing Documents filed by Harvey Morrison, Q.C., for Beaver Marine. Specifically, at paragraph 41 of Hatch's brief, it states that "Beaver did in fact file a properly completed Schedule Part "B" to their ADD enumerating what was being withheld."

64. Factory Mutual is willing to produce a Schedule B modelled on the language and content of Beaver Marine's ADD, of which Hatch has indicated it approves. As a result, we propose the following revised Schedule B, which should resolve Hatch's concerns:

Schedule B

Privilege is claimed over all communications giving, or created to obtain, counsel's advice. Kugler Kandestin LLP, through Michael H. Kay and Stuart Kugler, was retained on November 18, 2008. Co-Counsel Burchells LLP, through David A. Cameron, was retained on October 14, 2011.

Solicitor-client privilege is claimed over all documents in which counsel has communicated with the Plaintiff, Factory Mutual Insurance Company, for the purpose of formulating or providing advice.

Litigation or Solicitor-Client privilege is claimed over documents:

1. Correspondence between Norman Kadanoff or other representatives of Saia, Deslauriers, Kadanoff (SDK) and Kugler Kandestin LLP or Burchells LLP.

2. Preliminary work of Norman Kadanoff and SDK for Kugler Kandestin LLP with respect to analysis of the wharf failure.

Litigation privilege is claimed over:

1. All correspondence, reports and other documentation which date subsequent to the date litigation was contemplated and for which the Plaintiff, Factory Mutual Insurance Company, claims privilege by reason of the fact that the documents were obtained in contemplation of litigation and for the purpose of placing them before counsel.

   Other kinds of privilege are claimed over communications between representatives of Defendants or their counsel and the Plaintiffs or counsel on behalf of the Plaintiff that are either expressly or impliedly without prejudice.

> There are no documents over which another person has a claim for privilege.

[35] Then, according to her oral decision, the judge (perhaps in response to this offer) seemed to anticipate the filing of a more detailed ADD:

> I understand that an Affidavit of Documents, properly done, is going to be exchanged and that either has been done or has yet to be done but that is a separate document.

[36] In summary, I am not saying that we ought to condone the filing of an improper ADD. I am simply saying that, based on this record, the judge was alive to and dealt with this issue in a manner that apparently elicited no further complaint from the Appellant. In any event, it clearly did not result in a ground of appeal before this Court. Therefore, in my respectful view, my colleague's concern about an inadequate ADD, in the context of this record, appears to be unfounded.

Disposition

[37] I would grant leave but dismiss the appeal with costs to the respondent in the amount of $2,500.

Scanlan, J.A.

Concurred in:

MacDonald, C.J.N.S.

Dissenting reasons for judgment (Beveridge, J.A.):

[38] I have had the privilege of reading the draft reasons of my colleague, Justice Scanlan. With respect, I am unable to agree that the appeal should be dismissed.

[39] The reason for my disagreement is simple—the motions judge erred in law in failing to properly understand and apply the test for litigation privilege.

[40] My colleague is of the view that since the motions judge referred to the relevant principles of law, and made no palpable or overriding factual error, this Court must defer to her determination that litigation privilege had been made out.

[41] To understand my reasons for proposing to allow the appeal, it is necessary to recall the reason the law recognizes litigation privilege. That rationale defines the scope of the privilege, and acts as a guide to courts on how to assess litigation privilege claims.

LITIGATION PRIVILEGE

[42] In the ordinary course, each party to a civil law suit is required to produce to the other parties a copy of all relevant documents. However, privileged documents need not be produced. Litigation privilege is one cloak a party may try to wrap around its documents to decline production. But what does this privilege actually cover?

[43] In a general way, litigation privilege protects communications to and by a party to litigation for use in actual or contemplated litigation. The authorities make it clear that the only reason the privilege exists is to protect the fairness of the adversarial system of litigation.

[44] R.J. Sharpe (now Sharpe J.A.) in a frequently quoted article on privilege, "Claiming Privilege in the Discovery Process", in *Law in Transition: Evidence*, [1984] Special Lect. L.S.U.C. 163, at p. 165, explained the foundation for litigation privilege, and what sets it apart from its cousin, solicitor-client privilege:

> Litigation privilege, on the other hand, is geared directly to the process of litigation. Its purpose is not explained adequately by the protection afforded lawyer-client communications deemed necessary to allow clients to obtain legal advice, the interest protected by solicitor-client privilege. Its purpose is more particularly related to the needs of the adversarial trial process. Litigation privilege is based upon the need for a protected area to facilitate investigation and

> preparation of a case for trial by the adversarial advocate. In other words, litigation privilege aims to facilitate a process (namely, the adversary process), while solicitor-client privilege aims to protect a relationship (namely, the confidential relationship between a lawyer and a client).
>
> *Rationale for Litigation Privilege*
>
> **Relating litigation privilege to the needs of the adversary process is necessary to arrive at an understanding of its content and effect. The effect of a rule of privilege is to shut out the truth, but the process which litigation privilege is aimed to protect - the adversary process - among other things, attempts to get at the truth. There are, then, competing interests to be considered when a claim of litigation privilege is asserted: there is a need for a zone of privacy to facilitate adversarial preparation; there is also the need for disclosure to foster fair trial.**
>
> [Emphasis added]

[45] This explanation of the rationale for litigation privilege has been expressly adopted by the Supreme Court of Canada in *Blank v. Canada*, 2006 SCC 39 at paras. 28, 32, and 34.

[46] If there is more than one purpose for the preparation of a document a party refuses to disclose, privilege only attaches if the proponent can establish that the dominant purpose for the preparation was for use in actual or contemplated litigation.

[47] The case that settled this issue was *Waugh v. British Railways Board*, [1980] A.C. 521, [1979] UKHL 2. An employee died in an accident. A joint internal report was prepared by the British Railways Board (B.R.B.) within days of the accident. The heading on the report said it was to be used when reporting an occurrence when litigation by or against the B.R.B. is anticipated. It went on to stipulate that the report was for the information of the board's solicitor, for the purpose of enabling him to advise the B.R.B.

[48] The estate of the employee sued the B.R.B. It declined to produce the internal report, claiming legal professional privilege. The English Court of Appeal upheld that claim, with Lord Denning, M.R. dissenting. The House of Lords reversed.

[49] The affidavit in support of the privilege claim said that the joint internal report inquired into the cause of the accident, and was equally for the purpose of being sent to the board's solicitor as material on which he could advise the B.R.B.

upon its legal liability and for the purpose of conducting proceedings arising out of such accidents.

[50] The affidavit went on to assert that it is commonly anticipated when death or personal injury occurs while on or about the railway, a claim for damages will be made against the B.R.B.; and in this case, it was anticipated from the outset that a claim for damages would almost certainly ensue.

[51] Despite these unchallenged assertions, the House concluded privilege did not attach. Lord Wilberforce reasoned:

> It is clear that the due administration of justice strongly requires disclosure and production of this report: it was contemporary; it contained statements by witnesses on the spot; it would be not merely relevant evidence, but almost certainly the best evidence as to the cause of the accident. If one accepts that this important public interest can be overridden in order that the defendant may properly prepare his case, how close must the connection be between the preparation of the document and the anticipation of litigation? On principle I would think that the purpose of preparing for litigation ought to be either the sole purpose or at least the dominant purpose of it: to carry the protection further into cases where that purpose was secondary or equal with another purpose would seem to be excessive, and unnecessary in the interest of encouraging truthful revelation. At the lowest such desirability of protection as might exist in such cases is not strong enough to outweigh the need for all relevant documents to be made available.
>
> pp. 531-2

[52] Although not strictly necessary to dispose of the live issues in *Blank, supra*, Fish J. approved of the dominant purpose test chosen by the House of Lords in *Waugh*. He cited a number of Canadian authorities, including decisions of this Court which had already done so. Significantly, Justice Fish also approved of the rationale for requiring the more stringent test before privilege can be successfully invoked—as a matter of policy, the law favours full disclosure, only to be narrowed by the need for a party, or counsel, to prepare for the coming trial. He wrote as follows:

> [59] The question has arisen whether the litigation privilege should attach to documents created for the substantial purpose of litigation, the dominant purpose of litigation or the sole purpose of litigation. The dominant purpose test was chosen from this spectrum by the House of Lords in *Waugh v. British Railways Board*, [1979] 2 All E.R. 1169. It has been adopted in this country as well: *Davies v. Harrington* (1980), 115 D.L.R. (3d) 347 (N.S.C.A.); *Voth Bros. Construction*

(1974) Ltd. v. North Vancouver S. Dist. No. 44 Board of School Trustees (1981), 29 B.C.L.R. 114 (C.A.); *McCaig v. Trentowsky* (1983), 148 D.L.R. (3d) 724 (N.B.C.A.); *Nova, an Alberta Corporation v. Guelph Engineering Co.* (1984), 5 D.L.R. (4th) 755 (Alta. C.A.); *Ed Miller Sales & Rentals; Chrusz; Lifford; Mitsui; College of Physicians; Gower*.

[60] I see no reason to depart from the dominant purpose test. Though it provides narrower protection than would a substantial purpose test, **the dominant purpose standard appears to me consistent with the notion that the litigation privilege should be viewed as a limited exception to the principle of full disclosure and not as an equal partner of the broadly interpreted solicitor-client privilege. The dominant purpose test is more compatible with the contemporary trend favouring increased disclosure.** As Royer has noted, it is hardly surprising that modern legislation and case law

> [TRANSLATION] which increasingly attenuate the purely accusatory and adversarial nature of the civil trial, tend to limit the scope of this privilege [that is, the litigation privilege]. [para. 1139]

Or, as Carthy J.A. stated in *Chrusz*:

> The modern trend is in the direction of complete discovery and there is no apparent reason to inhibit that trend so long as counsel is left with sufficient flexibility to adequately serve the litigation client. [p. 331]
>
> [Emphasis added]

[53] Robert Hubbard et al. in *The Law of Privilege in Canada*, loose-leaf (Aurora, ON: Canada Law Book, Last Updated: 2014) distill the key principles of litigation privilege (at 12:10):

> Litigation 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.
>
> Litigation privilege can protect documents that set out the lawyer's mental impressions, strategies, legal theories or draft questions. These documents do not have to be from or sent to the client. This is the first broad category of documents that are most often protected by litigation privilege as part of the lawyer's brief. The second broad class of documents records communications by the lawyer, client or third party, brought into existence for the purpose of litigation, for example, witness statements, expert opinions and other documents from third parties.

[54] It is fundamental to a proper determination of a claim of litigation privilege to keep in mind the rationale for the privilege. This was aptly expressed by Conrad J.A. in *Moseley v. Spray Lakes Sawmills (1980) Ltd.*, 1996 ABCA 141:

> [21] **The rationale for litigation privilege provides an essential guide for determining the scope of its application. Its purpose is to protect from disclosure the statements and documents which are obtained or created particularly to prepare one's case for litigation or anticipated litigation. It is intended to permit a party to freely investigate the facts at issue and determine the optimum manner in which to prepare and present the case for litigation.** As a rule, this preparation will be orchestrated by a lawyer, though in some cases parties themselves will initiate certain investigations with a view to providing information for the "lawyer's brief". The litigation may already be pending or simply contemplated. There may even be relatively rare situations where a party intends to represent himself or herself throughout litigation proceedings, and gathers statements and documents specifically for the contemplated litigation. Privilege may well attach to such material, even where no lawyer is to be "briefed". That question, however, is not at issue in this case, and need not be decided now. Thus at the time of creation, preparation for litigation must be the dominant purpose.
>
> [Emphasis added]

[55] The scope of the privilege is not difficult to identify. But the actual test to assess a claim of litigation privilege, and how it is applied in practice, is open to debate. The Supreme Court of Canada in *Blank* did not comment on the actual test that should be applied, other than the requirement that the dominant purpose for the preparation of the document must have been for litigation.

The Test

[56] In *Mitsui & Co. (Point Aconi) Ltd. v. Jones Power Co. Ltd.*, 2000 NSCA 96, Roscoe J.A. referred to the test as follows:

> [17] Litigation privilege, sometimes referred to as "contemplated litigation privilege", provides protection for communications between a party and third parties or the party's solicitor and third parties so long as they were made in contemplation of litigation. Communications created by the party or its employees are also subject to litigation privilege if made in contemplation of litigation and for the dominant purpose of reasonably contemplated litigation. (Manes and Silver, *Solicitor-Client Privilege in Canadian Law*, (Butterworths, 1993)).

[57] Many appeal courts have referred to the test as having two requirements: litigation was in reasonable prospect when the document was made; and the dominant purpose of its production was to obtain legal advice or aid in the conduct of the litigation. For example, in *Raj v. Khosravi*, 2015 BCCA 49, Smith J.A., writing for the Court, offered the following concise statement of the test:

> [20] In summary, to succeed in a claim of litigation privilege over a document the person seeking to invoke the privilege has the onus of establishing that: (i) litigation was "in reasonable prospect" when the document was produced; and (ii) that the "dominant purpose" of the document was to obtain legal advice or was to conduct or aid in the conduct of the litigation.

[58] It is not uncommon to see different phrases for when litigation has not yet materialized at the time the document was produced, but privilege is asserted: reasonable prospect, reasonably anticipated litigation, and in Nova Scotia "definite prospect of litigation". It is safe to say that a mere subjective belief is not sufficient—it must be a reasonably held belief and not merely a possibility.

[59] One of the frequently quoted descriptions as to what is required is that of Wood J.A. in *Hamalainen (Committee of) v. Sippola*, (1991), 9 B.C.A.C. 254 where he wrote:

> I am not aware of any case in which the meaning of "in reasonable prospect" has been considered by this Court. Common sense suggests that it must mean something more than a mere possibility, for such possibility must necessarily exist in every claim for loss due to injury whether that claim be advanced in tort or in contract. On the other hand, a reasonable prospect clearly does not mean a certainty, which could hardly ever be established unless a writ had actually issued. In my view litigation can properly be said to be in reasonable prospect when a reasonable person, possessed of all pertinent information including that peculiar to one party or the other, would conclude it is unlikely that the claim for loss will be resolved without it. The test is not one that will be particularly difficult to meet. I am satisfied it was met in this case in connection with all of the documents in issue. The circumstances of this accident, and the nature of Mr. Hamalainen's injuries, were such that litigation was clearly a reasonable prospect from the time the claim was first reported on December 1st, 1986.

[60] This statement of the first part of the test was recently re-affirmed in *Raj, supra*, where Smith J.A. described the test as "low":

> [10] The threshold for determining whether litigation is "in reasonable prospect" is a low one. It is an objective test based on reasonableness. It does not require

> certainty but the claimant must establish something more than mere speculation. A bare assertion of "in reasonable prospect" will not be sufficient….

[61] However, at least in Nova Scotia, the first part of the test may not be so easy to satisfy. Justice Roscoe in *Mitsui* initially spoke of "contemplated litigation", but then she specifically adopted an oft quoted statement from Davison J. in *Ford Motor Co. of Canada v. Laconia Holdings Ltd.* (1991), 108 N.S.R. (2d) 416 (S.C.) that there must be a "definite prospect" of litigation before it can be said that litigation was contemplated:

> [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.

[62] The statements of the test in Nova Scotia outlined above were used by Hood J. in *Sable Offshore Energy Inc. v. Ameron International Corp.*, 2013 NSSC 131 (¶ 70), and later implicitly accepted by this Court on appeal (2015 NSCA 8, ¶ 52).

[63] None of the parties here made submissions on this particular issue. I need not dwell on it further. It is well recognized that the more difficult branch of the test is whether the documents in question were for the dominant purpose of litigation.

[64] For this, the judge must inquire into what was or were the purposes for the creation of the document at the time of its creation. Smith J.A. in *Raj* succinctly summarized this branch of the test:

> [12] The second part of the test -- the "dominant purpose" of a document -- is more challenging to meet. It requires the party claiming privilege to prove that the dominant purpose of the document, when it was produced, was to obtain legal advice or to conduct or aid in the conduct of litigation (*Hamalainen* at para. 21).

[65] In British Columbia, courts have usefully described the concept of a continuum to try to define the range of purposes that may attach to a document. Wood J.A. made the following often-cited statement in *Hamalainen v. Sippola*:

> [24] Even in cases where litigation is in reasonable prospect from the time a claim first arises, there is bound to be a preliminary period during which the

> parties are attempting to discover the cause of the accident on which it is based. At some point in the information gathering process the focus of such an inquiry will shift such that its dominant purpose will become that of preparing the party for whom it was conducted for the anticipated litigation. In other words, there is a continuum which begins with the incident giving rise to the claim and during which the focus of the inquiry changes. At what point the dominant purpose becomes that of furthering the course of litigation will necessarily fall to be determined by the facts peculiar to each case.

[66] It is obvious that serious accidents and incidents are going to trigger investigations by parties affected and their insurers. Furthermore, such events frequently lead to parties seeking and resisting payment for losses said to have been caused. Litigation may or may not ensue. Whether litigation privilege applies to shield certain documents from the usual and fundamental requirement of full disclosure during subsequent litigation can only be properly resolved by a court's due application of the test, in light of the rationale for the privilege, and pursuant to a process that permits an accurate determination of the claim.

The Process

[67] To understand the process that is supposed to be followed, it is important to recognize that in Nova Scotia full disclosure of all relevant documents has, for at least 40 years, been the law. Rule 20(1) of the *Nova Scotia Civil Procedure Rules (1972)* required each party to serve on the other party a list of documents that are or have been in his possession, custody or control relating to every matter in question in the proceeding. Rules 20(2) and (3) gave directions about the list:

> (2) A list of documents under paragraph (1) shall enumerate the documents in a convenient order with a short description of each document or, in the case of bundles of documents of the same nature, of each bundle.
>
> (3) A claim that any document is privileged from production shall be made in the list of documents with a sufficient statement of the grounds of the privilege.

[68] Lists claiming privilege were sometimes generic. For example, in *Creaser v. Warren* (1987), 77 N.S.R. (2d) 429 (C.A.), a party filed an amended list of documents that merely provided (¶ 3):

> Documents prepared for the purpose of being laid before counsel for the Defendants for advice and use in connection with this litigation, numbered 1 - 108, tied together in a bundle and labelled "B".

[69] There was nothing that revealed the nature of the documents. The chambers judge dismissed the application to require a specified list, and concluded the claim for litigation privilege was made out. The decision was reversed on appeal. Clarke C.J.N.S., for the Court, concluded that the need to give a short description of the document is not eliminated merely because it is in a bundle. There must at least be sufficient detail to enable a court to make a *prima facie* determination whether a likely claim for privilege exists. No deference was accorded to the chambers judge's determination of privilege. Clarke C.J.N.S. put it thus:

> [11] In our opinion, this Rule is not to be interpreted in such a way that, because documents are bundled, they are therefore exempt from "a short description of each document". The description need not be so detailed that it discloses the contents of the document in a manner that would destroy its privilege. It must be sufficient to enable a court to make a *prima facie* decision whether a likely claim for privilege exists. Whether a judge goes beyond the description to examine the document is, of course, in the discretion of the court. It is difficult to lay down a hard and fast rule for every document. However, the description of each document or series of similar type documents should have sufficient detail to reveal the nature of the documents to the opposing party and to avoid the necessity of frequent applications to the court for rulings.

[70] In relation to the inadequacy of the description provided, and what should be present, Chief Justice Clarke wrote:

> [14] In this instance, the description given to bundle "B" was inadequate. The respondents should have provided a short description of each document by identifying the status of the receiver and sender, their relationship to the respondents as parties to the action and the basis upon which the claim for privilege is grounded.

[71] Effective 2009, the 1972 Rules were replaced. The new rules are cited as the *Nova Scotia Civil Procedure Rules*. Many of the same guiding principles that animated the 1972 Rules find explicit and implicit recognition in the new rules.

[72] The language may be different, as well as the processes, but full disclosure is still mandated. Part 5 of the Rules is entitled "Disclosure and Discovery". Making full disclosure of relevant documents, electronic information and other things is presumed to be necessary for justice in a proceeding (Rule 14.08). But nothing in Part 5 requires a person to waive privilege or disclose privileged information (Rule 14.05).

[73] Rule 15 imposes duties on parties. The basic duty is to make diligent efforts to become informed about relevant documents the party had or has control of, search for relevant documents, sort them and either disclose or claim privilege. Rule 15.02 describes additional duties.

[74] There is no list of documents. Each party must deliver to the other parties an "Affidavit Disclosing Documents" (ADD) (Rule 15.03). A party must in its ADD swear or affirm to the completion of duties with respect to disclosure of documents. Schedule A is to list all relevant, non-privileged documents. Other Schedules are prescribed. Each schedule must describe documents for easy identification.

[75] Rule 15.03(3)(f) labels Schedule B as where claims for privilege are asserted. The affiant must provide information on all claims that a document is privileged in favour of the party, other than communication with counsel. It provides:

> (f) an attached Schedule B provides the date of retention of counsel, claims privilege over communications with counsel unless the party waives the privilege, and provides information on all claims that a document, other than a communication with counsel, is privileged in favour of the party or another person;

[76] A party dissatisfied with the ADD of another can, in reliance on any number of provisions in the Rules, move to require compliance with the duties to disclose, including a challenge to a claim of privilege. In keeping with the near universal maxim, he who alleges bears the burden; the onus of proving privilege is on the party claiming it (*Di-Anna Aqua Inc. v. Ocean Spar Technologies L.L.C.*, 2002 NSSC 138 at ¶ 6; *Butterfield v. Dickson* (1994), 28 C.P.C. (3d) 242, [1994] N.W.T.J. No. 31 at ¶ 13).

[77] When a party claiming privilege relies on generic or boiler plate language in its effort to assert, and later claim privilege, problems ensue. First, the opposing party really has no way to assess the likely validity of the claim. Second, absent details in Schedule B or on the motion, including the opportunity for the motions judge to examine the documents in issue, how is he or she to determine whether any of the documents in question meet the test for litigation privilege? What remedy should follow if there is a lack of detail? I will return to these issues later.

[78] With the principles I have outlined above, I turn to the motion.

THE MOTION

[79] There were apparently four outstanding motions between the various parties about disclosure of documents. Three were heard by the motions judge on April 23-24, 2014. Two were in relation to document production by Martin Marietta Minerals Canada Ltd. (Martin Marietta), and by Factory Mutual Insurance Company (FMI).

[80] One targeted claims of solicitor-client privilege asserted by Martin Marietta, and redactions made in documents in furtherance of that claim, and other redactions made on the basis of relevance.

[81] The other motion challenged the sufficiency of the Schedule B list in FMI's ADD in support of claims of privilege, and for disclosure of redactions made in FMI's Loss Memo Reports and for correspondence relating to SDK's investigative report on the cause of the collapse.

[82] The appellant's motions were supported by the affidavit of Gordon F. Proudfoot, Q.C. sworn April 7 and April 15, 2014. The former attached a copy of the unsworn ADD from FMI. In Schedule B, privilege was asserted over all communications giving or created to obtain counsels' advice. Two law firms were identified, Kugler Kandestin, retained on November 18, 2008, and Burchells LLP, retained on October 14, 2011.

[83] In relation to litigation privilege, there was no list. Only that: "Litigation privilege is claimed over documents that were prepared in the course of or in anticipated litigation".

[84] Various documents and correspondence were attached to the Proudfoot affidavits as exhibits demonstrating efforts to understand what was being claimed as privileged on behalf of both FMI and Martin Marietta. There is no need to detail these.

[85] FMI filed a brief and an affidavit from Michael Lodge, senior general adjuster with FMI. Also filed were affidavits from Helen Haynes, Associate General Counsel for Martin Marietta Materials Inc., the parent company of Martin Marietta.

[86] No further details were provided in any of these affidavits about the date, content, author, or recipient of documents over which FMI claimed litigation privilege.

[87] Mr. Lodge deposed in this affidavit that when he had learned of the partial collapse of the wharf and its vintage, he believed that FMI would ultimately commence legal action against the party(ies) responsible. He also described FMI's retention of Mr. Norman Kadanoff, structural engineer with SDK & Associates, to investigate the cause of the collapse and to evaluate remediation. He also referred to his retention of Kugler Kandestin, LLP, to "investigate and ultimately commence litigation".

[88] The relevant paragraphs of his affidavit are:

> 5. On November 14, 2008, I became aware through my role as senior general adjuster at FMI that the Martin Marietta wharf had begun to collapse (the "Collapse"). Due to the fact that this Collapse occurred less than three years after construction of the wharf had been completed, and due to the fact that the scale of the Collapse appeared to be significant, I and others at FMI believed and contemplated that FMI would ultimately commence legal action against the party(ies) responsible for the Collapse, for any damages to FMI that would result therefrom.
>
> 6. On November 15, 2008, I communicated with Mr. Norman Kadanoff, a structural engineer at the engineering firm of Saia, Deslauriers, Kadanoff, now known as SDK & Associates ("SDK"), to inform him of the Collapse and to ask him to visit Martin Marietta's Auld's Cove facility with me the following day. Mr. Kadanoff agreed to do so, and he and I travelled to the Auld's Cove facility on November 16, 2008.
>
> 7. I mandated Mr. Kadanoff as an expert structural engineer, and his mandate was twofold. Mr. Kadanoff's first and primary mandate was to observe the damage to the wharf and to begin an investigation into the cause of the Collapse. The purpose of Mr. Kadanoff's investigation into the cause of the Collapse was to be able to identify the party(ies) responsible therefor, in contemplation of eventual litigation by FMI against such party(ies), and to thereafter prepare an expert's report for the purpose of such anticipated litigation.
>
> 8. Mr. Kadanoff's second mandate was to evaluate the extent of structural damages to the wharf as a result of the Collapse, and to evaluate the scope of repairs and the cost of rebuilding the wharf. In this regard, I was informed by Mr. Kadanoff and do verily believe that he later communicated with Beaver Marine Ltd. and with Leslie & Benn

> Contracting Ltd. in order to evaluate what it would cost to rebuild the wharf as it had been prior to the Collapse.
>
> …
>
> 11. On November 18, 2008, FMI retained the law firm of Kugler Kandestin LLP in order to investigate and ultimately commence litigation against the party(ies) responsible for the Collapse, for any damages to FMI that would result therefrom. All communications between FMI and Kugler Kandestin LLP from that date onwards were for the purpose of obtaining legal advice with regard to this anticipated litigation.
>
> 12. On behalf of FMI, I agreed with Mr. Kadanoff and Kugler Kandestin LLP that Mr. Kadanoff would ultimately prepare an expert report for Kugler Kandestin LLP regarding the cause of the Collapse and the party(ies) responsible therefor, for the purpose of anticipated litigation against such responsible party(ies). All communications between Kugler Kandestin LLP and Mr. Kadanoff were for the purpose of such anticipated litigation.

[89] Mr. Lodge's affidavit also set out that he had been informed by Mr. Stuart Kugler that, to date, Mr. Kadanoff had not yet finalized an expert report regarding the cause of the collapse and the party(ies) responsible. Accordingly, neither FMI nor its counsel have a final expert report. Nonetheless, Mr. Lodge swore:

> 17. FMI asserts privilege over all documents produced by Mr. Kadanoff for the purpose of preparation of an eventual final expert report regarding the cause of the Collapse and the party(ies) responsible therefor.

[90] Ms. Haynes's affidavit contained uncontested background facts. The wharf was constructed in 2005 at a cost of approximately $10 million dollars. The partial collapse was taken seriously by her company. Martin Marietta contacted representatives of Beaver Marine, who had constructed the wharf, and Hatch, who had designed it, to have them come to the facility on November 15, 2008. They did.

[91] She attached letters that were sent by others in her company in the immediate aftermath, and put her interpretation on them. Some of these were already attached to the Lodge affidavit. The first in time was to both Beaver Marine and to SGE Acres [now Hatch] dated November 17, 2008:

> Dear Sirs:
>
> Re: Dock Damage Incident

> Thank you for visiting with us on Saturday for a preliminary assessment of the damages. The event and/or series of events that caused this structural failure are unknown at present.
>
> Representatives from our insurance provider FM Global are now on site.
>
> We are writing to extend an invitation to your insurers to participate in the investigation, mitigation efforts and the remedial action plan.
>
> Please contact your insurers and advise them of our invitation.
>
> Yours truly,

[92] The second letter was called an engagement letter. It is dated November 19, 2008, from Martin Marietta to Beaver Marine, advising that Martin Marietta wished to engage their services to assist with the mitigation of damage and do repair work at the wharf. It had this caveat:

> It is understood and agreed that the issuance of this engagement letter shall not constitute a waiver of any rights any of the parties may have by the fault or neglect of any party involved in the dock collapse of November 14th.

[93] Ms. Haynes also provided evidence that Martin Marietta had requested Hatch provide a copy of the as-built drawings. The request was made to the engineer, Grant McCharles, on November 15 when he had attended the site. Mr. McCharles returned on November 19, 2008 and hand delivered them. On November 24, 2008 Martin Marietta contacted Mr. McCharles to obtain design calculations. A memo by Martin Marietta of November 26, 2008 recorded Hatch's response, that as Martin Marietta had not paid for internal project files or calculations they would not be provided, but that Hatch would be available to assist with remediation pursuant to a service agreement.

[94] Ms. Haynes also deposed that at an unspecified date in December 2008, Martin Marietta retained Cox & Palmer to represent them in legal matters arising from the failure, "including, if necessary, to initiate legal action for damages resulting from the failure". In 2009, Cox & Palmer stopped representing Martin Marietta. It was not until March 25, 2010 that Martin Marietta retained Kugler Kandestin LLP.

[95] We know that litigation did ultimately ensue. The Action by Martin Marietta and FMI against Beaver, Hatch and Dywidag Systems International is dated October 31, 2011. This was followed by a host of cross and third party claims.

The Motions Judge's Decision

[96] The motions judge delivered oral reasons for judgment on May 30, 2014, which were later released as a written decision on July 18, 2014. Both are unreported.

[97] A little more than half of the motions judge's decision is taken up with resolving the issue of the redactions made by counsel for FMI and Martin Marietta. The redactions to documents were done on the basis of either solicitor-client privilege, or the information was irrelevant. Sealed envelopes containing the un-redacted versions were provided to the judge. She reviewed them and dealt with each. There is no complaint about that aspect of her decision.

[98] The motions judge then turned to what she referred to as the SDK materials and the claim of litigation privilege by FMI. She identified the evidence contained in the affidavits of Proudfoot, Lodge and Haynes. I will refer in more detail to the reasons of the motions judge later.

[99] It is sufficient for now to simply say that she was satisfied that the SDK reports and documents prepared for FMI were prepared for the dominant purpose of litigation, and that litigation was reasonably contemplated at the time they were created. Hence they were protected by litigation privilege and FMI would not be ordered to disclose them.

GROUNDS OF APPEAL

[100] The appellant identified six grounds of appeal in its Notice of Application for Leave to Appeal. These have been reduced somewhat in its factum to four, which my colleague has reduced to two. For convenience, I will repeat them:

1. Did the motions Judge err in relying on the affidavit of Mike Lodge and his explanations and interpretations therein from 5.5 years earlier instead of the Loss Memo dated November 26, 2008?
2. Did the motions Judge err by misapplying the dominant purpose test?
3. Did the motions Judge err by not finding that FMI had failed to produce a preponderance of evidence that the dominant purpose for retaining SDK was litigation?
4. Did the motions Judge err by failing to apply the general principles of litigation privilege?

[101] Before discussing the issues generated by these grounds of appeal, I need to refer to the standard of review we must apply—because it is my colleague's reliance on the standard of review to dismiss the appeal that is integral to my respectful disagreement with his proposed disposition of this appeal.

STANDARD OF REVIEW

[102] I agree with Justice Scanlan that *Housen v. Nikolaisen*, (relied upon by this Court in *Sable Offshore Energy, supra)*, defines the appropriate standard of review. Questions of law are reviewable on the standard of correctness, findings of fact, and mixed findings of fact and law, without an extricable legal component, are entitled to deference—palpable and overriding error must be established.

[103] Here, the motions judge decided that the documents in the possession of FMI were protected by litigation privilege. In my view, this was a question of law. Initially the respondent suggested that the decision by the motions judge was a discretionary one, attracting deference. It was later conceded that the issue of privilege is a question of law. Such questions are reviewed on a standard of correctness.

[104] There is good reason for this. Iacobucci and Major JJ., writing for the majority in *Housen*, explain:

> [8] On a pure question of law, the basic rule with respect to the review of a trial judge's findings is that an appellate court is free to replace the opinion of the trial judge with its own. Thus the standard of review on a question of law is that of correctness: Kerans, *supra*, at p. 90.
>
> [9] There are at least two underlying reasons for employing a correctness standard to matters of law. First, the principle of universality requires appellate courts to ensure that the same legal rules are applied in similar situations. The importance of this principle was recognized by this Court in *Woods Manufacturing Co. v. The King*, [1951] S.C.R. 504, at p. 515:
>
> > It is fundamental to the due administration of justice that the authority of decisions be scrupulously respected by all courts upon which they are binding. Without this uniform and consistent adherence the administration of justice becomes disordered, the law becomes uncertain, and the confidence of the public in it undermined. Nothing is more important than that the law as pronounced ... should be accepted and applied as our tradition requires; and even at the risk of that fallibility to which all judges are liable, we must maintain the complete integrity of relationship between the courts.

> A second and related reason for applying a correctness standard to matters of law is the recognized law-making role of appellate courts which is pointed out by Kerans, *supra*, at p. 5:
>
> > The call for universality, and the law-settling role it imposes, makes a considerable demand on a reviewing court. It expects from that authority a measure of expertise about the art of just and practical rule-making, an expertise that is not so critical for the first court. Reviewing courts, in cases where the law requires settlement, make law for future cases as well as the case under review.
>
> Thus, while the primary role of trial courts is to resolve individual disputes based on the facts before them and settled law**, the primary role of appellate courts is to delineate and refine legal rules and ensure their universal application. In order to fulfill the above functions, appellate courts require a broad scope of review with respect to matters of law.**
>
> [Emphasis added]

[105] Kerans & Willey in their work, *Standards of Review Employed By Appellate Courts*, 2nd Ed. (Edmonton: Juriliber Ltd., 2006), write:

> The concurrence (correctness) standard traditionally governs review of decisions about both the interpretation and the application of the rules about the hearing of evidence. We distinguish this, of course, from an assessment of that evidence in terms of its probative force, which we will discuss below. We here refer to the evidence rules about admissibility, privilege, and the competence and compellability of witnesses, and more precisely to the rules for review of application of those rules.
>
> The review of applications of these rules by first tribunals generally meets the tests for invocation of the concurrence (correctness) standard. …
>
> pp. 133-4

[106] To similar effect is Donald Brown's *Civil Appeals* (loose-leaf Toronto: Carswell. Last Updated: April 2015):

> **12:5320 *Standards of Review***
>
> Generally, evidence that is improperly received or excluded on the basis of relevance or because of an erroneous application of an exclusionary rule is viewed as an error of law, reviewable without deference. Where a decision as to admissibility involves the exercise of discretion, however, deference is generally accorded to a trial judge's conclusion, unless there is error of law or an error in the decision-making process, or the conclusion is "clearly wrong" or "unreasonable."

(See also: *R. v. Smith; R. v. James*, 2007 NSCA 19 at ¶ 166*; Halifax (Regional Municipality) v. Nicholson*, 2009 NSCA 109 at ¶ 22-23.)

[107] There are a number of situations where, although the decision by a trial or motions judge is on a question of evidence, and hence a question of law, deference may still play a role. A judge may have to hear evidence and find facts, or balance competing interests to inform the ultimate resolution of the question.

[108] But in this case, the motions judge was not engaged in resolving conflicting versions of the same event, or choosing what inferences to draw. Nor was she engaged in balancing probative value versus prejudicial effect; or if the threshold requirements of necessity and reliability were satisfied to allow admission of hearsay under the principled approach.

[109] Instead, she was engaged in a determination whether the requirements of litigation privilege had been met. She was applying a legal standard to uncontested facts. As recently explained by Watt J.A., this is a question of law alone:

> [45] Where a trial judge finds all the facts necessary to reach a legal conclusion but fails to do so, a court of appeal can accept the facts as found by the trial judge and disagree with the legal conclusion without trespassing on the fact-finding function of the trial judge. The disagreement is with respect to the law, not the facts nor inferences to be drawn from the facts. The issue raised involves a question of law alone within the meaning of s.676(1)(a): *R. v. Morin*, [1992] 3 S.C.R. 286, at p. 294; *R. v. J.M.H.*, 2011 SCC 45, [2011] 3 S.C.R.197, at para. 28; and *R. v. Luedecke*, 2008 ONCA 716, 93 O.R. (3d) 89, at para. 48.
>
> [46] The interpretation of a legal standard or the application of a legal standard to an uncontroverted factual premise involve questions of law alone: *R. v. Araujo*, 2000 SCC 65, [2000] 2 S.C.R. 992, at para. 18; *R. v. Biniaris*, 2000 SCC 15, [2000] 1 S.C.R. 381, at para. 23; *R. v. Ewanchuk*, [1999] 1 S.C.R. 330, at para. 21; and *Luedecke*, at para. 50.
>
> *R. v. S.H.*, 2014 ONCA 303

[110] As will become apparent, appeal courts have not hesitated to ensure that the determination of a claim of litigation privilege is correct. Mere recitation of the words of the governing test does not ensure a proper understanding and application of it.

ANALYSIS

[111] I agree with my colleague that there is no merit in the complaint that the motions judge erred in relying on the affidavit of Mr. Lodge, as opposed to his "Loss Memo" dated November 26, 2008. That Memo, drafted by Lodge, was attached to his affidavit. But in my respectful view, the assertions set out in that affidavit do not, as a matter of law, sustain the claim asserted by FMI for litigation privilege.

[112] My colleague quotes from the reasons of the motions judge:

> [100] The affidavit indicates, and I accept, that a subrogated claim was immediately being considered. The issue of pursing this type of a claim appeared in print as early as the loss memos of November 25, 2008. These memos reference engineers being hired to investigate cause, under the heading "subrogation" specifically. Factory Mutual hired counsel on November 18 to pursue these possibilities. I accept that the issue of litigation being commenced by Factory Mutual was either an immediate, or practically immediate, concern on their part.
>
> [101] Having considered all of the evidence and the caselaw before the Court, I accept that litigation was the dominant purpose for the seeking of this SDK report (as to cause).

[113] This leads my colleague to reason:

> [11] The motions judge found that a subrogated claim was contemplated "immediately or practically immediately" after FMI learned of the collapse of this large commercial structure. These are findings of fact which this Court should not interfere with absent a palpable and overriding error.

[114] With respect, the fact that a subrogated claim was being contemplated immediately or practically immediately is not sufficient. Obviously any person who is facing a loss or, in this case, an insurer facing a potentially large payout to its insured, is going to be looking for an opportunity, and may hope, to advance a subrogated claim. But where is the zone of privacy that needs to be protected?

[115] At most, the circumstances described in the affidavits demonstrated that if FMI's investigation established fault by the design or construction of the wharf, they would look to recover what they may need to pay out to its insured, Martin Marietta. At that time, they were still investigating the cause of the collapse. Furthermore, even if they were satisfied that the collapse was the fault of Hatch or Beaver, or both, there was no evidence that a litigation claim was being prepared.

[116] My colleague writes:

> [16] In *Raj*, Smith, J.A. said the threshold for determining whether litigation is a "reasonable prospect" is a low one. It is an objective test based on reasonableness. It does not require certainty but the claimant must show something more than speculation. I again refer to ¶98 of the motions judge's decision. She said she was required to objectively assess the situation from the perspective of a reasonable person. **She concluded that it was reasonable to believe that FMI would seek to recover from those responsible. I agree with her conclusion that a reasonable person aware of the circumstances of this case would conclude the claim would not be resolved without litigation.**
>
> [Emphasis added]

[117] As I have already mentioned, it is reasonable to believe that FMI would seek to recover. However, the motions judge did not find that a reasonable person would conclude the claim would not be resolved without litigation. What she actually said was:

> In the words of Justice Wright, in my view, that provides ample grounds to conclude that litigation would be brought by themselves as against the persons responsible and a reasonable person would conclude that the claim can't be resolved without having this information before it.

[118] In the written version of her decision, she says, in essence, the same thing:

> [93] In my view, the circumstances provide ample grounds upon which to conclude that litigation would be brought by themselves as against the persons responsible. Furthermore, a reasonable person would conclude that the claim could not be resolved without having this requested information.

[119] It is obvious that the "information" that had been requested was the input from SDK as to the cause of the collapse. I have no difficulty with the motions judge's conclusion that FMI needed to determine the cause of the collapse before they could proceed with a claim against anyone. But until they had such information, there was no definite prospect of litigation, nor any basis to conclude that documents that remained shrouded in mystery were privileged.

[120] Even if it could be said that the first part of the test is met, that FMI reasonably contemplated that litigation would ensue, based on this record, it is legally wrong to conclude that all documents FMI has in its possession or control to or from SDK Engineering are protected by litigation privilege. The motions judge found they were, and my colleague says we must defer to her determination.

To understand my respectful disagreement, it is necessary to further examine the reasons of my colleague, and those of the motions judge.

[121] My colleague writes:

> [23] In the present case, experts were required to determine the cause and extent of the collapse, to mitigate damages and to assess the extent of the damages. This included investigation as to how operations could resume using parts of the structure. There was also a need to estimate the cost of remediation. These are all issues likely to arise in the context of the ongoing litigation and it was not unreasonable for the motions judge to conclude that the dominant purpose for hiring SDK was to prepare the subrogation claim. That was a factual determination that should not be interfered with absent palpable and overriding error. I see no such error.
>
> [24] I again refer to the fact that the age of the wharf was found to have informed what FMI (the adjuster) had in mind as its dominant purpose in hiring SDK. It is for the motions judge to make this factual determination which should not be interfered with, absent a palpable and overriding error. **Mr. Lodge stated in his 2014 affidavit that the reason for hiring these experts, was to determine how to proceed with litigation against those parties who were found to be at fault by this investigation.** I have already alluded to the motions judge's finding that "… a subrogated claim was immediately being considered." (¶100) This was further evidenced by the loss memo of November 25, 2008 wherein there was reference to engineers being hired and this appeared under the heading "subrogation". All of the above led the motions judge to conclude that the dominant purpose for retaining SDK was to prepare for litigation.
>
> [Emphasis added]

[122] With respect, the Lodge affidavit does not state the reason for hiring SDK was to determine how to proceed against those parties found to be at fault.

[123] When Mr. Lodge contacted Mr. Norman Kadanoff, a structural engineer with SDK, the only thing Lodge knew was that a wharf constructed three years prior had suffered a partial collapse. Mr. Lodge identified multiple purposes to Mr. Kadanoff's mandate. The first and primary mandate was to observe the damage to the wharf and to begin an investigation into the cause of the collapse.

[124] The second mandate was to evaluate the extent of the structural damage to the wharf, and to evaluate the scope of repairs and cost of rebuilding the wharf. FMI assured Hatch that these documents had been disclosed, but none in relation to Mr. Kadanoff's collapse investigation.

[125] As earlier noted, Mr. Lodge also deposed that FMI retained the firm of Kugler Kandestin LLP in order to "investigate and ultimately commence litigation against the party(ies) responsible" for the collapse for damages to FMI that would result therefrom. Thereafter, Mr. Kadanoff and SDK "were to report to and take direction from Kugler Kandestin with respect to the preparation of an expert report regarding the collapse and the party(ies) responsible".

[126] The fact that counsel has been retained is not determinative—it is just one piece of the puzzle. *Horne v. Sanderson* (1987), 77 N.S.R. (2d) 340 (C.A.) demonstrates this principle. In *Horne,* the trial judge ruled that all documents prepared after the plaintiff retained counsel were privileged. This Court allowed the appeal on the basis that all documents did not become privileged by virtue of the plaintiff's retention of counsel; the matter was remitted back to the trial judge to reconsider whether each individual document was privileged in accordance with the test for litigation privilege. Macdonald J.A. pointed out (at p. 343) "[t]he mere fact that documents are prepared by a defendant's insurers after the plaintiff or claimant retains counsel does not in and of itself establish that the dominant purpose for their preparation was for use in litigation or for the obtaining of legal advice."

[127] Mr. Lodge referred to and adopted his Loss Memo, dated November 26, 2008 in support of the claim for litigation privilege. But there is nothing in that Memo that supports the blanket assertion by FMI that all documents in its possession to or from SDK were prepared for the dominant purpose of actual or contemplated litigation. The relevant extracts from the Memo are:

> The damages to the wharf are presently preventing ship loading activities. **Preliminary investigations point towards design and/or construction errors as a possible cause of the collapse.** Engineers are working to define possible solutions with respect to demolition and debris removal, temporary reports to resume shipping operations and permanent repairs to damaged structures and the correction of design and/or construction errors in the remaining areas. We have retained structure engineering consultants who are onsite investigating the cause and scope of damages. **Legal counsel has been retained to pursue subrogation potential.**
>
> …
>
> The insured's corporate engineers are investigating the cause of the collapse. We have retained structural engineers SDK to investigate cause. Norman Kadanoff of SDK was onsite 15-Nov and 17-Nov and Caroline Blais of SDK remains onsite as of 19-Nov.

> Based on preliminary information gathered so far, there are indications that the wharf construction does not match As-Built drawings and contract specifications. For instance, retaining plates shown as 9" x 12" on drawings appear to be 8" x 8" in reality. Spacer bolt locations in the whaler C-channels do not match up with drawings and specifications and some bolts are missing. There are also indications the steel pilings and toe pins were not all anchored in bedrock. Further developments in the cause investigation will be reported in future reports.
>
> [Emphasis added]

[128] There is no evidence of further reports by Mr. Lodge as to when the cause investigation was complete, or when FMI instructed counsel to pursue a claim against Hatch or others. The latest Loss Memo before the motions judge was dated September 30, 2009, almost a year later. It contained the same or similar language as the Loss Memo of November 26, 2008.

[129] There was no affidavit from Kugler Kandestin as to when they commenced preparation for litigation. We know litigation was not commenced by FMI and Martin Marietta, represented by Kugler Kandestin, until almost three years later, October 31, 2011.

[130] According to Mr. Lodge's affidavit, Mr. Kadanoff and SDK "were to report to and take direction from Kugler Kandestin LLP with respect to the preparation of an expert report regarding the cause of the collapse"; and he is "informed by Stuart Kugler, and does verily believe, that to date Mr. Kadanoff has not finalized an expert report regarding the cause of the collapse."

[131] There was no evidence that SDK actually did report to Kugler Kandestin or that counsel directed SDK. At no time did FMI claim that any materials to or from SDK were covered by solicitor-client privilege.

[132] Furthermore, whether SDK has finalized an expert report is irrelevant. In its motion, the appellants sought a list of the documents that were in the possession of FMI over which FMI were claiming privilege. Once that list was in hand, the parties could assess, and if necessary, the motions judge could rule if the claim for litigation privilege was well founded or not. This never happened.

[133] I have earlier referred to the decision of this Court in *Creaser v. Warren* about the requirement to properly list the documents with a short description, date, receiver, and sender. If this had occurred, then the motions judge would have been ideally placed to call for production of the documents for her examination.

[134] The motions judge recognized that FMI conceded that it had documents that were relevant, and absent establishing litigation privilege, must be produced. If protected by privilege, absent waiver, they will never see the light of day. She recognized that the second part of the test was more problematic for FMI—establishing the dominant purpose for the preparation of the documents was for laying them before counsel for use in litigation.

[135] The authorities demonstrate that decisions on privilege are governed by the circumstances, frequently on a document by document basis. That determination is guided by the rationale for the law recognizing litigation privilege—protect documents from disclosure which have been created to prepare one's case for litigation. The privilege permits a party to freely determine the optimum manner in which to prepare and present its case. Documents that otherwise don't qualify, are disclosed. The following illustrate.

[136] In *Shaughnessy Golf & Country Club v. Drake International*, [1986] 3 W.W.R. 681, [1986] B.C.J. No. 266 (C.A.) there was an appeal by the defendant, and cross appeal by the plaintiff, from a decision with respect to production of adjuster's reports.

[137] A fire destroyed the plaintiff's clubhouse on January 1, 1982. The loss was substantial. The insurer sued the defendant under its right of subrogation on May 27, 1982. The plaintiff's list of documents disclosed details of documents, but asserted litigation privilege over a number of them. Affidavits were produced in support. The motions judge upheld all of the claims of privilege.

[138] Like here, the adjuster deposed that it seemed clear that even on January 1, "this would be a matter for litigation". The reports were labelled privileged and strictly confidential to the solicitor for the insurer. The circumstances of the fire were plainly suspicious. Drake was a security company. Its security guard for the golf club invited friends to party in the luxury premises. They started a fire, and did nothing to put it out or get help.

[139] Esson J.A., for the majority, explained the obvious—adjusters are usually looking to blame someone other than the insured for the loss, and hence be able to pursue a subrogated claim. This does not lead to a sustainable claim of privilege for all documents:

> …But all fires have a cause and, in this era of liberal tort liability, some fault can be alleged against someone for allowing almost any cause to result in damage. If

> it is lightning or some other act of God, the designer or someone else should have provided better protection. If it is defective wiring or a malfunctioning furnace, someone, whether it be the electrician or furnace repairer or designer or someone else must have had a duty to prevent such a fault from materializing. If all else fails, a search can be made to determine whether a welder was seen in the area within days before the fire. What is sought is any cause for which the insured is not responsible. Any competent adjuster can be expected to be on the lookout for any clues which might assist in developing such a cause of action. It does not follow that his report is prepared for the dominant purpose of assisting in the litigation which later ensues.
>
> …
>
> The result, in my view, is this. The plaintiff has not established that the reports all owe their genesis to the dominant purpose of being used for the purpose of obtaining legal advice or to conduct or aid in the conduct of litigation which, at the time of its production, was in reasonable prospect. **What it did prove is that, if the reports are taken as a whole and treated as one document, the dominant purpose of the whole was to aid in the conduct of litigation. But that is not the proper way for the matter to be approached. Privilege was claimed for a large number of documents. The grounds for it had to be established in respect of each one. By trying to extend to the whole list the considerations which confer privilege on most of the documents, the plaintiff has confused the issue and created the risk that, because it did not make in its evidence the distinctions that could have been made, it must be held not to have established privilege for any**.
>
> [Emphasis added]

[140] The Court concluded that the motions judge had placed insufficient weight on the essential question of the dominant purpose for the document coming into existence, and virtually no weight to the considerations in favour of open discovery. There was no deference to the motions judge.

[141] The problem of how to properly apply the dominant purpose test was re-visited in *Hamalainen (Committee of) v. Sippola*, *supra*. Affidavits by adjusters were to the effect that they immediately believed there was a reasonable prospect of litigation, and that the principal purpose of the ensuing investigation was for the purpose of assisting in the preparation for and conduct of the litigation.

[142] Wood J.A., for the unanimous Court ultimately upheld the ruling by the Master, but emphasized that merely because an adjuster believes litigation will occur does not create a successful claim of privilege. Relying on *Shaughnessy*, he wrote as follows:

> Secondly, and more importantly, both affidavits appear to be based on what I view as a significant error of law, namely the assumption that because litigation seemed likely the reports must necessarily have been prepared for the "principal purpose of assisting in the preparation for and the conduct of" such litigation. This assumption is most clearly expressed in the highlighted portion of paragraph five of Nuthall's affidavit, but it underlies the often repeated conclusion to be found in both. Quite apart from the error inherent in assuming such a nexus, the proposition quoted suggests that the principal purpose of a report must necessarily be its dominant purpose. That such is clearly not the case is evident from the following passage at p. 321 of the report in the Shaughnessy Golf Club case:
>
> > The fact that litigation is a reasonable prospect after a casualty, and the fact that that prospect is one of the predominant reasons for the creation of the reports is now not enough. Unless such purpose is, in respect of the particular document, the dominant purpose for creating the document, it is not privileged.

[143] In *Cross v. Assuras*, [1996] 10 W.W.R. 367, [1996] M.J. No. 387 (C.A.), the plaintiff sued the hospital for negligence. She had to undergo surgery twice to remove tissue damaged when a chemotherapy drug, being administered by catheter, came into contact with healthy tissue. The hospital's insurer appointed an independent adjuster to investigate. His affidavit described meeting with hospital officials, and agreeing with their assessment that the claim would likely result in litigation. He advised the hospital to have the catheter inspected at his principal's expense. The catheter was sent to a third party expert who prepared a report. The hospital claimed privilege over the report. The Master agreed, and that decision was upheld by a judge of the Queen's Bench. The Court of Appeal reversed. There was no deference to the conclusion privilege had been established.

[144] Helper J.A., for the Court, in dealing with the issue of the report, wrote:

> [9] …There is no issue that the onus was on the HSC to prove privilege in this matter. There is also no issue that the appropriate question to be answered in determining whether that onus was satisfied is: What was the "dominant purpose" for which the report was requested? If the answer to that question is that the HSC requested the report for the purposes of assisting counsel in the preparation and conduct of litigation of this claim, then its position would be sustained. However, the evidence does not support that answer. The HSC provided no information on its reasons for seeking the inspection of the catheter or for requesting the report.

[145] Helper J.A. went on to explain:

> [15] Neither the affidavit of Mr. Malkoske, nor the answers he provided during his cross-examination on that affidavit establish that the dominant reason for his

> providing the advice he did to the HSC was in real anticipation of litigation. To conclude otherwise would render all reports ordered by an adjuster at the initial investigative stage of a claim subject to privilege. That was not and is not the objective of providing litigation privilege.

[146] In the case at bar, the evidence is that, as yet, there is no final report by Mr. Kadanoff of SDK. The appellant did not seek production of any such report. They asked the motions judge to order FMI to properly complete Schedule B of its ADD, and to order production of documents not protected by privilege.

[147] Implicitly, there are documents in FMI's possession or control to and from SDK. If FMI wanted to protect those documents from production on the basis of litigation privilege, it bore the onus of establishing that the dominant purpose at the time such documents were created was for use by it in the actual or contemplated litigation. Based on this record, they did not do so.

[148] The respondent argues that FMI, through correspondence actually written by Martin Marietta, put Hatch and Beaver on notice that they were both going to be held accountable, and litigation would ensue. It points to the letter dated November 17, 2008 from Martin Marietta to Beaver and Hatch attached to Mr. Lodge's affidavit.

[149] It is reproduced above (¶91). The letter is hardly adversarial. If anything, it is congenial. It expressed thanks to them for visiting the site on November 15, and that, "The event and/or series of events that caused this structural failure are unknown at present."

[150] The Loss Memo of November 26, 2008 repeated that the corporate engineers at Martin Marietta, as well as SDK, were still investigating cause. This was repeated almost a year later in Mr. Lodge's Loss Memo of September 30, 2009.

[151] Mr. Lodge's affidavit does not provide any further information when the investigation as to cause ended. There is simply no barometer to measure which documents, if any, were actually prepared to provide to counsel to obtain advice or enable him to prosecute an existing lawsuit or one in contemplation. Without such information, I am driven to the conclusion that the motions judge erred in law in finding litigation privilege had been established. She failed to apply the tests for such privilege in accordance with the rationale for its existence.

[152] The above principles have been consistently applied in Nova Scotia. For example in *Davies v. Harrington* (1980), 39 N.S.R. (2d) 258 (C.A.) the insurer,

under its right of subrogation sued. It refused to produce an expert's report. The adjuster, just two days after the fire, hired the expert. The evidence was that the only time the insurer hired this expert was when they wanted to take action against another insurance company to recover their loss. As soon as the report was received, it was sent to counsel. Cowan C.J.T.D. concluded the report was not privileged as its purpose was to determine the cause of the fire. This was upheld on appeal.

[153] In *MacDonald v. Acadia University*, 2001 NSSC 109, a student suffered a serious accident in a routine football practice. Litigation ensued. On the day of the accident, instructions were given by Dr. MacLeod for statements to be taken as he knew the injury was very serious, and he saw the likelihood of a claim and litigation. The adjuster also offered that his immediate opinion was that the claim would not be resolved without litigation. Neither of these views were sufficient.

[154] Justice Wright heard the motion seeking production. He explained:

> [14] The law on this subject has become well settled through a stream of cases decided over the past two decades of which I need refer to only two. The first is *Ford Motor Co. v. Laconia Holdings Ltd.* (1992) 108 N.S.R. (2d) 416 in which Davison, J. reviewed the applicable principles. Simply put, the burden is on the party who claims that the document is privileged to show that the dominant purpose for the preparation of the document was for legal advice and use in litigation. That burden extends to establishing not only that the document was obtained for the purpose of submitting it to counsel for advice but also for the purpose of litigation existing or in contemplation at the time the document was prepared. Justice Davison went on to say that these two requirements are conjunctive and not disjunctive. He then expanded on the second of the two requirements by stating as follows (at para 8):
>
> > Furthermore, 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.) at p. 284 and *Phipson on Evidence* (13th Ed.) at p. 303.

[155] The claims of privilege were not entirely made out. With respect to the adjuster's file, Justice Wright observed:

> [25] In his affidavit dated April 11, 2001, Mr. Roberts stated that because of the severity of the injuries and the policy limits under the All Sport Insurance (a group policy of accident insurance covering student athletes), his immediate opinion was that the claim would not be resolved without resort to litigation. He further stated in his affidavit that when he began his investigation, he was

> collecting information which he knew would be placed before counsel to represent the university; that there were no issues of coverage or policy breaches; and that the sole purpose of his investigation was to ensure the proper defence of the claim.

[156] In keeping with what should happen, the parties provided to Wright J. the content of the adjuster's file for his inspection. Justice Wright was then satisfied that after counsel was retained, the documents thereafter were protected by litigation privilege.

REMEDY

[157] Schedule B of FMI's ADD contained no list of the documents over which it claimed litigation privilege. Based on the record before the motions judge, its claim for privilege over all documents it has or had in its possession to and from SDK was not made out.

[158] It is tempting to simply order FMI to produce copies of all such documents. It had the burden to establish litigation privilege and it failed. But it seems obvious that at some point documents were prepared for the case FMI eventually brought. Perhaps that is the right outcome, in effect, a punishment by way of a loss of privilege for its failure to comply with the requirements of Rule 15.

[159] But the more common remedy is to order what Hatch originally sought, a properly completed ADD with a list attached to Schedule B. With that list in hand, Hatch can assess whether the claims for litigation privilege appear to be well founded, and if not, to challenge the claim. On that challenge, the motions judge can rule with the benefit of the details that should be set out in Schedule B, and if necessary, examine the actual documents.

[160] The problem with this latter remedy is that FMI gets in essence, another opportunity to claim litigation privilege. Some would say they are being rewarded for failing to comply with what has long been recognized, and currently located in Rule 15, as the appropriate mechanism to assert privilege. To mitigate against such reward, I would allow the appeal, and order that Hatch have its costs below in the amount of $5,000.00, and $4,000.00 in this Court, both inclusive of disbursements.

[161] That is not to say that in the future, a motions judge, or this Court on appeal, may well decide to simply issue an order disallowing a claim of privilege if it has

not been properly made out for any reason, including a failure to properly prepare Schedule B to an Affidavit Disclosing Documents.

[162] My colleague says that I am concerned or troubled that FMI did not properly complete Schedule B to its ADD. To brush aside the obvious shortcomings in the materials that the motions judge had before her to decide the claim of litigation privilege, Justice Scanlan writes that: my concerns are unfounded because the motions judge adequately addressed this issue; and in any event, the appellant has not raised this issue as a ground of appeal in this Court.

[163] With all due respect, my colleague is in error that the motions judge adequately addressed the issue, and misunderstands my discussion about the failure to follow the proper process to assert and resolve claims for litigation privilege. I will explain.

[164] First, what happened before the motions judge. My colleague sets out a lengthy exchange between counsel for the appellant and the motions judge as evidence that the motions judge resolved the issue of the inadequate Schedule B list.

[165] The quoted exchange has nothing to do with the inadequate Schedule B list for FMI's claim for litigation privilege; it is solely in relation to asserted claims of solicitor-client privilege.

[166] Recall that FMI had produced documents that had been redacted on the basis of solicitor-client privilege or because of irrelevancy. The un-redacted versions of these documents were produced for the motions judge's inspection. What the motions judge was doing in the quoted exchange was determining whether if she went through the exercise of examining the un-redacted versions to decide the issue of solicitor-client privilege, did the appellant still want a properly completed Schedule B for those documents. The appellant agreed that would not be necessary. I will highlight those portions of the exchange quoted by my colleague that makes this clear:

> **You've got 26 of them here, 24 of them I should say. So are you seeking in addition to the Court reviewing these and determining whether each of them is privileged or not or whether some portion of them is privileged or not, are you still seeking a detailed Schedule B with respect to each of those again, even though the Court is going through them**?
>
> …

> THE COURT: ... **let's assume that I was to go through all this and I'll say yes to this one and no to that one and yes to this one and no to that one, then is ... is your request for a detailed Schedule B then moot to some extent?** I mean has it been ... do you wish to respond
>
> …
>
> MR. SCHIPILOW: ... or ... then we'd ... we'd want to have some detail from our Friends so we know what we are dealing with so it's in compliance with our understanding of Schedule Part B. So at the end of it you ... say you get ... this stuff has been released. The rest has not but we would ask counsel for FMI to detail ... give more detail of the reason for your ... for your ...
>
> THE COURT: By that point though the Court would already have decided that it is privileged. I mean presumably ...
>
> MR. SCHIPILOW: Yes.
>
> THE COURT: ... **solicitor/client privilege and so ... so let's say just theoretically ... let's say I were to say okay, the letter of January 5th, 2009, the Court's decision is that this is solicitor/client privileged. You're looking for more than that?**
>
> **MR. SCHIPILOW: No, that's good.**
>
> …
>
> THE COURT: **Okay. Just ... and I just raise that because it seemed to me that if I was going to be going through them item by item, presuming I did that, then it seems to me that okay, well then the detail is going to be there**. It's going to be done so ... and if not, if that doesn't happen, then I take your point that you do wish more detail about them and I understand that.

[167] It is clear that the only documents produced for inspection by the motions judge were the ones that had been redacted for either solicitor-client privilege or lack of relevancy. Those were the ones inspected by the motions judge, and she properly clarified with the appellant that if she did that review it would be moot to then require a Schedule B list in relation to those documents.

[168] That exchange had nothing to do with the obvious non-compliance with Rule 15.03, an itemized Scheduled B for documents over which litigation privilege was being claimed. I see no abandonment of that request in the record produced on this appeal.

[169] My colleague then quotes from briefs, and then an excerpt from the motion judge's oral decision as suggesting a further "more detailed" Schedule B might have been "in the works", thereby resolving the issue of an inadequate ADD (¶ 34). The quote he relies on is:

> I understand that an Affidavit of Documents, properly done, is going to be exchanged and that either has been done or has yet to be done but that is a separate document.

[170] With respect, the quote is taken out of context. The comment was made by the motions judge because of the suggestion by counsel for the appellant that FMI may have waived litigation privilege by sharing SDK documents with Martin Marietta or its then counsel, Cox & Palmer. In response, Ms. Haynes filed her affidavit of April 29, 2014, that Martin Marietta had never received SDK documents, nor, by her investigation, had Cox & Palmer. Counsel for the appellant complained that the affidavit from Ms. Haynes of Martin Marietta was not the same as a properly completed ADD from Martin Marietta. The full excerpt from the oral decision of the motions judge explains:

> Therefore, having considered all of the evidence before the Court and the case law before the Court in terms of what I need to consider in this test, I do accept that litigation was the dominant purpose for the seeking of this report into the cause of the loss. I just want to make a comment, I guess, with respect to the issue of waiver. The issue of waiver, obviously, as I think I've said earlier, where a document is privileged it is certainly possible for the holder of the privilege to waive that through certain ways, one of the ways being disclosure through a third party.
>
> When, and I mentioned this earlier, at the hearing it was raised by Mr. Proudfoot, not until that moment, but it was raised by Mr. Proudfoot, that potentially if these documents had been shared by Factory Mutual with Martin Marietta or counsel or their previous counsel, being Cox & Palmer, then that would constitute a waiver. As I said, that was not something that had been raised previously. As I've previously said, rightly or wrongly, I allowed Mr. Proudfoot to raise this. I did not have to but I did indicate that further materials could be filed if the parties wished to, given the circumstances, and so this was done, as I've mentioned earlier. **The Affidavit of Helen Haynes, which is the most recent Affidavit she gave, indicates that she has not seen these materials from SDK. She would have if Martin Marietta had them. She is confident that she would have seen them. She has contacted Cox & Palmer and they have not received it.**
>
> **Mr. Proudfoot has responded to that Affidavit by indicating, as I understand it, that her Affidavit does not meet the requirements for an Affidavit of Documents under Civil Procedure Rule 15.03. From the Court's perspective, I can indicate that that is not what I was seeking from Ms. Haynes. I understand that an Affidavit of Documents, properly done, is going to be exchanged and that either has been done or has yet to be done but that is a separate document. This was to respond to the issue of waiver and, in fact, it was filed as a result of the raising of the issue during the hearing of this motion. I can indicate that from the Court's perspective it resolves the issue**

> **from my perspective. There was, in fact, no evidence that anyone at Martin Marietta has received these materials.** To this date I have no evidence that anyone at Martin Marietta or counsel has received these materials. But given that it had been raised, and given that it did raise a question, then I did not want it raised without the opportunity to respond and that has been done. So just with respect to that issue, I want to confirm that from my perspective, that matter has been dealt with.
>
> [Emphasis added]

[171] There was no "more detailed" Schedule B from Martin Marietta, let alone one from the party asserting litigation privilege, FMI, "in the works".

[172] I disagree with my colleague's concern that the adequacy of the Schedule B list is somehow a new issue on appeal. It was the very thing pleaded and argued to the motions judge. Also argued to the motions judge, and now to this Court, is that based on the materials produced by the respondent, they had not made out its claim for litigation privilege, and the motions judge erred in law in finding that it had.

[173] That is the basis that I decide the appeal, no other.

Beveridge, J.A.