# IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *The District of Sechelt v. Information and Privacy Commissioner of British Columbia,* 2021 BCSC 2143

Date: 20211101
Docket: S195174
Registry: Victoria

In the matter of the decision of the Office of the Information and Privacy Commissioner, Order F19-36 dated October 4, 2019 and in the matter of the *Judicial Review Procedure Act*, R.S.B.C. 1996, c. 241

Between:

**The District of Sechelt**

Petitioner

And:

**Information and Privacy Commissioner of British Columbia, and Edward Arthur Pednaud**

Respondents

Before: The Honourable Mr. Justice G.R.J. Gaul

## Reasons for Judgment

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|---|---|
| Counsel for the Petitioner: | J. Krusell |
| Counsel for the Respondent, Information and Privacy Commissioner of British Columbia: | C. Boies Parker, Q.C. |
| No one appearing for the Respondent Edward Arthur Pednaud | |
| Place and Dates of Hearing: | Victoria, B.C.<br>March 3, 2020<br>July 13 & 15, 2020<br>October 26 & 27, 2020 |
| Place and Date of Judgment: | Victoria, B.C.<br>November 1, 2021 |

## Introduction

[1] In the fall of 2019 the Information and Privacy Commissioner for British Columbia (the "IPC") ordered the District of Sechelt ("Sechelt") to produce to Mr. Edward Pednaud, certain emails that Sechelt claimed were privileged and therefore exempt from disclosure.

[2] On this petition for judicial review, Sechelt seeks an order in the nature of *certiorari* setting aside portions of the IPC's order.

[3] As Mr. Pednaud did not participate at the hearing of Sechelt's petition, the IPC is the sole respondent.

## Background Facts

### The Seawatch Development

[4] This judicial review of the IPC order arises in the context of ongoing litigation involving a 28-lot residential property development in Sechelt called Seawatch at the Shores ("Seawatch").

[5] Seawatch was built by a developer doing business under several entities, known and referred to collectively by the parties as "Concordia". Over time, geotechnical difficulties and related issues arose at Seawatch. Most notably, in 2015, a sinkhole developed on one of the Seawatch lots, rendering it unsafe for habitation.

[6] The geotechnical and related issues have led to multiple ongoing lawsuits involving Concordia, Sechelt and certain Seawatch homeowners. The actions generally allege that Sechelt was negligent in relying on the independent engineering team led by Concordia in approving and allowing the construction of Seawatch. In addition to the legal actions commenced by individual Seawatch property owners, Concordia commenced an action against Sechelt in June of 2016 and Sechelt filed its own action against Concordia in July of 2017.

The Freedom of Information Request

[7] Mr. Pednaud is one of the individual Seawatch property owners. On 19 November 2015, he applied under the *Freedom of Information and Privacy Act*, R.S.B.C. 1996, c. 165 ("*FIPPA*") for disclosure of all Sechelt's files relating to the Seawatch development (the "FOI Request").

[8] On 3 February 2016, Sechelt notified Mr. Pednaud that it was withholding certain of the requested records under ss.12, 13, 14, 17 and 21 of *FIPPA*.

[9] On 11 March 2016, Mr. Pednaud asked the IPC to conduct a review of Sechelt's decision to withhold certain records.

[10] With the assistance of the IPC, the parties attempted to mediate their dispute; this resulted in Mr. Pednaud narrowing his FOI Request to emails and text messages in Sechelt's possession about the Seawatch subdivision and Concordia.

[11] In response to Mr. Pednaud's new, more focussed request, Sechelt advised that it does not retain text messages. It did however, on 31 January 2017, release a series of records to Mr. Pednaud but refused to provide others, asserting their disclosure was exempted by the legal advice exception contained in s. 14 of *FIPPA*.

[12] On 23 April 2018, Sechelt provided additional records to Mr. Pednaud, however it continued to assert that certain other records could not and would not be disclosed on account of a claim of privilege.

The Inquiry

[13] On 28 August 2018, after attempts at further mediation failed to resolve the matter, Mr. Pednaud requested the IPC hold an inquiry pursuant to Part 5 of *FIPPA* (the "Inquiry"). The records that formed the subject of the Inquiry were 342 emails or email chains that Sechelt had either entirely or partially withheld from Mr. Pednaud (the "Disputed Records").

[14] The IPC adjudicator assigned to conduct the Inquiry (the "Adjudicator"), considered whether Sechelt was authorized to withhold disclosure of the Disputed

Records on the basis that the records were protected by legal advice privilege or litigation privilege and thus exempted from disclosure by s. 14 of *FIPPA*.

[15] Following Sechelt's initial submission to the Inquiry, dated 26 September 2018, the Adjudicator informed Sechelt that it had not provided sufficient information to allow her to make any findings respecting the application of s. 14 of *FIPPA* to the Disputed Records. In her letter dated 4 February 2019 to Sechelt's counsel (not counsel before me), the Adjudicator explained:

> …I do not have sufficient information to make any findings as to the District's claim that s. 14 applies to the responsive records. Due to the vital importance of solicitor client privilege, I write to offer the District another opportunity to provide evidence regarding its claims.

[16] Specifically, the Adjudicator sought additional information respecting which type of privilege Sechelt was claiming for each of the Disputed Records, and a description of how each record met the legal test for the type of privilege being claimed. The Adjudicator also sought more information about the individuals involved in each of the records.

[17] On 25 March 2019, Sechelt provided the Adjudicator, amongst other things, a spreadsheet with a description of each Disputed Record as well as a table of the names of each individual identified in the records. The Adjudicator was also provided with a copy of all the Disputed Records.

The Adjudicator's Decision and Order

[18] On 4 October 2019, the Adjudicator rendered her decision and issued Order F19-36 (the "Order"). Her reasons are indexed at 2019 BCIPC 40 (the "Decision").

[19] At the Inquiry, Sechelt had the onus of persuading the Adjudicator that privilege attached to the Disputed Documents. In doing so, Sechelt needed to identify and articulate the privilege being claimed. The Adjudicator found that legal

advice privilege or litigation privilege applied to some, but not all of the records. At paras. 12 and 13 of her Decision, the Adjudicator explains:

> [12] Section 14 allows public bodies to refuse to disclose information protected by solicitor client privilege. Section 14 encompasses two kinds of privilege recognized at common law: legal advice privilege and litigation privilege. Legal advice privilege protects confidential communications between a solicitor and client made for the purpose of obtaining and giving legal advice; litigation privilege applies to materials gathered or prepared for the dominant purpose of litigation.
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> [13] For the reasons that follow, I find that legal advice privilege or litigation privilege applies to much, but not all, of the information in dispute.

[20] The Order directed Sechelt to provide Mr. Pednaud with access to the 84 Disputed Records over which the Adjudicator found litigation privilege or legal advice privilege did not apply, by no later than 19 November 2019.

[21] In addressing the Disputed Records before her, the Adjudicator found that they could be divided into three distinct categories:

1) communications exclusive to Sechelt and its lawyers;
2) internal communications of Sechelt; and
3) communications involving third parties.

Legal Advice Privilege

[22] The Adjudicator first considered Sechelt's claim of legal advice privilege, also known as solicitor-client privilege, to these three categories of communications. In doing so, she referenced one of the leading cases in this area of the law, *Smith v. Jones*, [1999] 1 S.C.R. 455, and the following oft quoted observations of Mr. Justice Cory on the purpose of legal advice privilege:

> [46] Clients seeking advice must be able to speak freely to their lawyers secure in the knowledge that what they say will not be divulged without their consent. It cannot be forgotten that the privilege is that of the client, not the lawyer. The privilege is essential if sound legal advice is to be given in every field. It has a deep significance in almost every situation where legal advice is sought whether it be with regard to corporate and commercial transactions, to family relationships, to civil litigation or to criminal charges. Family secrets, company secrets, personal foibles and indiscretions all must on occasion be revealed to the lawyer by the client. Without this privilege clients could never be candid and furnish all the relevant information that must be provided to

> lawyers if they are to properly advise their clients. It is an element that is both integral and extremely important to the functioning of the legal system. It is because of the fundamental importance of the privilege that the onus properly rests upon those seeking to set aside the privilege to justify taking such a significant step.

[23] Regarding communications exclusive to Sechelt and its lawyers, the Adjudicator found all but one record fell within the four criteria required for legal advice privilege to apply. The single email not protected by this privilege involved business advice and information concerning the pricing of non-legal services offered by a third party. At paras. 28 to 30 of her Decision, the Adjudicator explains:

> [28] These types of emails clearly meet the four criteria required for legal advice privilege to apply. They are written communications between the District and its lawyers that directly relate to the seeking, formulating and giving of legal advice. As noted, these emails exclusively involve District representatives and lawyers retained by the District. This fact, paired with the context and content of these communications, leads me to find that these emails were intended to be confidential. I find that s. 14 authorizes the District to withhold these communications.
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> [29] However, as noted, in order for legal advice privilege to protect a communication, that communication must be directly related to the seeking, formulating or giving of legal advice or part of the continuum of communications related to that legal advice. The fact that a client and solicitor have a confidential communication does not necessarily suffice to establish privilege. Former Commissioner Loukidelis put it this way: "... even if a solicitor and client relationship exists, the lawyer must be acting as a lawyer and must be providing legal advice before the communication in question can be privileged.
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> [30] In this case, I am not satisfied that one of the exclusive District-to-lawyer communications directly relates to the seeking, formulating or giving of legal advice or is otherwise part of the continuum of information exchanged in relation to that advice. This email contains information and business advice about the pricing of non-legal services offered by a third party. The District has not explained how this email would reveal privileged communications and it is not clear to me. In my view, the District has not met its burden of establishing that legal advice privilege applies to this email, so s. 14 does not apply.

[24] With respect to Sechelt's internal communications, the Adjudicator found that many of the records were protected by legal advice privilege because they described, commented, shared, discussed, or allowed the reader to make accurate inferences about legal advice received or intended to be received by Sechelt. However, the Adjudicator found that some of the internal Sechelt communications

were not about legal advice and therefore were not protected by s. 14 of *FIPPA*. At paras. 31 to 34 of her Decision, the Adjudicator notes:

> [31] Some of the emails consist of internal District discussions that relate to legal advice the District received from its lawyers. In these types of emails, District representatives share legal advice with one another, comment on it and discuss its potential ramifications. I find that legal advice privilege extends to these communications wherever they explicitly contain, comment on, describe or could allow for accurate inferences as to privileged communications the District had with its lawyers. Section 14 authorizes the District to withhold this type of internal email.
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> [32] The District also withheld internal communications discussing the potential need to request legal advice. Previous orders have held that a statement in a record about the intent or need to seek legal advice at some point in the future does not, on its own, suffice to establish that a confidential communication between a client and solicitor actually occurred. In order to establish that legal advice privilege applies, the evidence must show that disclosure of the statement would reveal actual confidential communications between solicitor and client.
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> [33] In this case, a thorough review of the totality of the records leads me to conclude that disclosing these internal emails would reveal confidential communications the District had with its lawyers. I make this finding because the emails in which District representatives wrote about their intentions to seek legal advice contain some of the same information as the communications in which the District actually sought legal advice as intended. Given this, I find that in this case, disclosing the internal client emails that express an intent or need to seek legal advice would reveal privileged communications between the District and its lawyers. Therefore, legal advice privilege protects this type of internal email and s. 14 applies.
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> [34] However, following a careful review of the records, I am not satisfied that every internal District email reveals privileged communications the District had with its lawyers. Where internal emails do not describe, comment on, share, discuss or in any way allow for accurate inferences as to legal advice the District received or intended to seek from its lawyers, legal advice privilege does not apply. Section 14 does not authorize the District to withhold these types of internal District emails.

[25] The third and final category of records identified by the Adjudicator involve third parties and include communications with:

1. The Municipal Insurance Association of British Columbia, Sechelt's insurer (the "Insurer Communications");
2. Employees of Thurber Engineering ("Thurber") who had been retained as a consultant by Sechelt's counsel (the "Thurber Communications"); and
3. other third parties.

[26] The Adjudicator found that some of the records between Sechelt and its insurer were protected by legal advice privilege. At paras. 37 and 38 of her Decision, the Adjudicator remarks:

> [37] As described above, legal advice privilege extends to confidential communications between an insured, insurer and solicitor when those communications relate to legal advice because of the special, tripartite relationship between these parties. With this in mind, I find that some of the emails involving the District's insurer meet all four requirements for legal advice privilege to apply.
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> [38] These specific emails involve only District representatives, the District's insurer, and lawyers retained by the District (or some combination of these three parties). In these emails, the three parties discuss the legal and geotechnical issues occurring at Seawatch and either seek, give or talk about legal advice. I can tell from the content of these emails that the three parties have a shared interest and are not working in opposition. Additionally, in my view, these emails contain the type of information that lawyers, clients and insurers would discuss confidentially in the circumstances. Several of these emails also contain a strictly worded confidentiality proviso following the signature block. The confidentiality proviso paired with the nature, context, content and recipients of these emails indicates to me that these communications were intended to be confidential. For these reasons, I find that legal advice privilege applies to these emails, so s. 14 authorizes the District to withhold them.

[27] The Adjudicator reached a different conclusion when she considered Sechelt's claim of legal advice privilege over the Thurber Communications. The Adjudicator was not satisfied that Thurber served as a channel of communication between the client and solicitor or performed a function integral to the solicitor-client relationship, as was suggested by Sechelt. At paras. 39 to 43 of her Decision, the Adjudicator observes:

> [39] The District also claims legal advice privilege applies to emails that involve Thurber (the Thurber communications). In some of the Thurber communications, both the District and its lawyers are involved. In others, only the District or its lawyers communicate with Thurber.
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> [40] The only aspect of the District's submissions that relates to the Thurber communications appears in the description spreadsheet. In it, the District describes some records as "communications between counsel and third party consultants retained by counsel for the purpose of advising client." While the District does not explicitly say this, my review of the records leads me to conclude that the third party consultant is Thurber.
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> [41] As mentioned above, legal advice privilege only extends to communications involving third parties in limited circumstances. Briefly, legal

> advice privilege will apply if the communication meets the criteria for legal advice privilege and the third party either:
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> > (a) serves as a channel of communication between client and solicitor; or
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> > (b) performs a function integral to the solicitor client relationship.
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> [42] A third party serves as a channel of communication if it acts as an "agent of transmission," carrying information between the solicitor and client, or if its expertise is required to interpret information provided by the client so that the solicitor can understand it.
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> [43] A third party's function is integral to the solicitor client relationship if, for example, the third party has the client's authorization to either: (a) direct the solicitor to act on the client's behalf; or (b) seek legal advice from the solicitor on the client's behalf. Conversely, a third party's function is not integral to the solicitor client relationship if, for example: (a) the third party gathers information from outside sources and passes it on to the solicitor so that the solicitor might advise the client; or (b) the third party acts on legal instructions from the solicitor. [Emphasis in original]

[28] In concluding that Thurber Communications were not protected by legal advice privilege, the Adjudicator explains at paras. 47 to 49 of her Decision:

> [47] …I have considered whether Thurber acted as a channel of communications between the District and its lawyers. The District has not claimed that Thurber acted in this way and I see no evidence that it did. Nothing in the evidence or submissions indicates that Thurber's services were necessary to explain the District's information to the District's lawyers in order to enable the lawyers and the District to understand and communicate with one another. Furthermore, in the records I do not see Thurber acting as an "agent of transmission" by carrying information between the District and its lawyers. Therefore, I am not satisfied that Thurber acted as a channel of communication.
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> [48] I have also considered whether Thurber's function was integral to the relationship between the client and solicitor. As noted above, the District's description of some of the Thurber communications says that the District's lawyers retained Thurber "for the purpose of advising client." As *College of Physicians* establishes, the fact that a lawyer retains third party experts to assist her in advising her client does not, on its own, mean that legal advice privilege applies to the resulting third party communications. The courts have made it clear that "communications with a third party are not protected by [legal advice] privilege merely because they assist the solicitor in formulating legal advice to the client."
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> [49] Based on the content of the records at issue, I am not satisfied that the District authorized Thurber to seek legal advice from, or direct, the District's lawyers. Nothing in the communications themselves or the District's submissions indicates that the District authorized Thurber to do either of these things. Rather, the facts indicate that Thurber was retained in order to provide its independent, expert assessment of the geotechnical engineering

> issues that arose at Seawatch. Given the content of the records, I conclude that Thurber collected, analyzed and provided information to the District's lawyers respecting various geotechnical events at Seawatch. While Thurber's opinions were relevant, and perhaps even essential, to the legal problems confronting the District, nothing in the records suggests that Thurber stood in the place of the District for the purposes of obtaining legal advice.

[29] With respect to the remaining records involving third parties, the Adjudicator found that Sechelt had not provided sufficient evidence to establish any of the communications were intended to be confidential. At paras. 52 to 56 of her Decision, the Adjudicator explains:

> [52] I will now consider the emails that include Concordia representatives, employees of Golder and Urban Systems, lawyers working for Seawatch owners or Concordia (opposing counsel), and the individual the District did not include in its identification table. The emails I am discussing here involve District representatives, District lawyers and one of the third parties I just identified.
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> [53] In my view, the District has provided no evidentiary basis to establish that the emails that include the District, its lawyers and these third parties were intended to be confidential. The District did not proffer evidence about the subjective intentions of any of the individuals included in these emails, for example by providing an affidavit from someone involved. Furthermore, beyond quoting the four-part test for legal advice privilege, the District did not mention confidentiality anywhere in its initial submissions or subsequent correspondence respecting its s. 14 claims. In short, I have no submissions or evidence from the District that specifically relates to the confidentiality of the emails at issue other than the emails themselves.
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> [54] After carefully reviewing the emails and considering the general context of the issues that arose at Seawatch as I understand them, I fail to see how any of the communications described in paragraph 52 meet the confidentiality requirement necessary for legal advice privilege to apply. It does not make sense to claim that a communication that included a Concordia representative or opposing counsel, for example, would qualify as a confidential solicitor-client communication particularly given the context of the Seawatch litigation. Additionally, the District did not explain anything about what Golder or Urban Systems do or why employees from these two organizations were involved in some of the communications at issue. When it comes to the individual who the District did not identify in its identification table, I simply do not have sufficient evidence to find that the communications including this unidentified individual were confidential.
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> [55] The District has not asserted that any of the third parties described in paragraph 52 acted as a channel of communications or performed a function integral to the relationship between the District and its lawyers. Nothing in the emails themselves suggests that they did. As described in detail above, legal advice privilege only extends to communications involving third parties when

> those parties acted as a channel of communications or performed a function integral to the relationship between client and solicitor.
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> [56] Ultimately, the District did not provide submissions or evidence to explain how these communications that include individuals other than the District and its lawyers meet the confidentiality requirement necessary for legal advice privilege to apply. For all these reasons, I find that the District cannot withhold these communications under s. 14.

Litigation Privilege

[30] In addition to Sechelt's claim of legal advice privilege, the Adjudicator considered Sechelt's assertion that the Disputed Records were protected by litigation privilege.

[31] In addressing this facet of Sechelt's claim, the Adjudicator referred to a number of case authorities that address the relevant principles of litigation privilege, including *Gichuru v. British Columbia (Information and Privacy Commissioner)*, 2014 BCCA 259. Having done so, the Adjudicator states at para. 60 of her Decision:

> [60] In order for litigation privilege to protect a document, the party asserting privilege - in this case the District - must establish two facts:
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> 1) Litigation was ongoing or was reasonably contemplated at the time the document was created; and
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> 2) The dominant purpose of creating the document was to prepare for that litigation.

[32] From the materials presented to her, the Adjudicator found that litigation was a reasonable prospect beginning in 2012. She also found that some of Sechelt's communications with its insurer and Thurber were for the purpose of assisting with the conduct of the impending litigation. However, the Adjudicator also concluded that the remaining records involving third parties did not meet the test for litigation privilege because she was not satisfied that the dominant purpose of the communications was litigation-related. At paras. 68 to 73 of her Decision, the Adjudicator explains:

> [68] The District says that some of the emails at issue were communications made for the "predominant purpose of preparing for" the Seawatch litigation. Beyond this statement, which appears in the description spreadsheet, the District has adduced no other evidence that specifically addresses the dominant purpose of any of the emails. For example, the

District has not provided affidavit evidence from any of the individuals involved in the communications. That said, I have carefully reviewed each individual email in an effort to determine whether the contents of the documents themselves "establish that it is more likely than not that each document was prepared for the dominant purpose of seeking legal advice or aiding in the conduct of litigation."

[69] My review of the records in light of the context of the Seawatch events as I understand them leads me to find that the dominant purpose of some of the communications was litigation. For example, I am satisfied that the purpose of some communications that involve the District's insurer and some of the Thurber communications was to aid in the conduct of the impending Seawatch litigation or seek legal advice. Litigation privilege applies to these emails.

[70] However, based on my review, I am not satisfied that other emails were created for the dominant purpose of litigation. In making this finding, I have kept the following words of the BC Court of Appeal in mind:

> A finding of dominant purpose involves an individualized inquiry as to whether, and if so when, the focus of the investigation/inquiry shifted to litigation. This is a factual determination to be made based on all of the circumstances and the context in which the document was produced. As Wood J.A. explained in *Hamalainen*:
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> > [24] Even in cases where litigation is in reasonable prospect from the time a claim first arises, there is bound to be a preliminary period during which the parties are attempting to discover the cause of the accident on which it is based. At some point in the information gathering process the focus of such an inquiry will shift such that its dominant purpose will become that of preparing the party for whom it was conducted for the anticipated litigation. In other words, there is a continuum which begins with the incident giving rise to the claim and during which the focus of the inquiry changes. At what point the dominant purpose becomes that of furthering the course of litigation will necessarily fall to be determined by the facts peculiar to each case.

[71] In this case, I find it clear that some of the emails were not written for the dominant purpose of litigation. Instead, the content of some emails indicates that the parties were attempting to discover and understand the cause(s) of the various geotechnical events at Seawatch. In some instances, the emails expressly indicate that the individuals involved were engaged in an information gathering process.

[72] Other emails relate solely to certain administrative matters. I do not understand how these specific administrative matters would aid in the conduct of litigation and the District has not explained.

[73] Lastly, in one email, I note that the writer explicitly states his purpose in sending the message and it was not to aid in the conduct of the Seawatch litigation or seek legal advice in relation to the Seawatch matters. This email relates to multiple matters and I find it clear that the dominant purpose for

> creating the email was not to prepare for the Seawatch litigation. Therefore, I find that litigation privilege does not apply to this email. [Emphasis in original]

[33] In the result, the Adjudicator ruled that s. 14 of the *FIPPA* did not permit Sechelt to withhold disclosure of the information that she had highlighted in pink colouring on 84 of the 342 Disputed Records she had examined during the Inquiry.

**Judicial Review of the Decision**

[34] In partial compliance with the Adjudicator's Order, Sechelt has produced 54 of the 84 records it had been ordered to disclose to Mr. Pednaud. However, it continues to withhold the remaining 30 records which were numbered at the Inquiry as:

> 50, 54, 59, 75, 79, 80, 83, 87, 88, 89, 90, 157, 158, 159, 160, 165, 166, 168, 176, 210, 234, 265, 266, 305, 306, 307, 308, 309, 324, and 334 (the "Remaining Records")

[35] By petition filed 19 November 2019, Sechelt seeks to have the Adjudicator's decision judicially reviewed. More specifically, it seeks an order in the nature of *certiorari* setting aside those portions of the Order that require it to provide to Mr. Pednaud the information in the Remaining Records that the Adjudicator has highlighted in pink colouring.

[36] With respect to the Remaining Records, Sechelt submits the Adjudicator erred in finding they were not protected by privilege and therefore subject to disclosure to Mr. Pednaud.

[37] It is these 30 Remaining Records and Sechelt's continued claim of privilege over them that forms the foundation of its petition for judicial review.

**Issues**

[38] Based upon the materials before the court and the submissions of counsel, the following questions need to be answered:

1. What role does IPC's counsel play on this judicial review?
2. What is the applicable standard of review?

3. Should the Court exercise its discretion to hear new arguments and claims that were not made before the Adjudicator?
4. Did the Adjudicator err in concluding that Sechelt had not discharged its onus to demonstrate the Remaining Records were protected by legal advice privilege or litigation privilege? Specifically, did the adjudicator err in finding:
    i. that Sechelt failed to establish that Thurber acted as a channel of communication between client and solicitor or that it performed a function integral to the solicitor-client relationship;
    ii. that the Thurber Communications were not made for the dominant purpose of preparing for litigation and therefore failed to establish they were protected by litigation privilege;
    iii. that the Insurer Communications did not meet the requirements of legal advice privilege or were not made for the dominant purpose of preparing for litigation and were therefore not protected by litigation privilege; and
    iv. that one particular record between Sechelt and its legal counsel (#334) was not covered by legal advice privilege?

**Discussion**

1. <u>What role does counsel for the IPC play on this judicial review?</u>

[39] Counsel for the IPC raised this question as a preliminary issue at the outset of the hearing of this judicial review.

[40] In *British Columbia (Attorney General) v. British Columbia (Information and Privacy Commissioner)*, 2019 BCSC 1132, aff'd 2020 BCCA 238, Madam Justice Ross addressed the role of the originating tribunal in a judicial review of one of its decisions. Commenting on the scope of counsel for the tribunal's role on such a review, Justice Ross concluded:

> [25] In my view submissions with respect to the nature of the legislative scheme, the record of the proceeding, whether the petitioner should be permitted to raise a new issue in the judicial review, the standard of review, and the appropriate remedy fall within the scope described in the authorities. In the particular circumstances of this case, given the *in camera* evidence to which CCF did not have access, it was appropriate in my view for the Commissioner to make submissions about the *in camera* material without defending the Decision on its merits.

> [26] However, it fell outside the appropriate role for the tribunal to make submissions about the extent to which this Court is bound by previous decisions of this Court. That is a matter within the expertise and jurisdiction of this Court, not the tribunal. In addition, it was appropriate for the Commission to make submissions concerning the standard of review associated with findings of fact, factual inferences and findings of mixed fact and law. However, in my view, the characterization of different aspects of the Decision as fact, factual inference and mixed fact and law was a matter that strayed beyond the appropriate role for the tribunal.

[41] Further, the Supreme Court of Canada has identified instances were it is appropriate for the tribunal to make submissions on the merits of the decision under review. This was addressed in *Ontario (Energy Board) v. Ontario Power Generation Inc. 2015 SCC 44* ("*Ontario (Energy Board)")*. In that case the Supreme Court concluded that a trial court has discretion to permit counsel for a tribunal to assume a greater role and to argue the merits of the decision where it is necessary, for example, if an appeal would otherwise be unopposed. The exercise of this discretion should be premised on a careful balancing of the need for fully-informed decision-making and maintaining the tribunal's impartiality. In his reasons for judgment, Mr. Justice Rothstein explained:

> [54] Some cases may arise in which there is simply no other party to stand in opposition to the party challenging the tribunal decision. Our judicial review processes are designed to function best when both sides of a dispute are argued vigorously before the reviewing court. In a situation where no other well-informed party stands opposed, the presence of a tribunal as an adversarial party may help the court ensure it has heard the best of both sides of a dispute.
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> …
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> [57] I am thus of the opinion that tribunal standing is a matter to be determined by the court conducting the first-instance review in accordance with the principled exercise of that court's discretion. In exercising its discretion, the court is required to balance the need for fully informed adjudication against the importance of maintaining tribunal impartiality.
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> …
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> [59] In accordance with the foregoing discussion of tribunal standing, where the statute does not clearly resolve the issue, the reviewing court must rely on its discretion to define the tribunal's role on appeal. While not exhaustive, I would find the following factors, identified by the courts and academic commentators cited above, are relevant in informing the court's exercise of this discretion:

> (1) If an appeal or review were to be otherwise unopposed, a reviewing court may benefit by exercising its discretion to grant tribunal standing.
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> (2) If there are other parties available to oppose an appeal or review, and those parties have the necessary knowledge and expertise to fully make and respond to arguments on appeal or review, tribunal standing may be less important in ensuring just outcomes.
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> (3) Whether the tribunal adjudicates individual conflicts between two adversarial parties, or whether it instead serves a policy-making, regulatory or investigative role, or acts on behalf of the public interest, bears on the degree to which impartiality concerns are raised. Such concerns may weigh more heavily where the tribunal served an adjudicatory function in the proceeding that is the subject of the appeal, while a proceeding in which the tribunal adopts a more regulatory role may not raise such concerns.

[42] In the present case, circumstances of the kind contemplated in *Ontario (Energy Board)* justify this Court's use of its discretion to allow IPC's counsel to make submissions. First, there is the simple fact that there is no respondent to oppose Sechelt's petition. Then there is the fact that the Disputed Records were examined and addressed *in camera*, meaning the original applicant, Mr. Pednaud, has never seen the records in question, and would therefore have had difficulty making submissions or advancing arguments about the application of privilege to those records. Finally, the IPC has specialized knowledge and expertise relating to the issues in this dispute and was therefore well placed to assist the Court to consider and address legal issues and arguments not advanced by Sechelt.

[43] While counsel for Sechelt did not oppose the expanded role of the IPC on this judicial review with any noticeable vigour, in my opinion it was entirely appropriate, and helpful, to permit counsel for the IPC to make submissions on the merits of the decision under review.

2. <u>What is the applicable standard of review?</u>

[44] Sechelt contends that the principal issues on this judicial review relate to the interpretation and application of the law relating to privileged documents and more specifically, whether privilege applies to the Remaining Records. This, says Sechelt, raises a general question of law of central importance to the legal system as a whole

and therefore entails the application of the correctness standard of review. That standard requires a court to undertake its own analysis of the question in dispute and determine whether the administrative tribunal's decision was correct (see: *Canada (Minister of Citizenship and Immigration) v. Vavilov,* 2019 SCC 65).

[45] Sechelt submits that the correctness standard requires this Court to place itself in the Adjudicator's position and reach a decision without any deference to the analysis or conclusions she reached. This means reviewing each of the Remaining Records to determine whether the privilege claimed applies to any or all of them.

[46] The IPC does not dispute that a question of law of central importance to the legal system will attract the higher correctness standard. However, the IPC submits that situations can arise, as in this case, where it is not necessary or appropriate to apply that standard to the entire review before the Court (see: *Mouvement laïque québécois v. Saguenay (City)*, 2015 SCC 16 at para. 50).

[47] The IPC submits that as an administrative tribunal it is entitled to deference on matters where one of its adjudicators assesses the evidence before them and decides questions of fact, even where they do so in the course of deciding a larger issue that is subject to a correctness standard. Therefore, to the extent that the issues before the Court on the present judicial review involve purely factual determinations, such as the circumstances surrounding the creation of the communication or record in question, when it was created, who created or authorized it, and what use was or could be made of it, the standard is reasonableness applies and the adjudicator's findings are entitled to deference.

[48] I am not convinced by the IPC's argument on this point. At the hearing of the appeal from Ross, J's order in *British Columbia (Attorney General) v. British Columbia (Information and Privacy Commissioner)*, the IPC made submissions similar to those before me relating to the ability of the court to bifurcate the analysis and apply differing standards of review. Mr. Justice Harris rejected that argument in

the context of a judicial review of a decision concerning disclosure under s. 14 of *FIPPA*, much like the present case, finding:

> [36] The focus, contends the Commissioner, is now on general questions of law, not fact or mixed fact and law. These latter questions involve the application of legal tests, which may be of general importance, to matters of fact or mixed fact and law, which are not. The importance of particular findings resulting from the application of a test are of importance to the parties, not the system as a whole. Accordingly, a reasonableness standard relating to the application of the test in cases involving solicitor-client privilege in the freedom of information context is consistent with the rationale offered by the Supreme Court for reasonableness review generally.
>
> [37] In the result, the Commissioner says the adjudicator's articulation of the test to be applied, that is the interpretation of s. 14 in this case, is reviewed on a correctness standard, but the application of that test is subject to reasonableness review. In this case, the adjudicator identified the test correctly, and the court should defer to her application of the test to her findings about the facts if it is reasonable. In other words, this Court should apply a reasonableness standard to the decision that, in this case, disclosing the litigation costs would not risk a reasonably possible disclosure of solicitor-client communications.
>
> [38] I am not persuaded by this analysis. The core of the question under review is a general question of law of central importance to the legal system as a whole. This is sufficient to call for review on a correctness standard, notwithstanding the Supreme Court's abandonment of expertise as part of the rationale supporting correctness. The question, as I see the matter, engages the correct scope of a principle that is fundamental to the proper functioning of our legal system; a principle, the protection of which must be as near to absolute as possible. It is a question that, given its importance, calls for a uniform and consistent answer. The question is fundamentally about the scope of solicitor-client privilege. Admittedly, it arises in the factual context of a question about whether solicitor-client privilege attaches to a record disclosing the total sum spent on litigating a matter during a certain time period while the litigation is ongoing. But it remains a question about the proper scope of privilege. Moreover, the answer to that question has precedential value and a significant impact on the administration of justice as a whole and other institutions of government. It goes far beyond the immediate interests of the parties in this case. Respect for the rule of law demands this Court ensure a single, correct answer is provided. The standard of correctness, in my opinion, continues to apply.

[49] In my opinion, these observations apply with equal force to the present situation. The principal question before the Court on this judicial review is whether the Adjudicator properly determined the scope of privilege. The answer to the question will have a significant impact on the administration of justice as a whole. Consequently, the correctness standard is the applicable standard on this review

and I will review the Remaining Records to determine if they are protected by the privilege Sechelt claims.

3. Should the Court exercise its discretion to hear new arguments or claims of privilege that were not raised in the first instance?

[50] The IPC maintains that Sechelt has expanded it submissions over the course of this judicial review to include new claims that litigation privilege or legal advice privilege now apply to some of the Remaining Records, when those arguments were never made before the Adjudicator. For example, the IPC points to the fact that Sechelt did not originally submit before the Adjudicator that the Thurber Communications were protected by litigation privilege. Nor did it argue that legal advice privilege applied to all of the Insurer Communications. Finally, IPC notes that Sechelt's claim that record #176 is protected by settlement privilege is an entirely new claim that was never once mentioned in its submissions to the Adjudicator. The Court is being asked to consider these new arguments (as well as others) for the first time, as none of them were advanced during the Inquiry.

[51] The IPC argues that it is inappropriate for Sechelt to assert new claims of privilege on this judicial review, and equally inappropriate for it to provide new arguments, explanations, and evidence in support of the failed privilege claims that it made at the Inquiry. Simply put, Sechelt had ample opportunity to advance these claims and arguments during the prolonged and comprehensive Inquiry process.

[52] The IPC contends that permitting Sechelt to present these new arguments, evidence and claims of privilege will deprive the Court of the benefit of the Adjudicator's analysis. This in turn, say the IPC, will defeat the legislative intent of having the IPC consider these matters at first instance within the context of the whole administrative scheme.

[53] Sechelt admits that it did not raise the issue of settlement privilege with respect to record #176 during the IPC Inquiry and that it is broadening its argument relating to some of the Remaining Records to include new claims of litigation privilege or legal advice privilege. However, it submits the Court is justified in

exercising its discretion in hearing these expanded arguments, including the patently new issue of settlement privilege, as the submissions are not based on any new facts or evidence. Further, Sechelt submits that the Court is justified in addressing the issues because courts place a high importance on claims of privilege and in particular the role that settlement privilege plays in our justice system.

[54] Additionally, Sechelt submits that this is not a case where allowing the parties to make new submissions or claims would unfairly prejudice one of the parties or deny the Court of an adequate evidentiary record upon which the issues can be properly determined. Rather, Sechelt says its interests alone would be prejudiced by not having its new submissions and claims considered on this judicial review.

[55] Sechelt submits the Adjudicator erred in ordering the production of record #176 as it is subject to settlement privilege. It now asserts for the first time that this record is a communication made with a view to negotiate a resolution of a litigious dispute and was made in confidence and with the intention that it not be disclosed to third parties. Sechelt argues the role and purpose of settlement privilege ought to have been given attention and applied by the Adjudicator in her review of the Disputed Records, particularly where a record is marked “Without Prejudice”, like record #176. Sechelt contends that the Court, on this review, must consider the applicability of settlement privilege to this record as the Adjudicator’s failure to do so is clearly a reversible error.

[56] Sechelt also maintains that the Adjudicator should have considered the applicability of legal advice privilege or litigation privilege to certain of the Disputed Records, even when such a claim was not specifically advanced at the Inquiry.

[57] At paras. 89 and 90 of her written submissions, counsel for the IPC helpfully summarized the situation before the Court created by Sechelt’s desire to supplement its argument on this judicial review with submissions and positions that were not made before the Adjudicator:

> [89] The case at bar exemplified some of the difficulties with raising new issues on judicial review. Litigation privilege, legal advice privilege and

> settlement privilege are all distinct, and require different evidence bases. Because Sechelt did not raise it, the Adjudicator made no determination about the application of litigation privilege to the Thurber Communications or legal advice privilege to the majority of the Insurer Communications. And because there is no new evidence admissible on judicial review, Sechelt now seek to slip in through submissions what might be new relevant "facts" – such as nature of the relationship between Thurber's expertise and the activities of counsel, as well as the identity of an unidentified individual – something not addresses at all before the adjudicator.
>
> [90] The problems are particularly manifest with respect to Record 176. Settlement privilege is not an exception to an applicant's right of access captured by s. 14. It is a privilege at common law, which limits the FIPPA right of access, and IPC Adjudicators apply it on that basis. Because it was never raised by Sechelt (which has the burden on this issue), the Adjudicator did not have an opportunity to address settlement privilege at all, including whether any exceptions to the privilege would apply or whether Sechelt had met its evidentiary burden. Sechelt asks this Court to rule on all of these issues for the first time on judicial review.

[58] In my view, these submissions of the IPC are correct. More to the point, they underscore the reasons why Sechelt should not be permitted to advance new issues and arguments on this judicial review.

[59] Not only has Sechelt newly asserted forms of privilege that were not before the Adjudicator, including settlement privilege, it has also advanced new arguments and provided additional evidence in support of its existing privilege claims.

[60] In *Alberta (Information and Privacy Commissioner) v. Alberta Teachers' Association*, 2011 SCC 61, Mr. Justice Rothstein, writing for the majority, concluded that the discretion to permit a party to raise new issues on a judicial review, that were not argued before an administrative tribunal, ought to be exercised sparingly. At paras. 23 to 26, Justice Rothstein explained:

> [23] Generally, this discretion will not be exercised in favour of an applicant on judicial review where the issue could have been but was not raised before the tribunal (*Toussaint v. Canada Labour Relations Board* (1993), 160 N.R. 396 (F.C.A.), at para. 5, citing *Poirier v. Canada (Minister of Veterans Affairs)*, [1989] 3 F.C. 233 (C.A.), at p. 247; *Shubenacadie Indian Band v. Canada (Human Rights Commission)*, [1998] 2 F.C. 198 (T.D.), at paras. 40-43; Legal Oil & Gas Ltd. v. Surface Rights Board, 2001 ABCA 160, 303 A.R. 8, at para. 12; United Nurses of Alberta, Local 160 v. Chinook Regional Health Authority, 2002 ABCA 246, 317 A.R. 385, at para. 4).

> [24] There are a number of rationales justifying the general rule. One fundamental concern is that the legislature has entrusted the determination of the issue to the administrative tribunal (*Legal Oil & Gas Ltd.*, at paras. 12-13). As this Court explained in *Dunsmuir*, "[c]ourts ... must be sensitive ... to the necessity of avoiding undue interference with the discharge of administrative functions in respect of the matters delegated to administrative bodies by Parliament and legislatures" (para. 27). Accordingly, courts should respect the legislative choice of the tribunal as the first instance decision maker by giving the tribunal the opportunity to deal with the issue first and to make its views known.
>
> [25] This is particularly true where the issue raised for the first time on judicial review relates to the tribunal's specialized functions or expertise. When it does, the Court should be especially careful not to overlook the loss of the benefit of the tribunal's views inherent in allowing the issue to be raised. (See *Council of Canadians with Disabilities v. VIA Rail Canada Inc.*, 2007 SCC 15, [2007] 1 S.C.R. 650, at para. 89, *per* Abella J.)
>
> [26] Moreover, raising an issue for the first time on judicial review may unfairly prejudice the opposing party and may deny the court the adequate evidentiary record required to consider the issue (*Waters v. British Columbia (Director of Employment Standards)*, 2004 BCSC 1570, 40 C.L.R. (3d) 84, at paras. 31 and 37, citing *Alberta v. Nilsson*, 2002 ABCA 283, 320 A.R. 88, at para. 172, and J. Sopinka and M. A. Gelowitz, *The Conduct of an Appeal* (2nd ed. 2000), at pp. 63-68; *A.C. Concrete Forming Ltd. v. Residential Low Rise Forming Contractors Assn. of Metropolitan Toronto and Vicinity*, 2009 ONCA 292, 306 D.L.R. (4th) 251, at para. 10 (*per* Gillese J.A.)).

[61] While this decision pre-dates the Supreme Court of Canada's decision in *Vavilov*, in my opinion the importance of respecting legislative choice and the legislated administrative regime on judicial review remains a valid and useful consideration, including in the conduct of a review based on the correctness standard.

[62] Sechelt was made aware of the Adjudicators' concerns with respect to the evidentiary foundation it had provided her justifying its claims of privilege over the Disputed Records. In her letter of 4 February 2019, the Adjudicator explained those concerns and offered Sechelt the opportunity to provide additional evidence and submissions justifying its claims. She even suggested what information Sechelt might provide and in what format it might do so. It cannot be said that Sechelt did not have ample opportunity to advocate its position to its fullest extent before the adjudicator.

[63] By not putting its “best foot forward” when making its submissions before the Adjudicator and only on this judicial review advancing the additional arguments that should have been made in the first instance, Sechelt has deprived this Court of the Adjudicator’s analysis of these new arguments. Counsel for the IPC is correct when she submits that this defeats the legislative intent of having the IPC examine these matters in the first instance within the context of the entire administrative regimen created by *FIPPA*.

[64] A judicial review is conducted using the record that was before the administrative tribunal. On such a review, the court is tasked with determining whether, having considered and assessed the evidence and submissions of the parties, the tribunal erred in its decision.

[65] The present judicial review is not the time nor the place for Sechelt to advance the new and significant arguments that it now wishes to make in support of its unsuccessful attempt to persuade the Adjudicator that some form of legal privilege protects the records in question. By raising these arguments and claims now for the first time, Sechelt has deprived the Court of the analysis of the Adjudicator. This, in my opinion, is contrary to the interests of justice because I find it constitutes an attempt to circumvent legislative intent that the IPC determine the application of s. 14 of *FIPPA*.

[66] The scope of this judicial review is to determine whether the Adjudicator erred in the application of s. 14 of *FIPPA*; not to permit Sechelt to ‘try again’ with new arguments in front of a different decision-maker. I will not be considering the supplemental explanations or additional claims of new privileges that are only now being advanced for the first time on this judicial review. In my respectful view, to do so would require me to determine if the Adjudicator erred and was incorrect in her decision, based upon arguments and positions that were not before her. This in my view runs afoul of the general purpose and function of a judicial review.

[67] Although I have used the correctness standard and have examined each of the Remaining Records, my judicial review of the Decision has been conducted on the record that was before the Adjudicator.

4. Did the Adjudicator err in concluding that Sechelt had not discharged its onus to demonstrate the Remaining Records were protected by legal advice privilege or litigation privilege?

[68] Sechelt does not challenge the Adjudicator's statements of the law regarding claims of legal advice privilege and litigation privilege. However, it submits that the Adjudicator erred in applying the law by ordering disclosure of records that meet the test for either of those claims.

[69] Sechelt also submits that in applying the correctness standard on this judicial review, the Court ought to review each of the Remaining Records to determine whether the Adjudicator erred in concluding that Sechelt failed to establish the privilege claimed at the Inquiry.

[70] I agree with Sechelt in this regard and have examined and considered each of the Remaining Records to determine whether they are privileged documents, as Sechelt argued before the Adjudicator, and therefore protected from disclosure by s. 14 of *FIPPA*.

The Thurber Communications (records #59, 75, 79, 80, 87, 89, 90, 157-160, 168, 210, 234, 265, 266, 306 – 309, and 324)

[71] Sechelt submits that an examination of the face of these records demonstrates that they are protected from disclosure by either legal advice privilege or litigation privilege. Specifically it says, Thurber's technical expertise and services were necessary to allow its legal counsel to provide it with the confidential legal advice that it required when addressing the potential consequences of the geotechnical issues at Seawatch. Finally, Sechelt contends that the content these records demonstrate that their dominant purpose was for the preparation of reasonably anticipated or already-ongoing litigation.

[72] Sechelt's assertion that these records were protected from disclosure because of litigation privilege is a new claim that was not made to the Adjudicator. As I explained earlier in these reasons I have not acceded to Sechelt's request to advance this new submission on this judicial review.

[73] At paras. 47 to 49 of her decision, the Adjudicator explained the basis for her conclusion relating to the Thurber Documents. Those conclusions can be summarized as follows:

1. No claim had been made and no evidence presented that Thurber acted as a channel of communication between Sechelt and its legal counsel;
2. No submissions had been made or evidence presented suggesting Thurber's services were required to explain Sechelt's information to its legal counsel so as to enable them to better understand and communicate with each other;
3. The records in question did not convincingly show that Thurber acted as an "agent of transmission" for the purpose of relaying information between Sechelt and its legal counsel;
4. The records in question and the submissions of counsel left the Adjudicator unconvinced that Sechelt had authorized Thurber to seek advice from Sechelt's legal counsel or to direct them in any manner;
5. Sechelt retained Thurber to provide Sechelt with independent, expert assessment of geotechnical engineering issues relating to Seawatch, including collecting, analyzing and providing information to Sechelt's legal counsel; and
6. Thurber did not stand in Sechelt's place for the purposes of obtaining legal advice.

[74] I have examined the Remaining Records. I also have reviewed all of the other materials that were before the Adjudicator and I have considered the submissions, both oral and written, of counsel on this judicial review. Having done so, I find the Adjudicator correctly assessed the evidence that was before her and most importantly correctly applied the relevant legal principles when she concluded that Sechelt had not persuaded her that s. 14 of *FIPPA* permitted it to withhold the Thurber Communications from Mr. Pednaud on the grounds they were protected by legal advice privilege.

[75] Sechelt's claim that these records were also protected by litigation privilege requires the Court to consider new arguments that were not before the Adjudicator. For reasons that I have already explained, I am of the view that this judicial review is not the proper forum to raise this new claim and new arguments.

[76] In my opinion, the Adjudicator committed no error when she ordered Sechelt to disclose the portion of the Thurber Documents that she had highlighted in pink colouring. To put it in an affirmative light, having conducted my own assessment of the materials and having applied the uncontested principles of law relating to legal advice privilege, I find the Adjudicator's decision relating to these records was correct.

The Insurer Communications (records # 50, 54, 88, 165, 166, 305, and 308)

[77] Sechelt argued before the Adjudicator that these 7 records were protected by litigation privilege. It also described 2 of them (#88 and #308) as being subject to legal advice privilege.

[78] Sechelt does not dispute the Adjudicator's articulation of the legal principles relating to legal advice privilege or litigation privilege. Its complaint is with the Adjudicator's decision that these records, that contain communications between Sechelt, its insurer, its legal counsel, or a combination of them, do not meet the criteria of records that are protected by either privilege.

[79] Having considered the Adjudicator's Decision and more importantly having examined the records in question myself, I am not persuaded that Sechelt's complaint is well founded.

[80] The Adjudicator found that certain of the Disputed Records that involved communications between Sechelt, its insurer, and its legal counsel were protected by legal advice privilege. This was because the records evidenced the three parties discussing, in confidence, the need for legal advice on the Seawatch project.

[81] Although the Adjudicator did not specifically refer to records #88 and #308 in her Decision, it is clear from the fact that she ordered them disclosed that she was not persuaded that they were protected by legal advice privilege. Having reviewed the records myself, if find the Adjudicator was not incorrect in doing so.

[82] As for Sechelt's claim that the Insurer Communications are protected by litigation privilege, I find the Adjudicator correctly applied the two branches of the applicable test. More to the point, she properly examined whether the records' "dominant purpose" was to prepare for litigation. As she explained in her Decision, she found some of the Disputed Records met the criteria for litigation privilege, while others did not. The Adjudicator found that some of the records which involved the insurers were made in order to aid Sechelt in understanding the causes of the various geotechnical issues at Seawatch; or were for the purpose of information gathering or administrative matters: none of these records were created for the principal purpose of preparing for a lawsuit.

[83] Having conducted the same type of review of these records as I did for the Thurber Communications, I find myself in agreement with the Adjudicator's conclusions. In particular, I, like the Adjudicator, am not convinced that that Insurer Communications in question were created for the dominant purpose of preparing for litigation. Considering the evidence that was before the Adjudicator, I find it was entirely reasonable and correct of her to conclude that the threshold for litigation privilege had not been met and therefore the records could be disclosed to Mr. Pednaud.

Record # 334

[84] Sechelt agrees with accepts the Adjudicator's conclusion that legal advice privilege applies to internal communications between Sechelt officials where those individuals have expressed an intent or need to seek legal advice (see: Decision, para. 33). However, it disputes the Adjudicator's finding that the pink highlighted portions of the Remaining Records that the Adjudicator has identified are not protected by legal advice privilege and are therefore to be disclosed.

[85] Although Sechelt has not clearly identified which record or records fall into this category, I have taken this one record, #334, to be such a record as it has not been identified in any of the other categories.

[86] In the spreadsheet it provided to the Adjudicator, Sechelt claimed, as it did for many of the other Disputed Records, that record #334 was privileged because it was:

> Communications from client to counsel seeking legal advice, or providing information for the purpose of seeking legal advice, or as part of counsel's role in providing ongoing legal advice.

[87] At paras. 31 to 34 of her Decision, reproduced earlier in these reasons, the Adjudicator explained how and why she concluded that some of the Disputed Records were protected by legal advice privilege. These records involved communications that included the sharing or discussion of legal advice. Applying the criteria for legal advice privilege to other records, the Adjudicator found those records did not meet the necessary threshold in that they were not communications about legal advice. The Adjudicator concluded record #334 was such a record.

[88] Much like it has done in its submissions on the other Remaining Records, Sechelt has gone beyond what it submitted to the Adjudicator with respect to record #334 and has provided the Court with a more detailed explanation of why this record should be protected by legal advice privilege. In his written submission on this judicial review, counsel for Sechelt supplemented the description of record #334 that had previously been before the Adjudicator with the following:

> Confidential email from District to its solicitors for the purpose of seeking legal advice.

[89] Leaving aside that this a new argument in aid of a second attempt to have a record declared privileged after having failed in this assertion before the Adjudicator, I am not convinced that the Adjudicator erred or was incorrect in concluding that the record was not protected by privilege. Her understanding of the applicable legal principles is unchallenged by Sechelt. The complaint is with her application of those principles to this record. I have reviewed the record and have considered the legal

requirements for a document to be protected by legal advice privilege. Having done so, I am satisfied that the record is not about legal advice nor does it have a legal facet to it that would cloak it with the privilege Sechelt claims. In my opinion, the Adjudicator was correct in refusing to allow Sechelt to withhold disclosure of this document on the grounds it is privileged.

Record #176

[90] This record is somewhat of an outlier on this judicial review. I say this because it is unclear what submission was made to the Adjudicator about this record. The spreadsheet that counsel for Sechelt provided to the Adjudicator simply indicated " ** "; whereas the notations for all of the other records contained some explanation why privilege was being alleged. Be that as it may, on this judicial review Sechelt has raised the singularly new assertion that this document is protected by settlement privilege.

[91] Although the party who sent this communication was legal counsel to Sechelt, it is unclear, on the evidence that was before the Adjudicator, who the recipient was.

[92] Sechelt acknowledges that it did not raise the issue of settlement privilege in its submissions to the Adjudicator; however it nevertheless is critical of the fact that she failed to consider this privilege. In other words, Sechelt maintains that the Adjudicator herself should have considered the document as protected by settlement privilege without Sechelt having asked her to do so.

[93] In maintaining this position Sechelt is, in my opinion, asking and expecting too much of the structure of an FOI inquiry and the role of an adjudicator tasked with deciding whether documents ought to publicly disclosed under the provisions of *FIPPA*. The onus was on Sechelt to present evidence and submissions that would persuade the Adjudicator. In a fair and principled fashion, the Adjudicator permitted Sechelt to provide supplementary evidence and argument relating to the Disputed Records.

[94] Based on the evidence and submissions before her, the Adjudicator in my opinion correctly determined that Sechelt had failed to establish that record #176 was privileged.

**Conclusion**

[95] This has been a challenging judicial review. I have conducted it based upon the record that was before the Adjudicator and using the correctness standard. Over the course of the hearing, Sechelt's position with respect to the types of privilege claimed and the reasons for the claims evolved. At some points, Sechelt accepted that a claim under one type privilege (eg. legal advice) was no longer supportable, only to rejuvenate it with a claim using another type of privilege (eg. litigation privilege or settlement privilege). In other instances, Sechelt sought to support its position by making new submissions that had not been made before the Adjudicator. I concluded that it would be contrary to the interest of justice to consider the supplementary arguments and claims that Sechelt made for the first time on this review.

[96] I say all of this not meaning to be critical of the work of Sechelt's counsel but only to underscore the extent of the challenges this review has posed for the Court.

[97] Overall, I am not convinced that the Adjudicator committed any error when she ordered the portions of the Remaining Records that she had highlighted in pink colouring disclosed to Mr. Pednaud. In my view, the Adjudicator correctly identified the issues and applicable legal principles. She also correctly evaluated the submissions and evidence before her and correctly applied the relevant principles of law.

[98] I cannot say the Adjudicator committed any error in her analysis or application of the law to the facts of the case. In other words, I see nothing in the process in which the Adjudicator reached her Decision or in the Decision itself that is incorrect.

[99] For all of these reasons, Sechelt's petition is dismissed.

[100] If there is a need for the parties to address the issue of costs, they are to advise Supreme Court Scheduling within 30 days of the date of this judgment.

"G.R.J. Gaul J."