Docket: CA 156440
Date: 20000823

NOVA SCOTIA COURT OF APPEAL

[Cite as: Mitsui & Co. (Point Aconi) Ltd. v. Jones Power Co. Ltd., 2000 NSCA 96]

Roscoe, Flinn and Cromwell, JJ.A.

BETWEEN:

JONES POWER COMPANY LTD., a body corporate, and J.A. JONES CONSTRUCTION COMPANY, a body corporate

Appellants

- and -

MITSUI & CO. (POINT ACONI) LTD., a body corporate

Respondent

REASONS FOR JUDGMENT

Counsel: George W. MacDonald, Q.C.; Michelle C. Awad and A.H. Gaede, Jr. for the appellants
David A. Miller, Q.C.; Robert G. Grant, Q.C.; T. Arthur Barry and Virve Sandstrom for the respondent

Appeal Heard: March 27, 2000

Judgment Delivered: August 23, 2000

THE COURT: Leave to appeal is granted, and the appeal is allowed with costs to the appellants in the amount of $5,000.00, plus disbursements as per reasons for judgment of Roscoe, J.A.; Flinn and Cromwell, JJ.A., concurring.

ROSCOE, J.A.:

Background

[1] This is an appeal by Jones Power Company and J.A. Jones Construction Company of a pre-trial order made by Justice Peter Richard respecting the production of documents for which privilege was claimed by the respondent, Mitsui & Co. (Point Aconi) Ltd. This appeal was heard at the same time as the appeal from a subsequent decision, in the first segment of a severed trial, whereby Justice Richard determined the validity of a Memorandum of Understanding (MOU). The decision in that appeal is released concurrently with this decision.

[2] In an earlier interlocutory appeal in this matter reported at (1999), 173 N.S.R. (2d) 159, Flinn J.A. summarized the context of the dispute between the parties, commencing at para. 2, as follows:

> [2] This litigation arises out of the construction of the Thermal Electrical Generating Station at Point Aconi, Nova Scotia. The respondent (Mitsui) entered into an agreement

with the Nova Scotia Power Corporation to design and build this power plant. Mitsui then contracted with the appellant, Jones Power Company Ltd. (JPC) whereby JPC would act as construction manager for the project, and to carry out certain construction work. The contract price for JPC's services is in excess of $100 million dollars. The appellant, J.A. Jones Construction Limited (JPC's parent company), guaranteed the contractual obligations of JPC to Mitsui. Mitsui also contracted with the third party, Sargent & Lundy (SL), whereby SL would provide design and project management services for the project.

[3] During 1991 and 1992 disputes arose between Mitsui and JPC which the parties were unable to resolve. The dispute concerned compensation for work done, and the proper definition of the scope of the work to be done. By the spring of 1992 the claims for additional compensation by JPC had reached several millions of dollars. In an effort to get the project back on track and settle differences, and following intense discussions and negotiations among the senior executives of the parties, a meeting was held at the SL offices in Chicago on the 28th of July, 1992. At this meeting a Memorandum of Understanding (MOU) was executed by JPC and Mitsui. Mitsui takes the position, in this litigation, that the MOU fixed the total compensation for JPC at $118 million dollars, subject to adjustment only in accordance with the terms of the MOU; that JPC would achieve the completion date between July 1st and July 15th, 1993; and that the MOU constituted a valid and legally binding agreement between JPC and Mitsui. JPC's position, with respect to the MOU, is that it repudiated the MOU the day following its execution, on July 29th, 1992; that the MOU did not have, and was not intended to have, legal effect; that the MOU was too vague and uncertain to be capable of constituting a legally binding agreement; and that the MOU was nothing more than an agreement to agree.

[4] Discussions continued between the parties. On November 5th, 1992, the parties agreed to get the project finished, and to deal with their differences following completion. Neither party waived its rights, and Mitsui provided funding to complete the project.

[5] The disputes were not resolved, and Mitsui commenced an action against JPC in 1994. JPC commenced a separate action against Mitsui on October 11th, 1994.

[3] The 87 documents in issue in this appeal were all created between July 28, 1992, the date the MOU was signed, and November 5, 1992, the date the parties agreed to complete the project and leave the contractual dispute for determination after the conclusion of the construction. The application for disclosure of 91 documents, for which the respondent claimed privilege, was made during a telephone pre-trial conference with the trial judge on April 1, 1999. The litigation had commenced in October, 1994 and the trial was scheduled to begin on May 18, 1999. By brief memos faxed to counsel on May 10th and May 11th, Justice Richard advised counsel which documents were to be produced. Then, in a formal written decision dated May 17, 1999,

he provided reasons for ordering that four entire documents and portions of six others be produced to the appellants. The balance of the documents were found to be protected by solicitor client privilege or litigation privilege. The notice of appeal from that decision was filed on June 4, 1999, which was the thirteenth day of the trial. There being no application to stay proceedings or to adjourn the trial, however, the trial continued for a total of 20 days.

The Respondent, its employees, and its lawyers

[4] An understanding of the nature of documents in issue is not possible without an introduction to the respondent, the various components of its parent company and the many people who created, reviewed and received the documents, and the drafts and copies of them.

[5] The trial judge, in the MOU decision, described the respondent corporation as follows:

> [para4] Mitsui & Co. (Point Aconi) Ltd (MPA) is a wholly owned subsidiary of a Japanese based international trading company, Mitsui & Co Ltd. MPA is a special purpose company which was incorporated solely to complete the Point Aconi Power Generating Plant for the Nova Scotia Power Corporation. MPA came under the direct control of the Electric Machinery Division of Mitsui. Mitsui is a huge international corporation which has been in operation since 1876. It operates worldwide through some 300 subsidiary companies and is divided administratively into 14 business groups including the Electric Machinery Group which has two divisions. Mitsui employs some 10,000 people worldwide and has annual revenues of about $130 Billion (US). Mitsui does not design or construct power projects but assembles the necessary expertise to perform these functions. According to Kenji Akikawa the Electrical Division was responsible to Mitsui for the profit and loss of MPA. He also indicated that tax considerations and administration dictated the formation of MPA as a single purpose company - "much easier with a single purpose company".

[6] The employees of Mitsui, the parent company and the respondent, Mitsui (Point Aconi) (MPA), who were in some way involved in the preparation of the disputed documents are:

(1) Kenji Akikawa - the General Manager of Section 4, Electric Machinery International Division, Mitsui & Co., Tokyo and President and CEO of MPA since 1994. He was also the project manager of the Point Aconi project.

(2) Koichi Nitta - General Manager, Plant Team, Mitsui & Co., Ltd. From March, 1992, Mr. Nitta was involved in the negotiations with Jones when the initial Point Aconi contract was entered into and again when the MOU was signed. He was the person to whom Mr. Akikawa reported.

(3) Kazuharu Ohara - the Site Manager at the Point Aconi project from 1990 and the president of Mitsui Point Aconi from 1991. He returned to a position in Tokyo in 1994.

(4) Tadashi Ando - The in-house legal counsel and Manager of the Second Legal Department of Mitsui and Company, Tokyo.

[7] In addition to its own in-house counsel, Mitsui retained the services of two law firms:

(1) Smith Lyons Torrance Stevenson and Mayer - of Toronto, Ontario.

(2) Stewart McKelvey Stirling Scales - Halifax, Nova Scotia

[8] As in Justice Cromwell's decision in the companion appeal, for ease of reference, the parties will generally be referred to as "Jones" and "Mitsui", without distinguishing between the various corporate entities, unless the circumstances require otherwise.

The Documents

[9] The documents in issue were described and summarized in an affidavit of Mr. Akikawa sworn on April 16, 1999. That summary is all that has been available to the appellants. Justice Richard and this court have had the opportunity to review the actual documents, many of which were originally in Japanese, but have been translated. As indicated by Mr. Akikawa, although before Justice Richard there were 91 documents in issue, 29 of these were drafts of or memos concerning seven documents, the final version of which was produced to the appellants. The seven final documents are as follows:

(1) A letter dated August 27, 1992 from Mr. Nitta to Mr. D. L. Walcott, President of Jones Power Company, in response to a letter dated August 21, 1992 from Mr. Walcott.

(2) A letter dated August 28, 1992 from Mr. Akikawa to Mr. Walcott.

(3) A letter dated September 12, 1992 from Mr. Nitta to Mr. Walcott.

(4) A letter dated October 14, 1992 from Mr. Ohara to Mr. Frank Codispoti,

the Project Manager for Jones Power Company Ltd.

(5) A letter dated October 20, 1992 from Mr. Ohara to Mr. Codispoti.

(6) A letter dated October 27, 1992 from Mr. Ohara to Mr. Codispoti.

(7) A change order dated October 26, 1992.

[10] According to Mr. Akikawa, each of the six letters and the change order were initially prepared in draft form and then sent for comments back and forth between himself, Mr. Nitta, the legal department in Tokyo, Smith Lyons and Sergent and Lundy (S & L) so that the final version of the documents "produced in this manner would be a compilation of the comments and advice received, including in particular the advice from the legal department and from Smith Lyons".

Decision under Appeal

[11] In his decision, Justice Richard adopted the categorization of the documents urged by counsel for Mitsui and agreed that the documents fell into nine groupings:

(1) non-substantive cover memos;

(2) documents directly to or from the legal department;

(3) documents which in whole or in part relayed legal advice from the legal department or from Smith Lyons;

(4) documents which in whole or in part discussed matters upon which legal advice is to be obtained from the legal department or Smith Lyons;

(5) documents which were prepared for the purpose of placing before the

legal department or Smith Lyons to assist in obtaining legal advice;

(6) documents which were prepared on the basis of advice received from the legal department or Smith Lyons;

(7) documents consisting of draft correspondence to Jones or references to such drafts upon which legal advice was received prior to the correspondence being finalized;

(8) documents between Mitsui and Sergent and Lundy;

(9) documents containing expressions of opinions or attitudes and discussions of legal and settlement strategy.

[12] Justice Richard concluded as follows:

> There is no doubt in my mind that all of these documents were generated as a result of pending legal action or ongoing settlement negotiations. They may have been draft documents which never gained final form status. They may have been communications of opinions or proposed strategies to be considered. In reviewing the documents and the supporting affidavit I could not discern any attempt to mislead or deceive or prevent disclosure of a document to which the other party was rightfully entitled. In his 10 May submission counsel for Jones Power referred to the "robust protections" afforded by solicitor client privilege. Such protection is essential so that parties, their employees and counsel may communicate freely and express opinions and strategies without the risk of future detrimental disclosure.

Grounds of Appeal

(i) Did the Chambers judge err in concluding that certain documents which were not produced by the respondent pursuant to **Civil Procedure Rule** 20, were privileged; and

(ii) Did the Chambers judge err in concluding that the respondent had not waived privilege over certain documents through the disclosure of other documents.

Standard of Review

[13] The order appealed from was one granted in an interlocutory proceeding. We should therefore only interfere if wrong principles of law have been applied or a patent injustice would result if we did not. See **Exco Corp. v. Nova Scotia Savings & Loan Co. et al.** (1983), 59 N.S.R. (2d) 331; 125 A.P.R. 331 (C.A.), and **Minkoff v. Poole and Lambert** (1991), 101 N.S.R. (2d) 143; 275 A.P.R. 143 (C.A.).

General Principles

[14] Parties to an action may withhold from production and disclosure documents for which they claim privilege. There are two distinct types of privilege relevant here: solicitor client privilege and litigation privilege (**Baker v. Commercial Union Assurance Company of Canada et al.** (1995), 138 N.S.R. (2d) 169). The Supreme Court of Canada in **Solosky v. The Queen**, [1981] S.C.R. 821, adopted Wigmore's statement of the modern principle of solicitor client privilege at p. 835:

> Where legal advice of any kind is sought from a professional legal adviser in his capacity as such, the communications relating to the purpose made in confidence by the client are at his instance permanently protected from disclosures by himself or by the legal adviser, except the protection be waived.

[15] At p. 837 in **Solosky, supra**, Justice Dickson (as he then was), stated that in order to be protected by solicitor client privilege, a document must meet the following criteria:

(i) a communication between solicitor and client;

(ii) which entails the seeking or giving of legal advice; and,

(iii) which is intended to be confidential by the parties.

[16] More recently in **Descôteaux et al. v. Mierzwinski**, [1982] 1 S.C.R. 860, Justice Lamer (as he then was), summarized the court's position as follows at p. 892:

> In summary, a lawyer's client is entitled to have all communications made with a view to obtaining legal advice kept confidential. Whether communications are made to the lawyer himself or to employees, and whether they deal with matters of an administrative nature such as financial means or with the actual nature of the legal problem, all information which a person must provide in order to obtain legal advice and which is given in confidence for that purpose enjoys the privileges attached to confidentiality. This confidentiality attaches to all communications made within the framework of the solicitor-client relationship, which arises as soon as the potential client takes the first steps, and consequently even before the formal retainer is established.

[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)).

[18] In *Claiming Privilege in the Discovery Process (1984),* *Special Lectures of the Law Society of Upper Canada* 163, Professor Robert J. Sharpe (as he then was) stated:

> . . . It is important to distinguish this privilege from other forms of privilege, and the label "litigation privilege" conveniently depicts a distinct area. A definition of this rule which is often quoted is that given in the case of **Wheeler v. Le Marchant** (1881), 17 Ch. D. 675, at 681, per Jessel M.R.:
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> > The cases, no doubt, establish that such documents are protected where they have come into existence after litigation commenced or in contemplation, and where they have been made with a view to such litigation, either for the purpose of obtaining advice as to such litigation, or of obtaining evidence to be used in such litigation, or of obtaining information which might lead to the obtaining of such evidence.

[19] Professor Sharpe draws a distinction between the two types of privilege in the following passage commencing at p. 164:

> . . . First, solicitor-client privilege applies only to confidential communications between the client and his solicitor. Litigation privilege, on the other hand, applies to communications of a non-confidential nature between the solicitor and third parties and even includes material of a non-communicative nature. Secondly, solicitor-client privilege exists any time a client seeks legal advice from his solicitor whether or not litigation is involved. Litigation privilege, on the other hand, applies only in the context of litigation itself. Thirdly, and most important, the rationale for solicitor-client privilege is very different from that which underlies litigation privilege. This difference merits close attention. The interest which underlies the protection accorded communications between a client and a solicitor from disclosure is the interest of all citizens to have full and ready access to legal advice. If an individual cannot confide in a solicitor knowing that what is said will not be revealed, it will be difficult, if not impossible, for that individual to obtain proper candid legal advice.
>
> > 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).

[20] Although written in 1984, these passages from Professor Sharp's work have recently been cited with approval by the Ontario Court of Appeal in **General Accident Assurance Co. v. Chrusz** (1999), 45 O.R. (3d) 321; 180 D.L.R. (4th) 241; by Garry D. Watson and Frank Au in ***Solicitor-Client Privilege and Litigation Privilege in Civil Litigation*** (1998), 77 C.B.R. 315; and by this court in **Halifax Insurance Company v. Metlege** (1998), 174 N.S.R. (2d) 251.

Specific Issues

[21] In addition to the general principles that must be applied to each of the documents in issue, in order to determine if it is privileged, there are several more specific questions that should first be addressed in the context of this case:

(1) When was litigation contemplated by Mitsui?

(2) Are draft copies of documents privileged if the final version of it is produced?

(3) Does sending a carbon copy of an otherwise non-privileged document to

counsel change its characterization?

(4) Are documents reflecting pre-trial strategy privileged?

(5) When is privileged waived?

[22] I will discuss those before examining the documents in detail.

1. When was litigation contemplated by Mitsui?

[23] The trial judge did not specifically fix a date on which Mitsui contemplated that litigation was likely. His finding was that all of the documents were generated as a result of pending legal action or ongoing settlement negotiations.

[24] Since the earliest document in issue is dated August 5, 1992, presumably the trial judge concluded that at least by that date litigation was in contemplation of the respondent.

[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.

[26] In his affidavit filed on the application for production, Mr. Akikawa says that he was told by Michael Adams, the Construction Manager for Jones on August 6, 1992 that Jones had retained a claims consultant and had taken legal advice as to the validity of the MOA, and that they would take legal action if Mitsui did not pay Jones $135,000,000. He continued:

> By August 6, 1992, at the very latest (date upon which Mr. Adams communicated to me Jones' intentions with respect to legal action as set out above), MPA (and I personally) believed litigation was likely.

[27] Mr. Adams, in his affidavit, says that Mr. Akikawa's comments are taken out of context and that although there was a meeting on August 6, 1992, there was no threat of litigation. Rather he says, with respect to the $135,000,000, that he "advised Mr. Akikawa that if Mitsui refused to make such a commitment, I expected the matter would be considered by the Board of J. A. Jones Construction Co. and that the Board may decide to leave it for resolution by a third party". Mr. Adams denied that he ever advised Mr. Akikawa that lawyers had attended at the Point Aconi site.

[28] The appellants submit that there was insufficient evidence for Justice Richard to find that litigation was in contemplation of the parties as of August 6, 1992. I disagree. In the context of the purported repudiation of the MOU on July 29, 1992, which occurred after months of disputes between the parties regarding the interpretation of various

clauses of their contract, the evidence contained in both the affidavits of Mr. Akikawa and Mr. Adams is a sufficient basis for a finding that litigation was reasonably contemplated at least by August 6, 1992.

2. Are draft copies of documents privileged if the final version of it is produced?

[29] As noted above, many of the documents in issue on this appeal are draft copies of letters eventually sent to Jones by Mitsui. Mitsui submits that in each case a draft of the letter was first sent to either or both of the Tokyo legal department and Smith Lyons for legal advice, and that to produce the draft letters would permit Jones to infer the nature and extent of the legal advice received. The respondent cites as authority for this proposition **International Minerals & Chemical Corp. (Canada) v. Commonwealth Insurance Co.** (1992), 11 C.C.L.I. (2d) 243 (Sask. Q.B.). The respondent submits that since all correspondence was being checked by the legal department in Tokyo, all earlier draft copies of correspondence and references to the preparation of drafts are caught by both solicitor client privilege and litigation privilege.

[30] In **International Minerals**, Halvorson, J. was asked to determine, in an insurance matter, whether draft proofs of loss were privileged in the context of the insurers' allegation of fraud by the insured in the preparation of the proofs of loss. In an earlier decision concerning a claim of privilege between the same parties in the same case, Halvorson, J. had said:

> To engage solicitor-client privilege, it must be shown that the communication or document was made confidentially for the purpose of legal advice. Those objectives must be construed broadly. Where there is a continuum of communications and meetings between the solicitor and client, and information is passed by the solicitor or client to the other as part of the continuum aimed at keeping both informed so that advice may be sought and given as required, the privilege will attach to those communications and documents (see **Balabel**). (See **International Minerals & Chemicals Corp. (Canada) v. Commonwealth Insurance Co.** (1990), 47 C.C.L.I. 196, 89 Sask. R. 1 at pp. 7 and 8 [Sask. R.]).

[31] In **Balabel v. Air-India**, [1988] 2 All E.R. 246 at p. 256, the case relied on by Justice Halvorson, the court agreed with the master who had decided:

> Once solicitors are embarked on a conveyancing transaction they are employed to ensure that the client steers clear of legal difficulties, and communications passing in the handling of that transaction are privileged [if their aim is the obtaining of appropriate legal advice] since the whole handling is experience and legal skill in action and "a document passing during a transaction does not have to incorporate a specific piece of legal advice to obtain that privilege".

[32] Halvorson, J. found that the documents were prepared for the specific purpose of obtaining legal advice and that therefore the draft proofs, draft business interruption claims, and associated background papers were protected by solicitor client privilege. Although Halvorson, J. found that the documents did not qualify for litigation privilege because they did not meet the dominant purpose test, he found that documents that were not actually placed before counsel, but were a necessary step in generating documents which were to be given to counsel for advice, were protected presumably by solicitor client privilege.

[33] In reviewing the documents in issue on this appeal, where it is revealed that either the legal department or outside counsel were actually involved in the preparation of the draft, that is, that specific legal advice was sought and received, I would agree that the document would be protected by solicitor client privilege. As well, those documents that were “a necessary step” in the process of receiving legal advice would likewise be privileged. However, where it appears that the dominant purpose of any of the documents was not the contemplated litigation, but for the dominant purpose of communicating with Jones in relation to the continued construction of the power plant, litigation privilege would not be applicable.

[34] In this case, even though the final draft of the document was, in many cases, forwarded to Jones and therefore not a communication made in confidence, those portions of it which reflect the advice received from Mitsui’s solicitors, to the extent that they are apparent on the draft copies, are privileged. (See **Gendis Inc. v. Richardson Oil and Gas Ltd.**, [1999] 12 W.W.R. 629).

3. Does sending a carbon copy of an otherwise non-privileged document to counsel change its characterization?

[35] The respondent submits that any documents that were sent to the Second Legal Department in Tokyo and outside counsel were sent for the purpose of obtaining legal advice and therefore obviously privileged. As indicated above, to the extent that the documents reveal that advice was sought or given, they will be found to be privileged.

However, as noted by Halvorson, J. in the first of his **International Minerals** decisions (1990), **supra**, at p. 199:

> . . . the simple expediency of channelling all communications through legal counsel does not of itself shield the communications from disclosure.

[36] I would agree with that statement and as well with the following statement made by Saunders, J. in **Mutual Life Assurance Co. of Canada v. Deputy Attorney General of Canada** (1988), 28 C.P.C. (2d) 101 (Ont. S.C.) at p. 105:

> There are some documents between employees which transmit or comment on privileged communications with lawyers. In my opinion, in the context of this situation, such communications are also privileged.
> A difficulty arises in the case, for example, of a communication between the employees in which a copy is sent to a lawyer. If the lawyer marks the document or makes notes on it, it becomes a working paper and is privileged. **However, not all such documents are privileged simply because the lawyer received copies and put them in his file.** In my opinion, that would be extending the right to claim a privilege too far. An unmarked document, it seems to me, must be connected with legal advice or with litigation in order to be privileged.
>
> (emphasis added)

4. Are documents reflecting pre-trial strategy privileged?

[37] The respondent submits that 31 of the disputed documents, those in category 9, contain expressions of opinion, attitude or legal or settlement strategy and are therefore either privileged or irrelevant. Authority for this submission is said to be found in **Sydney Steel Corporation v. Mannesmann & Steele Corp.** (1985), 69 N.S.R. (2d) 389

(S.C.T.D.) and **Tsmikilis v. Halifax Insurance Company** (1992), N.S.J. No. 416 (S.C.T.D.).

[38] The appellants argue that the opinions of employees of Mitsui at the relevant times are factual and are therefore neither privileged nor irrelevant because they show the state of mind of the corporate entity at the relevant time. The appellants say that comments by employees of Mitsui and S & L in the period following July 28, 1992 respecting drafts of the MOU and drafts of change orders or other documents relating to the outstanding items post-MOU are all integral parts of the factual framework, especially where the issue is whether the MOU is a binding contract in itself or only an agreement to agree. The appellants also rely on **Sydney Steel** and **Tsmikilis**.

[39] In the **Sydney Steel** case, Hallett, J. (as he then was), was asked to determine, on a pre-trial chambers application, whether or not the defendant was obligated to produce documents it said were irrelevant to the issue in dispute. The issues raised by the pleadings were whether or not the parties had entered a contract for the sale of 100,000 tons of coal. The defendants alleged, as the appellants do here, that no contract was ever finalized. A second issue was if there was a contract and it was breached, what were the plaintiff's damages. Justice Hallett indicated that the question of solicitor client privilege was not raised before him. He was dealing only with whether or not the disputed documents were relevant. The defendant objected to producing the documents because they did not come into existence until more than a month after the

contract was allegedly concluded and secondly, they contained “merely expressions of opinions, attitudes and strategies relating to the anticipated claim by the plaintiff”.

[40] At para. 23 Justice Hallett stated the issue as:

> [23] There is a policy consideration that must be addressed. Should corporations not be free to discuss amongst those employees involved strategies and opinions in face of anticipated legal action without the risk of having to produce such documents? The answer is yes; documents that discuss strategies are not required to be produced unless otherwise relevant to the issues before the court.
>
> [24] Most of the telexes and memos I have reviewed are relevant to the issue of whether there was a contract or not even though expressions of strategies and opinions are intermixed in the documents. While the documents are relevant on the issues and should be produced for inspection by the plaintiff in accordance with Rule 20, the question of their admissibility and weight is for the trial judge.
>
> . . .
>
> [30] To the extent that statements of the defendant’s employees are expressions of opinion by laymen as to the legal strength or weakness of the defendant’s position, such opinions as contained in the documents would be either ruled inadmissible on a trial or given little weight. Furthermore, the opinions are intermixed with factual issues and cannot be extracted from the document without destroying the context of the document. The documents are relevant and must be produced.

[41] Justice Hallett went on to indicate that had any of the documents contained a proposed settlement with the plaintiff, he would have excluded those parts of the documents.

[42] In the **Tsmikilis** case, the plaintiffs sued to enforce the provisions of a fire insurance policy issued by the defendant to the plaintiffs. The defendant claimed that the plaintiffs’ claim was fraudulent and the plaintiffs claimed that the defendant had

acted in bad faith. The defendant insurer claimed privilege and irrelevancy with respect to insurance adjusters' reports, the claims file and the adjuster's file. Justice Gruchy relied on the decision in **Sydney Steel** in finding that whether or not the defendant was misled in any way by the plaintiffs was an issue to be determined at trial, and therefore the corporate state of mind of the defendant was relevant. As a result, exchanges of messages and correspondence amongst the defendants, servants and agents was relevant. I would agree with the following statements made by Justice Gruchy:

> There is no obligation on a party to produce irrelevant documents. There is certainly no right to inquire into or to receive communications between a party and its legal counsel (particularly with respect to legal issues). See **Garrison v. Lively et al.** (1978), 23 N.S.R. (2d) 125 and **Shaw's Estate v. Roemer et al.** (1980), 38 N.S.R. (2d) 657. In most cases opinions as to liability and statements relating to settlement should be considered either irrelevant or privileged. Subject to the question concerning bad faith, a document which expresses an opinion about liability or settlement ought to be afforded privilege. I keep in mind that statements of lay employees of a party as to legal positions and the strength or weakness of that party's case would in all likelihood be ruled inadmissible in a trial setting. The fact that I may rule that a document ought to be produced is in no way binding or even persuasive on the trial judge. **In many cases opinions are so inextricably bound up with factual issues that the factual issues cannot be isolated without destroying its context. In such event the documents ought to be produced. The plaintiff ought not to be deprived of knowledge of facts merely because the facts are interwoven with inadmissible opinions.**
>
> (emphasis added)

[43] Justice Gruchy ordered that all documents prepared prior to the commencement of the action should be produced on the basis that the dominant purpose of the documents on which privilege was claimed was the source and origin of the fire, and the secondary purpose was to obtain legal advice for possible litigation.

[44] The respondent submits that in this case the state of mind of Mitsui after the

attempted repudiation of the MOU by Jones is irrelevant because it has no bearing on either the construction of the MOU or the determination of its legal effect. Jones on the other hand says that the opinions of the employees of Mitsui as to the validity of the MOU immediately after its creation are relevant to the issue of whether the MOU was a complete contract or whether it was simply an agreement to agree.

[45] Based on the **Sydney Steel** and the **Tsmikilis** case, I would agree with the appellants that if a document was not prepared for the dominant purpose of the litigation and does not contain confidential information received or sent to legal counsel, it should have been produced. Absent either or both, there is no general exclusion or protection for documents containing pre-trial strategies. As noted in **Sydney Steel**, Justice Hallett dealt with the issue of relevance, not privilege. Here, since the issue before Richard, J. was privilege exclusively, it is too late, in my view, for the respondent to claim that a document can be withheld on the basis of irrelevance.

5. When is privilege waived?

[46] The appellants submit that to the extent that the respondent's claim for privilege is valid, the respondent has waived such privilege by disclosing the documents to third parties, specifically S & L, or by disclosing other documents concerning the same subject matter to third parties including the appellants. The respondent replies that privilege was not waived when copies of documents were sent to S & L because they

had a common interest with Mitsui or because their presence was necessary to assist in the litigation. It is further submitted by Mitsui that communications with S & L are subject to litigation privilege because Mitsui was communicating with them in order to obtain material to place before their counsel in order to obtain legal advice.

[47] S & L was joined as a third party by Jones in the action commenced against Jones by Mitsui and was also a co-defendant with Mitsui in the action commenced by Jones. All matters of dispute between Jones and S & L were settled in the fall of 1998.

[48] In his affidavit, Mr. Akikawa says:

> **THAT** throughout the course of the Point Aconi project, both before and after the Jones' alleged repudiation of the MOU, I on behalf of MPA consulted with S&L, in regard to their responsibility for design engineering and project management, to obtain their business and technical advice and opinions. This was particularly so in the aftermath of the purported repudiation of the MOU, as at that time there was a great concern within both Mitsui and S&L organizations with respect to the progress of the work on site. There was extensive strategizing and consultation between Mitsui and S&L in the period following the purported repudiation by Jones of the MOU, with respect to the approach taken by Jones, the need to take legal advice on various matters, and with respect to the approaches to be taken to resolve the disputes with Jones.

[49] In his decision, Justice Richard determined that draft documents relating to a power of attorney given to Mr. Nitta had lost their privileged status because the actual final copy of the power of attorney had been released to Jones. He did not, however, deal with the question of whether S & L had a common interest and the effect of release of documents to them.

[50] In the Manes and Silver text, ***supra***, at p. 191, the authors discuss implied waiver as follows:

> Generally, waiver can be implied where the court finds that an objective consideration of the client's conduct demonstrates an intention to waive privilege. Fairness is the touchtone of such an inquiry.
>
> One of the best expressions on implied waiver of solicitor-client privilege is that of McLachlin, J. (as she then was) in **S & K Processors** (1983), [35 C.P.C. 146 (B.C.S.C.)] where she said:
>
> > Waiver of privilege is ordinarily established where it is shown that the possessor of the privilege (1) knows of the existence of the privilege, and (2) voluntarily evinces an intention to waive that privilege. However, waiver may also occur in the absence of an intention to waive, where fairness and consistency so require. Thus waiver of privilege as to part of a communication, will be held to be waiver as to the entire communication. Similarly, where a litigant relies on legal advice as an element of his claim or defence, the privilege which would otherwise attach to that advice is lost: **Hunter v. Rogers**, [1982] 2 W.W.R. 189, 34 B.C.L.R. 206 (S.C.).

[51] In **Buttes Gas and Oil Co. v. Hammer**, [1983] All E.R. 475, Lord Denning described the common interest privilege as follows:

> . . . There is a privilege which may be called a 'common interest' privilege. That is a privilege in aid of anticipated litigation in which several persons have a common interest. It often happens in litigation that a plaintiff or defendant has other persons standing alongside him who have the selfsame interest as he and who have consulted lawyers on the selfsame points as he but who have not been made parties to the action. Maybe for economy or for simplicity or what you will. All exchange counsels' opinions. All collect information for the purpose of litigation. All make copies. All await the outcome with the same anxious anticipation because it affects each as much as it does the others. Instances come readily to mind. Owners of adjoining houses complain of a nuisance which affects them both equally. Both take legal advice. Both exchange relevant documents. But only one is a plaintiff. An author writes a book and gets it published. It is said to contain a libel or to be an infringement of copy right. Both author and publisher take legal advice. Both exchange documents. But only one is made a defendant.

> In all such cases I think the courts should, for the purposes of discovery, treat all the persons interested as if they were partners in a single firm or departments in a single company. Each can avail himself of the privilege in aid of litigation. Each can collect information for the use of his or the other's legal adviser. Each can hold originals and each make copies. And so forth. All are the subject of the privilege in aid of anticipated litigation, even though it should transpire that, when the litigation is afterwards commenced, only one of them is made a party to it. No matter that one has the originals and the other has the copies. All are privileged.

[52] Applying those statements to the facts of this case, I would hold that there is no doubt that S & L has a common interest with the respondent and it matters not that S & L has settled with Jones. Therefore, any documents for which privilege is established, will not lose that classification by reason of a copy of the documents having been disclosed to S & L. The fact that S & L and the respondent have had different legal counsel is immaterial.

Application of the General and Specific Principles

[53] Although a few of the documents are no longer in dispute either because they were ordered to be produced by Justice Richard and the respondent has not cross-appealed the order of production or because the appellants have not taken issue with Justice Richard's decision with respect to a few of the documents, I will make brief reference to those documents that are not in dispute for the sake of completeness, and to provide the whole background and context.

[54] Document 1 - a memo from Mr. Akikawa to Mr. Nitta dated August 5, 1992

asking Mr. Nitta to obtain legal advice respecting the issuance of a power of attorney to Mr. Nitta. This document was ordered to be produced by Justice Richard and is no longer in issue.

[55] Document 2 - a memo dated August 12, 1992 from Mr. Akikawa to Mr. Nitta reporting the details of a telephone conversation with Mr. Hamachek, the S & L Project Manager, and which refers to suggestions made by Mr. William Doran, another principal of S & L. Attached to the memo were a draft copy of a letter to Jones from Mr. Hamachek and two draft amendments to the Memorandum of Understanding prepared by Mr. Hamachek. Justice Richard ordered that the memo be produced but not the attachments. The respondent categorizes this document as a category 4 document, that is, one which in whole or in part discusses matters upon which legal advice is to be obtained. The memo says:

> Since it is the first draft, wording is subject to further changes in consideration of future legal procedure.

[56] The attached documents are stamped “draft for comment” and each contain handwritten notes suggesting changes. According to Mr. Akikawa’s affidavit the draft letter was never finalized and was never sent.

[57] It is apparent from the record that the two suggested amendments to the MOU were in fact produced to the appellants. They appear at tab 107 of the joint exhibit book 5 and Mr. Akikawa was cross-examined with respect to those documents commencing

at question 883. It also appears from the cross-examination of Mr. Akikawa commencing at question 904 that the letter attached as a copy to document 2, which was then exhibit 5, tab 9 was also in the possession of counsel for the appellants. That copy of the draft letter from Mr. Hamachek to Mr. Adams does not contain the handwritten notes. Mr. Akikawa testified that the letter was never sent. A further redraft of the same letter is contained in the trial exhibit book 5, tab 10. That copy of the letter has incorporated the handwritten changes as shown on the document 2 which is at issue in this appeal. In his affidavit filed on the production application, Mr. Akikawa says that he was aware that Mr. Nitta was consulting with the Second Legal Department with respect to the changes in the letter to Mr. Adams. He does not say nor am I able to determine from the record whose handwriting is contained on the letter attached to document 2. In my view, since the appellants already have several copies of that letter and since it does not appear to contain legal advice, nor was it prepared specifically or for the dominant purpose of the litigation, I would order that the attachments to document 2 be produced to the appellants.

[58] Document 3 - a memo prepared by Mr. Akikawa containing notes of various telephone conferences with Mr. Hamachek, apparently after Mr. Hamachek had discussions with Mr. Doran, who in turn had discussed matters with Mr. Walcott of Jones. The memorandum is dated August 13 with additions made on August 14. The memo also contains notes of Mr. Hamachek's report to Mr. Akikawa of a telephone conversation with Mr. Adams of Jones. Attached to the memorandum is a letter from Mr.

Doran of S & L to Mr. Walcott of Jones dated August 14, 1992. The respondent has placed this document in category 9, that is, a document containing expressions of opinion or attitudes and discussions of legal and settlement strategy. There is no specific reference to this document in Mr. Akikawa's affidavit nor in the respondent's factum.

[59] There does not appear to be any legal advice contained in this memorandum. There is one sentence that reflects what Mr. Hamachek said Mr. Doran thought about the legal validity of the MOU and in the same paragraph, some speculation about whether Jones will be concerned about being sued by Mitsui. Since the document does not appear to contain any advice received from solicitors or to have been prepared for the dominant purpose of the litigation, it should have been produced.

[60] Document 4 - a fax from Mr. Nitta to Mr. Akikawa dated August 19, 1992. The respondent submits that this document contains legal advice from the legal department, lists issues which should be checked with the legal department, and contains discussions of negotiation and settlement strategy "all in contemplation of litigation". In his description of the document, Mr. Akikawa says that it ". . . Sets out requests that Akikawa have S & L have its counsel check validity of the MOU, after noting that the Second Legal Department of Mitsui & Co., Ltd. ("Legal Department") has provided its opinion on the validity of the MOU".

[61] I would agree that this document is privileged as it is a communication between employees which transmits and comments upon legal advice. The balance of the document puts forward strategies for dealing with the ongoing dispute with Jones in light of the legal advice and would therefore also be privileged.

[62] Document 5 - a memorandum dated August 21, 1992, from Mr. Akikawa to Mr. Nitta attaching a draft letter to Jones which was never issued. Justice Richard ordered the production of this document so it is no longer in issue.

[63] Document 6 - a memo from Mr. Nitta to Mr. Akikawa dated August 24, 1992. Justice Richard ordered only the last sentence, which asks Mr. Nitta to have a power of attorney issued, to be produced. The balance of the document is in issue. The remainder of the brief memo refers to the retention of Smith Lyons to act on behalf of MPA in relation to the dispute with Jones, which would clearly be a communication between employees made in contemplation of litigation and therefore protected from disclosure.

[64] Document 7 - a memo from Mr. Akikawa to Mr. Nitta dated August 24, 1992, sending a draft power of attorney and which was ordered produced by Justice Richard.

[65] Document 8 - a memo from Mr. Akikawa to Mr. Nitta enclosing a draft copy

of a letter from Mr. Akikawa to Mr. Walcott of Jones. Justice Richard ordered most of the memo to be produced, including the enclosure. The one sentence that was not ordered produced refers to another attached document which is to be sent to Smith Lyons outlining the nature of the project and the dispute with Jones. Clearly, the sentence and the attached document is subject to solicitor client privilege, being a communication in draft form to be sent to legal counsel in confidence for the purpose of obtaining legal advice.

[66] Document 9 - a memorandum from Mr. Nitta to Mr. Akikawa dated August 25, 1992. The first paragraph sets out advice received from the legal department with respect to the draft letter referred to in document 8. The second paragraph refers to the draft power of attorney and was ordered to be produced by Justice Richard. The third paragraph refers to the drafting of change orders. The first paragraph is protected by solicitor client privilege as is the draft letter because they specifically set out legal advice received. I see no reason why the third paragraph which refers to the drafting of a change order should have been found to be privileged and would order it to be produced.

[67] Document 10 - a memo from Mr. Nitta to Mr. Akikawa dated August 26, 1992. The first paragraph discusses changes to the material to be sent to Smith Lyons as first discussed in document 8 above, and is for the same reasons privileged. The balance of the memo refers to the draft letter to Mr. Walcott and advice received from

the Second Legal Department and is therefore privileged for the same reason as the first paragraph in document 9.

[68] Document 11 - a memo from Mr. Akikawa to Mr. Nitta dated August 26, 1992, attaching a draft of the material to be sent to Smith Lyons. This document is privileged for the same reasons as the privileged portions of document 8, that is, a communication in draft form to be sent to legal counsel in confidence for the purpose of obtaining legal advice.

[69] Document 12 - a memo from Mr. Akikawa to Mr. Hamachek asking that he have S & L's counsel check the redraft of a letter to Mr. Walcott of Jones which is attached. This document and the enclosed letter contains advice received from the legal department and requests S & L, who have a common interest in the litigation, to have the enclosed letter reviewed by its legal department. The document and enclosure would thus be protected by both solicitor client and litigation privilege. The draft letter is in response to a letter from Mr. Walcott to Mr. Nitta dated August 21, 1992.

[70] Document 13 - notes made by Mr. Akikawa dated August 26, 1992. Mr. Akikawa's affidavit says that these notes reflect "musings, opinion, strategy and items to be referred for legal advice". There is nothing on the face of the document that indicates that any legal advice is being considered or that this document was prepared for the dominent purpose of the litigation. It should have been produced.

[71] Document 14 - a memo from Mr. Nitta to Mr. Akikawa dated August 27, 1992 attaching a further draft of the material to be submitted to Smiths Lyons. For the same reasons as document 8 this is privileged.

[72] Document 15 - a memo from Mr. Nitta to Mr. Ohara dated August 27, 1992. The first five paragraphs advise that from now on correspondence should be checked by the legal department, refer to change orders 11, 12 and 13 and comment upon the current relationship with Jones. I see nothing in those five paragraphs that is privileged and they should have been released. The balance of the document beginning from the words “however the present situation is” conveys legal advice and therefore is privileged.

[73] Document 16 - a memo from Mr. Akikawa to Mr. Nitta dated August 27, 1992 which attaches a draft letter to Mr. Walcott referring to the MOU and asking that Jones send an invoice. Page 1 of the memo discusses the draft change orders and on page 2 it is suggested that they be reviewed by the legal department in consideration of the MOU. The memo and the draft letter are privileged because they are documents that were a necessary step in the process of receiving legal advice and it is apparent that legal advice was sought and received before the final version of the letter was sent.

[74] Document 17 - a memo from Mr. Akikawa to Mr. Nitta dated August 27,

1992 commenting upon and enclosing a further draft of the information to be forwarded to Smith Lyons. This is privileged for the same reasons as documents 8 and 10.

[75] Document 18 - a memo from Mr. Akikawa to Mr. Nitta dated August 27, 1992 regarding a telephone call from Mr. Doran to Mr. Walcott. This document was ordered produced by Justice Richard and is no longer in issue.

[76] Document 19 - a fax from Mr. Akikawa to Mr. Hamachek dated August 27, 1992 sending a copy of the information to be sent to Smith Lyons. It is protected by solicitor client privilege which has not been waived as a result of sending it to S & L as previously discussed herein.

[77] Document 20 - a memo from Mr. Akikawa to Mr. Hamachek dated August 27, 1992 sending the draft change order which contains several handwritten notations. Mr. Akikawa swears in his affidavit in paragraph 26 that the handwriting on document 20 is that of Mr. Ando of the Second Legal Department. Since the document contains legal advice, it is subject to solicitor client privilege.

[78] Document 21 - a fax from Mr. Hamachek to Mr. Akikawa in response to document 19. It is privileged for the same reasons as document 19.

[79] Document 22 - a memo from Mr. Nitta to Mr. Akikawa dated August 28,

1992. Sections numbered 1 through 4 of the memo refer to whether a meeting between various representatives of the three companies is advisable. The balance of the memo again refers to the information to be given to legal counsel. A further copy of that information is attached in draft form. The first four numbered sections do not contain any legal advice, nor do they appear to be a communication made in contemplation of litigation. Those sections should be released. The balance of the memo and the attachment are subject to solicitor client privilege.

[80] Document 23 - a fax from Mr. Akikawa to Mr. Nitta dated August 28, 1992 reporting on a telephone conversation between Mr. Hamachek and Mr. Walcott, all of which was produced except a two sentence reference, in paragraph numbered 5, to documents to be sent to their lawyers. Although there is a reference to “lawyers”, there does not appear to be any legal advice mentioned nor does there appear to be any possible use for the litigation. Those sentences are not privileged and should be produced.

[81] Document 24 - a memo from Mr. Ohara to Mr. Nitta dated August 28, 1992 discussing an upcoming meeting at the site with representatives of Jones. The respondent says this document discusses pre-trial strategy “in light of contemplated litigation”. This document does not appear to have been prepared for the dominant purpose of the litigation but for the purpose of preparation for the upcoming meeting. It therefore should have been produced.

[82] Document 25 - a faxed memo from Mr. Akikawa to Mr. Nitta dated August 30, 1992 discussing the upcoming meeting at the site and Mr. Doran's suggestions as to items for discussion at the meeting. The last two paragraphs refer to legal advice received regarding the MOU and are thus privileged, but the balance of the document is like document 24 and does not appear to contain either legal advice or a communication for the dominant purpose of the litigation and is thus not privileged.

[83] Document 26 - a memo from Mr. Nitta to Mr. Akikawa dated August 30, 1992 containing the final material to be sent to Smith Lyons. The appellants do not contest the privileged status of this document and thus it is not in issue on this appeal.

[84] Document 27 - a memo from Mr. Nitta to Mr. Ohara dated August 31, 1992. Again, this is a memo with instructions as to matters for discussion at the upcoming meeting with Jones' officials at the site and is not privileged.

[85] Document 28 - a draft memo prepared by Mr. Ohara, but never sent to anyone, dated August 31, 1992 setting out his impressions of the on site meeting that had been held with Mr. Davison and Mr. Codispoti of Jones. A portion of the document appears to contain Mr. Ohara's opinion as to a possible settlement of outstanding disputes and in keeping with Justice Hallett's decision in **Sydney Steel, supra**, I would agree that that portion of the memo not be produced. The balance of the memo,

however, is simply a report on the meeting and does not appear to either contain legal advice or be for the dominant purpose of the litigation and therefore should be produced. The portion that should remain undisclosed starts on the second page beginning with the third paragraph commencing “in my view as the president . . .” and continuing to the end of the second paragraph on the third page ending with the words “. . . evaluate this judgment”.

[86] Document 29 - a memo from Mr. Nitta to Mr. Akikawa dated September 2, 1992. The first paragraph is a request for a document to be used in the litigation and is thus privileged. Most of the remainder of the document concerns strategies to employ at upcoming meetings. There is no privilege to that portion of the document. There are two small paragraphs, however, that make reference to legal advice that had previously been received and legal advice that should be sought and those portions of the document are privileged. They are the last two sentences on the first page beginning “There is no question . . .” and ending with “anything”, and the last sentence on the second page. The balance of the document should be produced.

[87] Document 30 - a memo sent by fax from Mr. Akikawa to Mr. Nitta dated September 2, 1992 which sets out legal advice received from Smith Lyons on the validity of the MOU. This document is protected by solicitor client privilege because it specifically sets out legal advice received.

[88] Document 31 - a memo from Mr. Akikawa to Mr. Nitta dated September 2, 1992 attaching an opinion letter from Smith Lyons. The appellants do not contest the privileged status of this document.

[89] Document 32 - a memo from Mr. Akikawa to Mr. Nitta dated September 2, 1992 and commenting upon the legal opinion and questions to be asked of Smith Lyons with respect to the change order. This document is privileged as it is a communication between employees transmitting and requesting legal advice.

[90] Document 33 - a memo from Mr. Nitta to Mr. Akikawa dated September 3, 1992 attaching a memo from Mr. Ando of the legal department. The attachment is clearly subject to solicitor client privilege. The memo makes comment upon the legal advice and thus should also be found to be privileged.

[91] Document 34 - a memo from Mr. Nitta to Mr. Akikawa dated September 9, 1992 setting out travel plans and schedules for himself, Mr. Doran and Mr. Toda which would appear to be completely irrelevant, but not privileged. The balance of the memo contained in three points on the first page is privileged since it instructs Mr. Akikawa to send information to Smith Lyons for their advice. Other than these three points, the memo should be produced.

[92] Document 35 - a memo from Mr. Nitta to Mr. Akikawa attaching a draft letter

to Mr. Walcott. The memo contains advice received from the legal department and Smith Lyons and suggest other matters which should be reviewed by Smith Lyons and is thus privileged.

[93] Document 36 - a memo from Mr. Nitta to Mr. Akikawa dated September 8, 1992. There are two references to seeking advice from Smith Lyons which are privileged: the paragraphs labeled “1)” which begins “First of all....”, and “3.” which is the last sentence of the memo. The balance of the document, however, is not privileged and should be released.

[94] Document 37 - a memo from Mr. Akikawa to Mr. Nitta dated September 8, 1992. Paragraph No. 1 reports on a telephone conversation with counsel at Smith Lyons and is privileged. The balance of the memo refers to discussions with Mr. Doran and his schedule and is not privileged.

[95] Document 38 - a draft letter from Mr. Nitta to Mr. Walcott of Jones dated September 10, 1992 which Mr. Akikawa says in his affidavit reflects the legal advice received from Smith Lyons and the Second Legal Department. Since the content of the legal advice is apparent by comparing the draft with the final copy, and it was a document prepared for the purpose of seeking legal advice, it is subject to solicitor client privilege and need not be produced.

[96] Document 39 - a fax cover sheet from Mr. Ohara to Mr. Ueda of MPA enclosing a letter from Smith Lyons. The letter from Smith Lyons is subject to solicitor client privilege. The covering memo simply says “I forward the fax (attached 5 pages) from Smith Lyons”, and I would agree with the respondent’s characterization of it as a non-substantive cover sheet, but since it is not privileged, it should be produced.

[97] Document 40 - a memo from Mr. Toda to Mr. Nitta which sets out advice received from Mr. Ando of the legal department which is entirely privileged.

[98] Document 41 - a memo from Mr. Tsurumaru, apparently another person in the Tokyo office, legal department of Mitsui, also setting out legal advice with respect to a letter to Mr. Walcott. It is therefore privileged.

[99] Document 42 - a memo from Mr. Akikawa to Mr. Nitta setting out his notes of a meeting at Smith Lyons. The appellants concede that this document is privileged and it is not in issue on the appeal.

[100] Document 43 - a memo dated September 12, 1992 from Mr. Nitta to his own section of the Tokyo Mitsui office reporting on telephone conversations with Mr. Walcott, Mr. Doran and Mr. Hamachek. The paragraph numbered 5 makes reference to advice to be sought from Smith Lyons and is privileged. However, the balance of the document does not contain any privileged information and should be released. The document

indicates that it has several attachments but none are attached to the copy of the memo that has been filed on the appeal.

[101] Document 44 - a fax cover sheet dated September 16, 1992 to S & L from Mr. Akikawa sending correspondence from Smith Lyons which, in itself, is a non-substantive inconsequential document which should be produced. The attachments are not included in the appeal book.

[102] Document 45 - entitled “General Concepts for a Contract Adjustment” dated September 17, 1992. The document has already been produced by S & L. According to Mr. Akikawa’s affidavit, they were notes prepared by Mr. Doran. Since it has already been produced, its categorization is now moot, and it is not necessary to deal with it on this appeal.

[103] Document 46 - a memo from Mr. Akikawa to Mr. Bernhardt of S & L forwarding a list of questions for “the lawyer”. The questions are not attached. I would find that this memo is similar to document 44, that is, a non-substantive inconsequential cover sheet, which should be produced.

[104] Document 47 - an E-mail from Mr. Hamachek of S & L to Mr. Akikawa setting out questions that should be asked of the lawyers. This document is privileged.

[105] Document 48 - a memo dated September 28, 1992 from Mr. Akikawa to Mr. Nitta (apparently in error dated August 28, 1992). From paragraph numbered 3 to the end of the document, there is a list of matters for which legal advice should be sought. That portion of the document is privileged, but the balance of the document which refers to design changes and the original contract is not privileged and should be produced.

[106] Document 49 - a memo from Mr. Hamachek to Mr. Akikawa dated September 28, 1992 forwarding correspondence from Smith Lyons which is privileged. As with documents 44 and 46, it is an inconsequential cover sheet, which should be produced.

[107] Document 50 - a memo from Mr. Akikawa to Mr. Nitta dated September 28, 1992, all of which has been produced by order of Justice Richard except a reference to an inquiry to Smith Lyons and their response. I would agree that that paragraph is privileged and need not be produced.

[108] Document 51 - notes made by Mr. Akikawa dated September 30, 1992. In his affidavit Mr. Akikawa indicates that the list on the top of the second page contains items upon which legal advice was to be sought. That portion of the document, being the first six lines at the top of page 2, is privileged. The balance of the document appears to contain notes regarding cost of specific construction items. Since these notes do not appear to contain legal advice or to have been prepared in contemplation

of litigation, they should have been produced.

[109] Document 52 - a memo from Mr. Akikawa to Mr. Nitta dated October 2, 1992 enclosing “proposal for possible arguments” and containing information regarding a claim by Jones for additional compensation for lighting cable. The document is a draft of a memo sent to Smith Lyons which is attached, commencing at page 667 of the appeal book. The memo and first attachment would therefore be privileged, that is from page 655 to 669. The other attachments were documents received from S & L and Jones but were marked up with comments and sent to counsel for advice and are therefore privileged.

[110] Document 53 - a table of contents or list of items for discussion prepared by Mr. Akikawa and forwarded to Mr. Toda dated October 4, 1992. Although Mr. Akikawa’s affidavit says that the materials noted in the table of contents reflect legal advice, it is not suggested that the list itself does, nor does it appear to be a document prepared in contemplation of litigation and therefore it should have been produced.

[111] Document 54 - a fax cover sheet dated October 13, 1992 from Mr. Akikawa to Mr. Doran which says “attached memo for your reference”. The memo is not attached and the cover sheet is not privileged.

[112] Document 55 - a memo from Mr. Akikawa to Mr. Ohara dated October 13,

1992 attaching a letter from Mr. G. D. Lethbridge, Vice-President, Engineering and Production of Nova Scotia Power Corporation dated October 13, 1992. The letter from Mr. Lethbridge has been produced. The third sentence of the cover memo suggests that legal advice should be sought and is thus privileged. The balance of the memo, however, does not appear to be privileged and should be produced.

[113] Document 56 - a memo dated October 13, 1992 from Mr. Akikawa to Mr. Nitta attaching a draft letter from Mitsui to Jones with comments about various parts of the letter. At the end of the memo it is indicated that the draft is being sent to the legal department and Smith Lyons for legal advice. I would therefore find that this is a document similar to document 32, that is, a communication between employees transmitting and requesting legal advice, and is therefore privileged.

[114] Document 57 - a memo to Mr. Nitta's department from Mr. Akikawa dated October 13, 1992 advising that the draft letter to Jones has been sent to Mr. Toda and requesting that it be reviewed by the legal department before being submitted to Smith Lyons. This document is privileged for the same reason as document 56.

[115] Document 58 - notes made by Mr. Akikawa dated October 13, 1992 after discussing the Nova Scotia Power letter with Mr. Akikawa. Mr. Nitta is obviously asking Mr. Akikawa to obtain legal advice from Smith Lyons with respect to numerous matters which arise from the Nova Scotia Power letter and this document is, therefore,

privileged for the same reason as documents 56 and 57.

[116] Document 59 - a memo dated October 13, 1992 from Mr. Akikawa to the Second Legal Department attaching a revised copy of the draft letter to Jones as a result of the Nova Scotia Power correspondence. This document is privileged for the same reason as the last several documents.

[117] Document 60 - a memo from Mr. Akikawa to Mr. Nitta dated October 14, 1992 advising him of information he had received from Smith Lyons. The appellants do not question the privileged status of this document.

[118] Document 61 - a memo from Mr. Akikawa to Mr. Ohara dated October 14, 1992 instructing him to prepare the final draft of the letter to Jones and which indicates that the draft reflects the comments of legal counsel. The draft is not attached to the memo. The memo itself does not contain any legal advice and nor is it a direct communication with counsel. This document is not privileged and should be produced.

[119] Document 62 - a memo from Mr. Nitta to Mr. Akikawa dated October 19, 1992 discussing points that should be made at an upcoming meeting with representatives of Nova Scotia Power. There are two small portions of the memo that are privileged; one because it requests Mr. Akikawa to check with Smith Lyons on one point and another because it possibly reflects advice previously received from Smith Lyons. After those two portions are excised, the document is not privileged and should

be produced. The parts that are privileged are point numbers 3 and 4(d).

[120] Document 63 - a memo from Mr. Nitta to Mr. Akikawa dated October 20, 1992. The first two pages of this memo set out information received from their legal counsel and are therefore privileged. The third point made on page 3 discusses design issues and is not privileged. The third page of the translated memo should be produced.

[121] Document 64 - a memo from Mr. Akikawa to Mr. Ohara forwarding a draft letter to Jones which incorporates comments made by Smith Lyons. The document and the enclosed letter contains advice received from Smith Lyons and is therefore privileged.

[122] Document 65 - a memo from Mr. Nitta to Mr. Akikawa dated October 23, 1992 confirming discussions from a previous telephone conversation between the two. The paragraphs numbered 1 and 2 and the second last sentence of the document are privileged because they discuss legal advice received from Smith Lyons. The balance of the memo is not privileged and should be produced.

[123] Document 66 - a memo from Mr. Ohara to Mr. Toda dated October 23, 1992. The memo discusses several issues including difficulties being encountered with Jones at the construction site, the effect of the Nova Scotia Power letter and a few mentions of legal advice. The portions of the memo reflecting legal advice or asking for

legal advice should be removed and then the document produced. The parts that should be severed are paragraph numbered 3 on page 3 of the translation and the second last sentence of the memo.

[124] Document 67 - a memo dated October 23, 1992 from Mr. Akikawa to Mr. Nitta attaching notes made from a telephone conversation with Mr. Mutch of Smith Lyons. The attachment is obviously privileged. The memo contains mainly information with respect to meetings with Nova Scotia Power officials and discussions with S & L. One heading and sentence refers to the Smith Lyons fax and should be severed; that is the last heading and sentence on the first page of the memo. Otherwise the document is not privileged and should be produced.

[125] Document 68 - a memo from Mr. Akikawa to Mr. Nitta dated October 25, 1992 attaching a draft letter to Jones and asking for advice. The memo indicates that the letter is also being sent to Smith Lyons for their review. As with document 38, a comparison of the draft with the final version would reveal the content of the legal advice and is therefore privileged.

[126] Document 69 - a memo dated October 25, 1992 from Mr. Akikawa to Mr. Nitta. The memo appears simply to be a cover memo enclosing documents to be sent to Smith Lyons. The enclosure is not attached to the memo. The document is privileged as it is a communication between employees requesting legal advice.

[127] Document 70 - a memo from Mr. Akikawa to Mr. Nitta dated October 25, 1992 attaching Mr. Akikawa's "hastily prepared . . . personal proposal". Most of the memo and attachment deals with construction problems, cost of labour and scheduling of the balance of the project. To that extent, the memo is not privileged because it appears that the dominant purpose has to do with the construction and not the litigation. There are a few small references to legal advice and a suggestion with respect to Nova Scotia counsel which should be excised. Those portions are contained on page 805 of the case book and are points 4(2), (3) and (5). The balance of the memo should be produced.

[128] Document 71 - a memo from Mr. Nitta to Mr. Akikawa dated October 26, 1992, indicating points for discussion with Mr. Lethbridge of Nova Scotia Power. One sentence in the memo refers to legal counsel and should be excised. That is the sentence labeled (b). The balance of the memo should be produced.

[129] Document 72 - a memo from Mr. Nitta to Mr. Akikawa dated October 26, 1992, most of the memo deals with the construction schedule and the ongoing disputes with Jones and is not privileged. Those portions of the memo that discuss legal advice received or to be sought are privileged and should be severed. Those are paragraphs numbered 3, 4, 6, 9 and 10.

[130] Document 73 - a memo dated October 27 from Mr. Nitta to Mr. Akikawa which attaches a memo from Mr. Nitta to Mr. Ohara and a letter from the legal department. The legal department letter is not attached to the documents filed before the court. The memos both refer to points raised by the legal department and thus are protected by solicitor client privilege.

[131] Document 74 - a memo from Mr. Nitta to Mr. Akikawa dated October 27, 1992. Paragraphs 4, 5 and 8 of this memo set out matters upon which legal advice should be sought or information that should be transmitted to legal counsel and is therefore privileged. The balance of the memo referring to dates of correspondence is not privileged and should be produced.

[132] Document 75 - a memo from Mr. Akikawa to Mr. Hamachek of S & L dated October 27, 1992 and enclosing draft change order number 14. Since the memo indicates that there are changes to this change order as originally drafted that had been made on the advice of counsel, the entire document is privileged.

[133] Document 76 - a memo dated October 27, 1992 from Mr. Nitta to Mr. Akikawa setting out the history of the dispute with Jones for the purpose of providing information to their lawyers. This document would therefore be subject to litigation privilege.

[134] Document 77 - a memo dated October 27, 1992 from Mr. Akikawa to Mr.

Ohara enclosing two drafts of a letter to Mr. Codispoti regarding the construction schedule. There are several handwritten notes on the drafts and the memo indicates that those are comments from the legal department at Smith Lyons. Therefore the memo and enclosures are privileged.

[135] Document 78 - a memo dated October 27, 1992 from Mr. Akikawa to Mr. Nitta, several paragraphs of which relate to legal advice and the retainer of Stewart McKelvey Stirling Scales. Those portions of the memo should be severed. Those are paragraphs 4, 5, 8 and 9. The balance of the memo concerning an upcoming meeting and other matters should be released.

[136] Document 79 - a memo dated October 28, 1992 from Nr. Nitta to Mr. Akikawa transmitting questions from the legal department to be sent to Smith Lyons. The appellants do not contest the privileged status of this document.

[137] Document 80 - a memo from Mr. Nitta to Mr. Akikawa dated October 28, 1992. Similar to document 76 and for the same reasons, I would find this document to be made in contemplation of litigation and therefore privileged.

[138] Document 81 - a typed copy of the historical summary referred to in documents 80 and 76 and once again I would find this document to be subject to litigation privilege for the same reasons.

[139] Document 82 - a memo dated October 29, 1992 from Mr. Nitta to Mr. Ohara enclosing a draft letter to Jones re overtime for electrical work. The memo indicates that legal advice should be sought from Smith Lyons urgently with respect to the attached letter. I would find that this document and the attachment is subject to solicitor client privilege.

[140] Document 83 - a memo from Mr. Nitta to Mr. Akikawa dated October 29, 1992 enclosing the draft letter from Mr. Ohara to Mr. Codispoti. The memo directs Mr. Akikawa to obtain legal advice with respect to the letter and therefore is privileged for the same reasons as document 82.

[141] Document 84 - a memo from Mr. Akikawa to Mr. Ohara dated October 29, 1992 commenting upon the letter attached to documents 82 and 83 and for the same reasons I would find this document privileged.

[142] Documents 85, 86, 87, 88, and 89 - these documents are the second and subsequent drafts of an historical summary and questions regarding the dispute with Jones to be placed before Smith Lyons for legal advice. They are further drafts of the document noted in document 69, and for the same reasons, these documents are subject to solicitor client privilege and litigation privilege.

[143] Document 90 - a memo dated November 3, 1992 from Mr. Akikawa to Mr.

Hamachek referring to a letter to be sent to Mr. Codispoti and asking for Mr. Hamachek's comments. The memo indicates that the letter will then be sent to the lawyers for review. The copy of the letter attached contains handwritten changes. Since the document indicates that legal advice is being sought with respect to the contents of the letter, I would find that it is privileged.

[144] Document 91 - a memo dated November 5, 1992 from Mr. Tsurumaru to Mr. Ueda. This is a memo from the legal department setting out their advice with respect to the extra work order and is thus privileged.

Summary and Conclusion

[145] Many of the documents for which solicitor client and litigation privilege was claimed by the respondent were not in fact so privileged. The trial judge was in error in upholding the claims for privilege on all those documents which have been noted above. The documents that should have been produced in their entirety are documents numbered: 2, 3, 13, 24, 27, 39, 44, 46, 49, 53, 54 and 61. I would order that the respondent produce copies of those documents to the appellants.

[146] Those documents for which privilege was established for a portion of the document but not the balance are documents numbered: 8, 9, 15, 22, 23, 25, 28, 29, 34, 36, 37, 43, 48, 50, 51, 55, 62, 63, 65, 66, 67, 70, 71, 72, 74 and 78. The portions not

found to be privileged should now be produced.

[147] Finally, those documents for which privilege was established for the whole document are documents numbered: 4, 6, 10, 11, 12, 14, 16, 17, 19, 20, 21, 30, 32, 33, 35, 38, 40, 41, 47, 49, 52, 56, 57, 58, 59, 64, 68, 69, 73, 75, 76, 77, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90 and 91. I would agree with the trial judge that those documents are entirely privileged.

[148] Although, in my view, the trial judge erred in not ordering many of these documents to be produced, for the reasons elaborated by Justice Cromwell at paragraphs 90 to 93 of the MOU appeal, I would not order a new trial. The documents are now ordered to be produced only in case they may be useful on the interpretation of the MOU and the other issues that are left for the balance of the trial.

[149] Leave to appeal is granted, and the appeal is allowed with costs to the appellants in the amount of $5,000.00, plus disbursements.

Roscoe, J.A.

Concurred in:

Flinn, J.A.

Cromwell, J.A.