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Bull<sub>LLP</sub>

Barristers & Solicitors

MUNICIPAL, PLANNING & DEVELOPMENT LAW

## ONTARIO BAR ASSOCIATION

### **Planning and Building on Professionalism: Dos and Don'ts for the Municipal Law Specialist**

Thursday, December 5, 2013

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# **Mediations and Settlement Discussions: Confidentiality and Other Ethical Issues**

Presented by Mary Bull

# Introduction

- Why Settlement Privilege?
- Settlement Privilege/ Without Prejudice Rule
- When does it apply?
- Exceptions
- Mediation /Settlement Issues

# SETTLEMENT ENCOURAGED

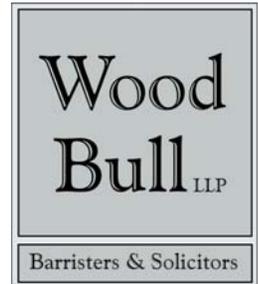
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*“The Courts consistently favour the settlement of lawsuits in general. To put it another way, there is an overriding public interest in favour of settlement. This policy promotes the interests of litigants generally by saving them the expense of trial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

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

# SETTLEMENT ENCOURAGED



## Rules of Professional Conduct, Rule 2.03

### *Encouraging Compromise or Settlement*

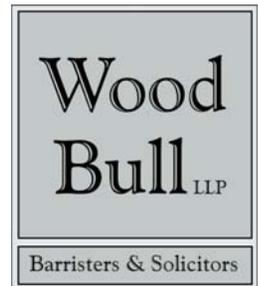
*(2) A lawyer shall advise and encourage the client to compromise or settle a dispute whenever it is possible to do so on a reasonable basis and shall discourage the client from commencing useless legal proceedings.*

*(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.*

# SETTLEMENT PRIVILEGE

- Also called the “Without Prejudice” Rule
- Class Privilege
  - *prima facie* presumption that communications
    - inadmissible
    - not subject to disclosure
- Essential in encouraging settlement
- What communications does it cover?

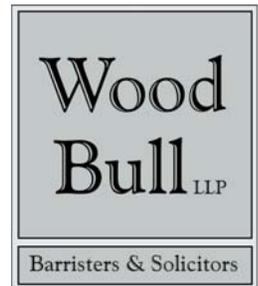
# SETTLEMENT PRIVILEGE - MEDIATION



## OMB Rules of Practice and Procedure, Rule 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.*

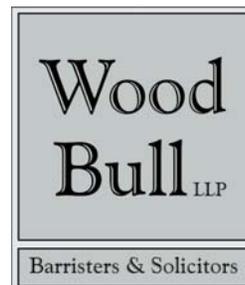
# WHEN DOES PRIVILEGE APPLY?



## 3 Part Test for Settlement Privilege

1. Litigious dispute in existence or contemplation
2. Communication made with express or implied intention that it not be disclosed
3. Purpose of communication to effect settlement

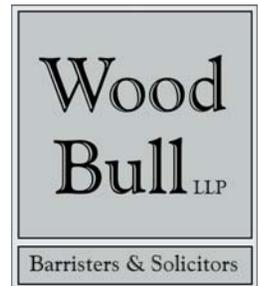
# WHEN DOES PRIVILEGE APPLY?



## 1. Litigious dispute in existence or contemplation

- *After appeal filed*
- *After decision, but before appeal*
- *Before decision and before appeal*

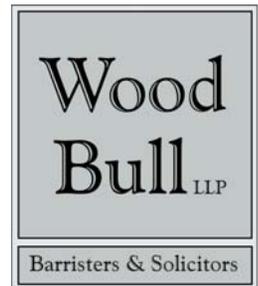
# WHEN DOES PRIVILEGE APPLY?



## 2. Communication made with express or implied intention that it not be disclosed

- Express Intention
  - without prejudice / confidential stated
- Implied Intention
  - Not need to state without prejudice or confidential
  - Depends on the circumstances
  - Earlier in “process”, less likely to be implied

# WHEN DOES PRIVILEGE APPLY?



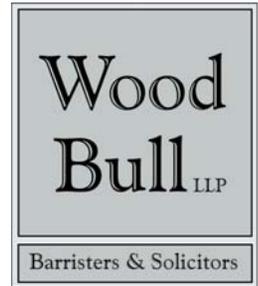
## 3. Purpose of communication to effect settlement

- Lawyer involvement indication, but not necessary
- Avoid disputes about settlement privilege
- Be explicit in written and verbal communications

## EXCEPTIONS

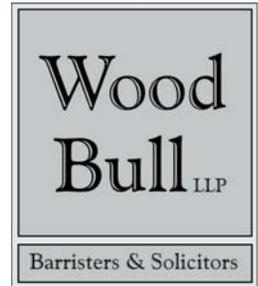
- **Onus on person seeking to introduce evidence**
- **Exceptions:**
  1. Public interest in disclosure must outweigh the public interest in encouraging settlement.
  2. Waiver of Privilege
  3. Freedom of Information Acts (MFIPPA)

# SETTLEMENT/MEDIATION ISSUES



- Participation of Experts
- Participation of Non-parties
- Presentation of Settlement Agreements
- Meeting of Expert Witnesses
- Making a “With Prejudice” Offer after a “Without Prejudice” Offer

# SUMMARY



- Expressly state that settlement privilege applies to avoid disputes about its application
- Strong public policy reasons to maintain settlement privilege, exceptions will be few and far between
- Be strategic regarding information disclosed in settlement negotiations / mediation

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