SUPREME COURT OF NOVA SCOTIA

Citation: *Mi'kmaw Family and Children's Services v. Sipekne'katik*, 2022 NSSC 313

Date: 20221102
Docket: Tru No. 511249
Registry: Truro

Between:

Mi'kmaw Family and Children's Services of Nova Scotia

Applicant

v.

Sipekne'katik

Respondent

D E C I S I O N

Judge:	The Honourable Justice James L. Chipman
Heard:	October 18, 2022, in Truro, Nova Scotia
Decision:	November 02, 2022
Counsel:	Dennis James, K.C. and Anna-Marie Manley, for the Applicant Mary B. Rolf, for the Respondent

By the Court:

INTRODUCTION

[1] The Applicant, Mi'kmaw Family and Children's Services of Nova Scotia ("MFCS") filed a Notice of Application in Court on December 2, 2021. The Application relates to a claim by MFCS that in November of 2021, the Respondent, Sipekne'katik, required MFCS to vacate a building on the Sipekne'katik reserve without proper notice and without any compensation. MFCS asserts ownership of the approximately 15,000 square foot building which contains administrative offices and where approximately 74 MFCS employees worked until the eviction.

[2] Sipekne'katik filed their Notice of Contest on January 17, 2022. Sipekne'katik says that it provided proper advance notice to MFCS to vacate the building, which they say is not owned by MFCS. Sipekne'katik asserts that MFCS complied with their notice, except that they refused to turn over keys to the building to Sipekne'katik.

[3] MFCS claims damages against Sipekne'katik for breach of contract and unjust enrichment. Sipekne'katik requests that the Application be dismissed with costs.

[4] By consent order issued January 19, 2022, the following was ordered:

1. The issue of liability and the issue of damages in Tru No. 511249 are hereby severed and shall be heard separately;
2. For greater certainty, the determination of damages shall be stayed pending the determination or agreement of the parties with respect to liability; and,
3. All dates and deadlines presently scheduled in the within proceeding by virtue of the Motion for Directions occurring herein on January 18, 2022, will be restricted to addressing issues of liability. The parties agree that further and separate dates and deadlines, including in respect of disclosure, evidence filing, the completion of discovery examinations, and hearing dates, will be scheduled to address issues of damages in the future, if needed.

[5] The hearing on the merits of the Application (liability issue only) was originally scheduled for October 18 and 19, 2022. During a September 7, 2022 on-the-record organizational call with counsel and the Court, it was agreed that the

October dates would be used for the hearing of the motions set out in the below filing history:

April 14:	MFCS filed affidavits of Arlene Johnson, Kendra Arseneau and Monica Clarke-Johnson;
May 25:	Sipekne'katik filed affidavits of Doreen Knockwood and Keith Julien;
June 2:	MFCS filed a supplemental affidavit of Ms. Johnson;
June 3:	MFCS filed a Notice of Objection to paras. 34 and 35 of Ms. Knockwood's affidavit;
June 23:	Sipekne'katik filed a Notice of Objection to significant portions of each MFCS affidavit;
July 21:	MFCS filed a Notice of Motion to strike affidavit evidence;
July 27:	Sipekne'katik filed a Notice of Motion to strike affidavit evidence;
August 10:	MFCS filed a brief, book of authorities and proposed order;
August 12:	Sipekne'katik filed a brief, book of authorities and proposed order; and,
August 24:	MFCS filed a brief and book of authorities in response to Sipekne'katik's motion to strike portions of MFCS's affidavit.

[6] Subsequent to the organizational call the Court received further materials, as follows:

October 3:	Sipekne'katik's Notice of Motion, brief, authorities and solicitor's affidavit referrable to their motion to compel answers to undertakings;
October 4:	Sipekne'katik's draft order referrable to their motion to compel answers to undertakings; and,
October 11:	MFCS's brief, authorities and solicitor's affidavit on the motion to compel undertaking answers.

[7] Given that the original hearing dates were converted to motion dates (albeit, only October 18th was required), the parties and Court scheduling agreed to set the merits Application for April 5 and 6, 2023.

[8] Review of the filed materials confirms that there are three motions before the Court:

1. MFCS's motion to strike two paragraphs from one of the two affidavits filed by Sipekne'katik;
2. Sipekne'katik's motion to strike multiple paragraphs and portions of paragraphs from the four affidavits filed by MFCS; and
3. Sipekne'katik's motion to compel discovery undertakings from MFCS.

THE MOTIONS TO STRIKE PORTIONS OF THE AFFIDAVITS

The Rule

[9] The parties agree and I find that Civil Procedure Rule 39 sets out directions for affidavits. Where an affidavit contains improper evidence and/or fails to comply with the rules of evidence, the offensive content may, or in some cases must, be struck from the affidavit. Rules 39.02 and 39.04 consider hearsay evidence in affidavits and striking paragraphs of affidavits, respectively:

> **39.01 Scope of Rule 39**
>
> A party may make and use an affidavit, and a judge may strike an affidavit, in accordance with this Rule.
>
> **39.02 Affidavit is to provide evidence**
>
> (1) A party may only file an affidavit that contains evidence admissible under the rules of evidence, these Rules, or legislation.
>
> (2) An affidavit that includes hearsay permitted under these Rules, a rule of evidence, or legislation must identify the source of the information and swear to, or affirm, the witness' belief in the truth of the information.
>
> **39.04 Striking part or all of affidavit**
>
> (1) A judge may strike an affidavit containing information that is not admissible evidence, or evidence that is not appropriate to the affidavit.
>
> (2) A judge must strike a part of an affidavit containing either of the following:
>
> (a) information that is not admissible, such as an irrelevant statement or a submission or plea;
>
> (b) information that may be admissible but for which the grounds of admission have not been provided in the affidavit, such as hearsay

> admissible on a motion but not supported by evidence of the source and belief in the truth of the information.
>
> (3) If the parts of the affidavit to be struck cannot readily be separated from the rest, or if striking the parts leaves the rest difficult to understand, the judge may strike the whole affidavit.
>
> (4) A judge who orders that the whole of an affidavit be struck may direct the prothonotary to remove the affidavit from the court file and maintain it, for the record, in a sealed envelope kept separate from the file.
>
> (5) A judge who strikes parts, or the whole, of an affidavit must consider ordering the party who filed the affidavit to indemnify another party for the expense of the motion to strike and any adjournment caused by it.

The Foundational Case

[10] In *Waverley (Village Commissioners) v. Nova Scotia (Minister of Municipal Affairs)*, 1993 NSSC 71, Justice Davison enumerated the now oft-repeated following principles regarding affidavit evidence:

> 1. Affidavits should be confined to facts. There is no place in affidavits for speculation or inadmissible material. An affidavit should not take on the flavour of a plea or a summation.
> 2. The facts should be, for the mots part, based on the personal knowledge of the affiant with the exception being an affidavit used in an application. Affidavits should stipulate at the outset that the affiant has personal knowledge of the matters deposed to except where stated to be based on information and belief.
> 3. Affidavits used in applications may refer to facts based on information and belief but the course of the information should be referred to in the affidavit. It is insufficient to say simply that "I am advised."
> 4. The information as to the source must be sufficient to permit the court to conclude that the information comes from a sound source and preferably the original source.
> 5. The affidavit must state that the affiant believes the information received from the course.

[11] While Justice Davison provided the above direction in the context of the "old" Rules, his enunciated principles have stood the test of time and are referenced in virtually all motions under the current Rules. For example, in *Annapolis (County) v. E.A. Farren, Limited*, 2021 NSSC 304, Justice Norton considered the continued

application of *Waverley* as a leading authority in Nova Scotia. He also touched on caselaw principles and textbook authority with respect to assessing objections based on hearsay, opinion evidence, submissions, materiality and relevance, as well as scandalous content when considering a motion to strike affidavit evidence. Justice Norton made several observations with which I concur, including:

> 20 As the authorities make clear, an item of evidence is only legally relevant if it helps establish (or disprove) one of these material facts.
>
> 21 The Respondent asserts that because the cause of action refers to the election, any information that can be tied to the election is legally relevant (specifically, information about the Warden's electoral campaign, residents' social media activity, the supposedly hostile climate, and Mr. Habinski's perceived victimization by constituents). With respect, none of this evidence is relevant in that it does not tend to prove or disprove a fact that is material.
>
> …
>
> 24 I have allowed some affidavit evidence as narrative. *Paccioco, supra,* explains narrative evidence as follows, at p. 46:
>
> > It is inevitable that in narrating a story, even in response to questions, witnesses will include my new shy that do not meet the tests of relevance and materiality. For example, the trier of fact is likely to learn what a police officer was doing when a call was received, or whether the police officer was in a marked or unmarked police vehicle. This is harmless background material, and reference to it is generally tolerated because it improves comprehension by presenting a total picture and makes it easier for the witness to recount the evidence.
> >
> > Care must be taken with the narrative doctrine; prejudicial information should gain this kind of "back door" entry only where significant testimony cannot be recounted meaningfully and fairly without its disclosure. Even then, the testimony should be edited pursuant to the judge's exclusionary discretion to the extent that it can be, to minimize any damage that may be done. When prejudicial or otherwise immaterial information does piggyback its way into the record as part of the narrative, judges must avoid relying on it for improper purposes and in jury trials, if there is any risk that jurors could misuse the evidence, judges must give limiting instructions directing those jurors as to the limitations on the use that the evidence can be put to.
> >
> > I am satisfied that I can instruct myself on the proper and improper use of the narrative evidence that I have admitted.

Opinion Evidence In Affidavits

[12] Further detail was provided in *Annapolis County* at para. 26 as opinion being dependent on the degree to which a witness's factual observations are condensed:

> 26 *Paccioco, supra*, provides the following assistive commentary, at p. 198:
>
> To understand this distinction, attempt to describe the difference between a vehicle traveling at 40 kilometres an hour and one traveling at 70 kilometres an hour without expressing what will clearly be conclusions they captured the series of indescribable and internalised observations that enable most people to provide fair estimates of speed. Or, consider the recognition of faces. The compendious statement of fact, "That is Aunt Sally", subsumes myriad subtle characteristics observed and digested by the witness, attributes that could not be communicated effectively without resort to conclusions.
>
> Excepting those common areas where this kind of opinion evidence is routinely admitted, the admissibility of lay opinion evidence is a matter of judicial discretion. Based on the reasoning in *Graat*, an important consideration is whether it is necessary to have the lay witness express an opinion. In exercising that discretion, the trial judge should therefore assess whether the trier of fact is in as good a position as the witness to form the relevant conclusion. If so, the lay opinion should not be admitted unless the lay opinion evidence can, without prejudice prejudicing the case, assist in the orderly presentation of information. In *R. v. Walizadah*, for example, it was useful to permit a police officer to give jurors a fair and balanced guided tour through a video re-enactment even though they were capable of seeing what was there to be seen.
>
> It is clear from *Graat* that in determining whether lay opinion evidence is needed, the trial judge should consider whether, given the nature of the observation or the deficiencies of language, it is necessary for the witness to resort to "compendious" statements in order to communicate effectively what has been observed. Where the witness can communicate the information adequately by describing with particularity what has been observed, the witness should generally not be permitted to express an opinion.

[13] An overview of opinion evidence was recently provided by the Nova Scotia Court of Appeal in *R. v. Kotio*, 2021 NSCA 76, in the context of *viva voce* evidence. Although Justice Derrick's comments were made in a criminal matter, I find her overview helpful and applicable for civil matters as well:

48 First, an overview of some legal principles respecting factual and opinion evidence is helpful:

1. As a general rule, a witness may only testify to facts within their personal knowledge, observation or experience (see Sidney N. Lederman et al, Sopinka, Lederman & Bryant on *The Law of Evidence in Canada*, 5th ed. (Toronto: LexisNexis Canada Inc., 2018), at p. 815). However, lay opinion and expert opinion evidence are exceptions to this rule (see David M. Paciocco et al, *The Law of Evidence*, 8th ed. (Toronto, Irwin Law, 2020) at p. 234).
2. Opinion refers to any inferences from observed facts. However, for characterization purposes, it is recognized that the distinction between opinion and facts is often difficult to draw (see *Graat v. R.*, [1982] 2 S.C.R. 819 at p. 835).
3. A properly qualified expert may provide opinion evidence to assist the trier of fact where their technical expertise is required to assist in drawing inferences (see *R. v. Abbey*, [1982] 2 S.C.R. 24 at p. 42). It is also generally accepted that an expert may also offer lay opinion evidence in the course of their testimony: Paciocco et al, at p. 237.
4. Non-experts may give lay opinion evidence or draw inferences from facts where their evidence consists of a "compendious statement of facts that are too subtle and too complicated to be narrated separately and distinctly," so long as particular expertise or special qualifications are not required to draw the inference (*Graat* at p. 841). For example, also in *Graat*, the Supreme Court of Canada set this non-exhaustive list: the identification of handwriting, persons and things; apparent age; the bodily plight or condition of a person, including death and illness; the emotional state of a person--e.g. whether distressed, angry, aggressive, affectionate or depressed; the condition of things--e.g. worn, shabby, used or new; certain questions of value; and estimates of speed and distance (at p. 835).
5. It is important to recognize that when the evidence approaches the central issues a judge must decide, "one can still expect an insistence that the witnesses stick to the primary facts and refrain from giving their inferences. It is always a matter of degree. As the testimony shades towards a legal conclusion, resistance to admissibility develops" (see Sopinka, Lederman & Bryant on *The Law of Evidence* p. 820).

Documentary Hearsay

[14] The law regarding documentary hearsay was set out by Justice Rosinski in *Gibson v. Party Unknown*, 2014 NSSC 220, at para. 25:

> 25 I recognize that under the rules of evidence, hearsay may also come from documentation. Such documentation may be admissible as an exception to the hearsay rule, if it meets the test for the *Ares v. Venner*, [1970] S.C.R. 608, criteria (the common law exception) or under s. 23 of the *Evidence Act* RSNS 1989 c. 154, records made in the usual and ordinary course of business; or if it can be characterized as "necessary" and "reliable: -- *R. v. Khelawon* [2006] 2 SCR 787; and its probative value significantly outweighs its prejudicial effect on the fair trial process.

[15] The common law business records exception to the hearsay rule was set out by the Alberta Court of Appeal in *R. v. Monkhouse*, 1987 ABCA 227, and adopted by the Nova Scotia Court of Appeal in *R. v. Wilcox*, 2001 NSCA, at para. 49:

> 49 Is Exhibit 24 admissible under the common law business records exception to the hearsay rule? All respondents accept *R. v. Monkhouse*, [1988] 1 W.W.R. 725 (Alta. C.A.) as an accurate statement of the requirements for such admissibility. The following passage from the judgment of Laycraft, C.J.A., for the Court at p.732 sets out the applicable principles:
>
> > In his useful book, *Documentary Evidence in Canada* (Carswell Co., 1984), Mr. J.D. Ewart summarizes the common law rule after the decision in *Ares v. Venner* as follows at p. 54:
> >
> > > ... the modern rule can be said to make admissible a record containing (i) an original entry (ii) made contemporaneously (iii) in the routine (iv) of business (v) by a recorder with personal knowledge of the thing recorded as a result of having done or observed or formulated it (vi) who had a duty to make the record and (vii) who had no motive to misrepresent. Read in this way, the rule after Ares does reflect a more modern, realistic approach for the common law to take towards business duty records.
> >
> > To this summary, I would respectfully make one modification. The "original entry" need not have been made personally by a recorder with knowledge of the thing recorded. On the authority of Omand, Ashdown, and Moxley, it is sufficient if the recorder is functioning in the usual and ordinary course of a system in effect for the preparation of business records. ...

[16] Section 23 of the Nova Scotia *Evidence Act*, RSNS 1989, c. 154, also deals with the admissibility of business records:

> **Business records**
>
> 23 (1) In this Section,

> (a) "business" includes every kind of business, profession, occupation, calling, operation of institutions, and any and every kind of regular organized activity, whether carried on for profit or not;
>
> (b) "record" includes any information that is recorded or stored by means of any device.
>
> (2) Any writing or record made of any act, transaction, occurrence or event is admissible as evidence of such act, transaction, occurrence or event if made in the usual ordinary course of any business and if it was in the usual and ordinary course of such business to make such writing or record at the time of such act, transaction, occurrence or event or within a reasonable time thereafter.
>
> (3) Evidence to the effect that the records of a business do not contain any record of an alleged act, condition or event shall be competent to prove the non-occurrence of the act or event or the non-existence of the condition in that business if the judge finds that it was the regular course of that business to make such records of all such acts, conditions or events at the time or within reasonable time thereafter and to retain them.
>
> (4) The circumstances of the keeping of any records, including the lack of personal knowledge of the witness testifying as to such records, may be shown to affect the weight of any evidence tendered pursuant to this Section, but such circumstances do not affect its admissibility.
>
> (5) Nothing in this Section affects the admissibility of any evidence that would be admissible apart from this Section or makes admissible any writing or record that is privileged.

Principled Hearsay Approach

[17] With regard to the principled hearsay approach, the Court of Appeal in *Wilcox* discussed the nature of the reliability and necessity considerations in the context of documentary evidence (see paras. 66 – 71).

Submission By An Affiant

[18] In terms of submission, a witness is permitted to describe an event that they experience in their own words. In addition, just because a word has a potential legal use does not mean that the witness is using that word for a legal purpose (see *Armoyan v. Armoyan*, 2013 NSCA 99, at paras. 146 – 147).

Proper Inferences

[19] There is a difference between an inference, which is supported by objective facts, and speculation, which although it may be plausible, amounts to a mere guess. As noted by Justice Oland in *Kern v. Steele*, 2003 NSCA 147:

> 98 Two of the leading cases on the difference between inference and speculation or conjecture are *Jones v. Great Western Railway Co.* (1930), 47 T.L.R. 39 (H.L.) and in *Caswell v. Powell Duffryn Associated Collieries, Limited*, [1940] A.C. 152. In the former, Lord Macmillan stated at p. 45:
>
> > The dividing line between conjecture and inference is often a very difficult one to draw. A conjecture may be plausible but it is of no legal value, for its essence is that it is a mere guess. An inference in the legal sense, on the other hand, is a deduction from the evidence, and if it is a reasonable deduction it may have the validity of legal proof.
>
> In the latter, Lord Wright stated at p. 169-170:
>
> > Inference must be carefully distinguished from conjecture or speculation. There can be no inference unless there are objective facts from which to infer the other facts which it is sought to establish. In some cases the other facts can be inferred with as much practical certainty as if they had been actually observed. In other cases the inference does not go beyond reasonable probability. But if there are no positive proved facts from which the inference can be made, the method of inference fails and what is left is mere speculation or conjecture.
>
> *Jones, supra* and *Caswell*, *supra* are often cited in the case law. See for example *R. v. German* (1979), 33 N.S.R. (2d) 565 (C.A.), *Parlee v. McFarlane* (1999), 210 N.B.R. (2d) 284 (C.A.) and *Lee v. Jacobson* (1994), 53 B.C.A.C. 75 (C.A.).

APPLICATION OF THE LAW TO THE IMPUGNED PORTIONS OF THE AFFIDAVITS

Doreen Knockwood Affidavit Paragraphs 34 and 35

[20] On May 25, 2022, the Respondent filed the affidavit of Doreen E. Knockwood, sworn on May 20, 2022, along with an affidavit sworn by Keith Julien. Ms. Knockwood's affidavit includes the following two paragraphs:

> 34. To the best of my knowledge and recollection, the request for MFCS to vacate 520 Church Street was a result of longstanding tensions in our community about MFCS' presence on reserve and longstanding grassroots dissatisfaction about how MFCS provides services to Band members.
>
> 35. My understanding and belief based on communications which Band Council has received from Band members is that much of this longstanding tension is attributable to a concern amongst Band members that, because MFCS' office was on reserve, MFCS was quicker to investigate families and apprehend children in

> our community as compared to other reserves in Nova Scotia, and that MFCS placed a disproportionate amount of scrutiny upon members of our community as compared to other reserves in Nova Scotia. There are other longstanding dissatisfactions amongst Band members that have been communicated to Band Council regarding the way that MFCS' services are delivered in relation to Band members, for example that children have been removed from their parents and placed in provincial care three to four hours away from the Band's reserve despite those children having grandparents or other relatives living on the Band's reserve.

[21] MFCS objects to the inclusion of these two paragraphs in Ms. Knockwood's affidavit and states that they should be struck. In the main, MFCS maintains that Ms. Knockwood's statements in paragraphs 34 and 35 are irrelevant. They go on to assert that the statements are hearsay and contrary to Rules 39.04(2), 39.05 and 88.02.

[22] In responding to the MFCS motion, Sipekne'katik submits that MFCS has not met its burden of proving the impugned paragraphs of Ms. Knockwood's affidavit are irrelevant or otherwise inadmissible. They assert that the content is directly responsive to allegations made by MFCS in its pleadings and statements entered as evidence in its witness' affidavits. Sipekne'katik therefor requests that MFCS's motion be dismissed with costs to Sipekne'katik.

[23] Having regard to Rule 39 and the caselaw, I find that Ms. Knockwood's comments at paragraphs 34 and 35 are unrelated to the material facts in this claim. In this regard, I am particularly mindful of Justice Norton's comments in *Annapolis (County)* at para. 21 (see my para. 11). In my view, Ms. Knockwood's comments in paragraphs 34 and 35 are not relevant because they do not tend to prove or disprove a fact that is material. Whether or not there have been longstanding tensions or grassroots dissatisfaction *vis-à-vis* MFCS on the Sipekne'katik reserve has nothing to do with the pleadings and inferences supported by objective facts.

[24] In the main, HFCS pleads breach of contract and unjust enrichment. The grounds for the sought order do not touch on the alleged rationale Ms. Knockwood provides about "longstanding tensions." In their Notice of Contest Sipekne'katik provides 15 grounds to support the pleading that the Application be dismissed. There is nothing plead within these grounds which touches on what Ms. Knockwood has deposed at paragraphs 34 and 35.

[25] With respect to the argument that Ms. Knockwood's comments are responsive to allegations made by the MFCS's affiants, I find nothing in the four filed affidavits that calls out for such a response. In the main, the affiants provide background and context for MFCS's allegation that they have not been provided with proper notice

or compensation. Consistent with the Notice of Application in Court, the affidavits do not speak to investigating Sipekne'katik families.

[26] Were I to permit paragraphs 34 and 35 to stand, I believe that this could lead to unnecessary time spent during the Application in Court delving into how MFCS has delivered services. In my view this would be counter-productive and not on point for what is scheduled to be a two day hearing to deal with the discrete issues plead.

[27] This is claim bounded by what has been plead in the Notice of Application in Court and Notice of Contest. On fair reading of the pleadings, I am of the view that they do not open the door for these kinds of averments. In the result, I hereby order that the Court return the filed affidavit of Ms. Knockwood and that Sipekne'katik's counsel replace it with an identical affidavit – including the original date – with the offending paragraphs removed.

[28] Given my ruling I need not go on to consider MFCS's alternative arguments.

Kendra Arseneau Affidavit

[29] Since August, 2016 Ms. Arseneau has been the Finance Manager of MFCS. Beginning at paragraph nine and concluding at paragraph 18 of her affidavit sworn April 13, 2022, Ms. Arseneau provides evidence under the heading "History of MFCS". Sipekne'katik objects to six of the ten paragraphs in the main because she speaks to MFCS's founding documents and the like, but "Ms. Arseneau has only been affiliated with MFCS since 2016 …" Sipekne'katik also questions the authenticity of the "true copies" attached as various exhibits. Accordingly, Sipekne'katik argues hearsay as the main objection to these passages.

[30] In assessing Sipekne'katik's objections to these paragraphs, I find their approach to be overly technical and disproportionate to what Ms. Arseneau is deposing. The objections might have more heft if she was attempting to provide evidence in a critical area. In any case, just because she started her employment with MFCS in 2016 does not mean that she cannot review older records and provide her view of the thrust of the documents. If she is incorrect, surely any errors can be exposed through cross-examination.

[31] In *Annapolis (County)* at para. 24 (see my para. 11), Justice Norton noted that this kind of background evidence may be permitted to allow the trier of fact to understand events narration. On my review of the impugned paragraphs, I conclude that what Ms. Arseneau deposes to when she reviews the MFCS history is harmless

background material that will help the assigned judge understand the situation. The evidence would appear to be uncontroverted and not controversial. Accordingly, I allow these passages to remain as they are.

[32] In the next section of Ms. Arseneau's affidavit she gives evidence under the heading "MFCS Financing and Reporting Obligations." Sipekne'katik takes objection to paragraph 24 for opinion and relevance and paragraph 25 for relevance. In paragraph 24 Ms. Arseneau provides her opinion that MFCS "continues to be underfunded." In paragraph 25 she provides details from MFCS's financial records and then deposes that funds "could not be used for any major capital projects such as buildings."

[33] In argument MFCS says that the proffered information is relevant as it helps to inform the trier of fact. For example, they say that this information touches on why the notice period may fairly be regarded as too short.

[34] Rather than harmless narration, I regard the information in paragraphs 24 and 25 as containing irrelevant financial detail, particularly in light of the consent Order which effectively leaves damages for a later day (subsequent to the April 5 and 6, 2023, Application in Court). In the result, these paragraphs shall be entirely struck.

[35] The next objection to Ms. Arseneau's affidavit comes under her heading "Search for Replacement Office Space." At paragraph 46 she deposes, "[I]n the current real estate market, office space for 74 employees in central Nova Scotia is not readily available." This is objected to on the grounds of relevance and opinion. MFCS says Ms. Arseneau's statement is bourne out given her subsequent paragraphs concerning MFCS's difficulty in acquiring space.

[36] In my assessment Ms. Arseneau's subsequent paragraphs speak for themselves and her opinion as to whether the office space is not readily available is based on her inquiries. Accordingly, I regard her proposed paragraph 46 as her opinion, which is acceptable given *Annapolis (County)*, para. 26 and *Kotio*, para. 48 and open to cross-examination challenge. In the result, I allow this paragraph to stand.

[37] With the exception of the first sentence at paragraph 47, all of the content in this paragraph and paragraph 48 is argued by Sipekne'katik to contain hearsay and speculation regarding the circumstances of MFCS's attempts to find office space by contacting Millbrook Chief Bob Gloade. In response MFCS says that these

paragraphs provide background which will inform the trier of fact on the issue of the notice period.

[38] Upon reviewing the proposed redactions, I find that they are valid. To my mind, this level of detail involving hearsay from Chief Gloade is unnecessary and may involve speculation. It is important to recall that Chief Gloade is the Chief of the Millbrook First Nation and Millbrook is not a party to this litigation. In all of the circumstances, I order these paragraphs struck.

[39] The final objection under the "Search for Replacement Office Space" section comes at the second and final sentence of paragraph 62 where Ms. Arseneau deposes to the estimated cost of setting up a new phone system. In short, I agree with Sipekne'katik's argument that these figures are not backed up and, in any event, go to damages. Accordingly, this sentence shall be struck. I make the same observations regarding the last two paragraphs – 67 and 68 – proposed by Sipekne'katik to be excised, and I therefore strike these paragraphs.

Monica Clarke-Johnson Affidavit

[40] Ms. Clarke-Johnson has been employed with MFCS for 24 years and currently serves as assistant Executive Director. Ms. Clarke-Johnson's affidavit was sworn on April 3, 2022. Under the heading "The Indian Brook Office" Sipekne'katik objects to paragraphs 12, 13 (except for the last sentence), 15 (last sentence), 16, 17, 18 and 19. Sipekne'katik also objected to paragraph 22 and MFCS agreed to remove it. The impugned paragraphs outline Ms. Clarke-Johnson's October 8, 2021 telephone conversation with Sipekne'katik Chief Mike Sack, a Facebook posting by him (attached as an exhibit), MFCS's conflict of interest policy, an October 19, 2021 letter authored by Chief Sack (whereby MFCS is told to vacate the building by November 30, 2021) and comments attributed to Chief Sack at a MFCS board meeting.

[41] Sipekne'katik objects to these paragraphs, primarily on the basis of hearsay. With respect to paragraph 17 (dealing with conflict of interest) Sipekne'katik cites relevance, opinion and speculation to found its objection. MFCS argues that the hearsay objections are not valid because they are with respect to a party witness, namely Sipekne'katik's Chief. As for paragraph 17, they argue as follows in their brief:

> MFCS has claimed that Sipekne'katik acted in bad faith by refusing to communicate with MFCS regarding the departure from the building. This

> paragraph sets out options that Sipekne'katik had to communicate concerns with MFCS operations to the Board and is directly relevant. The absence of this paragraph would leave the incorrect impression that Sipekne'katik did not have such opportunities.

[42] Having considered the competing arguments and law, I am of the view that the hearsay objections are not founded. Afterall, Chief Sack is the author of the October 19, 2021 letter (which is produced in another of MFCS's affidavits and is surely an important, highly relevant document). There is nothing in the Sipekne'katik affidavits which challenges Ms. Clarke-Johnson's summary of her phone call with Chief Sack or his Facebook post she reproduces as an exhibit. If they are problematic in terms of accuracy, then Sipekne'katik counsel will have opportunity to cross-examine Ms. Clarke-Johnson at the hearing. In the result, paragraphs 12, 13, 16 and 18 shall stand.

[43] As for the part of paragraph 15 challenged, I have no difficulty with Ms. Clarke-Johnson's deposing to her understanding "that Sipekne'katik authorized MFCS to build the Indian Brook office on Sipekne'katik land for MFCS to use, and that MFCS built and paid for the building." In this regard, I believe Ms. Clarke-Johnson's affidavit provides proper foundation for her stated understanding. Should Sipekne'katik take issue with Ms. Clarke-Johnson's view, once again, she will be made available for cross-examination during the Application in Court.

[44] With respect to paragraphs 17 and 19, I have concerns about Ms. Clarke-Johnson deposing to the obligations of the MFCS Board of Directors and what Chief Sack may have said at one of their meetings on an unspecified date. Whereas Arlene Johnson is an ex-officio Board member (she deposes to this in her April 13, 2022 affidavit at para. 18), the reader is not informed as to how Ms. Clarke-Johnson gleans the information which I find in any event to be vague. For example, the conflict of interest policy she speaks of is not provided. Further, she deposes that Chief Sack "said something to the effect …" at an undated Board meeting (minutes are not provided). Accordingly, I will exercise my discretion to strike paragraphs 17 and 19.

[45] Under the next heading in Ms. Clarke-Johnson's affidavit, "Impact on MFCS", she deposes to the affects of the building eviction on MFCS. Sipekne'katik objects to the majority of the paragraphs here; namely, 23, 24, 28, 29, 30, 31, 32, 36, 37, 38, 39 and 40 as well as portions of paragraphs 33, 34 and 35. Most of the passages are objected to for the main reason of relevance. In answer, MFCS says that the paragraphs are appropriate because they speak to the issue of what they say amounts to a lack of proper notice being provided by Sipekne'katik.

[46] Having carefully reviewed the impugned paragraphs, I find that they are relevant to the notice issue. This is because they generally outline MFCS's efforts to move out of the building within an approximate six week time frame. From what I have gleaned from the pleadings and affidavits, there is not a written lease agreement between the parties. Whereas much of this information might be unnecessary in the event of a lease which spelled out a notice period, the absence of this means that the Court will likely have to consider evidence along the lines deposed to by Ms. Clarke-Johnson. Accordingly, I am mindful of the trial relevance test and regard the proffered evidence as being relevant. I also regard Ms. Clarke-Johnson as well placed to make the statements because she was responsible for the day-to-day operations of the building and she continues to manage office operations for MFCS's newly leased space (see para. 5 of her affidavit).

[47] The final objection to Ms. Clarke-Johnson's affidavit comes under the heading "Move to New Office Space" and concerns paragraph 41 which reads "I have reviewed and adopt as evidence paragraphs 55 – 58 of the affidavit of Kendra Arseneau regarding the search for new office space." Sipekne'katik says that paragraph 41 is "not appropriate." I note that paragraphs 55 – 58 were not objected to by Sipekne'katik when Ms. Arseneau deposed to them. Review of paragraphs 55 – 58 demonstrate that they concern Ms. Arseneau and Ms. Clarke-Johnson working together on behalf of MFCS to sign on to new space leased out by Cushman & Wakefield. On balance, and in context, I have no difficulty with the efficiency of Ms. Clarke-Johnson attesting to this evidence in this manner.

Arlene Johnson Affidavit

[48] Ms. Johnson is the Executive Director of MFCS and she has held this position since 2011. She began her continuous employment with the agency on September 20, 1985. Sipekne'katik objects to the majority of the paragraphs deposed to by Ms. Johnson under the heading "About MFCS". In the main, Sipekne'katik says that the background information given by Ms. Johnson is irrelevant and "not necessary to understand the ethos" of the dispute. Strictly speaking, Sipekne'katik may have a technical point but on balance I regard the proffered information as the kind of harmless narrative I touched on and ruled as permissible when reviewing the objections to Ms. Arseneau's affidavit (see para. 31). I again refer to *Annapolis (County),* at para. 24 for authority that this type of evidence may be permissible. I would add that this sort of routine background information is the part of trial narrative evidence that is rarely met with objection. In the result, I permit the impugned paragraphs to stand.

[49] The next heading of Ms. Johnson's affidavit is "The History of the Indian Brook Office." Sipekne'katik objects to paragraphs 23, 24 and 25 on the basis of relevance and opinion. In these paragraphs Ms. Johnson provides her view as to why she believes that it is important for MFCS offices to be on reserve lands and delves into how she encourages staff "to be involved in community events and prioritizes the hiring of Indigenous staff …" While the impugned paragraphs are not as colorful as what I earlier reviewed in the case of Ms. Knockwood, I similarly regard the passages as off point, with reference to the pleadings. In the result, and consistent with what I set out when discussing Ms. Knockwood's impugned paragraphs, I hereby order that they be struck.

[50] With respect to paragraph 26, I find Ms. Johnson's reference to what Chief Terrance Paul was advised to be an appropriate recounting of what is in the attached MFCS minutes at paragraph 26. I make similar observations regarding what Ms. Johnson has deposed to (and is objected to by Sipekne'katik) at paragraphs 28, 29, 30, 31, 32, 34, 35 and 40 because she has supported her statements with exhibits which back them up.

[51] Sipekne'katik objects to the last sentence of paragraph 38 of Ms. Johnson's affidavit on the basis of hearsay. I agree with this objection because the deponent has not provided any foundation for her statement about the L'sitkuk First Nation.

[52] Sipekne'katik also objects to paragraphs 33 and 39 but on the basis that Ms. Johnson did not provide the minutes as an attached exhibit. MFCS concedes that without the minutes attached that paragraphs 33 and 39 are not appropriate averments. They advised the Court that they would file an additional affidavit from Ms. Johnson attaching the December 18, 2007 and June 25, 2009 minutes and MFCS did indeed file a supplemental affidavit of Ms. Johnson on October 19, 2022, attaching the minutes. Given that the minutes for these two meetings back up what she swore to at paragraphs 33 and 39, I shall permit these paragraphs to remain.

[53] With respect to paragraph 36, Ms. Johnson deposes:

> The process to designate land is set out under the *Indian Act*, RSC 1985, c. 1-5, and is undertaken by the Band, along with the Federal Crown. The Band must first hold a referendum of its members, and have the majority vote in favour of the designation. It must then be certified and submitted to the Minister of Indigenous Services for acceptance.

[54] Sipekne'katik objects to this because they assert that it is legal opinion which is irrelevant, adding that the legislation speaks for itself. Although Ms. Johnson is not a lawyer, she is describing a process based on her 37 years with MFCS and in her current (11 years) capacity as Executive Director. As noted by Derrick, J.A. in *R. v. Kotio* (para. 48 noted herein at para. 13), a witness may testify as to facts within her personal knowledge.

[55] During the Motion for Directions the parties confirmed that expert evidence would not be proffered. In any event, it would be reasonable to anticipate in this case that both sides would provide the Court with certain background information. Sipekne'katik has not challenged Ms. Johnson's view of the process to designate land. If they truly have an issue with what she is saying about how the legislation operates in practice, she will undoubtedly be cross-examined on this. In all of the circumstances, I find paragraph 36 to be acceptable for this witness to proffer.

[56] The last section of Ms. Johnson's affidavit comes under the heading "Eviction of the Indian Brook Office Building by Sipekne'katik" and Sipekne'katik objects to almost all of paragraphs 41, 43 and 47, all of paragraph 42 and part of paragraph 46. Sipekne'katik cites relevance, opinion, hearsay and speculation to found the bulk of their objections.

[57] At paragraph 41 Chief Sack's October 19, 2021 letter is attached and I find what Ms. Johnson says about it in paragraph 41 and 42 to be accurate and in no way contrary to the affidavit evidentiary considerations. I therefor allow these paragraphs to stand.

[58] In paragraph 43 Ms. Johnson attaches MFCS's October 29, 2021 response letter and I similarly find that her description of the letter is an accurate summary and in no way objectionable.

[59] As for paragraph 46, Ms. Johnson refers to Ms. Clarke-Johnson's affidavit at paragraphs 10 – 13. Consistent with my approach to paragraph 41 of Ms. Clarke-Johnson's affidavit, I have no difficulty with the efficiency of Ms. Johnson attesting to evidence in this abbreviated manner.

[60] With respect to paragraph 47, Ms. Johnson deposes:

> Based on my experience and interactions with staff, I believe that Sipekne'katik's eviction of MFCS on a six-week timeline had a huge impact on the Agency. MFCS did not have sufficient time to make the move as we would have liked. We were required to move in a rushed manner, with staff working overtime to move

> everything in just six weeks. We incurred costs over and above our budget to make this move. Staff expressed to me that they felt betrayed and isolated from their community. I personally feel that MFCS would be unwelcome in returning to Sipekne'katik in the future.

[61] With the exception of the third last sentence, Sipekne'katik objects to all of the above. Having reviewed the entire passage in the context of all of what is before me, I have no difficulty with the first part of the above paragraph. In this regard, I repeat what I noted earlier about the lack of a lease. Given that MFCS has put proper notice squarely in issue, I have no problem with Ms. Johnson deposing to why she believes the six week timeline has had a "huge impact."

[62] As for the last three sentences of the paragraph, I agree with the parties that the third last sentence is acceptable. As for the final two, I agree with the position taken by Sipekne'katik. Ms. Johnson strays into problematic territory when she attempts to make a blanket statement concerning what "staff expressed" to her. Further, her view about MFCS being unwelcome returning to the reserve is speculative. Further, this statement delves into the kind of proposed evidence that I disallowed in the case of Ms. Knockwood and with Ms. Johnson (with regard to her paragraphs 23, 24 and 25).

Ms. Arseneau Supplemental Affidavit

[63] In her supplemental affidavit sworn June 2, 2022, Sipekne'katik objects to the last sentence of paragraph 5, part of the last sentence of paragraph 6, as well as all of paragraph 7 and paragraph 13. In the objected to portion of paragraph 5, Ms. Arseneau refers to a September 19, 1991, agreement (attached as exhibit 1) and provides her summary of article 4. Sipekne'katik says Ms. Arseneau's averment is irrelevant as the document speaks for itself. They add that the content of exhibit 1 is "mischaracterized" by Ms. Arseneau. In reply, MFCS refers to the passage as "helpful narrative as it summarizes the relevant portion of the agreement for the Court."

[64] As for the part of paragraph 6 objected to, Ms. Arseneau merely deposes that she believes that an agreement is the same one that a former MFCS comptroller advises had been re-signed.

[65] In assessing the objections to paragraphs 5 and 6, I again refer to what I have classified as harmless narrative in other parts of this decision. If Sipekne'katik truly

believes that there has been a mischaracterization then it is open to them to cross-examine Ms. Arseneau and bring this to light during the Application in Court.

[66] Paragraph 7 attaches a letter between the parties along with a handwritten note, attributed to the former MFCS comptroller. The document is provided as an exhibit and I regard it as a business record which Ms. Arseneau is well placed to address as she is MFCS's finance manager. Accordingly, I see no basis for the hearsay challenge.

[67] At paragraph 13 Ms. Arseneau says that she disagrees "that the photographs (attached to Ms. Knockwood's affidavit) accurately represent the overall condition" of the building in question upon the departure of MFCS. She attaches as an exhibit videos taken by former MFCS office manager, Anna Paul, purporting to show the building as of November 30, 2021. She then deposes; "[T]he videos taken by Ms. Paul are consistent with my recollection of the condition of the Indian Brook office when I did my final walkthrough of the building."

[68] Sipekne'katik objects to the above on the basis of argument and because they assert that Ms. Arseneau "has no ability to authenticate a document (videos) taken by another individual." In response, MFCS acknowledges that Ms. Arseneau does not expressly state that she reviewed the video.

[69] Having reviewed the passage and competing arguments, I find support for Sipekne'katik's objection. I have difficulty with Ms. Arseneau commenting on a video which she attaches but did not film and when it is not even clear that she watched it. I would add that to the extent the condition of the building upon MFCS's departure is an issue, this will undoubtedly be part of the Judge's consideration at the damages hearing. In all of the circumstances, I order the paragraph struck.

[70] In conclusion on the Sipekne'katik motion, I hereby order that the Court return the four filed MCFS affidavits and that MCFS counsel replace them with identical affidavits – including the original dates – with the offending passages removed as outlined herein.

THE MOTION TO COMPEL DISCOVERY UNDERTAKINGS

[71] Two of MFCS's three affiants were discovered this past summer. MFCS Executive Director, Arlene Johnson, was examined on July 20th and the next day Finance Director, Kendra Arseneau was discovered. Sipekne'katik brings their

motion to compel answers to undertakings which were taken under advisement during the examinations and subsequently refused.

[72] Apart from the briefs and authorities, I was provided with solicitors' affidavits. Attached to Sipekne'katik's counsel's affidavit are discovery transcript excerpts and discovery exhibits, an email thread taken from MFCS's Affidavit Disclosing Documents, correspondence between counsel and Sipekne'katik's counsel's listing of the of the undertakings. Attached to MFCS's counsel's affidavit are further discovery transcript excerpts and correspondence between counsel.

[73] In addition to this material, upon reviewing MFCS's counsel's brief, I requested pursuant to Rules 14.05(5) and 85.06 to be provided with a sealed envelope containing the materials over which MFCS is claiming litigation privilege. This documentation – containing 44 tabbed documents – was received and reviewed the day before the motion.

The Rules

[74] I find that Civil Procedure Rules 14 and 18 are in play on Sipekne'katik's application to compel responses to their discovery questions. Under Rule 14, I draw particular reference to Rule 14.01(1) and (2) which touch on the meaning of relevant:

> **Meaning of "relevant" in Part 5**
>
> 14.01 (1) In this Part, "relevant" and "relevancy" have the same meaning as at the trial of an action or on the hearing of an application and, for greater clarity, both of the following apply on a determination of relevancy under this Part:
>
> (a) a judge who determines the relevancy of a document, electronic information, or other thing sought to be disclosed or produced must make the determination by assessing whether a judge presiding at the trial or hearing of the proceeding would find the document, electronic information, or other thing relevant or irrelevant;
>
> (b) a judge who determines the relevancy of information called for by a question asked in accordance with this Part 5 must make the determination by assessing whether a judge presiding at the trial or hearing of the proceeding would find the information relevant or irrelevant.
>
> (2) A determination of relevancy or irrelevancy under this Part is not binding at the trial of an action, or on the hearing of an application.

[75] Rule 14.08(1) is also of importance on this application and reads:

Presumption for full disclosure

14.08 (1) Making full disclosure of relevant documents, electronic information, and other things is presumed to be necessary for justice in a proceeding.

[76] With respect to Rule 18, I refer to 18.13 and 18.18 which read:

Scope of discovery

18.13 (1) A witness at a discovery must answer every question that asks for relevant evidence or information that is likely to lead to relevant evidence.

(2) A witness at a discovery must produce, or provide access to, a document, electronic information, or other thing in the witness' control that is relevant or provides information that is likely to lead to relevant evidence.

(3) A witness who cannot comply with Rule 18.13(2) may be required to make production, or provide access, after the discovery or at a time, date, and place to which the discovery is adjourned under Rule 18.18.

(4) A party who withholds privileged information but decides to waive the privilege must disclose the information to each party and submit to discovery if required by another party.

(5) An expert retained by a party are not subject to discovery, except as permitted under Rule 55 - Expert Opinion.

…

Production or access after discovery or at adjournment

18.18 (1) A party may require a witness who is examined at a discovery to produce, or provide access to, a document, electronic information, or other thing referred to by the witness but not brought to, or accessible at, the discovery, unless one of the following applies:

(a) the document, information, or thing is not in the control of the witness;

(b) it is not relevant and is not likely to lead to relevant evidence;

(c) it is privileged.

(2) A judge may order a witness who fails to comply with a requirement for production or access to make production or provide access, and the judge may order the witness to indemnify the party who seeks the order for the expense of obtaining the production or access.

> (3) A party who requires production or access before the party completes examination of a witness at discovery may adjourn the discovery.
>
> (4) A judge may relieve a party or a non-party witness from a requirement to produce, or provide access, at discovery examination if the party or witness rebuts the presumption for disclosure in accordance with Rule 14.08, of Rule 14 – Disclosure and Discovery in General.

The Guiding Cases

[77] The leading principles on relevance and production are set out by Justice Moir in *Saturley v. CIBC World Markets Inc.*, 2011 NSSC 4, which establishes that the standard of trial relevancy, including at discovery and disclosure, is determined based on the pleadings and evidence known to the judge, at the time that the ruling is made. In *Brown v. Cape Breton (Regional Municipality)*, 2011 NSCA 32, at para. 12, Justice Bryson adopted Justice Moir's statement of the law from *Saturley* and affirmed that the consequence of Rule 14.01 is that "judges have to determine relevancy long before trial, without the forensic advantages of the trial judge. This is thought to be the price of reducing litigation cost."

[78] Justice Moir explained in *Saturley* that Rule 14.01 must be understood in light of the 2009 reform of the *Civil Procedure Rules* and the significant changes it ushered in regarding document disclosure and discovery in Nova Scotia:

> [24] Rule 14.01(1) is to be understood against that background of legislative history: gradual adoption of the nineteenth century "semblance of relevancy" test on the basis that it is too difficult for lawyers and judges to determine relevancy in the pre-trial stage; recognition that the test lead to wasteful expense and, thus, impeded justice, and; for Nova Scotia, the recommendation of a solution through a definition of "relevant" for the purposes of disclosure and discovery.

[79] Justice Moir went on to note at para. 46 of *Saturley* that the principles now underlying Rule 14.01 flow from this very background:

> …In my opinion, these conclusions follow from, and are enlightened by, the principle that disclosure of relevant, rather than irrelevant, information is fundamental to justice and the recognition that an overly broad requirement worked injustices in the past.

[80] The standard of trial relevance therefore sets important boundaries on the conduct of discovery examinations, specifically, as established by Rules 18.13 and 18.18.

[81] The leading case on the principles of trial relevancy continues to be *Saturley*, which has been cited in numerous subsequent decisions including the recent case of *Park Place Centre Limited v. MacKie*, 2022 NSSC 143. In *Park Place Centre* at para. 18, Justice Boudreau cited the following principles of trial relevancy arising out of the *Saturley* decision:

- The semblance of relevancy test for disclosure and discovery has been abolished.
- The underlying reasoning, that it is too difficult to assess relevancy before trial, has been replaced by a requirement that judges do just that, Chambers judges are required to assess relevancy from the vantage of a trial, as best it can be constructed.
- The determination of relevancy for disclosure of relevant documents, discovery of relevant evidence, or discovery of information likely to lead to relevant evidence must be made according to the meaning of relevance in evidence law generally. The Rule does not permit a watered-down version.
- Just as at trial, the determination is made on the pleadings and evidence know to the judge when the ruling is made.

[82] Justice Boudreau continued at para. 19 with these observations:

> 19 I also note a subsequent *Saturley v. CIBC World Markets Inc*. case (2012 NSSC 57), wherein the court made the following comments:
>
> > [9] In my view, the court should take a somewhat more liberal view of the scope of relevance in the context of disclosure than they might at trial. This is subject, of course, to concerns with respect to confidentiality, privilege, cost of production, timing and probative value.
> >
> > [10] At the disclosure and discovery stage of litigation, it is better to err on the side of requiring disclosure of material that, with the benefit of hindsight, is determined to be irrelevant rather than refusing disclosure of material that subsequently appears to have been relevant. In the latter situation, there is a risk that the fairness of the trial could be adversely affected.

[83] The above quoted *Saturley* decision was authored by Justice Wood (as he then was). Towards the end of his decision the now Chief Justice of Nova Scotia noted:

> 51 As a final comment, I want to reemphasis that my decision with respect to disclosure of additional materials does not mean that those documents will necessarily be determined to be relevant and admissible at trial. I would remind the parties that Civil Procedure Rule 14.01(2) states that a determination of relevancy made in relation to issues of disclosure and discovery is not binding at trial. If there

> is a disagreement with respect to the use of any of these materials at trial, the Court will make a determination at that time, after giving the parties an opportunity to make submissions.

[84] Notwithstanding the above, it is important to make clear that the old semblance of relevance test is passé given the advent of the 2009 Rules. To my mind, the focus must be on relevant documents and not obscure theories or bald or boiler-plate assertions in pleadings. For example, in *Intact Insurance Company v. Malloy*, 2020 NSCA 18, at para. 35 Justice Farrar affirmed that even particularized pleadings must be supported by the evidence in order to avoid a fishing expedition:

> [35] Although the pleadings are a factor to be taken into consideration in determining whether documents are relevant, they are not the only factor. If that were the case, adroit counsel could draft pleadings in such a manner to allow a party to embark on a fishing expedition. This is precisely what the Rules were intended to avoid when they were amended to move from the "semblance of relevance" test to relevancy. The motions judge's decision, in my view, reverts to the "semblance of relevance" test. Allegations, no matter how specifically worded or drafted, which have no basis in the facts or the evidence without more, cannot be the basis for a production application. This is particularly true here, where there was a dearth of evidence before the motions judge.

Undertaking Regarding MFCS's Agency By-Law Documents

[85] Attached to Sipekne'katik's counsel's affidavit are included pages 18 and 19 of Ms. Johnson's discovery examination. Here she answers Mr. Blades' questions about constating documents and the like stating that MFCS has bylaws and "I think we have supporting documents that show that, you know, we are an agency that operates under the *Family and Children Services Act* in Nova Scotia." Upon receiving this reply, Sipekne'katik's counsel asked for any current bylaws and this was taken under advisement and ultimately denied by MFCS's lawyer.

[86] In Sipekne'katik's brief it is argued that the above request was "seemingly refused for unspecified reasons of irrelevance"; however, later Sipekne'katik acknowledges that the request was "subsequently granted in part." In this regard, MFCS's counsel's August 25, 2022 letter to Sipekne'katik counsel confirms that the original bylaws and certain Registry of Joint Stock information from the time of its creation in 1985 will be provided. In his August 31, 2022 letter Mr. James provides this information.

[87] Sipekne'katik argues that MFCS's current bylaws are relevant to the issues of legal personhood and standing raised in their Notice of Contest. They add that there

is “no principled basis to assert that the 1985 bylaws are relevant but the current bylaws are not.”

[88] On all of the evidence, relevant Rules and caselaw, I am of the view that the MFCS response is sufficient. In this regard, although Sipekne’katik challenges MFCS’s standing to bring the Application (para. 1, Notice of Objection), I find this to be a bald assertion without any demonstrated evidentiary basis. In coming to this conclusion I am mindful of the trial relevance test and Justice Farrar’s comments in *Intact Insurance Company*, as noted above.

[89] MFCS provided their public Registry of Joint Stocks entry, original constitution and by-laws. In the circumstances, this is a sufficient response. The Motion for Directions memorandum and Court file are silent concerning any motion to challenge MFCS’s standing. Given what is before me, I cannot imagine that the Application in Court will deal with what MFCS has demonstrated to be an ill-founded issue.

Undertakings Pertaining to MFCS’s Arrangements with Eskasoni and Bear River

[90] Three undertakings arose from Ms. Johnson’s discovery and two from Ms. Arseneau’s discovery concerning MFCS’s arrangements with two other Bands, Eskasoni and Bear River. The five undertakings may be summarized as follows:

- Confirm whether MFCS directly paid the cost of construction in relation to the former Eskasoni office space (constructed in around 1991), or whether periodic payments were made to the Eskasoni Band to reimburse the cost of construction.
- Confirm whether MFCS either requested or received compensation from Eskasoni for the value of MFCS former Eskasoni building in connection with MFCS vacating that space and moving into the new Eskasoni office building that was constructed in around 2020.
- Confirm the cost of construction for the current MFCS Bear River office.
- Confirm the total amounts paid by MFCS to construct, or renovate and improve, (a) the former MFSC Indian Brook office space at the convent building, and (b) the former MFCS building in Eskasoni, and (c) the Eskasoni Band’s “fisheries building” which MFCS temporarily occupied.

- Confirm whether MFCS has in the past ever received compensation for building value in connection with vacating what building and moving into new premises.

[91] Sipekne'katik presents two arguments supporting relevance; that MFCS referenced its Eskasoni and Bear River offices in its pleadings, and that evidence regarding MFCS's conduct on other offices, on other Band lands, may potentially be relevant to Sipekne'katik's defence to MFCS's unjust enrichment claim.

[92] The Notice of Application in Court references Eskasoni and Bear River as follows as para. 3:

> Until November 30, 2021, MFCS operated out of three offices in Nova Scotia, which were located on the Mi'kmaw reserve lands of Sipekne'katik, Eskasoni, and Bear River. The MFCS office on the Sipekne'katik reserve was located at 520 Church Street, Indian Brook, Nova Scotia ("Indian Brook Office").

[93] In their Notice of Contest Sipekne'katik does not refer to Eskasoni or Bear River. Accordingly, the sole pleadings reference is as quoted above, which is in the context of a general description of MFCS's operations.

[94] The Sipekne'katik affidavits do not refer to any Band offices, other than the one on their reserve. Although the affidavits of Ms. Johnson and Ms. Clarke-Johnson touch on the Eskasoni and Bear River offices, I have already characterized these averments as harmless background information.

[95] In Sipekne'katik's counsel's affidavit she attaches discovery exhibits 2 and 3 "tendered during the discovery examination of Arlene Johnson …." These exhibits consist of pages (298 – 357 and 368 – 377) from MFCS's Supplementary Affidavit Disclosing Documents. In Mr. James' July 14, 2022 letter to Sipekne'katik's counsel he noted that the documents were produced but; "in our view any additional records related to the Eskasoni and Bear River offices are not relevant. If their relevance is established during discoveries, then we will consider any request for additional disclosure at that time."

[96] At p. 93 of his examination of Ms. Johnson, Mr. Blades begins a line of questions concerning the Eskasoni and Bear River MFCS's offices. Challenged as to the relevance of the requests, Mr. Blades provides this rationale:

> I mean, we're here in a litigation that's dealing with arguments regarding the fairness of making certain levels of expenditures without compensation, and this is a related expenditure for a similar office space on a different reserve.

[97] With respect, I do not accept the rationale put forward by Sipekne'katik's counsel. In this regard, I am of the opinion that further production with respect to the Eskasoni and Bear River offices would not assist with what has been plead here. Once again, the evidence discloses that there is no lease agreement between Sipekne'katik and MFCS. To delve further into the agreements MFCS has or had with other Bands could potentially lead to an unnecessary tangent at the upcoming Application in Court. In this regard, I am concerned that the matter could devolve into an expanded, off point Application. Indeed, my concerns are analogous to my comments about "trials within the trial" in *Healy v. Halifax (Regional Municipality)*, 2017 NSSC 82 at para. 35:

> 35 With respect, I am of the view that these requests, if allowed, would lead to trials within the trial. In this regard, such an inquiry would lead to the parties and the Court having to delve into such things as the particular circumstances in each fire, the nature of the fire, its size, fire behaviour on the dates in question, atmospheric conditions, the individuals who fought the fire, what information they had about the fire, communications from dispatch, as well as the equipment available. Indeed, based on my review of the affidavit evidence and pleadings, the Plaintiffs have failed to establish any connectedness between earlier events and the fire in question. Accordingly, I am of the view that the seven requests need not be answered. They are irrelevant and would lead to a potentially unmanageable trial. In this regard, I find the decision of *Wilson v. Lind*, [1985] O.J. No. 535 be of application. As Justice O'Brien concludes at p. 3:
>
> > If such allegations were permitted in the statement of claim, the discovery process would be extensively prolonged and the trial would involve issues of prior and subsequent negligence and impairment. Rather than one trial there would be several.

[98] Additionally, Sipekne'katik argues that MFCS's pleading of unjust enrichment opens the door for them to explore MFCS's commercial arrangements with other Bands.

[99] In *Organigram Holdings Inc. v. Downton*, 2020 NSCA 38, Justice Bryson refers to the three-part test for unjust enrichment at para. 39:

> 39 Organigram makes a strong argument that this is an untenable cause of action. They cite authority that unjust enrichment is unsustainable when a contract is present. Organigram begins its attack on the judge's ruling with a quotation from

Garland v. Consumers' Gas Co., 2004 SCC 25 which sets out the well-known tri-part test for unjust enrichment:

1. An enrichment of the defendant;
2. A corresponding deprivation of the plaintiff; and
3. An absence of juristic reason for the enrichment.

[100] In *Garland v. Consumers' Gas Co.*, 2004 SCC 25, the Supreme Court of Canada provided guidance with respect to the juristic reason part of the test for unjust enrichment. Justice Iacobucci states as follows at paras. 44 – 46:

> 44 The parties and commentators have pointed out that there is no specific authority that settles this question. But recalling that this is an equitable remedy that will necessarily involve discretion and questions of fairness, I believe that some redefinition and reformulation is required. Consequently, in my view, the proper approach to the juristic reason analysis is in two parts. First, the plaintiff must show that no juristic reason from an established category exists to deny recovery. By closing the list of categories that the plaintiff must canvass in order to show an absence of juristic reason, Smith's objection to the Canadian formulation of the test that it required proof of a negative is answered. The established categories that can constitute juristic reasons include a contract (*Pettkus, supra*), a disposition of law (*Pettkus, supra*), a donative intent (*Peter, supra*), and other valid common law, equitable or statutory obligations (*Peter, supra*). If there is no juristic reason from an established category, then the plaintiff has made out a *prima facie* case under the juristic reason component of the analysis.
>
> 45 The *prima facie* case is rebuttable, however, where the defendant can show that there is another reason to deny recovery. As a result, there is a *de facto* burden of proof placed on the defendant to show the reason why the enrichment should be retained. This stage of the analysis thus provides for a category of residual defence in which courts can look to all of the circumstances of the transaction in order to determine whether there is another reason to deny recovery.
>
> 46 As part of the defendant's attempt to rebut, courts should have regard to two factors: the reasonable expectations of the parties, and public policy considerations. It may be that when these factors are considered, the court will find that a new category of juristic reason is established. In other cases, a consideration of these factors will suggest that there was a juristic reason in the particular circumstances of a case which does not give rise to a new category of juristic reason that should be applied in other factual circumstances. In a third group of cases, a consideration of these factors will yield a determination that there was no juristic reason for the enrichment. In the latter cases, recovery should be allowed. The point here is that this area is an evolving one and that further cases will add additional refinements and developments.

[101] In *Alva Construction Limited v. Wilson Cove Estates Inc.*, 2022 NSSC 279, I had cause to review unjust enrichment, noting at paras. 44 and 45:

> [44] The established categories that can constitute juristic reasons include what Justice Iacobucci set forth in the last part of para. 44 of *Garland*, quoted at my para. 42 above. In this case, I find that there is no juristic reason from an established category. In the result, Alva has made out a *prima facie* case under the juristic reason component of the analysis. Accordingly, my analysis must proceed to the second stage, where Wilsons has the burden to rebut the prima facie case by showing that there is some residual reason to deny recovery and that the enrichment should be retained. I must examine all of the circumstances of the transaction between the parties in order to determine whether Alva has shown that there is another reason to deny recovery.
>
> [45] In keeping with the Supreme Court of Canada's guidance, I have borne in mind two factors in this analysis: the reasonable expectation of the parties and public policy considerations.

[102] In this matter, should the situation reach the point where the burden shifts to Sipekne'katik, I am not persuaded on the evidence before me that Sipekne'katik will require the documentation that they are asking for. In saying this I am mindful of the potential examination of all of the circumstances of the transaction between the parties. I say this also bearing in mind the reasonable expectations of the parties and public policy considerations. In my view, straying into MFCS's arrangements with other Bands will no way inform the trier of fact on the critical issues between these parties.

Undertaking Regarding the Public Relations Company

[103] During Ms. Johnson's discovery it emerged that a public relations company was retained by MFCS. This lead to an undertaking to review and produce any relevant documents regarding National, the public relations company. MFCS counsel subsequently advised in his August 25, 2022 letter to Sipekne'katik counsel:

> To the extent any such documentation exists, it is protected by litigation and/or solicitor-client privilege. It is not disclosable on that basis.

[104] In Mr. James' affidavit he provides this background and rationale for the records over which MFCS is claiming privilege:

> 8. I was first retained as legal counsel by Mi'kmaw Family and Children's Services of Nova Scotia ("MFCS") regarding the present proceeding on October 8, 2021. From the time I was retained, potential litigation was

contemplated against Sipekne'katik regarding Sipekne'katik's stated demand that MFCS vacate its Indian Brook office.

9. I referred MFCS to public relations firm National Public Relations ("National") on October 27, 2021 regarding MFCS' potential litigation against Sipekne'katik. I was informed by email from National later that day that MFCS had retained National.

10. From my recollection and review of the records over which MFCS is claiming privilege, the following is an accurate description of the records' contents:

    (a) There are 78 email records, some of which contain attachments, which date between October 27, 2021 and August 29, 2022;

    (b) These records all pertain entirely to the present litigation against Sipekne'katik. They do not reference any other litigation or business interests of MFCS or any general elements of public relations.

    (c) These email records all include external legal counsel for MFCS, either myself and/or Anna-Marie Manley, who are the counsel of record for MFCS in this proceeding;

    (d) Most of these email records include other MFCS management-level employees and the Chair of the Board of Directors for MFCS.

    (f) In each of these email records, I, Ms. Manley and/or Ms. Levangie are included for the express purpose of providing a legal review of draft communications documents, which are attached to some of the email records.

    (g) In some of these email records, I, Ms. Manley and/or Ms. Levangie provide legal advice and opinion regarding the phraseology used in the draft communications documents.

    (h) Where I provided legal advice in the email records and in some attachments, I did so for the purpose of ensuring the legal accuracy of the draft communications documents with respect to the present litigation.

    (i) From my review of the available records, the other legal counsel copied provide commentary consistent with ensuring the legal accuracy of the draft communications documents with respect to the present litigation.

    (j) From the context of these communications, I understood that they were intended to remain confidential among the parties who were copied.

    (k) None of these documents have been disclosed to Sipekne'katik, nor have their contents.

> 11. From my review of the records over which MFCS is claiming privilege, the dominant purpose of each of these records is the present litigation involving Sipekne'katik. Specifically, the purpose of each of these records is to ensure that any public communications regarding the present litigation are factually accurate and align with and support the litigation strategy in the present litigation.

[105] In his October 17, 2022 sealed envelope letter to the Court, MFCS's counsel enclosed a volume of 44 tabbed documents matching the description set out in para. 10(a) quoted above.

[106] In their brief Sipekne'katik argues that the documents attract neither solicitor-client privilege or litigation privilege:

> 52. Asserting solicitor-client privilege would appear to be entirely unfounded. Solicitor-client privilege protects communications between lawyer and client. Communications between MFCS and a public relations firm are entirely different in nature. Public relations firms, by their nature, communicate publicly. They do not give legal advice.
>
> 53. Furthermore, there is no foundation to claim litigation privilege. The nature of a public relations firm's work is entirely distinguishable, antithetical even, to the notion of a lawyer's private preparations for trial on a client's behalf.
>
> 54. Sipekne'katik submits that the narrative put forward by MFCS in its communications with the public relations firm constitute a contemporaneous record of MFCS' legitimate expectations of its dealings with Sipekne'katik at the time, which is relevant to the court's assessment of MFCS' unjust enrichment claim, as discussed above.

[107] In response, MFCS's counsel states:

> As set out in paragraphs 8 to 11 of the Solicitor's Affidavit of Dennis James, the records in MFCS' possession are all email records with attachments. The documents were all created in the time period after Sipekne'katik provided formal notice that it was requiring MFCS to vacate the Indian Brook office, at the time when MFCS was contemplating litigation. All records relate to the present litigation. The majority of the correspondence involves MFCS personnel (management and the Chair of the Board of Directors). All correspondence involves MFCS legal counsel (either in house and external) and a public relations firm. The dominant purpose of the correspondence is the present litigation; specifically, to ensure that any public communications regarding the present litigation are factually accurate and align with and support the litigation strategy in the present litigation.

> Review and comments from legal counsel are actively sought and provided. Correspondence is exchanged with the expectation of confidentiality.

[108] In *Hatch Ltd. v. Factory Mutual Insurance Company*, 2015 NSCA 60, Justice Scanlan referred to what is meant by litigation privilege at para. 12, drawing from Justice Hood's decision in *Sable Offshore Energy Inc. v. Ameron International Corporation*, 2013 NSSC 131. Scanlan, J.A. then noted:

> [13] The motions judge correctly noted that she had to determine whether the document or material was produced for the dominant purpose of litigation. She also had to decide whether there was a reasonable prospect for litigation at that time. She correctly noted these are fact-based inquiries to be determined by examining the circumstances of each case. I adopt what I consider to be a succinct statement of the test for litigation privilege as enunciated in *Raj v. Khosravi*, 2015 BCCA 49:
>
> > [20] In summary, to succeed in a claim of litigation privilege over a document the person seeking to invoke the privilege has the onus of establishing that: (i) litigation was "in reasonable prospect" when the document was produced; and (ii) that the "dominant purpose" of the document was to obtain legal advice or was to conduct or aid in the conduct of the litigation.
>
> This statement is in accord with the test as applied by Justice Hood in *Sable* and as relied upon by the motions judge. The issue of dominant purpose is fact-based determination and should not be disturbed absent a palpable and overriding error.
>
> [14] The motions judge correctly pointed out that whether a party has retained counsel is relevant but not an end to the analysis. (See *Mitsui& Co. (Point Aconi) Limited v. Jones Power Co. Ltd*., 2000 NSCA 96). The primary litigation in this case involves complex multi-party claims dealing with allegations of failure in the construction, design or engineering related to a multi-million dollar facility. Many of the parties, as would be expected, lawyered up soon after they learned of the collapse of the recently built wharf. Retention of counsel is but one consideration when determining the issue of litigation privilege as I have already noted from the comments of Justice Fish in *Blank v. Canada (Minister of Justice)*, 2006 SCC 39, para32.
>
> [15] As noted in *Di-Anna Aqua Inc. v. Ocean Spar Technologies L.L.C.*, 2002 NSSC 138, the onus of proving privilege rests on the individual claiming privilege. The motions judge assessed the issue of whether there was a reasonable prospect of litigation independent from the issue of retention of counsel. She accepted that the issue of coverage was not in dispute between FMI and the insured. She found that
>
> > [92] ... "Clearly a subrogated claim for damages was being contemplated, as against third parties. I accept that it was reasonable to have contemplated such at that time."

> [16] In *Raj*, Smith, J.A. said the threshold for determining whether litigation is a "reasonable prospect" is a low one. It is an objective test based on reasonableness. It does not require certainty but the claimant must show something more than speculation. I again refer to para98 of the motions judge's decision. She said she was required to objectively assess the situation from the perspective of a reasonable person. She concluded that it was reasonable to believe that FMI would seek to recover from those responsible. I agree with her conclusion that a reasonable person aware of the circumstances of this case would conclude the claim would not be resolved without litigation.

[109] The Saskatchewan Court of Appeal considered whether solicitor-client privilege attaches to communications with accountants, in *Redhead Equipment v Canada (Attorney General)*, 2016 SKCA 115:

> [44] With respect to documents and communications created specifically by accountants, some principles emerge. There is no such thing as accountant-client privilege (*Tower v M.N.R.*, 2003 FCA 307, [2004] 1 FCR 183 [*Tower*]). Accounting documents will be subject to solicitor-client privilege only if the accountant was used as a representative of a client to obtain legal advice (*Gregory v Minister of National Revenue* (1992), 56 FTR 285 (TD). No privilege attaches where a communication is made to an accountant who must consider it and provide his or her own opinion (*Belgravia [Investments Ltd. v Canada*, 2002 FCT 649] at para 50). In such a situation the accountant is more than a conduit of information. In *Tower*, the Court determined that tax accountants do not give legal advice.
>
> [45] From the foregoing jurisprudence, some principles regarding communications with and of third parties such as accountants can be extracted:
>
> (a) communications of accountants are not in themselves privileged;
>
> (b) facts and figures are not in themselves privileged but may be if they are part of a communication which is privileged;
>
> (c) whether a communication is privileged depends on the function served by the third party in relation to the communication;
>
> (d) the privilege extends only to communications in furtherance of a function essential to the solicitor-client relationship or the continuum of legal advice provided by the solicitor, for example:
>
> (i) a channel of communication between solicitor and client;
>
> (ii) a messenger, translator or transcriber of communications to or from the third party by the solicitor or client;
>
> (iii) employing expertise to assemble information provided by the client and explaining the information to the solicitor; and
>
> (e) no privilege attaches to a communication to an accountant who must consider it and provide his or her own accounting opinion.

[110] With the above guidance in mind, I have carefully reviewed Mr. James' affidavit and the 44 tabbed documents. Without question, the communications of the public relations people (two from National were involved) are not in themselves privileged. Their content and opinions are not in themselves privileged but may be if they are part of a communication that is privileged. Whether an email and/or attachment of National's is privileged depends on the function served by the third party in relation to the communication. The privilege extends only to communications in furtherance of a function essential to the solicitor-client relationship or the legal advice provided by the solicitor. Significantly, no privilege attaches to a communication to a National employee who must consider it and provide her own public relations opinion.

[111] I have not been provided with an affidavit from anyone from MFCS or National to explain National's role. Whereas, Mr. James deposes that "…the purpose of these records is to ensure that any public communications regarding the present litigation are factually accurate and align with and support the litigation strategy in the present litigation", I have examined the documents involving National in order to understand their true role.

[112] Having reviewed the material, I have concluded that National provided communications advice to MFCS. Although Mr. James retained National and he and his associate along with MFCS in-house counsel were included in the voluminous emails, this does not change my view that the reason National was hired was to provide public relations advice. In particular, National came up with a communications plan, media statement and anticipated media questions with suggested answers. I say this having regard to the below email examples:

- in his October 27, 2021 email Mr. James thanks the National employees "…for the time to discuss and co-ordinate the communication piece with the legal piece."
- in the same email he later refers to "the communication advice…"
- in her reply email of the same date, National's Karen White speaks of "understanding how we can provide communications counsel and support …"
- in her email of October 28, 2021, Ms. White speaks of "drafting media responses" and attaches a "communications plan" and "media statement."
- on October 29, 2021, Ms. White attaches an updated communications plan, media statement and Q and A.
- there are several email references to ensuring that an MFCS in-house public relations employee has a copy of the media statement.

[113] Given the above, I cannot accept that the role served by National was in furtherance of a function essential to the solicitor-client relationship or continuum of legal advice provided by MFCS counsel. Rather, I regard National's role as receiving and considering communications and then providing their own public relations advice. In this respect, I find the case somewhat analogous to *Ralmax Properties Ltd. v. Pt. Ellice Properties Ltd.*, 2021 BCSC 2454, where the British Columbia Supreme Court relied on *Redhead Equipment* to inform the analysis. The trial judge described the factual background as follows:

> 13 In the present case, the defendants rely on two affidavits sworn by Berman. The first affidavit of Berman, made July 14, 2020, was filed in opposition to an application by the plaintiff to adjourn the trial, which was then set to commence October 7, 2020. That affidavit sets out a general description of the events that led to this civil claim, including his engagement of Austin. In his second affidavit, Berman describes Austin's role in more detail. He says that he wanted Austin to manage negotiations with the plaintiff, and that he trusted Austin to communicate as necessary with "Advisors" who were providing him and Pt. Ellice with "financial, tax, and other advice". These "Advisors" included the Accountants. Further, Berman says that he authorized Austin to seek and obtain legal advice on behalf of himself and Pt. Ellice. He expected Austin "to obtain the required legal advice and other advice from the Advisors", and that when any decision needed to be made, he expected Austin and the Advisors to provide him with the information and their recommendations. Berman says that he is:
>
> > ... aware that the Advisors, including legal counsel, communicated frequently about many aspects of the negotiations, and it would be my expectation that such communications included the provision of legal advice and opinions from my legal counsel.
>
> That affidavit concludes with a generic description of the "many hundreds" of emails over which the defendants claim privilege, as containing or seeking legal advice or in which legal advice is discussed or described.

[114] Justice Saunders then noted:

> 14 The defendants do not submit that the circumstances necessary to establish a claim of privilege over the third-party communications would be self-evident or readily inferred from a review of the documents themselves. Rather, the defendants rest their privilege claim on characterizing the role of the Accountants as members of a "team". The defendants submit that on their side of the negotiations, they and their advisors did a lot of "brainstorming", with Austin (on behalf of Berman) seeking input from everyone. The defendants submit in this regard that the Accountants' position was analogous to that of employees of a client, whose sharing of privileged solicitor-client communications does not constitute a waiver.

> 15 There is, however, no authority for the proposition that an independent third-party advisor receiving privileged information is to be treated as if they were an employee. Rather, the authorities are clear that each particular third-party communication over which privilege is claimed must be shown by the defendants to have arisen as a consequence of the third party having served a function essential or integral to the solicitor-client relationship, and the giving or receipt of legal advice. The defendants have provided no affidavit evidence from the Accountants that they, in being involved in a particular communication, were simply standing in the place of the client in dealing with the solicitors; nor from their solicitors, that the Accountants' expertise was required by the solicitors to interpret information provided to them by the client in order that legal advice could be provided. Berman's affidavits fall far short of prima facie grounds for the sweeping claim of privilege the defendants assert.

[115] Justice Saunders ultimately found that the defendants failed to show any entitlement to a claim of privilege over the disputed documents.

[116] During Ms. Johnson's discovery she confirmed that a public relations firm had been retained. Counsel for Sipekne'katik asked whether Ms. Johnson had reviewed documents related to the public relations firm as part of MFCS's search for documents, and Ms. Johnson answered she had not. Counsel requested an undertaking that MFCS gather and disclose all relevant documents relating to MFCS engaging the public relations firm. This request was taken under advisement and subsequently refused on the grounds that the documents are covered by litigation privilege and solicitor-client privilege.

[117] As the party claiming privilege over communications, MFCS has the burden on a balance of probabilities of demonstrating privilege (*Hatch* at para. 15). Having regard to the evidence, MFCS has not satisfied me that the National advice was in the solicitor-client or litigation privilege sphere. Rather, on fair reading it amounted to advice on how to deal with the media. In the result and in keeping with the authorities, I have determined that the impugned materials are not subject to the privilege claims. I therefor direct that MFCS's counsel disclose the relevant portions of the National documents to Sipekne'katik.

Undertaking Pertaining to MFCS's Letter to the Federal Government

[118] During Ms. Arseneau's examination she was asked by Mr. Blades about MFCS's request submitted to the federal government to cover moving expenses. At pages 59- 60 occurs the following exchange:

> Q. And how is this submitted? Is it just a spreadsheet or is there a letter or a narrative?
>
> A. There's a spreadsheet. And along with the supporting documentation would be the audited financial statements.
>
> Q. Okay. And is there a cover letter, any sort of narrative explanation as to why the request is being submitted?
>
> A. The spreadsheet would detail the components of the shortfall in relation to the … in relation to the financial statements. So there's a spreadsheet that's prepared documenting the additional … like the total funding shortfall along with the audited financial statements. So on that spreadsheet, I would refer to the audited financial statements.
>
> There's also what's called an Annex "A" that goes along with the audited statements that also shows additional details of further breakdowns on the financial statements and it's all combined and sent to the government with an overall explanation via email as to what the shortfall relates to.
>
> Q. Okay. And it's … as you've suggested a second ago, it's submitted via email.
>
> A. Correct.
>
> Q. Okay. I'll ask for an undertaking to produce that claim submittal. * Okay?

[119] Following the above request counsel engaged in a debate about the relevance (given the January 19, 2022, consent Order severing liability and damages) of the request. Having reviewed all of the provided transcripts and competing arguments, I have no hesitation in concluding that the spreadsheet and audited financial statements are not relevant to the upcoming (liability only) Application in Court. Although Sipekne'katik counsel speculates that MFCS's email may provide an explanation regarding the expense, on fair reading of Ms. Arseneau's evidence there is no basis for this. I would add that the records requested were prepared months after the eviction and do not amount to a contemporaneous account dating to the fall, 2021 matters in issue. In all of the circumstances, I have decided that MFCS need not provide the requested document.

CONCLUSION

[120] The three motions were rather laborious and tedious exercises. In assessing the motions I am cognizant of the Supreme Court of Canada's message in *Hryniak v. Mauldin*, 2014 SCC 7 where Justice Karakatsanis, writing for a unanimous Court stated at paras. 27 and 28:

> 27 There is growing support for alternative adjudication of disputes and a developing consensus that the traditional balance struck by extensive pre-trial processes and the conventional trial no longer reflects the modern reality and needs to be re-adjusted. A proper balance requires simplified and proportionate procedures for adjudication, and impacts the role of counsel and judges. This balance must recognize that a process can be fair and just, without the expense and delay of a trial, and that alternative models of adjudication are no less legitimate than the conventional trial.
>
> 28 This requires a shift in culture. The principal goal remains the same: a fair process that results in a just adjudication of disputes. A fair and just process must permit a judge to find the facts necessary to resolve the dispute and to apply the relevant legal principles to the facts as found. However, that process is illusory unless it is also accessible - proportionate, timely and affordable. The proportionality principle means that the best forum for resolving a dispute is not always that with the most painstaking procedure.

[121] With the proportionality principle in mind, it may be that on future motions to strike portions of affidavits like the ones before the Court here, that the assigned Judge will take it upon herself or himself to convert the matter from an Application to an Action so as to set aside the wrangling over affidavits and dispense with them all together. In this regard, I refer to Rule 5.13(4) which reads:

> **5.13 Motion for directions and to appoint time, date, and place**
>
> …
>
> (4) A judge hearing a motion for directions, or another motion concerning the course of an application, and who is satisfied on the materials filed in the application that it is obvious the application should be converted to an action may, on the judge's own motion without a further hearing, make an order under Rule 6.03(1) of Rule 6 - Choosing Between Action and Application.

In any event, I will leave this for another day.

[122] I would ask MFCS counsel to prepare an Order reflective of the directions contained in this decision. If the parties are unable to agree on costs on the three motions, I will receive written submissions (five pages or less) within 30 days of this decision.

Chipman, J.