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# MEDIATIONS AND SETTLEMENT DISCUSSIONS:

# CONFIDENTIALITY AND OTHER ETHICAL ISSUES

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## INTRODUCTION

The purpose of this paper is to discuss ethical issues that lawyers should be aware of when engaged in any form of settlement negotiations and, in particular, when engaging in mediation as a form of alternative dispute resolution.

## SETTLEMENT IS ENCOURAGED

There is a public interest in the encouragement of settlements as they allow parties to reach mutually acceptable resolution to disputes without prolonging the personal and public expense and time involved in litigation.[1] The benefits of settlement have been summarized a follows:

> *The Courts consistently favour the settlement of lawsuits in general. To put it another way, there is an overriding public interest in favour of settlement. This policy promotes the interests of litigants generally by saving them the expense of trial of disputed issues, and it reduces the strain upon an already overburdened provincial Court system.*[2]

The Ontario Municipal Board ("OMB") and other tribunals take a similar approach in encouraging settlement discussions, whether discussions between parties or OMB member facilitated mediation, as a means of reaching a resolution of disputes which is acceptable to the parties involved and more cost effective to the public and the parties.[3]

The importance of settlement in dispute resolution is emphasized by the *Rules of Professional Conduct* (the "LSUC Rules") which require a lawyer to encourage settlement and consider use of alternative dispute resolution. Rule 2.02 states:

> *Encouraging Compromise or Settlement*
>
> *(2) A lawyer shall advise and encourage the client to compromise or settle a dispute whenever it is possible to do so on a reasonable*

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[1] *Sable Offshore Energy Inc. v. Ameron International Corp.,* 2013 SCC 37.

[2] *Ibid.* at para. 11 (quoting *Sparling v. Southam Inc*., (1988) 62 O.R. (2d) 225 (H.C.J).

[3] *MLR Group Inc. v. Lakeshore (Town),* [2007] O.M.B.D. No. 53 at para. 9.

*basis and shall discourage the client from commencing useless legal proceedings.*

*(3) The lawyer shall consider the use of alternative dispute resolution (ADR) for every dispute, and, if appropriate, the lawyer shall inform the client of ADR options and, if so instructed, take steps to pursue those options.*

As clients become increasingly cost-conscious and demand faster, more certain outcomes, it is more important than ever that lawyers develop effective skills and strategies for achieving settlements through traditional negotiation and the use of alternative dispute resolution, when appropriate.

## SETTLEMENT PRIVILEGE

Settlement privilege is often referred to as the "without prejudice" rule. It has recently been clarified by the Supreme Court of Canada that settlement privilege is a class privilege.[4] A class privilege is one that entails a *prima facie* presumption that such communications are inadmissible and not subject to disclosure. The onus lies on the party seeking disclosure of the information to show that an overriding interest commands disclosure.[5]

Prior to this clarification, the courts were inconsistent in their consideration of settlement privilege. It was not clear whether settlement privilege was a class privilege or whether it had to be established on a case by case basis. To establish settlement privilege on a case by case basis, the person claiming the privilege was required to establish that the four conditions from Wigmore on Evidence used to recognize privilege for important relationships were satisfied.[6]

Settlement privilege provides that information obtained through settlement negotiations, including mediation, shall remain confidential and is not admissible in evidence at a hearing, subject to the limited exceptions discussed below. At one time, the common law rule of

[4] *Sable Offshore Energy Inc.* supra at para. 9.

[5] Sopinka, Lederman and Bryant, *The Law of Evidence in Canada*, 2nd ed. (Toronto: Butterworths, 2005), p. 714.

[6] *Ibid.* at p. 720.

settlement privilege only applied to failed negotiations and did not extend to successful negotiations where a settlement was reached. However, the courts have recently recognized that potential disclosure of information following successful negotiations that resulted in a settlement would discourage settlement.[7]

Settlement privilege extends to all information obtained in the course of settlement discussions including, verbal communications and written communications, such as reports, documents, emails and letters.[8]

The purpose of settlement privilege is to promote settlement.[9] It is based on the belief that litigants would be reluctant to participate in settlement negotiations or mediation if information revealed during the negotiations or mediation process could be used against that party should the matter proceed to a hearing. Without an assurance of confidentiality, parties may choose not to participate in settlement discussions or mediation in a meaningful or productive way. Therefore, confidentiality is considered essential to the encouragement of settlement discussions and mediation.

The common law rule of settlement privilege applies to settlement negotiations in the context of OMB proceedings. Under the *Statutory Powers Procedure Act* ("SPPA"), the common law rule of settlement privilege regarding the inadmissibility of evidence applies to proceedings before the OMB and other tribunals. The SPPA, section 15(2) states:

> *15(2) Nothing is admissible in evidence at a hearing,*
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> *(a) that would be inadmissible in a court by reason of any privilege under the law of evidence.*
>
> *(b) that is inadmissible by the statute under which the proceeding arises or any other statute.*

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[7] *Sable Offshore Energy Inc.* supra at para. 17.

[8] *City of Toronto Economic Development Corp. v. Olco Petroleum Group Inc.*, [2008] O.J. No. 2413, at para. 6.

[9] *Ibid.* at para. 2.

In addition, in accordance with the SPPA, sections 4.8 and 4.9, the Ontario Municipal Board's *Rules of Practice and Procedure* (the "OMB Rules") specifically provide that information, documents, and any suggested resolution or offer to settle shall remain confidential and cannot be disclosed in any proceedings, if the information or documents were exchanged during mediation. In addition, a mediator's notes shall remain confidential and the mediator cannot be compelled to give evidence in the proceedings. OMB Rule 69 is set out below.

> *69. The details of proceedings during a mediation are confidential. Any information or documents provided or exchanged during the mediation and any suggestion for resolution of the issues or offer to settle made during a mediation shall remain confidential and cannot be disclosed in evidence in the same or other proceeding, nor be placed on the Board file. A Board Member's notes of a mediation shall remain confidential and shall not be released to any person or admitted into evidence in any proceeding. A Board Member that participates in mediation is not competent or compellable in any proceeding to give evidence or produce documents regarding the mediation discussions.*

***When Does Settlement Privilege Apply?***

Settlement privilege applies to discussions that are intended to resolve the disputes between parties. In most cases, there will be no question as to whether the discussions are in furtherance of settlement. However, in cases where there is a dispute as to whether discussions and information is subject to settlement privilege, the following three-part common law test is applied.

1. a litigious dispute must be in existence or within contemplation;
2. the communication must be made with the express or implied intention that it would not be disclosed in the event negotiations failed; and
3. the purpose of the communication must be to attempt to effect a settlement.[10]

[10] Sopinka, Lederman and Bryant, *The Law of Evidence in Canada*, 2nd ed. (Toronto: Butterworths, 2005), p. 810.

***Litigation in Existence or Contemplated***

In the context of municipal and planning matters, once an appeal has been filed, there would be no question that a litigious dispute is in existence and the first part of the test would be met.

The interesting issue is whether settlement privilege can apply before an appeal is filed. It is not unusual in the processing of planning applications for proponents to attempt to resolve the issues raised by municipalities, agencies, neighbours, competitors and other stakeholders. Since most stakeholders have a right to appeal planning applications, it would seem reasonable that discussions regarding the settlement of issues even prior to filing an appeal could be considered to be in the context of the contemplation of litigation and, therefore, attract settlement privilege. This is especially true where privilege was expressly claimed during those discussions. For this reason, if the intention is that such discussions are not to be later disclosed at a hearing, it would be prudent to preface discussions by stating that they are without prejudice and confidential.

For instance, consider the circumstance where a high rise development is proposed and the municipal planner provides an initial opinion that that the building is too high. The developer might have discussions with the municipal planner offering to reduce the height of the building by several storeys if that would result in the support of the development by the municipal planner. If the development is ultimately not approved and subject to an OMB hearing, the developer would not want the fact that it had offered to reduce the height of the building to become a matter of evidence at the hearing. Therefore, in furtherance of the purposes of settlement, it would seem appropriate for such communications to be subject to settlement privilege.

***Express or Implied intention of Non-Disclosure***

The use of the words “without prejudice” communicates an express intention that the discussion, information or documents are intended to remain confidential and subject to settlement privilege. Although the use of the phrase is not conclusive of the intention that the communication is “without prejudice”, it may constitute some, if not *prima facie*, evidence of it and, therefore, its

use is of value.[11] As a practical matter, documents prepared in furtherance of settlement should always be identified as "without prejudice". This will avoid any dispute in the future regarding the nature of the communications.

Although settlement privilege is often referred to as the rule of "without prejudice", those precise words are not required to invoke the privilege.[12] It has been long established in Ontario that the use of the words "without prejudice" are not determinative in establishing whether a communication will attract settlement privilege. In *York (County) v. Toronto Gravel Road & Concrete Co.*[13] Proudfoot J. said:

> *The rule I understand to be that overtures of pacification, and any other offers or propositions between litigating parties, expressly or impliedly made without prejudice, are excluded on grounds of public policy.*[14]

The rule of *York (County)* was affirmed four years later in *Pirie v. Wyld* as follows:

> *The authorities seem, though not very numerous, to be clear upon the first point, that letters written or communications made without prejudice, or offers made for the sake of buying peace, or to effect a compromise, are inadmissible in evidence. It seemingly being considered against public policy as having a tendency to promote litigation, and to prevent amicable settlements.*[15]

The second part of the test that only applied if the negotiations failed has been modified by *Sable Offshore Development Inc.* supra, in that the privilege extends equally to communications during settlement, whether or not the negotiations are successful. Therefore, it would be appropriate for this second part of the common law test to be: "the communication must be made with the express or implied intention that it would not be disclosed."

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[11] Sopinka, Lederman and Bryant, *supra* at p. 810.

[12] *Sable Offshore Energy Inc.*, supra at para. 14 citing *Rush & Tompkins Ltd. v. Greater London Council*, [1988] All E.R. 737 (H.L.) at p. 740.

[13] (1882), 3 O.R. 584 (H.C.J.); aff'd (1885), 11 O.A.R. 765 (C.A.), aff'd (1885), 12 S.C.R. 517.

[14] *Ibid.*, at 593-594 (O.R.).

[15] (1886), 11 O.R. 422, at 427 (C.A.).

### *The Purpose of Settlement*

Discussions and information that have not been expressly identified as "without prejudice" will be able to claim the benefit of settlement privilege if an implied intention of settlement can be demonstrated. In considering this issue, the OMB has held that settlement discussions are presumed to be without prejudice and will be subject to settlement privilege.[16] The OMB has also stated:

> *Without a specific statement to the contrary, the Board finds that any discussions that are part of settlement negotiations are assumed to be without prejudice and attract the settlement privilege of both confidentiality and non-disclosure.*[17]

In most cases, the very involvement of lawyers implies that the communication is intended to be without prejudice.[18] However, the presence of lawyers is not required. Discussions between parties in the absence counsel will attract settlement privilege if the intention to engage in settlement discussions can be demonstrated through the use of the words "without prejudice" or the conduct of the parties.[19]

### *Exceptions to Settlement Privilege*

The OMB has consistently found that the preservation of settlement privilege is fundamental to the fair and efficient functioning of adjudicative tribunals and that it should be taken away only very carefully.[20] Once settlement privilege has been established, the onus is on the person seeking to introduce the evidence to prove that an exception applies.

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[16] *Campbell v. Tiny (Township),* [2009] O.M.B.D. No. 29.

[17] *MLR Group Inc. v. Lakeshore (Town),* at para. 9.

[18] Sopinka, Lederman and Bryant, supra at p. 811.

[19] *Ibid*. at p. 811.

[20] *Campbell* supra at para. 7.

***Competing Public Interest***

For otherwise privileged evidence to come within an exception and be admissible, the party seeking admission must show that, on balance, a competing public interest outweighs the public interest in encouraging settlement.[21] Such countervailing interests leading to exceptions have been found to include:

1. allegations of misrepresentation, fraud or undue influence;
2. preventing a plaintiff from being overcompensated;[22]
3. unlawful communications;
4. a defense to a claim of expiration of a limitation period.[23]

In *Zellers Inc. v. Kawartha Lakes (City)*[24], the OMB considered a motion to permit an appellant to re-open its case and admit evidence regarding information learned during settlement discussions. The appellant argued that the information relevant to the location of a road which was the only issue to be decided, was of such importance that the interest of justice superseded the question of privilege which would otherwise preclude the admission of the evidence. Counsel for the appellant argued that the evidence regarding the location of a road should be admitted since its exclusion would facilitate an abuse of the privilege. In rejecting this argument, the OMB found that the location of an intersection, however important to the furtherance of one party's commercial interest, is not the type of compelling or overriding interest that would justify an exception stating:

> *After consideration of this matter, the Board is at a loss to understand how the location of an intersection - however important to the furtherance of one party's*

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[21] *Sable Offshore Energy Inc.* supra at para. 19 (quoting *Dos Santos Estate v. Sun Life Assurance Co. of Canada,* 2005 BCCA 4, 207 B.C.A.C. 54, at para. 20).

[22] *Ibid.*, at para. 19.

[23] Sopinka, Lederman and Bryant, supra pp. 815-817.

[24] [2008] O.M.B.D. No. 998.

> *commercial interest - is the type of decision contemplated by the Court of Appeal in the fifth principle listed.*[25]
>
> *The preservation of settlement privilege is fundamental to the fair and efficient functioning of adjudicative tribunals such as the OMB.*[26]

In *Mattamy Realty Ltd. v. Oakville (Town)*, the OMB considered whether "without prejudice" communications that led to minutes of settlement should be subject to an exception where, the party seeking admission needed the communications to answer a motion to dismiss for failure to make submissions to council prior to passage of a by-law.[27] The OMB held that to satisfy the test for an exception, the party seeking admission must establish that a competing public interest outweighs the public interest in promoting settlements. Further, the OMB held that once settlement is achieved, the privilege associated with the negotiations remains in place. In this case, the OMB did not consider the exception test to have been satisfied and disclosure was not permitted.

***Waiver***

The Board has also been reluctant to find that settlement privilege has been lost through waiver, even where the matters discussed in settlement communications were already in the public record, unless, the waiver was knowingly made.[28] It should also be noted that once settlement privilege applies, it cannot be unilaterally waived by one party, but must be waived by both parties.

## SETTLEMENT AND MEDIATION ISSUES

The following section addresses issues that can arise in the context of settlement negotiations and mediation.

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[25] *Zellers Inc.*, supra at paras. 20 - 22.

[26] *Ibid.* at para. 25.

[27] [2012] O.M.B.D. No. 215

[28] *Campbell*, supra at para. 8.

***Participation of Expert Witnesses***

Due to the nature of litigation before the OMB, it may of assistance to have experts present during settlement negotiations in order to assist the client and legal counsel in assessing the merits of proposed resolution of issues. In fact, the OMB's directions for mediations usually require that appropriate consultants and professional staff attend to ensure that discussions on substantive issues are fully informed and constructive. However, problems may arise when experts are present at settlement negotiations or mediation and later give evidence at a hearing regarding the same matter.

It should be remembered that the settlement to be achieved is between the parties and not their consultants. Therefore, a cautious approach in settlement negotiations would be to limit the participation of the expert to providing advice to his/her client and their counsel. It would be prudent to avoid a situation where the expert engages in a discussion of the issues with opposing counsel. This could amount to a "free" discovery by opposing counsel that could assist him/her in preparing for cross-examination later and put the client at a disadvantage. In addition, the expert may give an opinion that supports a position that the client is unwilling to accept, an opinion that might not otherwise come to light in the hearing.

Lawyers should advise their experts to be cautious during meditation when asked by the OMB member to provide an opinion. If the expert's opinion is that a settlement proposal is acceptable, and later no settlement is reached, the expert cannot later take a contrary position at the hearing with respect to the same proposal. To avoid this situation, it is good practice to counsel experts to make sure that their opinions are given in manner that will not enable them to be taken out of context. For instance, a planning expert may advise that the proposed settlement of one issue may be acceptable only if a comprehensive settlement on all the other issues is reached.

Although what an expert communicates during settlement negotiations or mediation is subject to settlement privilege, and, in the context of Board mediation, the confidentiality requirements of Rule 69, the more cautious approach outlined above with respect to an expert's opinion should be followed.

### *Participation of Non-Parties*

Normally non-party participants should not attend settlement negotiations or mediation. As participants, they do not have a decision making role with respect to a settlement. Therefore, their presence is not appropriate. If participants wish to have a decision making role or impact on the resolution of a matter, then they should be a party to the appeal or an appellant.

An interesting issue arises when a participant is a commenting agency to a municipality and wishes to participate in the mediation There is a concern that if the participant is not a party, the OMB cannot impose sanctions, such as costs, for a breach of confidentiality. A potential solution would be to make the participant a party only for the purposes of mediation.

### *Mediation Briefs*

The OMB requires that parties to a mediation submit mediation briefs in advance of a mediation. The strategy used in preparing the mediation brief will depend on the circumstances of the case. The balance to be sought is between advocating your client's position while, at the same time, leaving the door open for creative solutions.

### *Presentation of Settlement Agreements*

If an agreement is reached through settlement discussions or mediation, there is an implied waiver of settlement privilege in regard to the evidence that is presented to the OMB in order to effect the settlement. A prudent approach would be to obtain an agreement between the parties regarding the nature and the extent of the evidence that will be presented at the settlement hearing.

## LIMITATIONS ON EVIDENCE FOLLOWING NEGOTIATIONS

Issues can arise regarding what evidence can be led that relates to potential settlements that were discussed in negotiations. It is clear that if the evidence is led, reference cannot be made to the fact that it was discussed in negotiations or the nature of those discussions. However, it is equally clear that settlement privilege cannot be used to prevent the OMB from hearing evidence that might otherwise have been led, had there not be settlement negotiations.

In *Jodamar Properties Ltd., v. Chatham-Kent (City)*, the Ministry of Municipal Affairs and Housing ("MMAH") sought to exclude portions of a witness statement that dealt with a proposed land swap that had been considered as a potential option during a "without prejudice" experts meeting.[29] MMAH also requested that the OMB rule that neither witnesses, nor counsel, were permitted to broach the issue of the land swap during the hearing. With respect to the witness statement, the OMB agreed with MMAH that the details of the potential settlement options should be excluded. However, with respect to the broader request, the OMB stated:

> *The Board cannot be expected to exclude from evidence, matters that would have arisen, or could have arisen in the natural course of the hearing. While the specific details of any potential land swap option raised during settlement discussions must be treated on a without prejudice basis, the concept of a land swap, in and of itself, cannot be considered to be privileged information.*[30]

The practical implication of this decision is that counsel may question an expert at a hearing about a proposal that may have already been discussed in "without prejudice" discussions, provided that no reference is made to the fact that the proposal was already discussed or, in what context.

However, if the expert's opinion at the hearing is not consistent with their previous position during the "without prejudice" discussions, this causes an ethical dilemma for the practitioner as impeachment would require the breach of settlement privilege.

Similar considerations arise with respect to amendments to applications or "with prejudice" settlement offers that are made following settlement negotiations which may resemble "without prejudice" settlement offers that were rejected. Again, provided that no reference is made to the fact that similar matters were discussed in negotiations, opposing counsel should have no reasonable basis for objection. Furthermore, opposing counsel may not be able to object without breaching settlement privilege.

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[29] [2009] O.M.B.D. No. 327.

[30] *Jodmar Properties Ltd.,* at para. 10.

## MEETINGS OF EXPERT WITNESSES

OMB procedural orders require that expert witnesses in the same field meet prior to a hearing to try and resolve or reduce the issues for the hearing. Counsel may attend the meeting of expert witnesses, but their attendance is not required. The issue is whether the meeting of expert witnesses attracts settlement privilege. A statement by the expert witnesses that the meeting is "without prejudice", would be sufficient to attract settlement privilege.

The expert witness should be able to share with his/her client and counsel the facts and opinions that other experts provided during the meeting, even if settlement privilege applies. The issue is the extent to which counsel may refer to this information in the conduct of the hearing.

## MUNICIPAL FREEDOM OF INFORMATION AND PROTECTION OF PRIVACY ACT

The *Municipal Freedom of Information and Protection of Privacy Act* ("MFIPPA"), section 4, provides:

> ***Right of access***
>
> ***4.*** *(1) Every person has a right of access to a record or a part of a record in the custody or under the control of an institution unless,*
>
> > *(a) the record or the part of the record falls within one of the exemptions under sections 6 to 15; or*
> >
> > *(b) the head is of the opinion on reasonable grounds that the request for access is frivolous or vexatious.*

Section 12 is an exemption for solicitor-client privilege and provides:

> ***Solicitor-client privilege***
>
> ***12.*** *A head may refuse to disclose a record that is subject to solicitor-client privilege or that was prepared by or for counsel employed or retained by an institution for use in giving legal advice or in contemplation of or for use in litigation.*

In *Ontario (Liquor Control Board) v. Magnotta Winery Corp.*, the Ontario Court of Appeal considered a request for confidential information under the *Freedom of Information and Protection of Privacy Act* ("FIPPA").[31] Under FPPIA, the right of access provisions and solicitor-client exemption mirror those of MFIPPA. Magnotta and the LCBO had settled several disputes engaging in both mandatory and voluntary mediation. A requester sought all material in the LCBO's possession related to the mediation, including agreements and minutes of settlement.

The LCBO refused the request on the basis of the solicitor-client privilege exemption under FPPIA, section 19, (MFIPPA, section 12). The Information and Privacy Commissioner allowed the requester's appeal and ordered the records released. A panel of the Divisional Court allowed the LCBO's appeal and restored the decision to withhold the records based on the finding that the records were exempt from disclosure based on solicitor-client privilege (FIPPA, section 19) and the common law doctrine of settlement privilege.[32]

The Court of Appeal upheld the Divisional Court's decision holding that since alternative dispute resolution methods have been incorporated into the civil litigation process, the documents prepared during the course of mediation were prepared for use in litigation and, therefore, came under the litigation disclosure exemption in FPPIA, section 19.[33]

A similar approach would apply in the municipal context to protect municipal records pertaining to settlement discussions and mediation.

## COSTS MOTIONS

The OMB has occasionally been willing to admit evidence otherwise subject to settlement privilege to establish a claim for costs. In *555816 Ontario Inc. v. Halton (Region),* the OMB admitted evidence subject to settlement privilege citing as authority rule 49.13 of the *Rules of*

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[31] 2010 ONCA 681.

[32] *Ontario (Liquor Control Board) v. Magnotta Winery Corp.*, (2009), 97 O.R. (3d) 665.

[33] *Ontario (Liquor Control Board)* ONCA at para. 36.

*Civil Procedure*.[34] Rule 49.13 allows a court to admit evidence with respect to written offers to settle to support a claim for costs once issues of liability are resolved. Although the OMB did recognize that the exception would not apply where the communications occurred in the context of Board assisted mediation, this case was reversed on other grounds by a panel of the Divisional Court.[35] Had the Court considered the particular issue of applying an exception to settlement privilege with respect to a motion for costs, it may well have reached a different conclusion than the OMB. There is a public policy argument against an exception to settlement privilege with respect to a costs motion because, parties will be less likely to make a written offer to settle if they fear that such offers may later be used against them.

In *1090504 Ontario Ltd. v. Kitchener (City)*, the OMB was willing to admit written offers to settle once issues related to the merits of the case were resolved while acknowledging that the exception would not apply if the offer was exchanged during mediation.[36] Again, this case is contrary to common law and undermines the basis for settlement privilege which is to allow the parties the freedom to negotiate without the fear that the efforts may result in a cost award if unsuccessful.

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[34] [2006] O.M.B.D. No. 1152.

[35] *Ontario (Ministry of Natural Resources v. 555816 Ontario Inc.*, [2009] O.J. No. 238.

[36] [2007] O.M.B.D. No. 1020.