EB-2013-0029

IN THE MATTER OF the *Electricity Act, 1998*, S.O. 1998, c. 15, Schedule A;

AND IN THE MATTER OF an Application made collectively by entities that have renewable energy supply procurement contracts with the Ontario Power Authority in respect of wind generation facilities for an Order revoking certain amendments to the market rules and referring the amendments back to the Electricity System Operator for further consideration.

ONTARIO POWER AUTHORITY
SUBMISSIONS ON CONFIDENTIALITY

Introduction

1. By letter dated February 6, 2013, the Ontario Power Authority (OPA) made a request for confidentiality to the Board in respect of information redacted from documents filed by the Independent Electricity System Operator (IESO). Pursuant to Procedural Order No. 2 in this case, and the Board's *Practice Direction on Confidential Filings* (the Practice Direction), the OPA filed unredacted, confidential copies of the documents with the Board and delivered to all parties redacted, non-confidential copies of the documents.

2. The OPA's request for confidentiality indicated that the OPA and the applicants in this proceeding are engaged in negotiations regarding the settlement of issues with regard to contracts for the purchase of electricity generated by the applicants.[1] The request went on to state that the redactions from the documents filed by the IESO were made by the OPA for the purpose of maintaining the confidentiality of information about the settlement negotiations and of information that, if disclosed, would prejudice the settlement negotiations.

3. On these grounds, the OPA has made redactions from 8 documents. As well, the Ministry of Energy has made a request for confidentiality in respect of the entirety of one additional document.[2] Should the Ministry of Energy's request for confidentiality in

[1] The existence of these settlement negotiations is apparent, for example, from the unredacted version of the document dated August 15, 2012 and entitled "Integration of Renewables and Recommendations for Dispatch Management Update to Ministry of Energy": see pages 16 and 22 of this document.
[2] This document is identified in Schedule C to the letter that is attached as Appendix B to Procedural

respect of the entirety of this document not be sustained by the Board, the OPA requests confidentiality for certain portions of the document on the same grounds as its request for confidentiality in respect of the 8 other documents.

4. The request for confidentiality made by the OPA is not a typical confidentiality claim in a Board proceeding. Typically, the issue arising from a confidentiality claim is whether information that is subject to the claim should be filed on the public record or should be disclosed only to participants in the proceeding who have signed a Declaration and Undertaking, as provided for in the Practice Direction.

5. In this case, the OPA submits that disclosure of the unredacted versions of the documents to participants in this proceeding, regardless of whether any such participant has signed a Declaration and Undertaking, will result in a breach of settlement privilege and will prejudice the settlement negotiations between the OPA and the applicants.

6. The OPA is particularly concerned about disclosure of the unredacted versions of documents to counsel for the applicants, because the same counsel also represents one of the applicants in the settlement negotiations with the OPA.[3] Any disclosure to counsel for the applicants in this proceeding of the OPA's confidential settlement-related information is effectively disclosure of such confidential information to counsel for one of the opposite parties in the settlement negotiations. In any event, though, the OPA submits that disclosure of the confidential settlement-related information to any participant in this proceeding would be a breach of settlement privilege.

Settlement Privilege

7. It is a longstanding and commonly cited policy of the common law to encourage parties to settle their disputes.[4] A leading Canadian text on the law of evidence states the proposition in the following manner:

> It has long been recognized as a policy interest worth fostering that parties be encouraged to resolve their private disputes without recourse to litigation, or, if an action has been commenced, encouraged to effect a

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Order No 2.

[3] In its confidentiality request made on February 6, 2013, the OPA indicated that counsel for the applicants in this proceeding is also counsel for the applicants in the settlement negotiations. Apparently counsel for all of the applicants in this proceeding represents only one of the applicants for the purposes of the settlement negotiations, but the point about disclosure of confidential settlement-related information remains the same whether counsel represents one or more of the parties to the negotiations.

[4] In D. Foskett, *The Law and Practice of Compromise*, 5th Ed. (London: Sweet & Maxwell, 2002), at page 172, it is said that no authority is needed to support the proposition that the courts welcome and encourage compromise.

compromise without resort to trial.[5]

8. The policy favouring settlement of disputes has been accepted in a multitude of Canadian cases, including decisions of the Supreme Court of Canada. For example, in a decision rendered in 1992, the Supreme Court of Canada quoted with approval the following comments about settlement made by an Ontario judge:

> ...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 a trial of disputed issues, and it reduces the strain upon the already overburdened provincial court system.[6]

9. The same passage was quoted by the Alberta Court of Appeal in a decision which said that, "[i]n these days of spiraling litigation costs, increasingly complex cases and scarce judicial resources settlement is critical to the administration of justice".[7] (Emphasis added.)

10. The Board's own *Settlement Conference Guidelines* attach a similar importance to the settlement of issues. The Introduction to the *Settlement Conference Guidelines* states as follows:

> The Ontario Energy Board is committed to the settlement conference process as part of the objective of achieving greater regulatory efficiency and effectiveness. A successful settlement conference process will result in Board decisions that are in the public interest and are accepted by the parties while at the same time achieving savings in time and money to all participants.[8]

11. The "overriding public interest in favour of settlement" referred to by the Supreme Court of Canada underpins the doctrine of settlement privilege.[9] If parties are to be encouraged to settle their disputes, they must be able to engage in settlement

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[5] A. Bryant, S. Lederman and M. Fuerst, *The Law of Evidence in Canada*, 3rd Ed. (Markham, Ontario: Lexis Nexis Canada, 2009), at page 103, paragraph 14.313.
[6] *Kelvin Energy Ltd. v. Lee* (1992), 97 D.L.R. (4th) 616, at page 634 (S.C.C.), quoting from the decision of Callaghan A.C.J.H.C. in *Sparling v. Southam Inc.* (1988), 66 O.R. (2d), 225 (Ont.H.C.).
[7] *Amoco Canada Petroleum Co. v. Propak Systems Ltd.* (2001), 200 D.L.R. (4th) 667, at page 677, leave to appeal to the Supreme Court of Canada refused 210 D.L.R. (4th) vi. See also *British Columbia Children's Hospital v. Air Products Canada Ltd.* (2003), 224 D.L.R. (4TH) 23, at pages 33-34 (British Columbia Court of Appeal), leave to appeal to the Supreme Court of Canada granted 233 D.L.R. vi.
[8] *Ontario Energy Board Settlement Conference Guidelines*, page 1.
[9] See, for example, *Johnstone v. Locke* 2011 ONSC 7138 (CanLII), at paragraph 5. And see *The Law of Evidence in Canada*, *supra*, at pages 1030-1032.

negotiations with confidence that their efforts to resolve their differences will be protected from disclosure.

12. Some Canadian authorities have enunciated a three-part test for settlement privilege. According to this approach, the following three conditions must be present for settlement privilege to apply:

> (i) a litigious dispute must be in existence or within contemplation;
>
> (ii) the communication must be made with the express or implied intention that it would not be disclosed in a legal proceeding in the event negotiations failed; and
>
> (iii) the purpose of the communication must be to attempt to effect a settlement.[10]

13. The redacted documents filed in this case make clear that litigation was within contemplation: one such document, for example, explicitly refers to "litigation potential".[11] It is equally clear that the documents were not intended to be disclosed in any legal proceeding: this is evident both from the nature of the contents of the documents and from explicit wording on the documents, such as "Confidential", "Confidential Advice to Government" and "Commercially Confidential – Not For Distribution". And, finally, it is apparent that the motivating purpose of the OPA, insofar as the documents and communications are concerned, was to attempt to effect a settlement.

14. A leading Canadian case on the doctrine of settlement privilege is the decision of the former Chief Justice of British Columbia, on behalf of himself and three other members of the British Columbia Court of Appeal, in *Middlekamp v. Fraser Valley Real Estate Board*.[12] In that case, McEachern C.J.B.C. made the following comments about settlement privilege that are directly pertinent to the confidentiality request made by the OPA in this case:

> ...I find myself in agreement with the House of Lords that the public interest in the settlement of disputes generally requires "without prejudice" documents or communications created for, or communicated in the course of, settlement negotiations to be privileged. I would classify this as a

[10] *Inter-Leasing Inc. v. Ontario (Minister of Finance)* (2009), 256 O.A.C. 83, at paragraph 10 (Ont.Div.Ct.), quoting from *The Law of Evidence in Canada*, *supra*, at paragraph 14.322.
[11] See the unredacted version of the document dated August 15, 2012 and entitled "Integration of Renewables and Recommendations for Dispatch Management Update to Ministry of Energy", at page 16.
[12] (1992), 71 B.C.L.R. (2d) 276.

> "'blanket', *prima facie*, common law or 'class'" privilege because it arises from settlement negotiations and protects the class of communications exchanged in the course of that worthwhile endeavour.
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> In my judgment this privilege protects documents and communications created for such purposes both from production to other parties to the negotiations and to strangers, and extends as well to admissibility, and whether or not a settlement is reached. This is because, as I have said, a party communicating a proposal relating to settlement, or responding to one, usually has no control over what the other side may do with such documents. Without such protection, the public interest in encouraging settlements will not be served.[13]

15. Applying the words of McEachern C.J.B.C. to this case, the documents and communications created by the OPA for the purposes of settlement negotiations are protected from production to the other parties to the negotiations, and to "strangers"; this goes to the admissibility of the documents and it is the effect of settlement privilege regardless of whether or not a settlement is actually reached.

16. The significance of the determination that settlement privilege is a "class" privilege is that the onus is on a party seeking disclosure of material subject to settlement privilege to establish that the case falls within an exception to the privilege.[14] In this case, there is nothing before the Board that would satisfy the onus on the applicants to establish an exception to settlement privilege.

17. As for the comment by McEachern C.J.B.C. about admissibility, the authorities leave no doubt but that the "overriding public interest" that underpins settlement privilege does indeed "override" relevance. In an Ontario decision, a judge of the Superior Court of Justice quoted from a decision of the British Columbia Court of Appeal the proposition that,

> ...mere relevance does not provide a sufficiently high threshold to displace the compelling public policy underlying settlement privilege.[15]

18. The OPA therefore submits that the information that it has redacted from documents filed by the IESO is protected from disclosure by settlement privilege.

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[13] *Middlekamp*, *supra*, at paragraphs 17-18.
[14] *Johnstone*, *supra*, paragraphs 2-14; see also *Inter-Leasing*, *supra*.
[15] *Johnstone*, *supra*, at paragraph 6, quoting from *Dos Santos (Committee of) v Sun Life Assurance Co. of Canada* (2009), 249 D.L.R. (4th) 416 (B.C.C.A.).

Prejudice to Settlement Negotiations

19. In addition to the doctrine of settlement privilege, a further basis for protecting the redacted information from disclosure is found in the Practice Direction. Appendix A to the Practice Direction sets out factors that the Board may consider in addressing the confidentiality of filings. One of these factors is follows:

> (a) the potential harm that could result from the disclosure of the information, including
> ...
> iii. whether the information could interfere significantly with negotiations being carried out by a party; ... .[16]

20. The OPA submits that the Board should not require disclosure in this proceeding of the information that has been redacted from the documents at issue because such disclosure would prejudice settlement negotiations between the OPA and the applicants. The Practice Direction indicates that, in determining a request for confidentiality, the Board may make one or more of a number of different orders, including any order that the Board finds to be in the public interest.[17] The OPA submits that it is appropriate for the Board to make an order that the unredacted versions of the documents at issue not be admitted into evidence in this proceeding.

Conclusion

21. For all of these reasons, the OPA submits that the Board should not require disclosure of the information redacted from documents by the OPA. The redacted versions of the documents should be protected from disclosure, first, on the ground of settlement privilege and, second, in accordance with the Practice Direction, because disclosure would prejudice settlement negotiations.

All of which is respectfully submitted.

February 13, 2013

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[16] Practice Direction, page 17, Appendix A,
[17] Practice Direction, page 9, paragraph 5.1.10.