SUPREME COURT OF NOVA SCOTIA

Citation: Sable Offshore Energy Inc. v. Ameron International Corporation, 2013 NSSC 131

Date: 20130425
Docket: Hfx. No. 220343
Registry: Halifax

Between:

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

Plaintiffs

v.

Ameron International Corporation, **Ameron B.V.**, **Allcolour Paint Limited**, **Amercoat Canada**, **Rubyco Ltd.**, **Danroh Inc**., **Serious Business Inc**.

Defendants

D E C I S I O N

Judge: The Honourable Justice Suzanne M. Hood

Heard: September 24 and 25, 2012, in Halifax, Nova Scotia

Written Decision: April 25, 2013

Counsel: **Robert G. Belliveau, Q.C, Christopher Robinson, Q.C. and Kevin Gibson** for Sable Offshore Energy Inc. et al
John P. Merrick, Q.C., **Darlene Jamieson, Q.C.** and **Tammy Manning** for Ameron International et al
Terrence L.S. Teed, Q.C. and **Ronald J. Savoy** for Allcolour Paint et al
David G. Coles, Q.C. for Zurich Insurance
Bruce T. Macintosh, Q.C. and Donn Fraser for Underwriters
Michael Ryan, Q.C. and **Stewart Hayne** for the Alliance Contractors

INTRODUCTION

[1] The defendants seek further production from the plaintiffs. The plaintiffs say the documents are not relevant or are privileged.

ISSUES

1. Production and relevance

    (a) Insurance issue

2. Privilege

FACTS

[2] The facts concerning this matter have been referred to in a number of previous decisions. In brief, they are: the Sable Offshore Energy Project involved the construction of both offshore and onshore facilities to produce and deliver natural gas and natural gas liquids. The Sable Owners are ExxonMobil Canada Properties, formerly Mobil Oil Canada Properties, Shell Canada Limited, Imperial Oil Resources, successor to Imperial Oil Resources Limited, Mosbacher Operating Ltd. and Pengrowth Corporation.

[3] Up until February 1, 2002, Sable Offshore Energy Inc. acted as agent for the Sable Owners. ExxonMobil Canada Properties now operates the Sable Offshore Energy Project.

[4] The construction of the Project occurred under an Alliance Agreement and seven EPC (Engineering, Procurement and Construction) Works Agreements, one with each of the seven Alliance contractors.

[5] This claim arises from allegations by the plaintiffs of paint failures on the projects' facilities.

[6] Deficiencies with respect to the coatings were identified before closeout of the contracts with the various Alliance Contractors. The allegations in Sable's Statement of Claim originally included the applicators and inspectors but they later settled with the plaintiffs. The Court approved Pierringer Agreements which provided for settlement with those parties and with insurers.

[7] The insurers of the project are not parties to this action. Sable commenced a separate action against the Onshore Insurers which action was settled. A settlement between Sable and the Offshore Insurers was reached before action was commenced.

[8] The defendants seek production of documents exchanged with the Alliance Contractors and with the insurers. The application is brought pursuant to the 1972 *Rules* pursuant to the terms of the Pierringer Order. Their applications (Motion No. 1) seek:

> Motion:
>
> Ameron International Corporation and Ameron B.V., Defendants in this proceeding, move for an Order that the plaintiffs:
>
> 1. Identify all documents relevant to the provisions of paragraphs (a) and (b) of the Order dated April 30, 2009 for which production has not been made by providing a short description of each document, by identifying the receiver and sender, their status and relationship to the parties and providing a statement of the grounds of privilege or other reason for non production sufficient to identify the justification for non production.
>
> 2. Produce all documents relevant to the placement of insurance coverage on the project, the scope of such coverage and the entities which came, or were intended to come, within the scope of such insurance coverage, including documents relating to coverage for any of the settled defendants.

3. Produce all documents relevant to any subrogation rights or other entitlement of the plaintiffs or their insurers to bring a claim against any of the original defendants and relevant to any release or waiver of such rights.

4. Produce all relevant factual evidence including surveys, interviews, reports, observations, photographs, videos, test measurements or results including all factual evidence from experts, provided to or received from any of the insurers involved in the Project and their adjuster.

5. Produce all documents relating to any claims by the plaintiffs for coverage or indemnity under any insurance coverage relating to the project but excluding evidence of the amount of any recovery, payout or benefits received by the plaintiffs from any insurance coverage relating to the project.

6. Produce all relevant factual evidence including surveys, interviews, reports, observations, photographs, videos, test measurements or results including all factual evidence from experts, provided to or received from any of the settled defendants.

7. Produce all documents relating to an allocation of responsibility for the coating failures provided to or received from any of the settled defendants or any entity on their behalf.

8. Produce all documents relating to failures of other coating systems (other than Ameron Coating Systems) that have occurred on the project.

9. Identify all relevant documents for which production is not made by providing a short description of each document by identifying the receiver and sender, their status and relationship to the parties and provide a statement of the grounds of privilege or other reason for non production sufficient to identify the justification for non production.

[9] Rule 1.03 of the 1972 Rules provides:

> **1.03.** The object of these Rules is to secure the just, speedy and inexpensive determination of every proceeding.

[10] Sub-Rules 20.01 (2) and (3) provide:

> 20.01.
>
> (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.

[11] Since the application was made, the defendants have withdrawn category #7. They also confirm that they are satisfied that they have received all relevant information referred to in categories 6 and 8. Subsequent to the hearing, the defendants advised they are satisfied there are no further documents to be provided as requested in category 3. The remaining items therefore in issue are categories 1, 2, 4, 5 and 9.

[12] Category 1 refers to an Order dated April 30, 2009 which provided:

> IT IS HEREBY ORDERED that the Plaintiffs produce for inspection the following documents as soon as reasonably possible:
>
> Subject to claims of privilege:
>
> a. All documents and portions of documents setting out any claims by the Plaintiffs for compensation from the Alliance Contractors as a result of the coating failures as alleged in the Statement of Claim; and
>
> b. Any agreements between the Plaintiffs and Alliance Contractors and all documents relating to any agreements between the Plaintiffs and Alliance Contractors which would describe how any claims relevant to the coating failures were addressed and any settlement or release of such claims.
>
> Any documents for which claims of privilege are made will be identified as provided by the Civil Procedure Rules relating to document disclosure.

[13] Because that Order refers to the Alliance Contractors, they were given notice of the defendants' application and an opportunity to respond to it.

[14] Category 9 is more generally worded but also requests identification of all documents for which privilege is claimed.

[15] The Alliance Contractors take the same position as the plaintiffs, that is, that any documents not already provided are privileged. In support of their positions, the plaintiffs filed the affidavits of David Strand, Glenn Davis and Wayne E. DeBoice. David Strand is a Calgary lawyer who was retained by Mobil Oil Canada, predecessor to ExxonMobil Canada Ltd., the managing partner of ExxonMobil Canada Properties which was the operator of the Sable Offshore Energy Project (SOEP). Glenn Davis is the senior insurance advisor for ExxonMobil Canada Ltd.. Wayne E. DeBoice was an insurance advisor employed by Mobil Oil Canada in 1993.

[16] Because categories 2, 4 and 5 deal with insurance matters, the insurers were given notice and made submissions. In support of its position, Underwriters submitted two affidavits of Elizabeth Jane Andrewartha. She is Underwriters' solicitor in London, England. An affidavit of Barry Kirkham was filed by counsel for Zurich Insurance Company. He is a Vancouver lawyer who was retained by the Onshore Insurers.

[17] A claim of statutory privilege was made with respect to some documents. The affidavit of J. Gregory MacDonald, the Environmental and Regulatory Supervisor for ExxonMobil Canada Limited, was filed in support of that privilege.

RELEVANCE AND PRODUCTION

[18] The 1972 Rules provide that all documents "relating to every matter in question in the proceeding" are to be provided (Rule 20.01(1).

[19] The *Rules* are to be interpreted liberally to provide for full disclosure. In *CMHC v. Foundation Company of Canada Limited,* [1982] N.S.J. No. 507 (C.A.), Jones, J.A. said in paragraph 9:

> **9** ... The test as to whether a question is valid is whether 'the answer sought appears reasonably calculated to lead to the discovery of admissible evidence.

[20] He continued in para. 10:

> **10** Coupled with the requirements under the Rules for complete disclosure and inspection of documents, interrogatories, admissions, notice of experts' reports, and pre-trial conferences, it is apparent that our Rules are designed to ensure the fullest possible disclosure of the facts and issues before trial and thereby avoid the element of surprise.

[21] With respect to interpretation, Jones, J.A. said in paragraph 11:

> **11** The practice in this Province has been to interpret the Rules liberally.

[22] In *Upham v. You*, [1986] N.S.J. No. 191 (C.A.), Matthews, J.A. at p. 8 repeated the words of Justice Jones with respect to full disclosure and liberal interpretation of the Rules.

[23] The test to be used under the 1972 *Rules* is "semblance of relevancy." In *B.C. Rail Partnership v. Standard Car Truck Co.,* 2007 NSSC 280, LeBlanc, J., at paragraph 23, referred to *Sydney Steel v. Mannesmann Pipe and Steel Corp*. (1985), 69 N.S.R. (2d) 389 (S.C.T.D.) and *Eastern Canada Coal Gas Venture Ltd. v. Cape Breton Development Corp*., [1995] N.S.J. No. 177 (C.A.) saying:

> 23 ... These two cases stand for the proposition that the test in Nova Scotia for production of documents and answers to interrogatories is a question not of relevance but a semblance of relevancy.

[24] In *Kairos Community Development Ltd. v. Nova Scotia (Attorney General)*, 2007 NSSC 330, the Court referred to *Upham v. You*, *supra*, saying in paragraph 16:

> The onus is on the party seeking production to establish that it is relevant.

[25] The Court continued in paragraph 18 saying: "To determine relevance, the Court must assess the issues", citing *ACA Cooperative Association Ltd. v. Associated Freezers of Canada Inc.* (1989), 90 N.S.R. (2d) 148 (S.C.).

[26] The defendants say that the documents they seek have a semblance of relevancy. The plaintiffs' dispute this with respect to the insurance placement documents and say with respect to the other documents sought that they do not have to be produced because they are privileged

Relevance

Insurance: *Motion 1, Category 2*

[27] The defendants say they may be unnamed insureds under the insurance policies on the project. The plaintiffs and the insurers say it is clear they are not,

based on the information provided, and that, therefore, any additional information sought is not relevant. The defendants say it is relevant because they have asserted coverage in their pleadings.

[28] The plaintiffs say they provided the placement file, although they say it is not relevant. They also say there is nothing more to provide. In his affidavit, Wayne E. DeBoice who is responsible for "the placement of insurance for the construction of the Sable Project Facilities" (para. 4) says in paragraph 11:

> 11. **THAT** coverage as it would relate to raw material suppliers/vendors was specifically addressed by Sable and the exact proposed wording was reviewed by the Sable insurance sub-committee.

[29] There was correspondence with respect to coverage for suppliers and it is attached as exhibits to his affidavit. In paragraph 15 he says:

> 15. THAT the Sable insurance sub-committee reviewed the wording and agreed that suppliers would not be included as additional insureds under the policy.

[30] Exhibit "C" to his affidavit includes wording amendments to the insurance coverage. Under the heading "1) Additional Insureds", it provides:

> It is agreed that 'suppliers' is deleted from the third line. Add at end of clause:
>
> Also to include vendors and suppliers, in respect of contracts solely for supply of raw materials, but only in respect of physical loss or physical damage as may be covered under Section 1 of policy relating to cargo transits covered hereunder.

[31] He then says in paragraph 20:

> 20. THAT raw material suppliers to the Sable project were not intended to be insured under the wrap-up liability or builders' all-risk policies with respect to faulty or defective materials based on the discussions, communications and correspondence in which I participated as lead member of the insurance sub-committee with the insurance brokers interfacing with underwriters.

[32] He was not cross-examined on his affidavit and no evidence was put forward to contradict his affidavit.

[33] Elizabeth Jane Andrewartha's second affidavit, sworn on August 30, 2012, deals with the claim that was paid by the Offshore Insurers. She says in paragraph 2 that the claim that was paid was a claim made by the Named Insureds. She says:

> I confirm that the settlement payment made to the Named Insured, and evidenced by the Settlement Agreement entered into between the Insurers and the Named Insureds dated the 3rd day of April 2003 ...was made in response only to a claim made by the Named Insureds under the policy.

[34] I accept this uncontradicted evidence. In my view, it responds in part to Category 2 of Motion 1. There are no other documents with respect to coverage issues that are relevant because the suppliers were not to be covered except in the limited way referred to in Exhibit "C" to the DeBoice affidavit and the offshore insurance claim was settled on the basis of a claim by Named Insureds.

[35] What is not dealt with is the issue of whether there was "coverage for any of the Settled Defendants." The Settled Defendants are collectively referred to as "Applicators" in Sable's Statement of Claim. The material provided does not answer the question of whether any of the Applicators so defined were additional insureds. The two affidavits referred to above dealt only with suppliers and payment of claims made by Named Insureds.

[36] Attached as Exhibits to the affidavit of Darlene Jamieson, Q.C. are various documents which refer to additional insureds. For example, the insurance policy at Exhibit 11 in clause 1(c) on page 2 includes sub-contractors as Additional Insureds. Exhibit 14, on the first page, includes the sentence:

> Kvaerner's position would be that Barrier at least are covered by the Project CAR.

[37] At Exhibit 15, there is reference in an email to "stressing Barrier's coverage under the policies (our current view)...".

[38] G.R. Addison at ExxonMobil wrote a letter on March 6, 2003, (Exhibit 16) in which he says, on p. 2:

> It would appear, based on the wording of the policy and the sub-contract between Kvaerner and Barrier Coatings that both are "ADDITIONAL INSUREDS" within the definition of the policy....

[39] The Defendants allege that if Barrier is an "Additional Insured" they may have coverage through them. Coverage correspondence with respect to "Applicators" and who is an "Additional Insured" is therefore relevant and must be disclosed.

PRIVILEGE

[40] The plaintiffs, the Alliance Contractors and the insurers say documents are privileged for one or more of five reasons:

1. Solicitor/client privilege
2. Litigation privilege
3. Common interest privilege
4. Settlement privilege
5. Statutory privilege

Privilege Generally

[41] In *Di-Anna Aqua Inc. v. Ocean Spar Technologies LLC*, 2002 NSSC 138, Scanlan, J. at paragraph 5 referred to the broad disclosure requirements in the *Nova Scotia Civil Procedure Rules* and then said:

> The one exception in terms of disclosure is documents over which a valid claim for privilege exists.

[42] In *CMHC*, *supra*, Jones, J.A. said in paragraph 15:

> It was for the respondent to establish the existence of any privilege.

[43] In *Creaser v. Warren*, [1987] N.S.J. No. 108 (C.A.), the Court dealt with the information that should be contained in a Part II List. At page 3, Clarke, C.J.N.S. cited sub-rules 20.01(2) and (3) (quoted above) and then said:

> 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.

[44] He continued on that page to say:

> ... 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.

[45] As Davison, J. said in *Ford Motor Co. of Canada v. Laconia Holdings Ltd.*, [1991] N.S.J. 206 at page 3:

> ... 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 in the use of litigation. In that event, the document is protected from production.

[46] In *Commercial Union Assurance Co. of Canada v. Baker,* [1995] N.S.J. No. 54, (C.A.), Freeman, J.A. referred to Wigmore's four conditions for establishing privilege. He said in paragraph 9:

> **9** In the introduction to their text Solicitor-Client Privilege in Canadian Law, Butterworths Canada Ltd. 1993, the authors, Ronald D. Manes and Michael P. Silver, explain the present state of the law at pp. 2-3:
>
> 'Although many propositions in solicitor-client privilege are based on centuries-old cases, it is a topic which is often litigated throughout all stages of the litigious process. New cases, with new subtleties, are constantly arising. Further, in addition to well-established precepts of solicitor-client privilege, the Supreme Court of Canada in Slavutych v. Baker (1975), [55 D.L.R. (3d) 224 at p. 228] has expressly adopted Dean Wigmore's four conditions for establishing new forms of professional privileges. Dean Wigmore's four criteria are:
>
> 1. The communications must originate in a confidence that they will not be disclosed.
>
> 2. This element of confidentiality must be essential to the full and satisfactory maintenance of the relation between the parties
>
> 3. The relation must be one which in the opinion of the community ought to be sedulously fostered.
>
> 4. The injury that would inure to the relation by the disclosure of the communications must be greater than the benefit thereby gained for the correct disposal of the litigation.

> The fourth criterion is really a public interest balancing test – weighing the interest at stake in the maintenance of the relationship between the parties, with the interest at stake in the litigation. Therefore, the book is open on new kinds of privileges extended by our courts to relationships of sufficient importance in contemporary society.
>
> ...

a. Solicitor/Client Privilege

[47] In The Law of Privilege in Canada (*Canada Law Book*, 2012), the authors give a summary at pp. 11-3 and 11-4:

> Solicitor-client privilege protects the direct communications - both oral and documentary - prepared by the lawyer or client and flowing between them, in connection with the provision of legal advice. The communication must be intended to be made in confidence, in the course of seeking or providing legal advice, and must be advice based upon the professional's expertise in law.
>
> ...
>
> Solicitor-client privilege is no longer considered to be a rule of evidence, but a substantive rule that has evolved into a fundamental civil and constitutional right.
>
> Solicitor-client privilege is not absolute, but it is the privilege that is as close to absolute as possible to ensure public confidence and retain relevance. It will only yield in certain clearly defined circumstances and does not involve a balancing of interests on a case by case basis.

[48] In *Smith v. Jones*, [1999] 1 S.C.R. 455, the Supreme Court of Canada dealt with the issue of solicitor/client privilege in the context of exceptions to it. In that case, a psychiatrist had examined an accused person and concluded he was a danger to society. The accused's lawyer told the psychiatrist that the court would not be told of his concerns. The psychiatrist therefore brought an action to obtain a declaration that he was entitled to disclose the information in the interests of public safety. Cory, J. introduced the subject of solicitor/client privilege in paragraph 35 saying:

> **35** ... It has long been recognized that this principle is of fundamental importance to the administration of justice and to the extent it is feasible, it should be maintained.

[49] In paragraphs 44 to 50, he discussed the nature of the privilege. He said in paragraph 44:

> **44** It is the highest privilege recognized by the Court.

[50] He continued in para. 45:

> **45** The solicitor-client privilege has long been regarded as fundamentally important to our judicial system. ...

[51] He said in para. 46:

> **46** Clients seeking advice must be able to speak freely to their lawyers secure in the knowledge that what they say will not be divulged without their consent. It cannot be forgotten that the privilege is that of the client, not the lawyer. The privilege is essential if sound legal advice is to be given in every field....Without this privilege clients could never be candid and furnish all the relevant information that must be provided to lawyers if they are to properly advise their clients. It is an element that is both integral and extremely important to the functioning of the legal system. It is because of the fundamental importance of the privilege that the onus properly rests upon those seeking to set aside the privilege to justify taking such a significant step.

[52] In para. 48, he referred to *Solosky v. The Queen,* [1980] 1 S.C.R. 821 at p. 836, after stating:

> **48** The solicitor-client privilege was originally simply a rule of evidence, protecting communications only to the extent that a solicitor could not be forced to testify. Yet now it has evolved into a substantive rule.

[53] Thereafter, in *Blank v. Canada (Minister of Justice)*, [2006] S.C.J. No. 39, the Court had the occasion to distinguish between solicitor/client privilege and litigation privilege. Fish, J., in paragraph 24, reiterated that solicitor/client privilege is now a rule of substantive law. He continued in that paragraph:

> **24** ... And the Court has consistently emphasized the breadth and primacy of the solicitor-client privilege. ...

[54] In paragraph 26, he referred to the rationale for the privilege saying:

> **26** ... The solicitor-client privilege has been firmly entrenched for centuries. It recognizes that the justice system depends for its vitality on full, free and frank communication between those who need legal advice and those who are best able to provide it. Society has entrusted to lawyers the task of advancing their clients' cases with the skill and expertise available only to those who are trained in the law. They alone can discharge these duties effectively, but only if those who depend on them for counsel may consult with them in confidence. The resulting confidential relationship between solicitor and client is a necessary and essential condition of the effective administration of justice.

[55] He continued in paragraph 31, referring to both litigation privilege and solicitor/client privilege:

> **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. ...

[56] After a lengthy discussion with respect to litigation privilege, he returned to the issue of solicitor/client privilege saying in para. 50:

> **50** Commensurate with its importance, the solicitor-client privilege has over the years been broadly interpreted by this Court. In that light, anything in a litigation file that falls within the solicitor-client privilege will remain clearly and forever privileged.

[57] The Defendants say that, if a document is a communication between a lawyer and client or advice given by a lawyer, it need not be produced. There are a relatively small number of documents for which the only claim of privilege is solicitor/client privilege. Examples from the Plaintiff's Part II list are as follows: 0086955, p. 2; 0086085, p. 2; 0085608, p. 6; E000046, p. 7; E09769, p.36.

b. 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)).

[68] In paragraph 18, she said:

> **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. LeMarchant (1881), 17 Ch. D. 675, at 681, per Jessel M.R.:
> >
> > > 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.

[69] Roscoe, J.A., in paragraph 19, said Professor Sharpe distinguished between litigation privilege and solicitor-client privilege. He said of the former:

> **19** ... 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).

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

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

[71] In *Ford Motor Company*, *supra*, Davison, J. said on page 4:

> ... the privilege that attaches to communications between either the solicitor or his client and third parties is much more limited. The key to this second class of privilege is 'litigation apprehended or actual'.

[72] On page 4, he cited *13 Halsbury,* 4th ed. at page 62 as follows:

> Communications between a party and a non-professional agent or employee or third party are only privileged if they are made both (1) in answer to inquiries made by the party as the agent for or at the request or suggestion of the solicitor, or without any such request, but for the purpose of being laid before a solicitor or counsel for the purpose of obtaining his advice or of enabling him to prosecute or defend an action, or prepare a brief; and (2) for the purposes of litigation existing or in contemplation at the time. Both these conditions must be fulfilled in order that privilege may exist.

[73] He continued on that page:

> Thus it would seem that the two requirements are conjunctive and not disjunctive...

[74] He went on to refer to the example of insurance adjusters' files saying on pages 4 & 5:

> The most difficult cases in which to ascertain that point where policy demands otherwise relevant evidence should not be produced on grounds of privilege involve insurance adjusters' files. The duties of an adjuster are complex. Invariably, he gathers information for many purposes. When there has been a casualty, information is necessary to determine the cause of the loss with a view to ascertaining if the policy provides cover. Information is required to determine if any conditions of the policy have been breached. Information is required to determine the size or quantum of the loss. Information is required to determine whether the assured or others are at fault for the loss. Adjusters seek information, prepare reports and assess the information in order to make recommendations to their principals. In all of these roles, there can be situations which arise at some point where litigation becomes a definite prospect in order to assert a subrogation claim, defend a liability claim or maintain a denial to the insured. The court must examine the whole background and be alert not to be misled by transparent attempts to protect the documents from disclosure by using lawyers as conduits only, or even by well-meaning but generalized statements that litigation was 'probable'.

[75] In *Di-Anna, Aqua*, *supra,* Scanlan, J. referred to the onus and the evidence necessary to support the privilege claim. He said in paragraphs 6:

> **6** The onus of proving privilege rests on the individual claiming privilege. In this regard I refer to Gouthro Estate v. Canadian Indemnity Company (1990), 88 N.S.R. (2d) 264 (T.D.). It is incumbent upon the Respondent in this case to produce through affidavit, evidence in support of the privilege claim. The affidavit should recite not only a claim or assertion that the communications consist of privileged materials but it must also refer to the content of the materials to the extent necessary to establish a privilege claim. In other words any affidavit should identify the nature and purpose of the communications ...

[76] After stating that the question in that case was determining what was the dominant purpose in producing the documents in issue, he said in paragraph 8:

> **8** The dominant purpose test applies, not only to communications as between solicitor/client but also to derivative evidence. This is noted in Manes and Silver, The Solicitor Client Privilege in Canadian Law, at page 90:
>
> > Derivative communications will be privileged only if made for the dominant purpose of reasonably contemplated litigation. This is particularly important where a dual purpose or multitude of purposes exists behind the creation of communications, as often occurs with a corporate client.
> >
> > While the communication need not specifically state that it relates to contemplated litigation, it must implicitly contemplate litigation.

> The intention of the actual composer of the communication is not solely relevant - the origin of the communication and accordingly the intention of the person under whose authority it was made is also relevant.
>
> The entire communication must be prepared for the dominant purpose of litigation.

(ii) When does Litigation Privilege End?

[77] The leading authority on when litigation ends is *Blank*, *supra.* Once the litigation is over, litigation privilege ends. However, the question remains: When does the litigation end? Fish, J. said in paragraphs 34 to 36:

> **34** The purpose of the litigation privilege, I repeat, is to create a 'zone of privacy' in relation to pending or apprehended litigation. Once the litigation has ended, the privilege to which it gave rise has lost its specific and concrete purpose - and therefore its justification. But to borrow a phrase, the litigation is not over until it is over: It cannot be said to have 'terminated', in any meaningful sense of that term, where litigants or related parties remain locked in what is essentially the same legal combat.
>
> **35** Except where such related litigation persists, there is no need and no reason to protect from discovery anything that would have been subject to compellable disclosure but for the pending or apprehended proceedings which provided its shield. Where the litigation has indeed ended, there is little room for concern lest opposing counsel or their clients argue their case 'on wits borrowed from the adversary', to use the language of the U.S. Supreme Court in *Hickman*, p. 516.
>
> **36** I therefore agree with the majority in the Federal Court of Appeal and others who share their view that the common law litigation privilege comes to an

> end, absent closely related proceedings, upon the termination of the litigation that gave rise to the privilege: ...

[78] He arrived at an expanded definition of litigation. He said in paragraphs 38 to 40:

> **38** As mentioned earlier, however, the privilege may retain its purpose – and, therefore, its effect – where the litigation that gave rise to the privilege has ended, but related litigation remains pending or may reasonably be apprehended. In this regard, I agree with Pelletier, J.A. regarding 'the possibility of defining ... litigation more broadly than the particular proceeding which gave rise to the claim'...
>
> **39** At a minimum, it seems to me, this enlarged definition of 'litigation' includes separate proceedings that involve the same or related parties and arise from the same or a related cause of action (or 'juridical source'). Proceedings that raise issues common to the initial action and share its essential purpose would in my view qualify as well.
>
> **40** As a matter of principle, the boundaries of this extended meaning of 'litigation' are limited by the purpose for which litigation privilege is granted, namely, as mentioned, 'the need for a protected area to facilitate investigation and preparation of a case for trial by the adversarial advocate."....

[79] He continued in paragraph 41:

> **41** In such a situation, the advocate's 'protected area' would extend to work related to those underlying liability issues even after some but not all of the individual claims had been disposed of. There were common issues and the causes of action, in terms of the advocate's work product, were closely related. When the claims belonging to that particular group of causes of action had all been dealt with, however, litigation privilege would have been exhausted. ...

[80] *Blank* was applied in *Potash Corporation v. Dupont Canada Inc*., 2007 NBQB 389. McLellan, J. quoted extensively from it at paragraph 11 including the passages quoted above. He continued in paragraphs 12 to 14:

> [12] Here, as I see it, there is some similarity in both the first and second litigations. They are between the same parties and both actions involve allegations implying product liability claims for allegedly defectively manufactured pipe. The circumstances are sufficiently related that counsel for the Plaintiffs now want to use the similar fact evidence concept to help to try to prove their case.
>
> [13] As I read the directions of the Supreme Court of Canada in ***Blank*** it seems to me that the Supreme Court is taking a much broader and extended definition of litigation than had previously recognized in ***Maritime Steel*** and ***Podeszwa v. London***.
>
> [14] In paragraph 40 of the ***Blank*** case the Supreme Court refers to situations that might arise where '**The parties were different and the specifics of each claim were different but the underlying liability issues were common** ...'.

c. Facts to be Disclosed

[81] The defendants seek information from the plaintiffs and the insurers which they describe in their Motion No. 1 as "factual evidence" (Category #4). They include in that list "surveys, interviews, reports, observations, photographs, videos, test measurements or results including all factual evidence from experts, provided to or received from any of the insurers ... and their adjusters."

[82] The issue of disclosure of facts most often arises in cases where litigation privilege is claimed. It can, however, also arise where solicitor/client privilege is claimed.

[83] The issue of disclosure of facts or evidence was dealt with in this court in *Saturley v. CIBC World Markets Inc.*, 2011 NSSC 310. Moir, J. sets out the background in paragraphs 29 to 32.

> **29** For months now, Mr. Saturley has been pressing for details of the allegation that he made unauthorized discretionary trades. CIBC Wood Gundy responds by saying that it intends to prove that Mr. Saturley generally exercised discretion on behalf of numerous clients who did not, and perhaps could not, give him the authority to do so.
>
> **30** Mr. Saturley does not concede that the unauthorized trading alleged against him founds just cause, but he wishes to know as much detail as possible about the case he has to meet.
>
> **31** CIBC Wood Gundy has provided, and will continue to provide, the names of the clients its investigations suggest were the subjects of unauthorized trading. It discloses whether it alleges all trades on behalf of an alleged client were unauthorized or that Mr. Saturley exercised unauthorized discretion only on certain occasions. When it decides to add the name of a client to the list, it discloses documents in its possession respecting that client.
>
> **32** This level of disclosure is unacceptable to Mr. Saturley. He wants all the details known to counsel for CIBC Wood Gundy

[84] In paragraph 44, Moir, J. repeated from his earlier decision the material facts in Mr. Saturley's action for wrongful dismissal and other causes against his former employer. He said:

> 44 ... The material facts are:
>
> * Mr. Saturley either did not obtain or could not be given a discretion to make trades in the kinds of securities at issue.
>
> * Nevertheless, he made large numbers of trades for many clients without seeking or obtaining their specific approval of the trades. That is, he generally exercised discretion for which he had no authority.
>
> * The clients are those named by CIBC Wood Gundy and whose client file records it discloses.
>
> In my view, the greater detail desired by Mr. Saturley is a call for evidence, not material fact suitable to pleadings.

[85] Mr. Saturley's position was that the disclosure sought was facts not evidence and, therefore, not protected by litigation privilege. He referred to *Metledge v. Halifax Insurance Co*., [1998] N.S.J. No. 309 (C.A.) as authority for this submission.

[86] Moir, J. referred to the article by Professor Sharpe, referred to above, which was quoted in *Metledge, supra,* and he also referred to the decision in *Blank*, *supra*. He said in paragraph 53:

> **53** Two more passages from Professor Sharpe's lecture give us a more refined understanding of the foundation for litigation privilege and its relationship to obligations for disclosure. The Court of Appeal referred to them at para. 23 and 24 of *Metlege*.
>
> > 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 preparations; there is also the need for disclosure to foster fair trial.
> >
> > The adversary system depends upon careful and thorough investigation and preparation by the parties through their counsel. The adversarial advocate cannot prepare without the protection afforded by a zone of privacy. Discovery and privilege must strike a delicate balance. Too little disclosure impairs orderly preparation. Counsel cannot come to trial prepared without adequate information about the case the opposing side will present. On the other hand, total disclosure would be demoralizing and would impair orderly preparation. Thorough investigation and careful development of strategy would be discouraged if every thought and observation had to be disclosed. The work product test focuses on the need to protect counsel's observations, thoughts, and opinions as the core policy of the protection from disclosure of preparatory work.

[87] He then focussed in on the disclosure of facts saying in paras. 54 to 56:

> **54** Para. 31 of *Metlege* requires close examination before treating it as a complete statement of the law on this point. It says:
>
> > Privilege cannot be used to protect facts from disclosure if those facts are relied upon by a party in support of its trial position. It is immaterial that the fact was discovered by a party at the direction of its solicitor, or even by the solicitor independently. If the fact is to be relied upon in support of the defence, then the fact must be disclosed
>
> **55** The word 'facts' can have a wider or narrower meaning in legal discussions. In one context, we distinguish facts from law. In that sense, everything about a witness interview is fact, from what counsel saw and heard (observed), to what counsel believed (thought), to what counsel took to be important enough to note or not (counsel's opinion). In another context, we admonish parties to plead facts but not evidence. We tell civil jurors that they determine the facts, but they must do so on the evidence.
>
> **56** The very next passage in *Metlege*, para. 32, gives us the sense in which the Appeal Court was using the word 'facts'. It includes, 'he must disclose the facts on which he relies although not the evidence to support the fact.'.

[88] In *Saturley*, the plaintiff had relied on *Tiller v. St. Andrews College*, [2009] O.J. No. 2634 (S.C.J.) as authority for requesting a summary of the facts referred to in the interviews of witnesses. Moir, J. said in paragraph 69:

> **69** ... I must disagree with the notion that there is a substantial difference between turning over a copy of a witness' statement and providing a summary of what is in it.

[89] He continued in paragraph 70:

> **70** I think that the distinction submitted by Mr. Saturley is entirely too insubstantial to achieve the necessary balance between the 'need for disclosure to foster fair trial' and the 'need to protect counsel's observations, thoughts and opinions' in order to provide 'a zone of privacy to facilitate adversarial preparations.' The balance is better achieved by the approach taken in decisions cited to me by Mr. Ryan and Mr. Keith: *Arcola School Division No. 72 v. Hill*, [1999] S.J. No. 596 (C.A.) and *Potash Corp. of Saskatchewan Inc. v. Mosaic Potash Esterhazy Limited Partnership*, [2011] S.J. No. 326 (Q.B.). Both decisions take a stricter view of what amounts to 'facts.' See *Arcola* at para. 10 and *Potash* at para. 37.

[90] His second reason for refusing to grant the requested order dealt with facts versus evidence. He said in paragraph 75:

> **75** Secondly, this is not a request for material facts as distinct from evidence. The dichotomy between fact and evidence informs the exclusion of the former from, and the inclusion of the later in, litigation privilege. As I said, summarizing the evidence given by a witness does not elevate it from evidence to fact. The material facts are as pleaded, including in the correspondence that stands as part of the pleadings.

[91] In paragraph 76, he said of Mr. Saturley's knowledge:

> **76** In short, Mr. Saturley knows the allegation of generally exercised unauthorized discretion against him. He knows which former clients CIBC Wood Gundy says were subjects of the unauthorized discretion. What those clients said to counsel during witness interviews is indicative of the evidence they will give in support of the alleged material facts. As such, it is covered by litigation privilege.

[92] The Nova Scotia authority on this issue therefore follows a different path from that in other jurisdictions. The defendants rely on the line of authority from the other jurisdictions.

[93] The earliest case cited referring to the issue of facts versus evidence is *Susan Hosiery Limited v. Minister of National Revenue*, 69 D.T.C. 5278 (Exch. Ct. of Canada). At page 8, the Court said:

> What is important to note about both of these rules is that they do not afford a privilege against the discovery of facts that are or may be relevant to the determination of the facts in issue. What is privileged is the communications or working papers that came into existence by reason of the desire to obtain a legal opinion or legal assistance in the one case and the materials created for the lawyer's brief in the other case. The facts or documents that happen to be reflected in such communications or materials are not privileged from discovery if, otherwise, the party would be bound to give discovery of them.

[94] Continuing on that page, the Court quoted from *Lyell v. Kennedy* (No. 2), (1883) 9 A.C. 81. I refer to part of that quote as follows:

> ... I do not mean to state (and I mention it in case I should be misunderstood) that a man has a privilege to say, 'I have a deed , which you are entitled to see in the ordinary course of things, but I claim privilege for that deed because it was obtained for me by my attorney in getting up a defence to an action,' or 'in the course of litigation.' That would be no privilege at all. So again with regard to another fact, such as a man being told by an attorney's brief that there is ground for thinking that there is a tombstone or a pedigree is a particular place – if the man went there and looked at it and saw the thing itself I do not think that he would be

> privileged at all in that ease *(sic)*[case]: because it is no answer to say, 'I know the thing which you want to discover, but I first got possession of the knowledge in consequence of previous information.' That is not within the meaning of privilege.
> ...

[95] Referring to the case before it, the Court said on p. 9:

> In my view, it follows that, whether we are thinking of a letter to a lawyer for the purpose of obtaining a legal opinion or of a statement of facts in a particular form requested by a lawyer for use in litigation, the letter or statement itself is privileged but the facts contained therein or the documents from which those facts were drawn are not privileged from discovery if, apart from the facts having been reflected in the privileged documents, they would have been subject to discovery. For example, the financial facts of a business would not fall within the privilege merely because they had been set out in a particular way as requested by a solicitor for purposes of litigation, but the statement so prepared would be privileged.

[96] In *Arcola School Division No. 72 v. Hill,* [1999] S.J. No. 596 (C.A.),

Sherstobitoff, J.A. referred to *Susan Hosiery, supra,* at some length in para. 5.

The issue on that appeal was set out in para. 1:

> [1] This appeal concerns the extent to which litigation privilege, on examination for discovery respecting the facts of the case, protects from disclosure details of a party's investigation of the facts, such as the name of the investigator and the names of the persons from whom statements were taken, as well as the content or 'facts' contained in each of the investigator's reports or witness statements.

[97] Sherstobitoff, J.A. said in paragraph 8:

> [8] On the application of these principles to the documents in this case, the written witness statements, they, having been prepared for the purpose of litigation, are privileged and need not be disclosed. However, the facts relevant to the case, whether reflected in the privileged documents or not, are not privileged, and must be disclosed if sought by one party from the other in a proper way, in this case, through an examination for discovery. ...

[98] He continued in paragraph 10:

> [10] ... The criterion for discoverability is whether the information sought may be characterized as being 'facts that are or may be relevant to the determination of the facts in issue.' The names of all potential witnesses clearly fall into that category, but they have already been provided. However, the name of the insurance adjuster who investigated the accident and the names of potential witnesses from whom he took statements, written or otherwise, on behalf of the appellant during the course of his investigation just as clearly do not. These names do not reveal anything of the facts in issue that the respondent does not already have, but do reveal details of the appellant's investigation of the facts in issue. The respondent cannot be said to be seeking facts when he asks for this information; he is seeking details of the appellant's investigation. That is exactly the sort of information that litigation privilege is designed to protect.

[99] In para. 14, he referred to "facts" to be disclosed where he said:

> [14] Nothing said herein should be read to derogate from or diminish the right of a party to obtain disclosure of all facts known to the other party. Indeed, it would be an abuse of the privilege to use it to conceal any relevant facts from the opposite party. The term 'facts' in this context must be construed broadly so as to include all evidence bearing on the relevant facts, whether favourable or unfavourable to either party. As a starting point, a party has the other party's version of the facts in the pleadings as required by the Rules of Court. With proper preparation and diligent questioning on the examination for discovery he should be able to ferret out all the relevant facts known to the other party. A party armed with all of the relevant facts and the names of all potential witnesses should be able to adequately prepare for trial. What he cannot expect is to indirectly obtain access to the other party's solicitor's brief and to its entire record of the investigation of the facts by

> demanding to know exactly what the insurance adjuster said as to the investigation of the facts as set out in the reports, exactly who was interviewed and exactly what each potential witness interviewed said during the course of the interview, unless it can be shown that there is something therein of a factual nature that has not been otherwise disclosed and is relevant to the proof of the case.

[100] In *Potash Corp of Saskatchewan Inc. v. Mosaic Potash Esterhazy Limited. Partnership*, 2011 SKQB. 208, Gabrielson, J. referred to *Susan Hosiery* and *Arcola*. In paragraph 36, he quoted para. 10 from *Arcola* (quoted above) and then said in para. 37:

> **37** Similarly, in the circumstances of this case, Mosaic has already been provided with information that the persons who reviewed the transcripts of the IMC litigation and who reviewed the file at the Regina court house were external legal counsel of PCS. Mosaic also has copies of the transcripts and copies of the files at the Regina court house involving the IMC litigation or, at least, access to these transcripts and files by attending at the said court house. Accordingly, what it seeks is the results of the external counsel's investigations and any legal conclusion as to the relevancy of certain facts, and not just the facts themselves. In my opinion, this is the type of information that litigation privilege is designed to protect. It is the legal counsel's work product rather than just the facts. The facts can be obtained by Mosaic by conducting the same type of investigation. ...

[101] *Susan Hosiery, supra,* was also quoted in *Canada Post Corp v. Euclide Cormier Plumbing and Heating Inc*., 2008 NBCA 54, where the opposite result occurred. J.E. Drapeau, C.J.N.B. said in paragraph 49:

> **49** Our *Rules of Court* allow broad informational discovery. Thus, under Rule 32.06(1), a person being examined for discovery may not limit his or her

> answers to matters within personal knowledge. Rather, that person must answer to the best of his or her knowledge, information and belief any question relating to an issue in the action. Moreover, Rule 32.06(1)(a) provides that a question may not be objected to on the ground that the information sought is evidence. Those testimonial obligations require the disclosure of any factual information communicated in privileged witness statements or reports (see *Susan Hosiery Ltd. v. Minister of National Revenue*).

[102] He continued in paragraph 53:

> **53** It is not difficult to imagine a case where a privileged document might contain references to matters that are privileged (e.g. legal advice, discussion of litigation strategy etc.) and matters that are not (e.g. factual information). No one would argue that, in those circumstances, the privilege over the document itself becomes meaningless when the factual information it contains is disclosed to the opposing parties at discovery.

[103] Other authorities contrary to *Saturley, supra,* rely on a decision of the Ontario Court of Appeal in *General Accident v. Chrusz* (1999), 45 O.R. (3d) 321 (C.A.).

[104] Two Ontario decisions and a Prince Edward Island decision cite *Chrusz, supra*. The first is a decision of a Master in *Friend v. Waters,* [2009] O.J. No. 2987, (S.C.J.). In paragraph 10, Master MacLeod said:

> **10** In any event not everything in the lawyer's file is protected by litigation privilege. One cannot for example cloak documents, facts or evidence with privilege just because counsel has undertaken the collection of those items. It is

> litigation strategy or 'work product' that is protected and not evidence necessary to determine the merits of the case. In the case at bar, it is not only relevant but essential to know when the plaintiff ordered the hospital records and when she received them.

[105] In my view, to include both facts and evidence as material to be disclosed from documents otherwise protected by litigation privilege is not consistent with the wording of *Susan Hosiery* and the authorities which have cited it.

[106] The second Ontario decision is *Tiller*, *supra*. Moir, J. In *Saturley* did not apply *Tiller*. As quoted above, he said he could not see any distinction between providing the document itself and a summary of it. He said he preferred the reasoning in *Arcola* and *Potash Corp*.

[107] The third decision following *Chrusz* is *Llewelynn v. Carter*, 2008 PEISAD 12. McQuaid, J.A. referred to *Blank*, *supra*, and the article by Robert Sharpe. He then, in paragraph 30, quoted *Rule 31* of the P.E.I. *Rules of Court*. *Rule 31* in P.E.I. deals with discovery and provides:

> 31.06(1) A person examined for discovery shall answer, to the best of his or her knowledge, information and belief, any proper question relating to any matter in issue in the action or to any matter made discoverable by subrules (2) to (4) and no question may be objected to on the ground that,

(a). the information sought is evidence;

[108] In the context of that *Rule*, McQuaid, J.A. said in paragraph 30:

> **30** Also, in accordance wiith Rule 31, refusal to answer questions shall not be grounded on the argument that the information sought is evidence, that the question is the cross-examination of the witness or on the affidavit of documents unless the question goes to the credibility of the witness. Therefore, it would appear that a party may be questioned and indeed cross-examined on the affidavit of documents and while not obligated to disclose the document itself, provided it was prepared for the dominant purpose of the litigation, may be required to disclose the name and address of the person who prepared the document, when it was prepared and the nature of the information gathered in the document. The party conducting the examination is entitled to not only the facts as alleged by the other party but the evidence which the party intends to use to prove the alleged facts.

[109] He relied on *Chrusz*, *supra*, citing it in paragraph 39 and quoting from paras. 24 to 28 of it. Paragraph 25 of *Chrusz* quoted therein says:

> para. 25 The zone of privacy' *(sic)* is an attractive description but does not define the other reaches of protection or the legitimate intrusion of discovery to assure a trial on all of the relevant facts. 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. In effect, litigation privilege is the area of privacy left to a solicitor after the current demands of discoverability have been met. There is a tension between them to the extent that when discovery is widened, the reasonable requirements of counsel to conduct litigation must be recognized.

[110] The decision in *Chrusz* refers to the tension between litigation privilege and disclosure and comes down on the side of disclosure.

[111] However, in *Canada Post*, *Chrusz* and *Llewellyn***,** the Rules of Court of New Brunswick, Ontario and Prince Edward Island specifically provide that, in discovery, information cannot be refused because it is "evidence." Because of that *Rule***,** I conclude that these decisions are of no assistance to the defendants. The *Rule* in Nova Scotia does not have the same requirement to provide evidence on discovery.

[112] Furthermore, as noted above, this issue was raised by Moir, J. in *Saturley, supra,* and he said he preferred the approach taken in Saskatchewan in *Arcola, supra* and *Potash Corp., supra.* I agree with the approach taken by Moir, J. in *Saturley*, *supra*, and the distinction he made between facts and evidence.

[113] In my view, this is consistent with protecting the "zone of privacy" in which the lawyer prepares for trial. If the material facts are known to the other party, that party is as capable of gathering the evidence as the party who has done so. The pleadings are to set out the facts but not the evidence to prove those facts. The court procedures after filing pleadings are designed to provide an opportunity for a party to gather its own evidence.

d. Common Interest Privilege

[114] The plaintiffs claim privilege over certain documents because they were the subject of common interest privilege agreements between the plaintiffs and other parties pursuant to which documents were provided by each to the other.

[115] However, it is not correct to say that this is a separate heading of privilege. It is a means by which a privileged document provided to another party can retain its privileged status.

[116] As Denning, L.J. said in *Buttes Gas and Oil Co. v. Hammer* (No. 3), [1981] Q.B. 223 (C.A.) at p. 243:

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

> An author writes a book and gets it published. It is said to contain a libel or to be an infringement of copyright. Both author and publisher take legal advice. Both exchange documents. But only one is made a defendant.
>
> In all such cases I think the courts should - for the purposes of discovery - treat all the persons interested as if they were partners in a single firm or departments in a single company. Each can avail himself of the privilege in aid of litigation. Each can collect information for the use of his or the other's legal adviser. Each can hold originals and each make copies. And so forth. All are the subject of the privilege in aid of anticipated litigation, even though it should transpire that, when the litigation is afterwards commenced, only one of them is made a party to it. No matter that one has the originals and the other has the copies. All are privileged.

[117] Several conditions must be present in order for the privilege to apply. These are:

1. The document must be subject to privilege in the hands of the person who provides it. That can be either solicitor/client privilege or litigation privilege.

2. If it is alleged to be protected by litigation privilege, the test is that for a claim of litigation privilege.

3. There must be a common interest in the litigation or anticipated litigation.

[118] If the document would have to be disclosed in any event, common interest privilege cannot protect it. A common interest privilege agreement cannot create a privilege which did not exist before. What common interest privilege protects against is waiver of privilege when a privileged document is disclosed to someone who otherwise would have no right to have it and with whom the party has a common interest. In such circumstances, if the document is a communication between solicitor and client or a solicitor's legal opinion, the privilege attaching to it continues in spite of it being provided to another party. If it is subject to litigation privilege as part of a lawyer's work product, common interest privilege prevents its privilege as such from being lost.

[119] In order to have the protection of litigation privilege, the dominant purpose for its creation has to be for, or at the request of, a lawyer in the course of preparing for anticipated litigation or litigation which has been commenced. The question must be asked in each case: What is the common interest between the parties? As Lord Denning said, the interest must be "the self same interest" (p. 243). He gave as examples: neighbours complaining of a nuisance but only one is a plaintiff; an author and a publisher of his book having been said to have libelled someone or infringed a copyright but only one is sued.

[120] In the case of the Court of Appeal in *Buttes Gas*, documents were passed between the plaintiffs and the Ruler of Sharjah although the Ruler was not a party to the action because of sovereign immunity. He had, however, been named as a party to the conspiracy with the plaintiffs and others. At page 224 of the decision, Lord Denning said:

> All the ruler's documents or copies of them were passed to the plaintiffs by the ruler or his English solicitors (who later were instructed by the plaintiffs) as material in which the ruler and the plaintiffs had a common interest but all under a requirement of strict confidence which was not at any relevant time relaxed.

[121] In *Maritime Steel & Foundries Ltd. v. Whitman Benn & Associates Ltd.* (1994), 130 N.S.R. (2d) 211 (S.C.), *Buttes Gas* was cited to Saunders, J. (as he then was) (paragraph 31). After considering the facts before him, Saunders, J. said at paragraph 43.

> 43 I find in these unique circumstances, that each of the groups of defendants were entitled to assert a legitimate claim of privilege from the time the report was delivered to their respective solicitors. Both Mr. MacDonald and Mr. Outhouse were justified in forming their conclusions that the Di Cesare report was privileged in their own clients' hands. Clearly, ISRM prepared its report and delivered it to all defendants to assist in litigation (which at time of delivery had already been commenced) and with a view toward a joint settlement offer. At that point there was a mutuality of interests which I find resulted in a "common interest' privilege. ...

[122] However, he said that the common interest privilege later ended. He said in paragraph 44:

> **44** However, that mutuality of interests ended when the defendants abandoned the notion of presenting a joint settlement offer and crossclaimed against one another. These events on November 26, and December 6, 1993 signalled a divergence of interests whereby the joint privilege which originally protected the Di Cesare report was lost. It then became advantageous for one group of defendants to maximize the exposure of the other, thereby tending to reduce their own liability. Their interests in defending against the considerable claim launched by the plaintiff were different, competing and adverse ...

[123] He concluded they no longer had a mutuality of interest, saying in paragraph 46:

> 46 The mutuality of interest necessary to maintain confidentiality and extend any joint claim of privilege no longer exists.

[124] *Mitsui*, *supra*, also cited *Buttes Gas* and quoted Lord Denning's words with respect to common interest privilege quoted above. Roscoe, J.A. applied the principle to the matter before the Court. She said in paragraph 52:

> **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.

[125] The Supreme Court of Canada dealt with the issue of common interest privilege in *Pritchard v. Ontario Human Rights Commission*, 2004 SCC 31. The appellant wanted copies of all the documents the Commission had when it rendered its decision, including the opinion of its in-house counsel. The Supreme Court of Canada did not order the production of the legal opinion because procedural fairness did not require the disclosure of solicitor/client privileged documents. The appellant had also argued that the common interest privilege exception applied. Major, J., writing for the Court, said in paragraph 22:

> 22 The appellant submitted that solicitor-client privilege does not attach to communications between a solicitor and client as against persons having a 'joint interest' with the client in the subject-matter of the communication. This 'common interest, or 'joint interest' exception does not apply to the Commission because it does not share an interest with the parties before it. The Commission is a disinterested gatekeeper for human rights complaints and, by definition, does not have a stake in the outcome of any claim.

[126] In the context of solicitor/client privilege, he said in paragraph 23:

> 23 The common interest exception to solicitor-client privilege arose in the context of two parties jointly consulting one solicitor.

[127] He referred to *Buttes Gas* in paragraph 24 saying:

> 24 The common interest exception originated in the context of parties sharing a common goal or seeking a common outcome, a 'selfsame interest' as Lord Denning, M.R., described it in *Buttes Gas & Oil Co. v. Hammer* (No. 3), [1980] 3 All E.R. 475 (C.A.), at p. 483.

[128] He referred to subsequent exceptions to it which he said were "narrow" but are inapplicable in the matter before me.

[129] Newbould, J. in *Barclays Bank PLC v. Metcalfe and Mansfield*, 2010 ONSC 5519 discussed common interest privilege. He pointed out that it depends upon an underlying privilege. He said in paragraph 11:

> [11] Common interest privilege is not a separate category of privilege. Rather, it depends on the existence of an underlying privilege being made out, and provides a basis under which the otherwise privileged document can be shared with certain third parties without constituting a waiver of privilege. If the requisite common interest is not established, then the sharing of the documents will constitute a waiver of the privilege and the documents are then producible. See *Chruz*, *supra*, at paras. 44 to 46; *Pitney Bowes of Canada v Canada*, [2003] [F.C.J. 311 at paras. 17-20 (TD); *CC&L Dedicated Enterprise Fund (Trustee of) v. Fisherman*, [2001] O.J. No. 637 at paras. 29-32 (SCJ).

[130] He said the interests need not be "identical." He also said the possibility the parties may at some future time become adverse did not mean their common interest should be denied at present (paragraph 12).

[131] He cited *CC & L Dedicated Enterprise Fund (Trustee of) v. Fisherman,* [2001] O.J. No. 637 (S.C.J.) as authority for his conclusions. In that case, YBM Magnex International Inc. was in receivership and the Receiver had a report which the plaintiffs in two class actions in Canada wanted to have. The Receiver refused to waive privilege in the report and would not provide it if that had the effect of a waiver of privilege. The class action plaintiffs submitted they had a common interest with the Receiver.

[132] Cumming, J. referred to *Buttes Gas, supra,* in paragraph 25. In paras. 27 to 30 he said:

> 27 In *Supercom of California v. Soverign General Insurance Co.* (1998), 37 O.R. (3d) 597 (Ont. Gen. Div.) at 612 Wilson J. stated that 'Common interest privilege implies the dynamic of parties sharing a united front against a common foe'. Parties may have a *common* interest even if they do not have *identical* interests. See generally J. Sopinka, S.N. Lederman, A.W. Bryant, *The Law of Evidence in Canada*, 2d ed.. (Toronto: Butterworths, 1999) at 761.
>
> 28 Common interest is not restricted to co-parties. The Ontario Court of Appeal in *General Accident Assurance Co. v. Chrusz* (1999), 45 O.R. (3d) 321 (Ont. C.A.) ('*General Accident Assurance Co.*') at 337-338 adopted the principles set forth in *United States v. American Telephone & Telegraph Co.*, 642 F.2d 1285 (U.S.D.C. Ct. App., 1980), (1980 S.C.C.A.) At 1299-1300:
>
> ... The existence of common interests between transferor and transferee is relevant to deciding whether the disclosure is consistent with the nature of the work product privilege. *But 'common interests' should not be construed as*

> *narrowly limited to co-parties. So long as the transferor and transferee anticipate litigation against a common adversary on the same issue or issues, they have strong common interests in sharing the fruit of the trial preparation efforts*. Moreover, with common interests on a particular issue against a common adversary, the transferee is not at all likely to disclose the work product material to the adversary. When the transfer to a party with such common interests is conducted under a guarantee of confidentiality, the case against waiver is even stronger. [Emphasis in original]
>
> 29 The principle of 'common interest privilege' applies to legal opinions provided in the context of a corporate transaction. *Archean Energy Ltd. v. Minister of National Revenue* (1997), 202 A.R. 198 (Alta. Q.B.) at 203. Common interest privilege may attach to documents shared by parties with a common interest despite the fact they become adverse in respect of another related action. *Western Canadian Place Ltd. v. Con-Force Products Ltd.* (1997), 202 A.R. 19 (Alta.Q.B.) at 25 ('*Western Canadian*').
>
> 30 The possibility that parties might at some future pint in time become adverse in interest is insufficient to deny the existence of a common interest privilege at present. *Almecon Industries Ltd. v. Anchortek Ltd.* (1998), [1999]1 F.C. 507 (Fed. T.D. at 512-513; *Lessard (Guardian ad litem of) v. Canosa* (1995), 12 B.C.L.R. (3d) 78 (B.C.S.C. [In Chambers]) at 81.

[133] Accordingly, although their interests were not identical and they were not co-parties, the motion was granted. The report was provided on the basis that the Receiver and the plaintiffs in the class actions had a common interest against a common adversary. This was in spite of the fact that at some later time they might become adverse in interest.

[134] Schulman, J. in *Hospitality Corp. of Manitoba Inc. v. American Home Assurance Co.*, 2002 MBQB 294 concluded there was no common interest between

the parties at the time a letter was written which the Plaintiff later wanted produced. Schulman, J. set out the underlying facts with respect to the letter in paragraph 1:

> 1 ... Counsel have agreed that the letter is relevant to an issue in this case and that, in the letter, the law firm expresses an opinion to Household that would come within the rubric of solicitor- client privilege in the hands of Household. However, Household provided a copy of the letter to American Home in circumstances which, it is agreed, would constitute a waiver of privilege unless it is exempt from production as being the subject of common interest privilege. The issue on this motion is whether there has been a waiver.

[135] At para. 7, he too referred to *Chrusz*, *supra*, which cited *Buttes Gas*, *supra*. He cited an earlier Manitoba case in paragraph 12:

> 12 In *Lehman v. Insurance Corp. of Ireland* (1983), 25 Man. R. (2d) 198 (Man. Q.B.), Morse J. held that the common interest privilege did not apply in the circumstances of the *Lehman* case. He stated::
>
> > [26] In my view, the nature of the interest which existed between the defendant insurers and the insurer for Manitoba in this case was not the type of common interest which was considered in Buttes to give rise to the common interest privilege. Although both were interested in ascertaining the cause of the leak, they did not have an interest which, in my opinion, could be said to be common. The interest of the defendant insurers was to assist them in resisting a claim by Independent under the policy of insurance. The interest of the insurer for Manitoba was in defending any action brought by Independent against Manitoba. As the learned referee pointed out, it is possible that the defendant insurers could have been or might yet be called upon to pay under their policy of insurance, in which case they would be subrogated to their insured's claim against Manitoba, a claim which the insurer of Manitoba is

> defending. In such a case, the interests of the two would clearly be adverse.
>
> [27] I am of the opinion that the relationship between the defendant insurers and the insurer of Manitoba was not one which ought sedulously to be fostered and that the agreement between the two adjusters, acting for their respective clients, to exchange reports, destroyed any claim for privilege which otherwise would have existed.

[136] In paragraph 14, he noted that the common interest had been firmly established at the time the document was provided in cases where the common interest had been previously established in cases where the common interest privilege was upheld. In the case before him, he concluded that privilege was waived when the legal opinion was provided by Household to American Home. He said the letter was provided before they agreed to cooperate and in an effort to persuade American Home to cooperate with it. Furthermore, he said there was a possibility that Household would have to sue American Home.

e. Settlement Privilege

[137] Settlement privilege is a means of maintaining privilege over correspondence and documents shared between parties in an effort to resolve litigious issues between them.

[138] In *Middelkamp v. Fraser River Real Estate Board*, [1992] B.C.J. No. 1947, 1992 CarswellBC 267 (C.A.)**,** McEachern, C.J. for the majority said at para. 2:

> 2 I have no doubt that it is in the public interest, that parties to disputes should be free to negotiate *Competition Act* matters and other disputes freely, and without fear of later prejudice arising out of the steps taken during efforts to arrange settlements.

[139] He referred to *Rush & Tompkins Ltd. v. Greater London Council*, [1988] 3 All E.R. 737 (H.L.). in para. 15 and then said in paras. 17 and 18:

> 17 ... I find myself in agreement with the House of Lords that the public interest in the settlement of disputes generally requires 'without prejudice' documents or communications created for, or communicated in the course of, settlement negotiations to be privileged. I would classify this as a 'blanket', *prima facie*, common law, or 'class' privilege because it arises from settlement negotiations and protects the class of communications exchanged in the course of that worthwhile endeavour.
>
> 18 In my judgment this privilege protects documents and communications created for such purposes both from production to other parties to the negotiations and to strangers, and extends as well to admissibility, and whether or not a settlement is reached. This is because, as I have said, a party communicating a proposal related to settlement, or responding to one, usually has no control over what the other side may do with such documents. Without such protection, the public interest in encouraging settlements will not be served.

[140] In *Brown v. Cape Breton Regional Municipality*, 2011 NSCA 32, Bryson, J.A. said at para. 24:

> [24] Settlement privilege has been recognized by Anglo-Canadian courts for at least two centuries.

[141] He referred to the theoretical foundation for it in para. 25:

> [25] Various explanations have been offered for the theoretical foundation of settlement privilege. In Sopinka, Lederman & Bryant, *The Law of Evidence in Canada*, 3rd ed., (Markham, ON: LexisNexis Canada Inc., 2009) at para. 14.316, ('Sopinka') the authors quote from **Wigmore** on Evidence:
>
> > 1. That admissions in settlement negotiations are likely to be hypothetical or conditional only, as a supposition on which a settlement might rest, whether that supposition is true or false, and that such an admission has no relevance and is inadmissible on that ground, though if an admission is clearly an unqualified admission of fact, it would be admissible;
> >
> > 2. That all admissions in the course of negotiations towards settlement are without prejudice, whether those words are used or not, and are protected by a privilege based on public policy, and are not admissible in evidence;
> >
> > 3. That settlement negotiations are conducted on the normal contractual basis of offer and acceptance and with an express reservation of secrecy, and that, if a contract is reached, the negotiations are superseded by the contract itself, and become irrelevant and inadmissible, and if no contract is reached, then the negotiations are, for that reason, irrelevant;

> 4. That admissions made in the course of settlement negotiations may not be concessions of wrongs done, but merely an expression of a desire to purchase peace, and as such irrelevant and inadmissible.

[142] The Supreme Court of Canada has recognized the importance of the public policy in favour of settlement, the second *Wigmore* criterion. Bryson, J.A. said in para. 26:

> [26] In Canada, the second **Wigmore** criterion predominates, although the intent of the parties themselves is also a factor. The public policy importance of the doctrine has been recognized by the Supreme Court of Canada in *Kelvin Energy Ltd. v. Lee*, [1992] 3 S.C.R. 235 at para. 48, quoting from *Sparling v. Southam Inc.* (1988), 66 O.R. (2d) 225 at 230:
>
> > ... Courts consistently favour the settlement of lawsuits in general. To put it another way, there is an overriding public interest in favour of settlement. This policy promotes the interests of litigants generally by saving them the expense of trial of disputed issues, and it reduces the strain upon an already overburdened provincial Court system. [Emphasis in original.]

[143] There is a conflict between full disclosure and encouraging settlement. Bryson, J.A. said in para. 27:

> [27] Whether potentially relevant settlement communications should be disclosed involves a competition between the public policy of full disclosure serving the truth-seeking function of the court, against that which fosters informal resolution of litigious matters. As a general proposition the latter has prevailed. Settlement discussions require candour. That will not be forthcoming without the protection from non-disclosure that settlement privilege confers.

[144] He set out the three conditions for settlement privilege in para. 30:

> [30] It is generally accepted that there are three conditions that must be met to attract settlement privilege:
>
> (1) A litigious dispute must be in existence or in contemplation;
>
> (2) The communication must be made with the express or implied intention that it would not be disclosed to the court in the event that negotiations failed;
>
> (3) The purpose of communication must be to attempt to effect a settlement.

(Per Sopinka, at para. 14.322)

[145] He traced the history of settlement privilege referring to *Rush & Tompkins* and British Columbia Court of Appeal decisions including *Middlekamp*, *supra.* In para. 39, he considered its broader application citing *Unilever v. Procter and Gamble*, [2001] 1 All E.R. (C.A.), then saying in para. 40:

> [40] And on p. 793, Walker L.J. observed that the protection extends beyond mere admissions:

> ... Conversely, however, I respectfully doubt whether the large residue of communications which remain protected can all be described as admissions. One party's advocate should not be able to subject the other party to speculative cross-examination on matters disclosed or discussed in without prejudice negotiations simply because those matters do not amount to admissions.

[146] He then came down on the side of a blanket privilege rather than a case by case analysis. He said in para. 56:

> [56] But the fundamental reason that the case-by-case analysis should be rejected is that it does not adequately support the policy underlying settlement privilege. If settlement discussions and agreements are not *prima facie* privileged and therefore are disclosable, the very reason for protecting and fostering informal resolution of disputes is at risk. ...

[147] On the issue of whether relevance is a sufficient reason to overcome settlement privilege, Bryson, J.A. said in para. 64:

> [64] The threshold for an exception requiring disclosure obviously cannot be relevance alone. If that were so, a great deal of privileged communication would be disclosable. Accordingly, one must also link relevance to a compelling policy reason to show that disclosure is necessary to give effect to that policy (*Dos Santos* at para. 20).

[148] The most recent decision of the Nova Scotia Court of Appeal on the subject is *Ameron International Corporation* v. *Sable Offshore Energy Inc*., 2011

NSCA 121. It is on appeal to the Supreme Court of Canada and because of that I do not refer to it.

f. Statutory Privilege

[149] In some cases, documents are provided pursuant to a statutory requirement. The plaintiffs say that any such documents retain their privilege although disclosed pursuant to that statutory scheme.

[150] In this case, the plaintiff's claims statutory privilege over documents provided pursuant to the *Canada - Nova Scotia Offshore Petroleum Resources Implementation Act*, S.C. 1988, c. 28 and the *Canada - Nova Scotia Offshore Petroleum Resources Implementation (Nova Scotia) Act*, S.N.S. 1987, c. 3.

[151] The affidavit of J. Gregory Macdonald, the Environment and Regulatory Supervisor for ExxonMobil Canada Ltd. was filed in support of this claim of privilege. He also refers to the *National Energy Board Act*, R.S.C. 1985, c. N-7. He attaches to his affidavit as an Exhibit a list of documents he says are subject to statutory privilege. He adds that they are communications concerning litigation.

[152] One issue is whether having provided them in furtherance of statutory requirements is a waiver of litigation privilege. The privilege claimed is stated as "statutory privilege: communications concerning proposed or ongoing litigation." The documents are either authored by ExxonMobil or the Nova Scotia Offshore Petroleum Board.

[153] Mr. MacDonald says in his affidavit that SOEP was required to provide information to the Canada/Nova Scotia Offshore Petroleum Board and to the National Energy Board.

[154] The Provincial and Federal Statutes are mirror images of each other in their provisions with respect to confidentiality. The *Canada/Nova Scotia Offshore Petroleum Resources Accord Implementation (Nova Scotia) Act*, S.N.S. 1987 c. 3 provides in ss. 121(2) & (3):

> (2) Subject to this Section and Section 19, information or documentation provided for the purposes of this Part or Part III or any regulation made pursuant to either Part, whether or not such information or documentation is required to be provided pursuant to either Part or any regulation made thereunder, is privileged and shall not knowingly be disclosed without the consent in writing of the person who provided it except for the purposes of the

> administration or enforcement of either Part or for the purposes of legal proceedings relating to such administration or enforcement.
>
> (3) No person shall be required to produce or give evidence relating to any information or documentation that is privileged pursuant to subsection (2) in connection with any legal proceedings, other than proceedings relating to the administration or enforcement of this Part or Part III.

[155] Subsection (5) provides exceptions. The defendants have not argued that the information falls within one of these exceptions.

[156] Section 122 of the *Canada/Nova Scotia Offshore Petroleum Accord Implementation Act*, S.C. 1988, c. 28 has identical wording.

[157] The only authority cited on the subject is *Yellow Bird (Next Friend of) v. Lytviak*, 1998, ABQB. 272. In that case, the *Alberta Evidence Act*, R.S.A. 1980, c. A-21 provided a statutory privilege. Master Breitkreuz referred to an earlier decision of the Alberta Queen's Bench, *Goad v. Cavanaugh*, (1992) 3 Alta. L.R. (3d) 18. He said at para. 18:

> **18** It appears to me that the statutory privilege is a restriction from the common law right of production and ought therefore to be construed narrowly.

[158] He then carefully considered the documents sought against the wording of the *Evidence Act*. He concluded that only those that clearly fell within the prohibition on disclosure were protected and ordered disclosure of some documents.

[159] The defendants in their written submissions say there is no evidence to establish that the documents to which Mr. MacDonald refers were prepared or provided pursuant to the statutory requirements.

[160] In fact they say they appear to be documents related to the litigation. They say therefore that statutory privilege is not established.

[161] According to *Yellowbird, supra*, I am to construe the wording of the statutory privilege narrowly. Doing do and having regard to the lack of evidence that these documents have the confidentiality protection provided by the Acts, I conclude they are not privileged, subject to the following.

[162] They may be subject to litigation privilege but only if the dominant purpose for their creation was contemplated or actual litigation, not the requirements of the Acts. If that is not the case, they must be produced.

1**)** **Relevance and Production of Documents Sought**

[163] The defendants say that the documents referred to in category #1 are presumed to be relevant because an Order was granted to produce these documents subject only to claims of privilege. I agree that is the case. Furthermore, if I am not satisfied that a claim of privilege is established, the order of April 30, 2009 requires that the documents be produced.

[164] With respect to category #9, the motion asks that these documents be "identified". It also refers to "relevant" documents. The issue therefore is whether the documents are sufficiently identified so that privilege can be established. If I conclude that is not the case, a further application will likely follow in which production of those documents will be sought.

[165] The plaintiffs and insurers do not dispute that other documents are relevant but claim they are privileged. I will deal first with the issue of relevance.

[166] I have dealt with category #2 above.

[167] With respect to category #4, the defendants must satisfy me that these documents are relevant and should be produced. In my view, there is little question of the relevance of these documents. The test is a semblance of relevancy. These documents relate directly to the issues in this litigation. They include investigations done of the facilities where the coatings were applied, interviews, etc.

[168] With respect to category #5, the documents provided to the insurers concerned the project and the plaintiffs' claims for insurance coverage resulting from failure of the coatings. These documents would include such things as copies of reports, interviews, etc.

[169] The issue with respect to both categories 4 and 5 is whether all this material is privileged.

2) Disclosure versus Privilege

[170] The defendants submit that I must balance two important principles: disclosure and privilege. They say there may be occasions when privileged material must be produced. The plaintiffs and insurers vehemently oppose such a proposition. They say that the protection given to privileged material outweighs the obligation of disclosure.

[171] In *Saturley*, *supra*, Moir, J. referred to the tension between disclosure of documents and non-disclosure of privileged material. I conclude, however, there is no balancing of the two. If material is privileged, it is simply not disclosed. Material facts, however, must be disclosed. The question is "What are the material facts?" In *Saturley*, *supra*, Moir, J. set out the material facts (quoted above) and concluded the information sought by Frederick Saturley was evidence not facts.

[172] In this case, the plaintiffs say in the introduction to their Amended Statement of Claim (last amended January 17, 2013) that the basis of their claim is "as a result of widespread, premature paint failures on the facilities" comprising the SOEP. The plaintiffs say in para. 61A that the "Ameron Suppliers", (as defined in the Statement of Claim), who are the defendants making this application, had a collateral contract which they breached. In addition, in para. 61D they say that Ameron BV breached the collateral contract.

[173] In para. 62, the plaintiffs say the defendants owed a duty of care to the Sable Owners. In paras. 68ff, the plaintiffs say there was negligent misrepresentation by these defendants. In paras. 75ff, the plaintiffs say these defendants were negligent.

[174] In para. 78, the plaintiffs say:

> **78** As a result of the negligent misrepresentations, negligence, breach of contract and breach of collateral contract of the Defendants, as stated in the foregoing paragraphs, the Plaintiffs have suffered damages and will continue to suffer damages and will continue to suffer damages, and claim against the Defendants, and each of them ...

The question then becomes what are the material facts the plaintiffs allege underlying their claim against these defendants. I conclude they are:

1. That the paint failed on the facilities;

2. There was a contract collateral to the purchase agreements between these defendants and the Applicators and/or the Alliance Contractor, Kvaerner, and that its terms were that the paint supplied would perform as warranted. In para. 61C, the alleged breaches of that collateral contract by these defendants are set out as follows:

> 61C. The Ameron Suppliers breached the terms of the Collateral Contract by manufacturing and providing to the Sable Project through the Applicators and Alliance Contractor Kvaerner a paint system identified on labels and invoices as Amercoat 132 and PSX 700 that:
>
> a. that included primers that:
>
> (i) were not zinc rich primers;
>
> (ii) did not contain more than 85% by weight of metallic zinc in the dried film;
>
> (iii) did not contain as much zinc as Amercoat 68HS;

(iv) was not properly tested according to NORSOK requirements; and

(v) did not pass or was not qualified to NORSOK standards.

b. did not have an offshore and onshore life equal to the Sable Project life of 25 years;

c. has not performed equal to or better than the traditional 3 or 4-Coat Systems, including providing equal cathodic protection (zinc preferentially corroding over the steel);

d. has not performed as well as the Amercoat 68HS / PSX 700 system, including providing equal cathodic protection (zinc preferentially corroding over the steel);

e. has not provided a reduction of as-installed total system cost relative to the traditional 3 or 4-Coat Systems;

f. did not have a simplified maintenance regime, resulting in lower long term operating costs;

g. did not have excellent resistance to abrasion and impact;

h. did not have reduced handling and construction damage with fewer on-site repairs;

i. has not been durable, cost effective, and an appropriate coating system for use on the Sable Project; and

j. was more vulnerable to damage than the traditional 3 or 4-Coat Systems.

[175] In addition, in para. 61D, they allege that Ameron BV further breached the Collateral Contract by:

(a) tinting Amercoat 68 so that it resembled Amercoat 132, Amercoat 68 for Amercoat 132 from August 1998 through November 1998 without advising or seeking the consent of the Sable Owners;

(b) not advising the Sable Owners at any time prior to the filing of its Defence in this action that Amercoat 68 had been substituted for Amercoat 132;

(c) supplying a reformulated Amercoat 132 from November 1998 without advising the Sable Owners of the reasons for the reformulation.

[176] The paint failures alleged are set out in para. 66 as follows:

Ameron Paint Failures

66. The Ameron Paint Failures include:

a. failure of the Amercoat 132 / PSX 700 System to preferentially corrode which has led to corrosion of the underlying steel;

b. failure of the Amercoat 132 / PSX 700 System to adhere properly to edges;

c. low impact resistance of the Amercoat 132 / PSX 700 System;

d. low abrasion resistance of the Amercoat 132 / PSX 700 System;

e. brittleness of the Amercoat 132 / PSX 700 System;

f. accelerated undercutting of the Amercoat 132 / PSX 700 System;

g. improper surface preparation prior to application of the Amercoat 132 / PSX 700 System; and

h. improper application of the Amercoat 132 / PSX 700 System.

[177] The negligent misrepresentations claimed are set out in para. 73:

73. The Amercoat 132 / PSX 700 System was not suitable for use on the Sable Project, and the Ameron Suppliers and Barrier, or either of them, breached their duty of care and were negligent in making the Advice and Representation that it was, particulars of which include:

a. recommending the Amercoat 132 / PSX 700 System when they knew or should have known that the Amercoat 132 primer was not zinc rich, contained less zinc than the 85% by weight specified, contained less zinc than Amercoat 68HS, and in any event, less zinc than required to perform as a zinc rich primer should;

b. after problems were discovered with use of Ameron's new two-coat system on other offshore projects, in reassuring the Alliance there was no reason to be concerned about the paint system so long as it was applied correctly. The Ameron Suppliers and Barrier knew or should have known there was good reason to be concerned about the suitability of the Amercoat 132 / PSX 700 System for the Sable Project, particularly having regard to the limited experience they had with Ameron's two-coat PSX 700 systems;

c. failing to make a proper assessment of the suitability of the Amercoat 132 / PSX 700 System for the Sable Project;

d. failing to take any or any reasonable steps to ascertain the paint requirement to meet the conditions at the Sable Project;

e. failing to foresee that the Amercoat 132 / PSX 700 System would be unlikely to meet the conditions at the Sable Project;

f. failing to ascertain that the Amercoat 132 / PSX 700 System was not properly tested according to NORSOK requirements; and

g. failing to disclose that other projects had experienced problems with the Amercoat 132 / PSX 700 System.

[178] Paragraph 74 sets out the "untrue, inaccurate or misleading" "Advice and Representations" as follows:

a. that Amercoat 132

(i) was not a zinc rich primer;

(ii) did not contain more than 85% by weight of metallic zinc in the dried film;

(iii) did not contain as much zinc as Amercoat 68HS, and

(iv) was not properly tested according to NORSOK requirements.

b. that as a result of Amercoat 132 not being a zinc rich primer, not having a zinc content greater that *(sic)* 85% (by weight in the dried film), not containing a much zinc as Amercoat 68HS, and not being properly tested according to NORSOK requirements:

(i) there was a significant risk the Amercoat 132 / PSX 700 System would not:

(A) have an offshore and onshore life equal to the Sable Project life of 25 years;

(B) perform equal to or better than the traditional 3 or 4-Coat Systems, including providing equal cathodic protection (zinc preferentially corroding over the steel);

(C) perform as well as the Amercoat 68HS / PSX 700 system, including providing equal cathodic protection (zinc preferentially corroding over the steel) [;]

(D) provide a reduction of as-installed total system cost relative to the traditional 3 or 4-Coat Systems;

(E) have a simplified maintenance regime, resulting in lower long term operating costs;

(F) have excellent resistance to abrasion and impact;

(G) have reduced handling and construction damage with fewer on-site repairs

(H) be durable, cost effective, and an appropriate coating system for use on the Sable Project.

(ii) the Amercoat 132 / PSX 700 System was more vulnerable to damage than the traditional 3 or 4-Coat Systems; and

c. that the Ameron Suppliers failed to disclose to the Alliance the facts set out in a and b above.

[179] The alleged negligence is specified in para. 75:

75. The Ameron Paint Failures on the Sable Project were caused by the negligence of the Ameron Suppliers, particulars of which are:

a. providing Amercoat 132 / PSX 700 System as a product suitable for use on the Sable Project;

b. failing to properly instruct and advise the Alliance and the Applicators on the proper storage, mixing, and thinning of the Amercoat 132 / PSX 700 System;

c. failing to warn the Alliance that the Amercoat 132 / PSX 700 System was unsuitable for conditions on the Sable Project;

d. failing to warn the Alliance and the Applicators that the Amercoat 132 / PSX 700 System would not provide the same cathodic protection as the Amercoat 68HS/PSX 700 Systems or the traditional 3 or 4-Coat Systems that had been originally specified for use on the Sable Project;

e. failing to warn the Alliance and the Applicators that the Amercoat 132 / PSX 700 System had to be applied with greater care and attention to achieve specified dried film thickness than the traditional 3 or 4-Coat

Systems originally specified, and as a result was more vulnerable to application errors than the traditional 3 or 4-Coat Systems;

f. failing to provide proper instruction to the Alliance and the Applicators on application techniques of the Amercoat 132 / PSX 700 System;

g. providing a product for use on the Sable Project that had poor edge retention;

h. providing product for use on the Sable Project that was brittle;

i. providing a product for use on the Sable Project that had low-impact resistance;

j. providing a product for use on the Sable Project that had poor abrasion resistance;

k. failing to ensure Amercoat 132 had sufficient zinc content to function as a zinc rich primer and provide cathodic protection;

l. manufacturing the Amercoat 132 / PSX 700 System in a manner which made it unsuitable for use on the Sable Project;

m. manufacturing the Amercoat 132 with large foreign bodies present that prevented the Amercoat 132 from preferentially corroding;

n. failing to take any or adequate measures to ensure correct manufacture of the Amercoat 132, PSX 700, and their ingredients;

o. failing to design Amercoat 132 with sufficient zinc content to provide cathodic protection; and

p. such other breaches of contract or negligence as may appear.

[180] These are the material facts as alleged by the plaintiffs. The means by which they intend to prove them is evidence.

[181] The defendants seek "all factual evidence including surveys, interviews, reports, observations, photographs, videos, test measurements or results including all factual evidence from experts, provided to or received from any of the insurers involved in the Project and their adjusters." (Category #4 from Motion #1)

[182] In the context of the material facts in this case, I conclude this is evidence in proof of those material facts. Evidence contained in privileged material is protected.

[183] The issue then is whether the documents containing the evidence are privileged. As mentioned above, the defendants have conceded that any communication between lawyer and client and any legal advice given is solicitor/client privileged. Accordingly, any of this evidence in these materials is not to be disclosed.

[184] If this evidence is in documents which are subject to litigation privilege, that evidence need not be disclosed. As the law referred to above establishes, the document must have been generated with contemplated litigation in mind, litigation of which there was a reasonable prospect. It must be produced as a aid to the conduct of that litigation. If the document was prepared for more than one purpose, the dominant purpose must be litigation in order to attract the protection of litigation privilege.

3. When was litigation contemplated and was the document's dominant purpose that litigation?

[185] In *Ford*, *supra*, Davison, J. at p. 5 (quoted above) said the court must look at the "whole background" and not be "misled" by "generalized statements" that litigation was "probable."

[186] In *MacDonald v. Acadia University*, 2001 NSSC 109, Wright, J. referred to *Ford*. In *MacDonald*, the doctor who attended at the scene of the accident asked that statements be taken. He was cross-examined about his intention in having those statements taken. As Wright, J. said in para. 21:

> **21** ... He made no mention in cross-examination of these statements being destined to be placed before legal counsel and indeed acknowledged that he was not then familiar with the legal process. His main concern at the time was that an accurate record be prepared of what had happened, anticipating that questions would be asked later.

[187] He continued in para. 22:

> **22** In my view, the passages from Dr. MacLeod's affidavit above referred to are in the 'well-meaning but generalized' category....

[188] He then concluded in that para:

> It cannot reasonably be said that Dr. MacLeod then had any more than a vague anticipation of litigation.

[189] Wright, J. also considered the file materials of the adjuster again referring to *Ford, supra.*. The adjuster had filed an affidavit. Wright, J. said in paras. 25 to 27:

> **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 AllSport 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.

26 Mr. Roberts further stated in his affidavit that when CURIE opened its file, a reserve was immediately put in place for legal representation as it was apparent from the outset that this matter would be litigated. He acknowledged on cross-examination, however, that he recommended to CURIE that legal counsel be retained immediately so that privilege could be claimed over his entire file.

27 Mr. Roberts also acknowledged in cross-examination that the extent of his knowledge about the accident at the outset of his investigation was that derived from the Incident Report which had been prepared by Dr. MacLeod on September 4, 1996 and sent to the insurer.

[190] He said in para. 30:

30 I have no doubt but that Mr. Roberts, as an experienced insurance adjuster, foresaw the possibility of litigation from the outset of his appointment. However, can it reasonably be said that there was, prior to any investigation, a definite prospect of litigation based on the bare information contained in the Incident Report above mentioned?

[191] He concluded in para. 31:

31 In my view, potential litigation could only reasonably be said to have taken shape as a definite prospect once Mr. Roberts had conducted his initial investigation above detailed as a prelude to his first meeting with Mr. Miller. I also observe that the adjuster's file itself contains nothing in the way of commentary or notation during the time frame in question indicating that litigation was then contemplated as a definite prospect.

[192] The result was that material in the adjuster's file prior to the date on which counsel was retained was to be produced.

[193] In *Garrison v. Lively*, (1977), 23 N.S.R. (2d) 125 (S.C.T.D.), Cowan, C.J. considered a memo by an adjuster and various statements that had been taken, in the context of the date on which a lawyer was retained. He said in paras. 12 and 13:

> 12 At this point, I note that the insurance company is taking the necessary steps to obtain details as to the incident giving rise to its insured's claim against the company, and there is merely an indication that the company is prepared to implement its obligations under the policy to provide Mr. Lively with the protection afforded him under the policy, which, of course, contained the usual coverage with respect to theft of a vehicle. The letter goes on to impress upon Mr. Lively that it was imperative that both he and Miss Delaney meet with Mr. Euloth to obtain the necessary details. It then goes on to state that, if the insurance company does not receive the cooperation of its insured, Lively, it, the insurer, would have no alternative but to advise the owner of the other vehicle to make a claim and commence any action directly against Mr. Lively.
>
> 13 As I read this portion of the letter, it is warning Mr. Lively that, if he does not provide the usual cooperation required of insureds and provided for in the policy, he could be sued directly by the person whose vehicle was damaged. This does not refer to any contemplated litigation, in the ordinary course of events, by the person whose vehicle was damaged. It merely points out to Mr. Lively the dangers inherent in a refusal or neglect on his part to co-operate with his insurer in providing information.

He then concluded in para. 14 that the conditions necessary for establishing litigation privilege had not been met.

[194] In *Sobeys Land Holdings Ltd. v. Harvey & Co.*, [2002] N.J. No. 227 (S.C.T.D.), Orsborn, J. (as he then was), dealt with litigation arising from a fire. A forensic electrical engineer had been retained four days after the fire and prepared a report thirteen days after the fire. The issue was whether the report was protected by litigation privilege. Although counsel was retained before the date of the report, Orsborn, J. concluded in paras. 36 & 37:

> **36** The evidence here supports the conclusion that, at the time of preparation of Joubert's report, a subrogated claim was a possibility. But it does not follow that, as of the same time, it was reasonable to conclude that the matter would not be resolved without resort to litigation. The likelihood of a subrogated claim could not be determined until the investigation was completed, and as David Boone testified, even if a subrogated claim arises, litigation does not necessarily follow. ...
>
> **37** ...Where, as here, a 'cause and origin' report is requested essentially immediately following a fire, the facts necessary to support a finding that litigation was in reasonable contemplation at the time must be clear and convincing. The facts here, objectively assessed, do not satisfy the low threshold and do not support the conclusion that litigation was reasonably contemplated. At best, there was a possibility - yet to be determined - of a subrogated claim. That is not sufficient.

He ordered the report to be produced.

[195] In *Mitsui*, *supra*, Roscoe, J.A. referred to *Tsmikilis v. Halifax Insurance Company*, [1992] N.S.J. No. 416 (S.C.T.D.). In para. 43, she quoted from Gruchy, J.'s decision saying:

> **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.

[196] Also in *Mitsui, supra*, Roscoe, J.A., in paras. 26 and 27, considered the affidavits of the parties. Based on those affidavits and other evidence, she concluded litigation was contemplated by the date set out in the applicant's affidavit.

[197] In *Di-Anna Aqua*, *supra*, Scanlan, J. concluded that a statement was protected by litigation privilege, although counsel had not yet been retained. This was in the context of a threat of litigation made approximately six weeks before the statement was given.

[198] The courts have also cautioned against accepting evidence of material being channelled through counsel so a claim of litigation privilege can be made. In *Ford*,. *supra*, Davison, J. said the court must not be "misled by transparent attempts to protect the documents from disclosure by using lawyers as conduits only ... ." (p. 5 quoted above)

[199] This was echoed by Roscoe, J. in *Mitusi, supra*, where she referred to *International Minerals and Chemicals Corp. (Canada) v. Commonwealth Ins. Co.* (1990), 47 C.C.L.I. 196, 89 Sask. R. 1 (Sask. Q.B.). In para. 35, she quoted Halvorson, J. at p. 199 as follows:

> **35** ... the simple expediency of channelling all communications through legal counsel does not of itself shield the communications from disclosure.

[200] In *Sobeys*, *supra*, Orsborn, J. in considering the dominant purpose of the document said at para. 7:

> **7** The first criterion requires an assessment of the context and circumstances in which the document was created. This assessment may lead a court not to accept what may be self-serving statements of purpose - even if contemporaneous with the preparation of the document - if the surrounding context and circumstances suggest a different conclusion.

[201] In that case, he had an affidavit from counsel. He said in para. 15:

> **15** ... Counsel provided an affidavit in which he deposed that, at the time of Joubert's report, counsel considered litigation a certainty. Counsel also deposed that on May 26 he told Joubert that his report was required solely for the purpose of litigation against the persons involved in the manufacture and repair of the trailer.

[202] However, in para. 31, he said:

> **31** I place no weight on the instructions given to Joubert by counsel, nor on counsel's expression to Joubert of the purpose of the report. Counsel - an experienced counsel - was no doubt aware of the law relating to litigation privilege and took whatever steps were available to try and ensure that this privilege would arise and prevail. ...

[203] I must determine at what point litigation was reasonably contemplated in order to determine if any of the documents for which litigation privilege is claimed are in fact so protected. The plaintiffs and insurers say that, since there are no affidavits from the defendants and no cross-examination to contradict their affiants, I must accept their evidence of when litigation was contemplated. I do not agree. I must consider all the circumstances to determine that date and must be cautious not to too readily accept the date chosen by counsel.

THE AFFIDAVITS

a) The Strand Affidavit

[204] David Strand is a partner in the Calgary law firm Burnet, Duckworth and Palmer. In his affidavit of January 17, 2012, he says he was retained by the operator of the SOEP which was one of the Sable Owners (para. 2). He says his retainer was to "advise and assist the Sable Owners."

[205] He says in para. 9 of his affidavit that there was "a lack of progress in negotiating the close-out list" between the Sable Owners and the Alliance Contractors and "by mid 2001", they recognized "that it would be prudent to proceed to mediation" as provided in the Alliance Agreement.

[206] He says the mediation commenced "in the fall of 2001 and continued through to May of 2002, at which point the mediation talks collapsed." (para. 12) He continued in para. 13:

> 13. **THAT** as a result of the collapse of the mediation talks with the Alliance Contractors in May of 2002, the Sable Owners contemplated litigation against the Alliance Contractors, sub-contractors and suppliers, with regard to outstanding issues, including the coating failure issue.

[207] He then discusses the insurance claims and the claims against third parties. He says in para. 17:

> 17. **THAT** the Sable owners recognized that they, the Alliance Contractors and the insurers, both Offshore and Onshore, all had a common interest in pursuing third parties for the recovery of losses occasioned as a result of the Amercoat 132/PSX700 coating system failure on the Sable project facilities.

[208] Exhibit "A" to his affidavit is a list of documents for which the plaintiffs claim privilege.

[209] He says in para. 19 that the Sable Owners were required, as part of the Alliance Contract, to pursue insurance claims. He continues in para. 20:

> **20 THAT** in order to advance those claims against the Insurers, exchange of privileged information was necessary between the Sable Owners and the Insurers.

[210] He says that, because of this, a Common Interest Privilege Agreement ("CIPA") was entered into with the Offshore Insurers and attaches as Exhibit "B" a copy of the Agreement and, as Exhibit "C", a list of documents he says are covered by that agreement.

[211] He says in para. 23 that a similar agreement was executed with the Onshore Insurers (Exhibit "D") and Exhibit "E" is a list of the documents he says are protected by that agreement. He says that a similar agreement was not executed between the Sable Owners and the Alliance Contractors "because one of the Alliance Contractors believed (wrongly in my view) that entering into such an agreement might be an admission of liability for coating failure." (para. 25)

[212] He attaches as Exhibit "F" a list of documents he says were received "pursuant to their common interest privilege, plus documents generated by or on behalf of the Sable Owners, which refer to information contained within documents received from the Alliance Contractors."

[213] With respect to the close-out of the Alliance Contract, he says in para. 27:

> 27. THAT further settlement efforts and communications related to resolving the outstanding close-out list with the Alliance Contractors continued from 2002 on an off again, on again, basis until 2006.

[214] Exhibit "G" is the Agreement ultimately reached in June 2006 between them. He attaches as Exhibit "H" a list of documents which he says are related to

"without prejudice settlement negotiations" between May 2001 and July 2006 (para. 31).

b) The Andrewartha Affidavits

[215] Elizabeth Jane Andrewartha is a partner in Clyde & Co LLP, solicitors in London, England. Her affidavit sworn on May 21, 2012 relates to privilege issues. In that affidavit, she says her firm was retained by Underwriters with respect to the Offshore Insurance policy. She says in para. 6:

> I was instructed in October 2002 to represent Underwriters in relation to coverage issues under the Offshore Policy concerning Sable's claim relating to the coating failures on the Sable Project which first became apparent in late 2000.

[216] In para. 7, she says:

> ... given the matter was in contemplation of legal proceedings

the adjusters reported to her.

[217] She says in para. 8:

> 8. From mid 2003, Underwriters, through BCL, were engaged in discussions and negotiations with Sable concerning the nature and cause of the coating failures. Without determining such matters it would not be possible to avert the litigation which seemed likely at that stage.

[218] She says in paras. 9 and 10:

> 9. Sable and Underwriters recognised that they had a common interest in cooperating to review the matters which formed the basis of the claim under the Offshore Policy, and in protecting documents and other evidence from disclosure in the prosecution of the claim Sable was contemplating against the manufacturers and applicators of the coatings on the Sable project.
>
> 10. To the extent that Sable and Underwriters had privileged information or work product which would be shared among them during the course of reviewing the insurance claims, the parties agreed that they did not wish to waive any such privilege in those documents as against any third parties.

[219] As Exhibit EJA1, she attaches a copy of the agreement, which is also attached to David Strand's affidavit as Exhibit "B". In para. 12, she says the purpose of the agreement was to prevent the waiver of privilege over information shared between them "during pursuit of the insurance claims in light of the potential rights against third parties."

[220] From July 2003 until June 2006, efforts were made to resolve coverage issues and the amount of the claim (paras. 13 and 14) and the matters were ultimately resolved. She attaches as Exhibit EJA2 a list of documents for which privilege is asserted.

c) Davis Affidavit

[221] Glenn Davis is the Senior Insurance Advisor for ExxonMobil Canada Limited. His affidavit was sworn on January 16, 2012. In it, he says he has been involved in the construction insurance claims related to the Sable Project (para. 2).

[222] In para. 3, he says he initiated claims against both the Onshore and Offshore Insurers. He does not state the date on which the claims were made but refers only to the fact that the coating failures "became apparent in late 2000." He also refers to the retainer of adjusters, Bateman Chapman Limited ("B.C.L.") "in due course." (para. 4) and says information was provided to them "commencing in 2001" (para. 5) without specifying a date.

[223] In para. 7, he says that "commencing in mid 2003 there were negotiations with respect to the coverage issue through B.C.L. and the Insurers' outside counsel." He then refers to the CIPA which is also attached to the Strand and Andrewartha affidavits. He attaches a list of documents which he says in para. 12 were "in relation to settlement negotiations and discussions."

[224] In para. 13, he specifically refers to notes of Wes Burton which he says were "drafted to assist in Offshore insurance settlement."

[225] The claim was denied by the Onshore Insurers on July 7, 2003 and action was commenced on August 11, 2003 (paras. 14 & 15). Glenn Davis says that a CIPA was executed on October 13, 2004 (Exhibit "C" to his affidavit which is also Exhibit "D" to the affidavit of David Strand). He says in paras. 17 and 18:

> 17. **THAT** commencing in April 2006, I was aware that discussions were taking place between counsel for the Sable Owners and counsel for the Onshore Insurers for the purpose of advancing a resolution of the Onshore Insurance coating claim and litigation.
>
> 18. **THAT** approximately a year later, resolution had not been reached and I was aware that the coating failure action against the Onshore Insurers proceeded forward in the normal manner with disclosure of documentation and discovery examinations of witnesses.

[226] Ultimately, the matter was settled and settlement agreements were executed in 2009 (para. 19). He attaches as Exhibit "D" a list of documents he says were "in relation to settlement negotiations and discussions with the Onshore Insurers, or their representatives." (para. 20)

d) Kirkam Affidavit

[227] Barry Kirkham is a partner in the Vancouver law firm of Owen Bird. His affidavit was sworn on March 9, 2012. In it, he refers to a claim made by the Sable Owners under the Onshore Insurance policy on August 9, 2002 (para. 2). He says that he was retained by the Onshore Insurers with respect to the claim "shortly after August 9, 2002." (para. 3) He says in para. 4:

> 4. **THAT** after August 9, 2002, the Onshore Insurers appointed Bateman Chapman Limited ("B.C.L.") as adjusters to investigate the claim. B.C.L. was instructed to report to me as it was anticipated the claim was likely to be denied and was likely to be litigated..

[228] On July 7, 2003, his client denied the claim and the action was commenced "on or about August 11, 2003." (paras. 6 & 7)

[229] He then refers to the CIPA that was entered into (para. 8 and Exhibit "A"). He says that, pursuant to that agreement "I forwarded documentation to and received documentation from David Strand... " (para. 9) and attaches a list of those documents as Exhibit "B". He also says that Exhibit "B" contains documents "sent, presented or received in relation to settlement negotiations and discussions with the Sable Owners or their counsel." (para. 13)

[230] I must determine if the claims of privilege of various types over various documents is established.

THE PRIVILEGE CLAIMS

[231] I must determine if the claims of privilege are made out. They involve: 1) the Alliance Contractors; 2) the Offshore Insurers; 3) the Onshore Insurers; and 4) the defendants in this action. The plaintiffs, Alliance Contractors and/or Insurers cannot substantiate a claim for litigation privilege over documents prior to the date on which litigation was reasonably contemplated. Also at issue is whether certain documents are settlement privileged or have a common interest privilege.

1) The Alliance Contractors

[232] With respect to the Alliance Contractors, the Strand affidavit addresses the negotiations between the Sable Owners and the Alliance Contractors. There were discussions with respect to close-out followed by mediation efforts. It was only after the mediation efforts failed that he says in May 2002 litigation was contemplated. No action was in fact ever commenced against the Alliance Contractors. That makes the determination of whether litigation privilege protects documents somewhat more difficult.

[233] In my view, the ordinary exchange of documents and correspondence with a view to completing the close-out would not result in that material being privileged. Firstly, it was done in the ordinary course of business to close-out the contract. Secondly, there was no litigation between the parties and, at least at the outset, none anticipated.

[234] According to the affidavit of David Strand, litigation was only contemplated against the Alliance Contractors in May 2002, after the mediation talks ended. He also said they tried to resolve the outstanding issues between them

even after May 2002 and on an“off again on again” basis (para. 27) until 2006. It was at that time, four years after mediation failed, that the parties entered a settlement agreement on June 28, 2006.

[235] One of the recitals to the settlement agreement says “WHEREAS various disputes exist among the Parties concerning the design, construction and functionality of the Sable Facilities and the costs of correcting deficiencies (collectively the “Disputes”)”. It also refers to claims against insurers and third parties (which include these Defendants). Clause 8 refers to “disputed claims”.

[236] The parties also agree not to disclose the terms of settlement, except internally, “to their accountants, auditors and legal advisors or otherwise as required by law”.

[237] Unlike the case of *Di-Anna Aqua*, *supra*, where there was a letter threatening litigation, there is no evidence before me that there was a threat of litigation made by or to the Alliance Contractors.. The question is when, if at all, was there a reasonable prospect of litigation between these parties. Am I to conclude that the moment mediation efforts with the Alliance Contractors failed,

everything thereafter was done in reasonable contemplation of litigation against the Alliance Contractors. Or were these continuing negotiations to resolve their dispute?

[238] The onus is on the party asserting privilege to establish that it exists. A bald statement by counsel that, after May 2002 litigation was contemplated, is insufficient. I must look at all the circumstances to determine if that is so.

[239] There is no affidavit evidence from any of the Alliance Contractors. David Strand says in para. 13 (also quoted above):

> 13. ... the Sable Owners contemplated litigation against the Alliance Contractors, sub-contractors and suppliers, with regard to outstanding issues, including the coating failure issue.

[240] He continued in para. 14:

> 14. THAT regarding the issues being considered in the preceding paragraph, in June 2002, I approached and then retained experts concerning the coating failures to assist me in giving legal advice to the Sable Owners, the purpose of which was to obtain expert information and opinions concerning the coating failures on the Sable Project.

[241] Experts were retained concerning the coatings failures. There is no further reference to litigation against the Alliance Contractors, only to negotiations to conclude the close-out. I conclude that the contemplated litigation referred to by David Strand in para. 13, and in the context of the retaining of experts, was litigation against the sub-contractors and suppliers, not the Alliance Contractors.

[242] The ultimate agreement reached with the Alliance Contractors in 2006 refers in its recitals to "the Close-out Resolution" "closing out the Alliance Agreement...".

[243] I find there is no evidence that there was a reasonable prospect of litigation or a reasonable contemplation of litigation between Sable and the Alliance Contractors.

[244] However, the plaintiffs and the Alliance Contractors say that their exchange of documents was also protected by common interest privilege and/or settlement privilege.

[245] Sable and the Alliance Contractors were in a contractual relationship. The terms of the contract required them to agree upon the deficiencies at the end of the contract. They could not agree and the affidavit of David Strand sets out the efforts made to resolve their contractual dispute. In order to resolve their dispute, each gave to the other documents. Even if they were privileged in one party's hands, that privilege was waived when disclosed to the other party because they were adverse in interest.

[246] Dealing first with the claim of settlement privilege, I conclude it does not apply. Its pre-conditions are not met. There was a dispute between the parties but it was in the context of their contractual arrangements. Not every negotiation can be said to be a litigious dispute.

[247] It is not necessary that there be litigation, anticipated or actual, for protection to be granted to documents provided to another party. However, there must be something more than ordinary negotiations which commonly occur to resolve issues between contracting parties. The phrase "litigious dispute" must be given a meaning beyond the meaning of "dispute". I conclude in this case that that level of dispute had not arisen.

[248] Accordingly, subject to the issue of common interest privilege, I conclude that any documents exchanged between Sable and the Alliance Contractors must be disclosed. These documents relate to the close-out of their contract not to anticipated litigation.

[249] As discussed above, common interest privilege applies only where otherwise privileged documents are provided to a party who has the "self-same interest" against a common adversary. It protects against what would otherwise be a waiver of privilege.

[250] David Strand says at para. 17 of his affidavit that the Sable Owners, the Alliance Contractors and the insurers, both Offshore and Onshore, "all had a common interest in pursuing third parties" (including these defendants) for issues resulting from the paint failures.

[251] The Sable Owners did not enter a CIPA with the Alliance Contractors but both claim common interest privilege with respect to documents exchanged. A common interest privilege can exist without an agreement evidencing it. I have

said above that, with respect to the close-out of their contract, they did not have a common interest. However, to some extent, they did have a common interest in pursuing others for the losses sustained. In paragraph 5 of his affidavit, David Strand says:

> 5. **THAT** pursuant to the Alliance Agreement, the parties were required to:
>
> (a) agree on the deficiencies which needed to be resolved;
>
> (b) agree on the cost of the rectification of each of the agreed deficiencies;
>
> (c) pursue third party recoveries, including all insurance or other claims; and
>
> (d) in the event that third party recoveries are not realized by the time the parties wanted to close out the Alliance Agreement and the parties were unable to agree on a value to be ascribed to each outstanding third party recovery, closeout calculations would have to await finalization of any and all non-agreed outstanding third parties recoveries.

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

[253] Because I have not viewed the documents in question, I recognize that this may cause difficulties in determining if a document should be disclosed or not.

[254] According to David Strand's affidavit, both parties had the obligation to pursue third party recoveries. However, I point out again, in order for a document to be protected by common interest privilege, that document must first be privileged in the hands of the party providing it. Common interest privilege cannot clothe a non-privileged document with privilege. As I have said, it is a means of preventing a claim of waiver of privilege over such documents. For example, a legal opinion which would be solicitor/client privileged may be provided to a party with a common interest. Providing the document in other circumstances would constitute a waiver of privilege, yet it may be useful in preparing the joint approach of the two parties against their common adversary. It was privileged and remains privileged. Similarly, for lawyers' work product: It may be disclosed without waiving litigation privilege where the other party has a common interest with the party providing it against a common adversary.

[255] An example of the type of document which would therefore be protected would be one where the parties exchange legal opinions with respect to the liability of third parties. Vague references to claims against third parties, without specifics, in documents which are not otherwise privileged would not be sufficient to result in the protection of common interest privilege.

[256] The Strand affidavit also addresses the interactions between the Sable Owners and the insurers, both offshore and onshore. In the case of the Onshore Insurers, Sable commenced an action against them on August 11, 2003. At some point before that, documents would be litigation privileged when litigation was reasonably contemplated. The plaintiffs and insurers claim common interest privilege for documents exchanged between them because they say they had a common interest in recovery from third parties, including these defendants. They also claim settlement privilege.

[257] David Strand says that, by early 2002, insurance claims had been lodged with both sets of insurers. Glenn Davis also addresses the dealings with the insurers. No action was commenced against the Offshore Insurers. Settlement agreements were reached with both sets of insurers (and other former parties to this

action) which was evidenced by execution of settlement agreements in 2009. These Pierringer agreements were approved by the court.

2) The Onshore Insurers

[258] Dealing first with the Onshore Insurers against whom action was commenced, I must determine when that litigation was reasonably contemplated. David Strand in his affidavit says by early 2002 litigation was contemplated against, *inter alia*, the Onshore Insurers. He says Sable had an obligation to pursue those insurance claims and to do so privileged information had to be exchanged between Sable and the Onshore Insurers. As a result, he says they protected that information by entering into a CIPA dated October 13, 2004.

[259] According to Glenn Davis, the Onshore Insurers denied Sable's claim on July 7, 2003 and action was commenced against them on August 11, 2003.

[260] Barry Kirkham says a claim was made against the Onshore Insurers on August 9, 2002. He was then retained. BCL was appointed to investigate the claim and information was provided to BCL.

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

[262] Documents with respect to the Onshore Insurers which pre-date July 7, 2003, therefore, are not litigation privileged. Documents created after that date are litigation privileged only if they were created for the dominant purpose of litigation. To paraphrase Professor Sharpe, they must have been created to obtain legal advice in the litigation or to obtain evidence or information leading to evidence to be used in the litigation.

[263] Claims of settlement privilege are also made. The three pre-conditions for settlement privilege are set out above. In my view, there was no litigious dispute

between these parties until the claim was denied. Until that time, their exchange of documents was done in the context of making and responding to an insurance claim. As I said with respect to the dispute with the Alliance Contractors, there must be something more than a "dispute" to attract settlement privilege. There must be an express or implied intent that the documents exchanged in an attempt to settle the dispute would not be disclosed.

[264] The CIPA with the Onshore Insurers was executed on October 13, 2004, approximately fourteen months after the litigation was commenced. As was the case with documents for which common interest privilege was claimed with respect to the Alliance Contractors, Sable was adverse in interest to the Onshore Insurers in part and, in part, had a common interest.

[265] Documents provided to or received from the Onshore Insurers with respect to the insurance claim cannot be protected by common interest privilege because they were adverse in interest. However, if those documents were exchanged in order to attempt settlement of the litigation between them, they may be settlement privileged. There must have been an express or implied intent that they not be disclosed. In this case, the Common Interest Privilege Agreement is a statement of

that intent. But the documents must still have been exchanged in efforts to settle the litigation. There must be some reference to settlement negotiations, either explicit or implied, in the document itself or in correspondence enclosing a document. As the authorities have concluded, it is not necessary that they specifically contain admissions.

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

[267] The litigation against the Onshore insurers ended with the settlement reached in 2009. As *Blank*, *supra*, makes clear that does not necessarily end the litigation privilege. In my view, there is no question that that litigation is closely related to this. The insurance claims and this action both arise from the same claims of paint failures on the Sable project. They could not be more closely related. Accordingly, whatever documents were litigation privileged remain so.

3) The Offshore Insurers

[268] Litigation privilege is a more difficult question is with respect to the Offshore Insurers because no action was ever commenced against them.

[269] In para. 6 of his affidavit, Glenn Davis says:

> 6. **THAT** with regard to the Offshore Insurance coating claim, the Offshore Insurers did not acknowledge that the claim was covered under the terms of the policy of insurance.

He does not, however, specify a date or even a year when that occurred, nor does he say there was a denial of coverage. In my view, not acknowledging the claim and an actual denial are not the same.

[270] In the next paragraph, he refers to negotiations to resolve the coverage issue with the Offshore Insurers commencing in mid 2003. He then refers to a meeting in July 2003 in which information was provided to the Offshore Insurers. He says:

> 9. **THAT** in July of 2003 I, along with others, on behalf of the Sable Owners attended a meeting with B.C.L., the purpose of which was to provide

> information to the Insurers for the purpose of persuading the Insurers to agree that the coatings claim was covered under the terms of the Offshore Insurance Policy. ...

[271] Both Glenn Davis and David Strand refer to the CIPA with the Offshore Insurers which was executed on August 15, 2003. Elizabeth Jane Andrewartha also attached a copy of that agreement to her affidavit of May 21, 2012. In her affidavit, she says in para. 8:

> 8. From mid 2003, Underwriters, through BCL, were engaged in discussions and negotiations with Sable concerning the nature and cause of the coating failures. Without determining such matters it would not be possible to avert the litigation which seemed likely at that stage.

[272] She uses the phrase "litigation which seemed likely" at that stage. In para. 5, she set out her understanding of the English law with respect to litigation privilege. She uses the phrase "litigation in reasonable contemplation."

[273] She also says in paras. 13 and 14:

> 13. From July 2003 forward, there were communications, presentations and discussions with Offshore Insurers including BCL and Sable's counsel, attempting to resolve coverage issues and eventually the amount of the claim.

> 14. The coverage issues between Underwriters and Sable in relation to the Offshore Policy were resolved in February 2006.

[274] The onus is on the party asserting privilege to establish it. The CIPA of August 15, 2003, says in its recitals:

> E. The Sable Owners (and any Insureds claiming through them) and the Insurers have a common interest in cooperating to review the matters which form the basis of the Insurance Claims and, to the extent possible, to pursue claims against third parties, whether directly by the Sable Owners or as subrogated claims by the Insurers.
>
> F. To the extent that the parties hereto have privileged information or work product which will be shared as among them during the course of the *(sic)* reviewing the Insurance Claims, the parties do not wish to waive any such privilege as against any other third parties.
>
> G. The parties hereto acknowledge and agree that it is in each of their individual and common interest to share certain information without waiver of any claims of privilege over such information, as against third parties.

[275] There is nothing in the evidence which satisfies me that litigation was ever reasonably contemplated against the Offshore Insurers. Coverage was not denied. There were negotiations with respect to coverage issues and with respect to the amount claimed.

[276] Elizabeth Jane Andrewartha says litigation must be in reasonable contemplation for there to be litigation privilege but does not say that was the case. She simply says it "seemed likely" after mid 2003. In my view, that is insufficient. I do not accept the two phrases to be synonymous.

[277] Nor has counsel for Sable at the relevant times, David Strand, been more helpful. He refers to contemplated litigation in para. 13 of his Affidavit, quoted above, but does not mention contemplated litigation against the insurers.

[278] I conclude the onus has not been met to satisfy me that litigation privilege applies.

[279] As mentioned above, David Strand says in his affidavit at para. 17 that there was a common interest between Sable and the Insurers, both Onshore and Offshore in pursuing claims against third parties. He says they exchanged documents for this common purpose and entered common interest privilege agreements with respect to the exchange of documents. This common interest and these agreements are also referred to in the affidavits of Andrewartha and Davis.

[280] The common interest referred to in the affidavits seems to presuppose that, if two adverse parties have an interest in resolving matters between them, that gives them a common interest sufficient to protect documents exchanged between them. That is not a common interest for the purpose of the privilege. For example, in David Strand's affidavit, he says in paras. 20 and 21:

> 20. **THAT** in order to advance those claims against the Insurers, exchange of privileged information was necessary between the Sable Owners and the Insurers.
>
> 21. **THAT** in order to further protect the exchange of privileged information, including experts' opinions, with the Offshore Insurers, the Sable Owners and Offshore Insurers agreed to formalize their common interest privilege by entering into a Common Interest Privilege Agreement, a true copy of which is attached hereto and marked Exhibit "B" to this my Affidavit.

[281] The CIPA with the Offshore Insurers attached to his affidavit as Exhibit "B" says in clause 4:

> 4. Sharing of Common Interest Privilege Materials has taken place and will take place in the future concerning only those insurance issues about which the Parties conclude they share common interest.

[282] Although the Offshore Insurers were not sued by Sable, they were adverse with respect to the claims Sable was making against them and their response to those claims. They did not in fact have a common interest with respect to

"insurance issues." I conclude that Sable and the insurers were attempting to protect from subsequent disclosure documents over which they were waiving privilege by disclosing them to a party with whom they were adverse in interest.

[283] Accordingly, documents exchanged between Sable and the insurers dealing with the insurance claims are not protected by common interest privilege. If privileged documents were provided, privilege was waived when they were disclosed.

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

documents provided do not obtain privileged status by virtue of providing them to another party, even one with whom there is a common interest against third parties.

[285] If the documents exchanged meet the three conditions for settlement privilege to which I have referred above, they may be privileged. As I said above, there does not have to be litigation, actual or reasonably contemplated, in order for there to be a litigious dispute. There must be something more than a mere dispute, but it need not, in my view, have risen to the level where litigation is either actual or reasonably contemplated. In the context of settling a dispute, it is the last step before litigation is reasonably contemplated. There was a litigious dispute between Sable and the Offshore Insurers at some time before the settlement was reached in February 2006.

[286] However, I am unable to determine, on the evidence before me, what that date is. Settlement, or without prejudice, privilege is claimed, among others, for documents dating back to May 2003 (David Strand Affidavit, Exhibit "C") and July 2003 (Elizabeth Jane Andrewartha Affidavit of May 21, 2012, Ex. EJA2).

[287] Accordingly, the claim of settlement privilege is not established on the evidence I now have.

4) The Defendants in this Action

[288] The Sable action was commenced on April 25, 2004. It had been a topic of discussion for some period prior to that with both the Alliance Contractors and the insurers. The Common Interest Privilege Agreements referred to protecting documents from disclosure to third parties. The first of those agreements was executed on August 15, 2003.

[289] In my view, that is the date on which litigation was contemplated in this matter. Litigation privilege therefore attaches after that date to documents the dominant purpose for which was this litigation.

[290] A distinction must be made between such documents and documents which related, for example, to repairs to the project. I note, for example, Exhibit 33 to the affidavit of Darlene Jamieson, Q.C. The documents at that exhibit refer to "Sable Coatings Repair Project". Insofar as the documents referred to therein are related to repairs, I conclude their dominant purpose was repairs, not litigation. Other documents referred to relate more directly to the litigation. It is only those documents which attract litigation privilege.

[291] Documents exchanged with the Settled Defendants in an attempt to settle the action against them are likewise privileged as long as they meet the three pre-conditions to which I have referred.

[292] Any documents for which solicitor-client privilege is claimed remain solicitor-client privileged.

SUMMARY:

[293] I have concluded that any documents for which solicitor-client privilege is claimed are privileged. The defendants did not dispute that category of documents.

[294] I have concluded there is no litigation privilege or settlement privilege for documents exchanged between Sable and the Alliance Contractors.

[295] I have concluded there is no litigation privilege for documents exchanged with the Offshore Insurers.

[296] I have determined the date on which litigation privilege commenced for documents exchanged between Sable and the Onshore Insurers. I have also concluded that litigation privilege continues for any documents where the dominant purpose for their creation was litigation or contemplated litigation.

[297] I have concluded that common interest privilege does not apply to documents exchanged where Sable and the other parties were adverse in interest, but does apply to documents exchanged in furtherance of their joint interest in pursuing third parties.

[298] Some documents exchanged between Sable and the Onshore Insurers may be protected by settlement privilege but only if the three pre-conditions are strictly

met. No such privilege applies with respect to Sable and the Alliance Contractors. I am not satisfied on the evidence that it applies to Sable and the Offshore Insurers.

[299] With respect to categories 1 and 9 of the defendants' motion, I have dealt with these under the various headings of privilege.

[300] For Category #2, I have concluded that no further documentation need be disclosed with respect to insurance coverage for suppliers. To the contrary, I have decided that, with respect to the Settled Defendants, including Barrier, additional disclosure is to be made.

[301] I have concluded that the documents sought, referred to in Category 4, are documents containing evidence in support of Sable's claims. If privileged, they are not to be disclosed.

[302] With respect to category 5, I have concluded that some of these documents are not privileged. Others are privileged.

[303] I recognize that my conclusions on this decision will require Sable, the Alliance Contractors and the insurers to revisit some documents for which they have claimed privilege. It may in fact be necessary for a judge to review some of these documents or parts of documents to determine if a claim of privilege is made out.

[304] If the parties cannot agree on costs in light of the mixed success, I will accept written submissions.

Hood, J.