COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: *Acciona Wastewater Solutions LP v. Greater Vancouver Sewerage and Drainage District,* 2026 BCCA 62

Date: 20260130
Dockets: CA51138; CA51140

Docket: CA51138

Between:

Acciona Wastewater Solutions LP by its General Partner, AWS General Partner Inc.

Applicant/Appellant/
Respondent on Cross Appeal
(Plaintiff)

And

Acciona Wastewater Solutions LP, AWS General Partner Inc., Acciona Agua Canada Inc., Acciona Infrastructure Canada Inc., Corporacion Acciona Infraestructuras S.L., Acciona Construccion S.A., and Acciona Agua S.A.

Applicants/Appellants/
Respondents on Cross Appeal
(Defendants by Counterclaim)

And

Greater Vancouver Sewerage and Drainage District

Respondent/
Appellant on Cross Appeal
(Defendant and Plaintiff by Counterclaim)

- and -

Docket: CA51140

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(Plaintiff)

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Acciona Wastewater Solutions LP, AWS General Partner Inc., Acciona Agua Canada Inc., Acciona Infrastructure Canada Inc., Corporacion Acciona Infraestructuras S.L., Acciona Construccion S.A., and Acciona Agua S.A.

Applicants/Appellants
(Defendants by Counterclaim)

And

Greater Vancouver Sewerage and Drainage District

Respondent
(Defendant and Plaintiff by Counterclaim)

Before: The Honourable Justice Winteringham
(In Chambers)

On appeal from: Orders of the Supreme Court of British Columbia, dated October 20, 2025 and November 6, 2025 (*Acciona Wastewater Solutions LP v. Greater Vancouver Sewerage and Drainage District*, Vancouver Docket S222719).

Oral Reasons for Judgment

Counsel for the Appellants:	M.L. Burris T.A. Posyniak
Counsel for the Respondent:	J. Goulden, K.C. E.J.F. Grant
Place and Date of Hearing:	Vancouver, British Columbia January 29, 2026
Place and Date of Judgment:	Vancouver, British Columbia January 30, 2026

Summary:

This is a complex breach of contract action relating to the construction of the North Shore Wastewater Treatment Plant. The builder/developer sues the District (and the District counterclaims) for, among other things, breach of contract relating to the construction of the North Shore Wastewater Treatment Plant. The assigned case-management/trial judge has presided over several document-type applications. The builder/developer seeks leave to appeal various rulings where the judge upheld the district's assertions of case-by-case privilege relating to municipal council documents.

Held: Application for leave to appeal dismissed. The applicant did not satisfy the test for leave to appeal this primarily discretionary pre-trial decision regarding assertions of case-by-case privilege.

WINTERINGHAM J.A.:

Introduction

[1] The applicants (collectively, "Acciona") apply for leave to appeal two orders dismissing their application for the production of documents subject to a claim of privilege. The judge had upheld the respondent's assertion of case-by-case privilege over municipal council documents.

[2] The orders relate to many documents that are not the subject of this leave application. With respect to this leave application, the two orders at issue are:

1. from the order of October 20, 2025, item 1(b): Tab 39 of Exhibit C of the Affidavit No. 2 of Matt Mulligan; and

2. from the order of November 6, 2025:

    i. item 1(a): Tab 161 of Exhibit C of the Affidavit No. 2 of Matt Mulligan, only; and

    ii. item 1(b): Tabs 17, 40, 42–44, and 46 of Exhibit C of the Affidavit No. 2 of Matt Mulligan.

[3] The documents that are the subject of this appeal can be categorized into two groups. The first group of documents (the "Task Force Documents") are a

series of minutes and recommendation documents prepared by an *ad hoc* standing committee of the Metro Vancouver Regional District ("Metro Vancouver"). The committee was tasked with privately assessing information in closed meetings and providing recommendations about a project to design and construct the North Shore Wastewater Treatment Plant (the "Project")—a project that was eventually awarded to Acciona. The second group of documents (the "Closed Board Meeting Documents") are a series of documents prepared for or presented at closed meetings of the Greater Vancouver Sewerage and Drainage District's (the "District") board of directors or committees.

[4] The judge agreed that case-by-case privilege was properly asserted over some Task Force Documents and some of the Closed Board Meeting Documents.

[5] The District primarily argues that leave should not be granted over either category of documents. However, they submit that if Acciona is granted leave to appeal, then the Court should also consider the District's application for leave to cross appeal. The District argues in its proposed cross appeal that the judge erred in finding that some of the Closed Board Meeting Documents were not protected by privilege. Also, if leave is granted, the District applies for an interim stay of the chambers judge's document production orders pending the outcome of the appeal.

Background

[6] The underlying proceeding is a complex civil action arising from the design, construction, and partial financing of the Project. Acciona was the designer/builder of the facility. The District entered into a project agreement with Acciona dated April 5, 2017. The District terminated the project agreement effective January 20, 2022, when the project was partially complete. Acciona seeks over $250 million in damages based on the breach of various contractual duties, breach of the duty of honest performance, and wrongfully terminating the contract. The District has filed a counterclaim alleging that Acciona breached the contract, including material breaches, and asserts that its claim for damages could be over $1 billion.

[7] The judge has been case managing this proceeding since 2024 and has presided over other disclosure-type applications since early 2025. He is also the assigned trial judge. These appeals arise from two orders that he made as the result of four applications related to various claims of privilege, including solicitor-client privilege. However, the proposed grounds of appeal only address the judge's orders regarding some of the documents found to be protected by case-by-case privilege.

The Task Force Documents

[8] The Task Force Documents arose from the meetings of the North Shore Wastewater Treatment Plant Program Task Force (the "Task Force"), an *ad hoc* standing committee of the board of Metro Vancouver to consider the options and costs to complete the Project. The Task Force operated from September 2023 until it completed its mandate in March 2024. The members of the Task Force were either mayors or councillors of the member municipalities of Metro Vancouver.

[9] The Task Force held meetings that were closed to the public, as were required in its terms of reference. It was also empowered to do so pursuant to s. 90(1) of the *Community Charter*, S.B.C. 2003, c. 26, which permits council meetings to be closed to the public if the subject matter being considered relates to certain sensitive subjects. Section 90(1) applies to Metro Vancouver based on s. 226(1)(a) of the *Local Government Act*, R.S.B.C. 2015, c. 1. The terms of the Task Force's reference also included that all documents, discussions, and information were to be treated as privileged and confidential.

[10] The Task Force meetings were attended by lawyers, who provided legal advice to Metro Vancouver employees during the meetings. The District does not argue that the Task Force Documents that are the subject of this leave to appeal application are solicitor-client privileged, litigation privileged, or settlement privileged.

The Closed Board Meeting Documents

[11] The Closed Board Meeting Documents come from certain meetings of the District. The documents all arose from meetings that were closed to the public. The

District, being one of the four corporations that comprise Metro Vancouver, follows the general procedures at board and board committee meetings established pursuant to s. 225(1) of the *Local Government Act*. Metro Vancouver's Bylaw 1368 provides:

> **Duty to Respect Confidentiality**
>
> 20. Pursuant to the *Charter*, a member or former member must, unless specifically authorized by the Board or committee:
>
> (a) keep in confidence any record held in confidence by the Regional District, until the record is released to the public as lawfully authorized or required, and
>
> (b) keep in confidence information considered in any part of a meeting that was lawfully closed to the public, until the Board or committee discusses the information at a meeting that is open to the public or releases the information to the public.

[12] All the Closed Board Meeting Documents were prepared for meetings or parts of meetings that were lawfully closed to the public, following a resolution of the board of Metro Vancouver affirming that the matters under consideration involved one or more of the following enumerated situations in s. 90(1) of the *Community Charter*:

> …
>
> (g) litigation or potential litigation affecting the municipality;
>
> …
>
> (i) the receipt of advice that is subject to solicitor client privilege, including communications necessary for that purpose;
>
> …
>
> (k) negotiations and related discussions respecting the proposed provision of a municipal service that are at their preliminary stages and that in the view of the council could reasonably be expected to harm the interests of the municipality if they are held in public;
>
> …

Document production

[13] After pleadings closed, the parties began document production—a process which has thus far been extensive. Acciona has produced nearly four million documents. The District produced more than 200,000 documents.

[14] The District initially claimed privilege over 19,000 documents. Acciona sought the District's position on certain documents marked as solicitor-client privileged. Acciona later brought an application for the District to produce 5,401 documents, over which it challenged whether solicitor-client privilege applied. The application was heard over multiple days from May until November 2025. As time passed between hearings, the District withdrew several privilege claims and changed the nature of others.

[15] By September 2025, only 266 documents remained in dispute: 249 Closed Board Meeting Documents and 17 Task Force Documents.

[16] The chambers judge reviewed a sample of 38 of these documents: 37 Closed Board Meeting Documents and one Task Force Document. He set out to provide a decision about the privilege of each of these documents. The parties would then be at liberty to discuss the remainder of the documents and if necessary, request a further hearing to review other disputed documents.

The reasons for judgment

[17] The judge's first decision, indexed as *Acciona Wastewater Solutions LP v. Greater Vancouver Sewerage and Drainage District*, 2025 BCSC 2040 ("RFJ"), examined three categories of privileged documents. Relevant only to this leave application is the judge's decision regarding the category of documents found to be subject to case-by-case privilege. The judge determined that one Task Force Document he had reviewed was subject to case-by-case privilege.

[18] The judge began by properly reviewing the principles of case-by-case privilege as follows:

> [123] The courts will extend the protection of privilege on a case-by-case basis where Professor Wigmore's four criteria for establishing confidentiality at common law are established by the claimant:
>
> a) the communications must originate in confidence;
>
> b) this element of confidentiality must be essential to the full and satisfactory maintenance of the relationship in which the communications arose;

> c) the relationship must be one which should be sedulously fostered (i.e. with care, diligence, and persistence) in the public interest; and
>
> d) the public interest served by protecting the communications from disclosure must outweigh the public interest in getting at the truth and the correct disposal of the litigation.
>
> *R. v. National Post*, 2010 SCC 16 at para. 53.
>
> [124] The fourth Wigmore criterion "does most of the work". This step requires the courts to "weigh against its protection any countervailing public interest such as the investigation of a particular crime (or national security, or public safety or some other public good)": *National Post* at paras. 58–59.
>
> [125] The Wigmore criteria are not set in stone. Rather, they provide a framework within which to weigh and balance competing public interests in a context-specific manner: *National Post* at paras. 51–53.

[19] He held that the first two Wigmore factors were "clearly" met. The terms of reference of the Task Force required that the meetings be held behind closed doors: RFJ at para. 126. The Task Force's mandate—selecting an option to complete a public infrastructure project—required Metro Vancouver staff to communicate openly and honestly: RFJ at para. 127.

[20] Regarding the third factor, the judge agreed that it was "unusual" for mere confidentiality to be raised as a reason for a relationship to be fostered: RFJ at para. 134. However, there was nonetheless an important public interest in protecting the Task Force's deliberations: RFJ at para. 135. He drew an analogy to *Kalen v. Brantford*, 2011 ONSC 1891, in which a municipality of Brantford case report on the termination of a fire chief was found to meet the third Wigmore criterion because of the importance of protecting municipal employees' ability to be fully open with municipal council: RFJ at para. 134.

[21] On the fourth factor, the judge found that the public value in protecting the confidence outweighed the truth-seeking function of the Task Force Documents. Any additional probative value of the Task Force Documents, beyond other documents already disclosed by the District, was unclear at this stage: RFJ at para. 136.

The First Oral Ruling

[22] The parties could not come to an agreement about privilege with respect to the Closed Board Meeting Documents. In November 2025, they went back before the judge, who in turn rendered three oral decisions. The first decision was about whether the Closed Board Meeting Documents met the first three Wigmore criteria.

[23] He first began his reasons by clarifying that he only found privilege over one Task Force Document that he had viewed. The Task Force Documents are not, as a class, case-by-case privileged: *Acciona Wastewater Solutions LP v. Greater Vancouver Sewerage and Drainage District* (6 November 2025), Vancouver Docket No. S222719 at para. 3 (B.C.S.C. Re: Claim of Privilege Over Exhibit C Documents) (the "First Oral Ruling").

[24] With respect to the first Wigmore criterion, the judge noted that based on the decision by the board to close parts of their meetings and go *in camera*, that the members expected the discussions in closed sessions to remain confidential. The judge inferred that the decisions of the Metro Vancouver board to host their meetings *in camera* showed that there was an expectation of confidentiality: First Oral Ruling at para. 10.

[25] Regarding the second Wigmore criteria, he stated that this element of confidentiality must be essential to the full and satisfactory maintenance of the relationship in which the communications arise. He found that the confidentiality is essential to the proper functioning of the closed sessions of the board, which depend upon staff and members discussing the matters enumerated in s. 90(1) of the *Community Charter* frankly and candidly: First Oral Ruling at para. 11. He added this:

> [11] … The purposes of s. 20 of Bylaw 1368 and s. 90(1) of the *Community Charter* would be entirely frustrated if staff and members were free to disclose the legal advice, litigation strategy or negotiations that they discuss during the closed sessions.

[26] With respect to the second criterion, the judge referred to *Kalen* for the proposition that municipal employees' honesty should be fostered by protecting it

with privilege: First Oral Ruling at para. 12. He rejected the proposition that specific testimony from the municipal employees was necessary to prove that there would be a chilling effect by not granting privilege: First Oral Ruling at para. 21. This is because the importance of confidentiality may be inferred in the Legislature's intent in enacting s. 90(1) of the *Community Charter*, which deems certain communications confidential: First Oral Ruling at para. 22.

[27] Of note, and in addition to *Kalen*, the judge examined in some detail authorities relied on by Acciona—including *McGraw v. Southgate (Township)*, 2021 ONSC 2785 and *Northwest Organics, Limited Partnership v. Roest*, 2017 BCSC 673 [*Northwest Organics*]. The judge explained why he was not persuaded by the applicant's submission and why these authorities should be distinguished from the circumstances before him: First Oral Ruling at paras. 13–22.

[28] With respect to the third criterion, the question was whether the discussions between the Metro Vancouver board members in closed meetings about the Project created the type of relationship to be fostered by protecting it with privilege. The judge held that it did but only for matters enumerated under s. 90(1) of the *Community Charter*: First Oral Ruling at para. 24.

[29] Finally, at the conclusion of the First Oral Ruling at para. 26, the judge noted that the fourth Wigmore criterion requires a consideration of the documents over which privilege is asserted and whether the public interest in maintaining confidentiality outweighs the public interest in disclosure of the documents. The judge concluded this ruling, noting that the burden to sustain the privilege claim rested on the District: First Oral Ruling at para. 27.

The Second and Third Oral Rulings

[30] On the same day, the parties also sought rulings on whether case-by-case privilege extended to 17 other documents, including several Task Force Documents: *Acciona Wastewater Solutions LP v. Greater Vancouver Sewerage and Drainage District* (6 November 2025), Vancouver Docket No. S222719 (B.C.S.C. Re:

Documents Attached as Tabs to Exhibit C in the Affidavit of Mr. Mulligan) (the "Second Oral Ruling"). The judge decided as follows:

1. 15 documents were ordered to be produced with redactions because they contained either privileged or irrelevant information: Second Oral Ruling at paras. 2–13, 18–24, 26–27, 29–30.

2. Two Task Force Documents were ordered to be protected by case-by-case privilege for the same reasons as written in the RFJ: Second Oral Ruling at paras. 14–17, 31.

[31] The parties sought and received an additional oral ruling on six more documents: *Acciona Wastewater Solutions LP v. Greater Vancouver Sewerage and Drainage District* (6 November 2025), Vancouver Docket No. S222719 at (B.C.S.C. Re: Tabs to Exhibit C of Mr. Mulligan's Affidavit) (the "Third Oral Ruling"). The judge held:

1. An email attached to a draft slide deck for a Task Force meeting was privileged because "[a]ny additional probative value from the disclosure of the contents of the … document is outweighed by the harm to the confidentiality of the Task Force deliberations": Third Oral Ruling at para. 6.

2. Four memos to the Task Force were privileged because they were not "necessary for a fair adjudication of the plaintiff's claims" and "the injury to the relationship outweighs the benefit of disclosure": Third Oral Ruling at para. 8.

3. One email discussing Task Force issues should be disclosed.

The leave to appeal application

[32] Acciona seeks leave to appeal the two orders arising from the four rulings of the chambers judge. There is one appeal about the Task Force Documents and

another appeal about the Closed Board Meeting Documents. In total, Acciona's appeal is about eight documents which were found to be privileged.

[33] Acciona makes the same arguments on both appeals—that the judge erred in his application of the Wigmore test. Specifically, they submit that he erred in the second criterion (finding that confidentiality is essential to maintain the relationship between District board members and its employees or the Task Force) and third criterion (that those relationships ought to be fostered in the public interest). They also contend that the judge's reliance on *Kalen* was misplaced with respect to both the second and third Wigmore factors. Finally, they argue that he erred in his assessment of the fourth Wigmore criterion by weighing the evidence's materiality to the dispute rather than asking or weighing the public interest in adjudicating the case on the merits against the public interest in protecting the documents.

[34] The District has submitted a cross appeal only with respect to the Closed Board Meeting Documents. They argue that the judge erred by improperly weighing the probative value of the documents in the assessment of the fourth Wigmore factor. In my reading of the decisions and arguments, this cross appeal is about the 15 documents that the judge ordered to be produced in the Second Oral Ruling.

Law

[35] Justice Dickson recently and succinctly stated the relevant considerations for whether to grant leave to appeal in *Laliberté v. Québec Revenue Agency*, 2025 BCCA 372 (Chambers):

> [20] The well-established test for leave to appeal was articulated by Justice Saunders in *Goldman, Sachs & Co. v. Sessions*, 2000 BCCA 326 at para. 10 (Chambers):
>
> a) whether the point on appeal is of significance to the practice;
>
> b) whether the point raised is of significance to the action itself;
>
> c) whether the appeal is *prima facie* meritorious or, on the other hand, whether it is frivolous; and
>
> d) whether the appeal will unduly hinder the progress of the action.

> [21] All four criteria are considered under the rubric of and the overarching consideration of the interests of justice: *Hanlon v. Nanaimo (Regional District)*, 2007 BCCA 538 at para. 2 (Chambers); *Vancouver (City) v. Zhang*, 2007 BCCA 280 at para. 10 (Chambers).
>
> [22] The party seeking leave to appeal bears the onus of establishing the conditions for leave are met: *British Columbia Teachers' Federation v. British Columbia (Attorney General)* (1986), 4 B.C.L.R. (2d) 8 at 11, 1986 CanLII 1089 (C.A. Chambers).
>
> [23] In assessing the merits, the applicant must be able to show that the proceeding is "reasonably founded or arguable": *Keremelevski v. British Columbia (Workers' Compensation Board)*, 2019 BCCA 338 at para. 3 (Chambers), aff'd 2019 BCCA 428 at para. 4.

Analysis

[36] I turn to consider each of the considerations relevant to the application for leave.

Is the appeal significant to the practice?

[37] Acciona submits that there are two reasons this appeal is important to the practice: (1) this Court has never before considered the "unusual" application of case-by-case privilege over communications between local government employees and leadership; and (2) the judge's reasoning will be a precedent of general application.

Unusual circumstances are inherent to case-by-case privilege

[38] In its first argument, Acciona submits that the judge recognized the "unusual" circumstances of applying the doctrine of case-by-case privilege to the activities of a municipal government. They argue that this circumstance is more than unusual—being a significant expansion of the ambit and rationale for case-by-case privilege. I agree that this is an unusual application of the doctrine. In my view, however, the fact that these claims are unusual is exactly aligned with the purpose for case-by-case privilege.

[39] In John Henry Wigmore, *A Treatise on the System of Evidence in Trials at Common Law*, vol. 4 (Toronto: Canada Law Book Company, 1905) at 3185 [*Wigmore on Evidence*], Professor Wigmore explains that the four factors—being

necessary prerequisites to recognize privilege—take into account the one-off nature of case-by-case privilege claims. The factors are derived from the necessary qualities that lead to categorical privilege, like solicitor-client or spousal privilege. Conversely, one or more factors are not present in categories of privilege that the court refused to recognize: *Wigmore on Evidence* at 3186. For example, Professor Wigmore argues that physician-patient class privilege is not recognized because the confidentiality of that relationship is not always essential to the relationship: *Wigmore on Evidence* at 3186. Therefore, the purpose of case-by-case privilege is to capture specific documents in unique circumstances that are not protected by a class privilege but otherwise justify the protection of privilege: see *A. (L.L.) v. B. (A.)*, [1995] 4 S.C.R. 536 at paras. 74–75, 1995 CanLII 52. In this way, the recognition of the unusual nature of case-by-case privilege claims over municipal communications by the judge does not constitute an expansion of the doctrine. Rather, it is a feature of the doctrine.

[40] This Court does not need to be called upon to discuss every circumstance in which case-by-case privilege arises.

The judge's decisions do not set a dispositive precedent

[41] This brings me to discuss Acciona's second argument: that the judge's decision will serve as a precedent of general application. I disagree. Case-by-case privilege applies only on a case-by-case basis.

[42] Acciona argues that the judge's logic is so broad and adaptable that it will serve to apply case-by-case privilege overbroadly to many government decision-making processes that are not otherwise privileged. Acciona specifically takes issue with the judge's logic that there is a public interest in protecting the documents in issue because the employees of the District and Metro Vancouver may have otherwise not provided full and candid information (and that such information was provided without testimony from the employees).

[43] The judge used this logic in his assessment of the second Wigmore criterion—that is, whether the relationship was one that required confidence to

properly function: First Oral Ruling at paras. 7, 19, citing *McGraw*; Third Oral Ruling at para. 7. He was clear that he was not finding a class privilege: First Oral Ruling at para. 3.

[44] The particular circumstances in which other governmental communications occur between employees and other elected bodies may be analogous to the relationship that Metro Vancouver's employees had with its board or the Task Force. However, that is a question that can be decided on the facts of each case of claimed case-by-case privilege that comes before the court. Even minor changes in the facts could cause the relationship to be sufficiently different to no longer meet this criterion. In fact, the judge engaged in this exact reasoning in his discussion of the precedential value of *Kalen* and *McGraw* in the First Oral Ruling at paras. 12–20.

[45] Further, even if the decisions under appeal are dispositive in all government-employee relationships in the second Wigmore criterion (which in my view, they are not), the three remaining Wigmore criteria still must be established in order to prove case-by-case privilege in a specific circumstance: *R. v. National Post*, 2010 SCC 16 at para. 60. Consequently, the judge's decisions regarding case-by-case privilege would only be binding on a case with similar facts. This is because any difference in facts could raise a difference in a judge's interpretation of any of the four Wigmore criteria: Halsbury's Laws of Canada, *Evidence*, "Case-by-case privilege distinguished from class privilege" at HEV-188 (2022 Reissue).

[46] The limited precedential value of these appeals can readily be seen on the facts of this case. Only eight of the dozens of documents reviewed by the judge were subject to case-by-case privilege. In all those circumstances, different determinations on privilege flowed, even though the same governmental relationships existed (being between Metro Vancouver's board and employees or the employees involved in the Task Force).

Conclusion on significance to the practice

[47] I am not convinced that this appeal would have significance to the practice. Determining case-by-case privilege is a fact-heavy exercise with little applicable precedential effect. I would find that this factor weighs in favour of the District.

Is the point significant to the action itself?

[48] On this factor, the District submits that the proposed appeals relate to only eight documents out of more than four million. Acciona responds by arguing that the District has leveraged the judge's decision, purporting to extend case-by-case privilege to further documents. For example, three weeks prior to the scheduled examinations for discovery of the District's representative, the District retracted several pages of the representative's notes on the basis that they related to a closed board meeting and were therefore privileged. Acciona also argues that, without the documents over which the District claims privilege, there is an informational imbalance that creates unfairness in the litigation.

[49] As I consider the history of this proceeding and the judge's approach to the many privilege claims, the judge has attempted to manage Acciona's complaints about the timing and good faith of the District's privilege claims. He has viewed the documents and made determinations about privilege and he is best situated to determine whether privilege is properly extended over other documents in the future.

[50] Regarding the informational imbalance: this consideration is captured in the fourth Wigmore factor. The judge, after viewing the documents himself, determined that the public interest in protecting the contents of those specific documents outweighed the potential unfairness in the litigation. The judge is familiar with the specifics of this lawsuit, and in particular, the document production relating to it. As demonstrated in the four rulings presented on this leave application, he is well-situated to assess, and perhaps re-assess, claims of privilege as they arise.

[51] As a result, I would not find that the proposed grounds of appeal are particularly significant to the action.

Is the appeal *prima facie* meritorious?

[52] With respect to the merits of the appeal, both parties raise that it is necessary to assess the merit of the grounds of appeal with the standard of review in mind: *Price v. Robson*, 2017 BCCA 419 at para. 49 (Chambers). The parties dispute the applicable standard of review. Acciona argues that the question is whether the judge correctly identified and applied the test for privilege, which is a question of law: *Northwest Organics* at para. 25. The District argues that the determination of whether a document is covered by case-by-case privilege is entirely discretionary. As a result, the District submits, Acciona should only be granted leave where it is arguable that the order is clearly wrong, a serious injustice will occur, the discretion was exercised on a wrong principle, or not judicially: *Institutional Mortgage Capital Canada Inc. v. Plaza 500 Hotels Ltd.*, 2020 BCCA 193 at para. 48 (Chambers).

[53] Counsel for Acciona candidly submitted that he was unable to locate any case from this province that definitively holds the standard of review in proceedings involving case-by-case privilege claims is correctness. He also acknowledges the discretionary nature of the judge's assessment of the documents in issue and applying the Wigmore criteria to each of the documents.

[54] Where, as here, it was necessary for the chambers judge to make a number of determinations for each document based on the evidentiary record presented, in addition to the judge's review of the actual document, those determinations are largely factual—or involve interpretation of the evidence overall. However, whether I categorize the proposed grounds of appeal as an error of law, mixed fact and law, or one where deference is owed, it does not impact my decision on the leave application before me. The judge's determinations here lay toward the factual end of the spectrum; but for the purpose of the leave application, in my view, it does not impact the result.

[55] A judge's analysis of the Wigmore factors is a "general framework within which policy considerations and the requirements of fact-finding can be weighed and balanced on the basis of their relative importance in the particular case before

the court": see *National Post* at para. 53, citing *R. v. Gruenke*, [1991] 3 S.C.R. 263 at 290, 1991 CanLII 40. I note as well that the analysis of the Wigmore factors is discretionary: see *Canada (Transportation Safety Board) v. Carroll-Byrne*, 2022 SCC 48 at para. 87.

[56] With respect to the second proposed ground of appeal, I agree with the applicants that this does raise a legal error and the standard of review there should be correctness.

[57] I turn then to the specific issues raised on this leave application.

[58] The first issue is whether the judge erred in determining that: (1) confidentiality is essential to maintaining the relationships at issue with respect to the documents declared privileged in this case; and (2) that those relationships ought to be fostered in the public interest (respectively, under the second and third Wigmore criteria). The judge has seen the documents. The judge would know the specific details of the documents that could give rise to case-by-case privilege based on the particular relationship of the communicating parties.

[59] On this leave application, the documents were not presented for review. However, the judge embarked on a review of each of the documents at issue and conducted his assessment of whether privilege applied. He was well-situated to make that determination.

[60] With respect to the third issue, Acciona challenges the breadth of the judge's analysis in balancing the public interest in adjudicating the case on its merits against the probative value of the documents. This is again taking issue with a discretionary exercise. The Wigmore factors are a framework but the decision as to whether case-by-case privilege applies ultimately belongs to the judge when making their assessment based on the context of the case: RFJ at para. 125, citing *National Post* at paras. 51–53.

[61] The second issue raised by Acciona is whether the judge erred in his interpretation of *Kalen*. Acciona argues that the judge's reliance on *Kalen* created a cabinet-like presumption of privilege for all municipal communications. By the judge's reasoning, they argue the first three Wigmore criteria are met by every municipality's private meetings, leaving only the question of whether the public interest in the administration of justice outweighs the public interest in the confidentiality of the council meetings.

[62] Acciona argues that the judge misinterpreted *Kalen* to be a broader proposition than what was actually stated in that case, resulting in flawed reasoning. The District argues that the judge simply used *Kalen* to support his independent conclusion that the third Wigmore criterion could be met by municipal corporations. I have concluded that the point is reasonably arguable about the scope of the privilege claim.

[63] While I find that this proposed ground of appeal contains points that would be reasonably arguable, I only find so by a very small margin.

Will the appeal unduly hinder the litigation?

[64] Acciona notes that the trial is set for March 2027 and is not at risk of being delayed due to this appeal.

[65] This appeal is about eight documents (albeit, combined with the cross appeal, another potential 15 documents). The parties have already begun arguing about the privilege of other documents. While this appeal is ongoing, there will be a procedural roadblock for the judge in rendering decisions about other documents put before him to determine privilege. He will not know whether he can rely on his former reasons and will therefore be prevented from making expeditious decisions.

[66] The applicants propose proceeding with the privilege applications before the judge and when the applicants believe the judge has fallen into error, the applicants will simply seek to add those documents to the outstanding appeal, should leave be granted. In my view, this proposal raises additional logistical issues that could

hinder the litigation. For example, the District may suggest that leave is required for each document and require that process to be instituted for each.

[67] In sum, it appears to me that this appeal would delay the discovery process. It will unduly hinder the litigation.

Conclusion

[68] In balancing the factors I have listed, I conclude that it is not in the interests of justice to grant leave to appeal. The appeal is neither significant to the practice nor is it significant to the litigation itself. Allowing this leave to appeal application will create a procedural roadblock to advancing the litigation in the trial court. It also mostly regards discretionary decisions made by the judge about case-by-case privilege.

[69] This is a dispute about the judge's determination that case-by-case privilege is attached to the eight documents at issue. The judge assessed the evidence before him and stated the legal principles applicable to the issue. As I consider the submissions of Acciona, I am of the view that the gist of the submissions is that the application of the legal test should have resulted in a different outcome. In my view, it is clear from the judge's October reasons and the subsequent November 6 rulings that he considered the submissions now repeated before me. He set out the relevant principles governing his assessment and then thoroughly considered the various legal issues advanced. I would not interfere with his assessment of the evidence and his application of the law to each of the documents. He was satisfied with the sufficiency of the evidence proving the confidential nature of the relationship; he was in the best position to assess the submissions in the context of the documents; whether this was properly closed-door meeting was not an issue before the judge.

[70] Lastly, I wish to emphasize that the judge's decisions as to the case-by-case privilege may be revisited at a later stage in the litigation based on a better or different understanding of the exact issues in the case. As the judge aptly noted in his reasons about the document at Tab 165 of Exhibit C of Affidavit No. 2 of Matt Mulligan in the Second Oral Ruling:

> [32] At this stage and on the basis of the evidence currently available to me I am prepared to find that the injury to the proper functioning of the closed board meetings is outweighed by the benefit of disclosure.
>
> [33] This is a document to which Acciona might return in what is commonly referred to as stage two of document production. There may be a further basis for relevance established at a later date. However, based only on the date of the draft and potential relevance to bad faith termination I am not persuaded at this time that it should be produced given the encroachment on the confidentiality of closed board discussions of potential litigation. However, as I say, it may be a document to which we will need to return to at a later date.

Disposition

[71] In the result, I would dismiss both of Acciona's applications for leave to appeal. Given this conclusion, it is unnecessary to consider the District's applications for leave to cross appeal and for a stay.

"The Honourable Justice Winteringham"