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BY EMAIL and RESS

February 15, 2013
Our File No. 20130029

Ontario Energy Board
2300 Yonge Street
27th Floor
Toronto, Ontario
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Attn: Kirsten Walli, Board Secretary

Dear Ms. Walli:

Re: EB-2013-0029 – RESG Market Rules Review – Confidentiality

We are counsel to the School Energy Coalition ("SEC"). Pursuant to Procedural Order No. 3, these are SEC's submissions with respect to the confidentiality claims by the Ontario Power Authority ("OPA") and the Ministry of Energy ("MoE").

Ontario Power Authority Confidentiality Claim

The OPA is claiming confidentiality on a number of documents, in the possession of the Independent Electricity System Operation ("IESO"), ordered to be produced by the Board. The grounds are that producing the documents would be a breach of settlement privilege and that it would prejudice negotiations with the Applicant. It is further seeking on the same grounds that regardless of the Board's policy on confidentiality, the documents should not be produced in confidence to any party.

Settlement Privilege. SEC submits that the documents do not meet the requirements of settlement privilege and should be produced.

The OPA has for the most part stated the law of settlement privilege correctly, although in Ontario, the issue of it being a class or case-by-case privilege is still a point of significant disagreement.[1] The key part of the test of settlement privilege is that the "purpose of the communication must be to attempt to effect a settlement".[2] The documents at issue are not communications, nor were they sent between parties. The rationale for settlement privilege is to

[1] *IPEX Inc. v. AT Plastics Inc*, 2011 ONSC 4734 at paras 34-41. (Appendix A)
[2] *Johnson v. Locke*, 2011 ONSC 7138 at para 5. (Appendix B)

encourage settlement, and the law has determined that communications in furtherance of that should not be disclosed to the court, or to a third party.[3] Parties would be less likely to discuss or exchange settlement offers if they knew the receiving party could reveal the communications.

The documents at issue are presentations made within and between government agencies (MOE, OPA, and IESO). They are not presentations of offers or counter-offers to or from the OPA and renewable generators (including the Applicants). Reviewing the slide titles, the redacted sections of the documents at best may discuss general issues regarding the negotiations but they are not communications in furtherance of settlement. The redacted portions of the documents do not meet the test for settlement privilege because of that the Board should reject OPA's claim.

Regardless, even if settlement privilege does apply, disclosure is permissible in certain circumstances. In *Mueller Canada Inc. v. State Contractors Inc.*, Doherty J. discussed one of the exceptions to settlement privilege:[4]

> I. Waxman & Sons Ltd., *supra* also makes it clear that there are exceptions to the privilege which operates where one of the parties to the negotiations, or a stranger to those negotiations, seeks production. In discussing those exceptions, Sopinka and Lederman at p. 201 say:
>
> > "The aforesaid exceptions to the rule of privilege find their rationale in the fact that the exclusionary rule was meant to conceal an offer of settlement only if an attempt was made to establish it as evidence of liability or a weak cause of action, not when it is used for other purposes."
>
> The reference to establish "liability or a weak case" must refer to liability in relation to the matters which are the subject of the settlement -- in this case the alleged wrongs which led to the initial dispute between State and the Kellogg Companies. Where documents referable to the settlement negotiations or the settlement document itself have relevance apart from establishing one party's liability for the conduct which is the subject of the negotiations, and apart from showing the weakness of one party's claim in respect of those matters, the privilege does not bar production." [emphasis added]

This was similarly confirmed in other cases, that where the document "has relevance apart from establishing liability or weakness, the privilege is no bar to production".[5]

In this proceeding, the Board is not determining nor interested in, potential liability that the OPA may or may not believe it has towards the Applicants due to the terms of the RES I and RES II contracts. The Board's considerations in this proceeding are outlined in section 33(9) of the *Electricity Act*. The redacted information, in so far as it does not include information regarding liability, should be disclosed because it may be useful in the Board's inquiry. This includes important information on the quantification of the financial impacts to the Applicant generators of the Renewable Integration Amendments. That information is very important in determining if the amendments further the purposes of *Electricity Act* include protecting consumers with respect to

[3] *Mueller Canada Inc. v. State Contractors Inc,*. [1989] O.J. No. 2059. (Appendix C)
[4] *Ibid* at paras 12-13.
[5] *Stevenson v. Reimer* [1993] O.J. No. 2440 at para 16. *Sabre Inc. v. International Air Transport Assn.* [2009] O.J. No. 903 at paras 21-23. (Appendix D, E)

price, both in the short-term, and also potentially in the long-term if the magnitude of the financial harm to the industry is significant.

Prejudice. The OPA claims that disclosure of this document to the public or to the Applicant will cause prejudice to its negotiations since counsel for the Applicant in this proceeding is also counsel for some of the parties in that negotiation. SEC believes that this is an overstatement since financial impacts to the Applicant generators outlined in the documents would seem to be made on an aggregate basis.[6] Since the RES I and II contracts are not standard offers (like the FIT program), negotiations with the OPA will have to be completed on an individual basis.

It is clear is that non-disclosure will prejudice all parties, including SEC. Parties will not have relevant information about the financial impact to the Applicant generators, because of curtailment that the OPA has projected. This is an important issue in the proceeding as outlined in SEC's earlier submissions on the issues of production and cost awards.

The Board is being asked to balance the *potential* prejudice to the OPA by producing the documents against *definite* prejudice to all parties in this proceeding by not doing so. SEC believes that this balance is best met by providing, on a confidential basis, the redacted sections of the documents to all external counsel and consultants. All parties should be reminded, and in this case especially counsel to the Applicant, that the Board's Declaration and Undertaking requires that the confidential information be used exclusively for duties performed in respect of this proceeding.[7]

Ministry of Energy Confidentiality Claim

The MoE is claiming confidentiality on the entirety of a single document, held in the possession of the IESO, and ordered to be produced by the Board. The basis for the confidentiality claim is primarily grounded in the considerations set out in Appendix A of the Board's *Practice Direction on Confidential Filings* ("*Practice Direction*"), which relate to certain Freedom of Information and Protection of Privacy Act ("FIPPA") disclosure exemptions. SEC believes that certain portions of the document should be treated as confidential, but that it should be provided to counsel to the parties pursuant to the *Practice Direction*.

FIPPA has specific application to freedom of information requests. The Board is not bound by it in any way. Exemptions under FIPPA, relied upon by the MoE, are only a guide to the Board under the *Practice Direction* in determining if the document at issue should be treated confidentially, not that it should not be disclosed in its entirety. The Board's Declaration and Undertaking is sufficient protection of confidential material, and only in the most exceptional circumstances is the nature of the document such that it should be completely secret, so that no parties see it. This proceeding is not an example of such exceptional circumstances.

[6] Since SEC does not have access to the redacted portions of the documents, the assumption that this information is in aggregate (as compared to listing the impacts per generation facility) is based primarily on the slide headings.

[7] The Board's Form of Declaration and Undertaking, contained in Appendix C to the *Practice Direction on Confidential Filings* states:

> "I undertake that:
>
> 1. I will use Confidential Information Exclusively for duties preformed in respect of this proceeding."

Confidential Advice to Government and Minister. Even under FIPPA, the exemption of disclosure of information that would reveal "advice or recommendations" under section 13(1) is not as broad as the MoE argues, and would certainly not include the entire document. The MoE urges the Board to take an even broader interpretation of "advice and recommendations" than is contemplated under FIPPA or the *Practice Direction*.[8] SEC submits that the opposite should be true. Because the Board is not bound by FIPPA, if anything its interpretation should be narrower.

The Non-Confidential Summary[9] includes a number of pieces of information contained in the document that are neither "advice" nor "recommendations", such as a forecast of the level of SGB, and a description and analysis of the tools that can be used to manage it. Neither of these categories of information includes a selection of options (advice) or a Ministry staff recommended option (recommendation). FIPPA itself is clear, that 'factual' material is an exemption to s.13(1).[10] This information should therefore be placed on the public record.

With respect to information regarding parts of the document that could be considered "advice or recommendations", the harm the MoE claims will occur from disclosure of this information, even on a confidential basis, is overstated. While surplus baseload generation issues are an ongoing policy concern, SEC seeks the information to understand what information was available to the IESO in its design of the Renewable Integration Amendments and to understand, to the extent this information is included, the financial impact to both ratepayers and the Applicant. The signed Declaration and Undertaking is more than adequate to protect the information from the harms the MoE believes disclosure may cause.

Prejudice to Third-Parties, Commercially-Sensitive Information and Harm to Economic and Other Interests of Ontario. SEC relies on its submissions above regarding the OPA's claim of confidentiality over certain documents on a similar basis. On balance, the Board should order the document disclosed to all parties, and information related to financial impacts be treated confidentiality.

All of which is respectfully submitted.

Yours very truly,
Jay Shepherd P.C.

Original signed by

Mark Rubenstein

cc: Applicant and Intervenors (by email)

[8] For further discussion on the scope of "advice" and "recommendations" see *Ontario (Finance) v. Ontario (Information and Privacy Commission),* 2012 ONCA 125 (Leave to Appeal to the SCC granted). (Appendix F)
[9] Appendix A to the Ministry of Energy's Letter dated February 6, 2013.
[10] *Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, s. 13(2)(a)

Appendix A

Case Name:

IPEX Inc. v. AT Plastics Inc.

RE: IPEX Inc., Plaintiff/Appellant, and
AT Plastics Inc., Defendant/Respondent

[2011] O.J. No. 3636

2011 ONSC 4734

337 D.L.R. (4th) 63

23 C.P.C. (7th) 70

205 A.C.W.S. (3d) 654

4 C.L.R. (4th) 223

2011 CarswellOnt 8144

Court File No. 06-CV-316859PD1

Ontario Superior Court of Justice

G.R. Strathy J.

Heard: May 17, 2011.
Judgment: August 10, 2011.

(74 paras.)

Civil litigation -- Civil procedure -- Discovery -- Production and inspection of documents -- Objections and compelling production -- Orders for production -- Privileged documents -- Documents prepared for the purpose of settlement -- Appeals -- From Masters' decisions -- Appeal by plaintiff from master's order requiring production of documents created in United States litigation to which plaintiff was party allowed in part -- Defendant supplied raw materials to plaintiff, who manufactured pipes -- Plaintiff claimed against defendant for contribution and indemnity after settlement of class actions relating to pipe failure -- Master ordered production of documents related to settlement of class actions -- Only way to understand plaintiff's liability in class actions was by examining documents -- Defendant entitled to know factual foundation of plaintiff's claim -- Only documents from claims for which plaintiff sought indemnity need be produced.

Appeal by IPEX Inc. from a master's order requiring it to produce certain documents created in litigation to which IPEX

was a party in the United States. IPEX claimed that the documents were protected by settlement privilege. IPEX manufactured pipe that was used in plumbing and heating installations. IPEX claimed against AT Plastics ("ATP"), which supplied raw materials to IPEX in negligence. IPEX was the defendant in 25 or more class actions in Canada and the United States related to premature failure of its pipes. The class actions had been conditionally settled. IPEX sought indemnity from ATP. The master's order required IPEX to produce all documents in the United States proceedings concerning offers to settle, mediation materials, and settlement agreements.

HELD: Appeal allowed in part. IPEX's claim against ATP was based on the settlements. Production of the documents was therefore essential to permit ATP to defend the claim. ATP would be unable to defend itself unless it was able to lift the veil on the settlements. The only way to understand the basis of IPEX's liability in the class actions was to examine the documents. The overriding interest of justice demanded that ATP be given a fair opportunity to know the underlying factual foundation for IPEX's claim and to properly meet that claim. However, the master erred in ordering production of all documents related to the class actions. The only documents that were to be provided were those that were subject to a claim of contribution and indemnity from ATP.

Statutes, Regulations and Rules Cited:

Rules of Civil Procedure, R.R.O. 1990, reg. 194, Rule 1.04(1.1), Rule 24.1.14, Rule 29.2.03, Rule 29.2.03(1)(a), Rule 29.2.03(1)(b), Rule 30.1

Counsel:

Jessica Kimmel and Sara Gottlieb, for the Plaintiff/Appellant.

Larry Theall and Jeff Brown, for the Defendant/Respondent.

REASONS FOR DECISION (APPEAL FROM MASTER)

1 **G.R. STRATHY J.**:-- This is an appeal by the plaintiff IPEX Inc. ("IPEX") from an order of Master Graham requiring that it produce certain documents created in litigation to which it is a party in the United States. The appeal concerns, among other things, the nature and scope of the settlement privilege.

The Action and the Pleadings

2 IPEX manufactures "Kitec" pipe, which is used in residential, institutional and commercial plumbing and heating installations.

3 The defendant AT Plastics Inc. ("ATP") has supplied some of the raw materials used in the manufacture of Kitec pipe. Not all IPEX's Kitec pipe was manufactured using ATP's product. At various times, some was manufactured using raw materials purchased from other suppliers.

4 IPEX alleges that it has received complaints of premature failure of the Kitec pipe. The complaints include allegations by end users that pipes have burst in plumbing and heating installations, with consequential property damages, replacement costs and related damages.

5 IPEX is a defendant in some twenty-five or more class actions in Canada and the United States. There are also individual actions. The claims are massive.

6 IPEX has commenced this action claiming damages against ATP for negligence, breach of contract and breach of

warranty. It alleges that ATP's product degrades too quickly and was not fit for the purpose for which it was intended. It claims damages, including the cost of investigating and responding to complaints, payment for property damages, the cost of repairing and replacing the pipe, and associated costs.

7 IPEX also claims contribution and indemnity for any amounts that it has paid, or pays in the future, or becomes obligated to pay, as a result of allegations related to Kitec pipe manufactured with ATP's product. There has been a conditional settlement of some of the U.S. and Canadian class actions for US$125,000,000, inclusive of attorneys' fees. IPEX claims indemnity for these amounts, as well as amounts paid as a result of settlements or judgments in other litigation. It is said that the potential claims for indemnity have a value in excess of $500 million and could potentially be as high as $1 billion.

8 ATP's statement of defence asserts, among other things, that the damages claimed by IPEX are the result of its own negligent design and manufacturing process and, in particular, that IPEX used brass fittings in the construction of its pipe. These fittings were allegedly susceptible to a particular form of corrosion, known as "dezincification", whereby zinc leaches from the fitting and causes a powdery build-up on the inside of the fitting. It is alleged that this in turn restricts water flow, causing the pipe to become pressurized and ultimately to burst.

9 Similar allegations have been made by the plaintiffs in the class actions.

The Documents at Issue

10 ATP sought production of, among other things, all documents sent by IPEX or received from third party claimants, or their counsel, in the U.S. proceedings (described as the "Litigation Files"), including all documents concerning offers to settle, mediation materials, and settlement agreements (referred to as the "Mediation Briefs"), as well as pleadings and depositions. The precise relief requested was described in para. (n) of the notice of motion as follows:

> All documents of any kind received from or sent to any claimants or their counsel in relation to KITEX [sic] claims (including the Washington class action, the Woodlands matter, and the Nevada class action), including pleadings, correspondence, productions, offers to settle, agreements, mediation materials, settlement agreements, motion materials, discovery requests and responses, transcripts from examinations or depositions, and court orders including those used in an attempt to resolve the original [sic].

11 IPEX took the position that these documents (other than the productions in the U.S. litigation, which it has agreed to produce) were privileged and confidential and were protected from production under the local laws of the jurisdictions in which the proceedings were being litigated.

The Decision of the Master

12 The Master dealt with several other production issues in a brief endorsement and reserved his decision on the relief sought in para. (n), above. In a supplementary endorsement dated February 25, 2011, he granted an order requiring IPEX to produce:

> ... all documents produced or created in the US Actions, including pleadings, correspondence, productions, offers to settle, agreements, mediation materials, settlement agreements, motion materials, discovery requests and response, transcripts from examinations and court orders ...

13 The "US Actions" were defined to mean all lawsuits, whether individual or class action, whether pending, dismissed, settled or otherwise resolved, in any jurisdiction in the United States, including the federal Multi-District Litigation ("MDL") regime, involving a claim or claims against IPEX in relation to Kitec pipe or fittings that (a) form a basis for IPEX's claim for contribution and indemnity against ATP and/or (b) relate to brass fittings and/dezincification.

14 This order is extremely broad. It encompasses production of the Litigation Files, which includes the complete files of IPEX's lawyers in the various class proceedings, and the Mediation Briefs, which are a subset of the Litigation Files. The Mediation Briefs include all documents and briefs exchanged in connection with mediations in the U.S. litigation, some of which resulted in settlements that form a part of the claim by IPEX against ATP in this litigation and some of which did not. The order also covers production of documents in proceedings that are not the subject of IPEX's claims for contribution and indemnity from ATP.

15 The Master's reasons on this issue were as follows:

> The issue on which I reserved is whether the plaintiff must produce further documents of the description in item (n) of the notice of motion.
>
> These documents include all documents forming part of the cases in the U.S. against IPEX with respect to which IPEX is claiming contribution and indemnity from AT Plastics ("ATP"). I accept the submission of counsel from ATP that in those cases in which IPEX is claiming indemnity from ATP, ATP is in the same position as a third party without the same rights of production that a third party would have from the plaintiffs. Accordingly, IPEX shall produce to ATP all documents produced or created in those U.S. Kitec actions which are the basis for indemnity claims against ATP. Those documents shall include any settlement agreements and documents filed for the mediations, but the plaintiff may redact any portions of any documents that constitute admissions against IPEX's interest in relation to ATP. This court cannot apply the U.S. statutes relied upon by IPEX in relation to settlement or mediation privilege where the U.S. law is not properly proven through an expert. (See *Lear v. Lear*, [1974] O.J. No. 2100, 1974 CarswellOnt 162 at para. 10.) The provisions of rule 24.1.14 cannot apply to a mediation held in another jurisdiction.
>
> In addition, even though the plaintiff IPEX is not claiming indemnity with respect to 'dezincification' claims, ATP's pleading in para. 21(f)(i) of its statement of defence with respect to IPEX's use of brass fittings makes relevant documents in any case or cases in which the U.S. plaintiffs make a similar allegation relating to the use of brass fittings. Documents in any such action or actions shall be produced.
>
> ATP's use of the documents ordered produced shall be subject to the provisions of Rule 30.1.

Applicable Law and the Agreement of the Parties

16 The Master's observations about U.S. law not having been properly proven through an expert were the result of submissions by counsel for ATP that the evidence adduced by IPEX concerning U.S. law, which had not been tendered through an expert in U.S. law, was inadmissible. This led to a motion by IPEX for leave to adduce further evidence of U.S. law on the appeal before me. The issue was, very sensibly, resolved by the parties by agreement that the issue of privilege should be decided under Ontario law. The agreement was in the following terms:

> 1. The issue of whether or not documents should be produced in this action, including mediation materials, offers to settle and settlement agreements, is governed by and should be decided under Ontario law, including the questions of whether they are subject to a class privilege and, if so, if there is an exception to the privilege that would justify their production in this case, or if they are not subject to a class privilege, whether they meet the *Wigmore* test.

2. The materials exchanged or presented at or in connection with mediations or settlement conferences relating to claims in the United States that are the subject of the Order appealed from (which would include offers to settle, correspondence, mediation or settlement materials and settlement agreements as itemized in the Order) were produced or created in a 'without prejudice' process in circumstances where the parties had an expectation of confidentiality.
3. On the basis of the foregoing agreements, the court does not need to dispose of IPEX's motion for leave to file the fresh evidence and it will be withdrawn.

The Standard of Review

17 The standard of review on an appeal from a Master was set out by the Divisional Court in *Zeitoun et al. v. The Economical Insurance Group* (2008), 91 O.R. (3d) 131, [2008] O.J. No. 1771 (S.C.J.), aff'd. (2009), 96 O.R. (3d) 639 (C.A.): the decision should not be interfered with unless the Master made an error of law, exercised his or her discretion on the wrong principles or misapprehended the evidence such that there was a palpable or overriding error.

18 Where there is an error of law, the standard of review is correctness, whether the order is final or interlocutory. Where there is an error in the exercise of discretion, it must be established that the discretion was based on a wrong principle or that there was a palpable or overriding error in the assessment of the evidence: see *Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235. The relevance of a document is a question of law, but whether or not a particular relevant document should be produced may involve an element of discretion: *Wahid v. Malinkovski*, 2010 ONSC 3249, [2010] O.J. No. 2872 at para. 8, referring to *Air Canada v. McDonnell Douglas Corp.* (1994), 34 C.P.C. (3d) 181, [1994] O.J. No. 4435 (Gen. Div.) at para. 6.

19 I accept the general proposition, put forward by counsel on behalf of ATP, that a Case Management Master's decision on documentary production is one that falls squarely within the Master's area of experience and expertise. Masters have been aptly described as being on the "front line" of production and discovery motions and their decisions on those issues are entitled to deference on appeal: *Noranda Metal Industries Ltd. v. Employers Liability Assurance Corp*. (2000), 49 C.P.C. (4th) 336, [2000] O.J. No. 3846 (S.C.J.); *Temelini v. Wright*, [2009] O.J. No. 4447 (S.C.J.) at para. 16, aff'd. 2010 ONCA 354, [2010] O.J. No. 5994. This is particularly so where the decision involves an element of discretion.

20 I also accept the general proposition that a Judge sitting in appeal of a Master's decision should assume that the Master considered all the issues before him or her, even if those issues are not directly addressed in the reasons: *Temelini*, above, at para. 18. That being said, in this particular case the Master made no reference to the principle of proportionality, an issue that has particular significance in this case and to which I shall refer below. The absence of reasons on this issue makes it difficult to assess whether the Master gave any weight to the proportionality factor.

The Issues and the Positions of the Parties

21 The principal issues on this appeal are:

(a) whether, having regard to the existence of settlement privilege, the Master erred in ordering production of the Mediation Briefs; and
(b) whether, having regard to the principles of relevance and proportionality, the Master erred in ordering production of the entire Litigation Files.

22 IPEX asserts that the Master's decision with respect to the Litigation Files failed to consider the relevance of those records, including the Mediation Briefs, particularly because some of the underlying U.S. Actions were not the subject of claims for contribution and indemnity and some of the cases were ongoing and had not been settled. It says, as well, that the production of all Litigation Files was not proportionate, would involve extraordinary time and expense, including the expense of reviewing the files for privileged information, and would involve production of irrelevant

documents. It says that ATP has not established that those documents are relevant and that, when considered in the context of the substantial production that IPEX has voluntarily agreed to make, the additional production ordered by the Master is simply not proportional.

23 IPEX takes the position that the Mediation Briefs are privileged. It also says that the order fails to take into account the interests of third parties who were parties to the underlying actions.

24 ATP's position is that the Litigation Files and the Mediation Briefs are relevant and that it would be unfair not to require their production. It says that IPEX is seeking contribution and indemnity for amounts it is required to pay under some settlements of U.S. litigation and that it is entitled to discovery of all the documents that were generated in arriving at those settlements. The reasons why IPEX agreed to enter into settlement agreements will be a key issue for the trial judge and IPEX will have to demonstrate that the settlements were reasonable. ATP will be entitled to show that they were not reasonable or that they were entered into for reasons having to do with other factors, such as, for example, the dezincification problem, which had nothing to do with ATP. ATP says that even if the Mediation Briefs and settlement agreements are subject to some form of privilege, IPEX has waived privilege by putting the settlements directly in issue.

25 ATP says that there was no evidence before the Master to suggest that the production of the Litigation Files requested was disproportionate and that IPEX failed to discharge its onus of showing that it was disproportionate.

Settlement Privilege

26 The law of privilege is a judicial, and in a few cases legislative, compromise between the search for the truth and over-riding social values. It has the effect of excluding relevant evidence because the admission of the evidence would impair important social relationships and values. Communications in the context of certain relationships are said to be subject to a "class privilege", in which the communications are presumptively protected from disclosure and the onus is on the party seeking disclosure of the communication to show that there is an over-riding interest in such disclosure: *R. v. Beharriell*, [1995] 4 S.C.R. 536. The tendency in Canada has been to limit class privileges and to take a more flexible and nuanced approach to claims for privilege on a case-by-case basis: see *Slavutych v. Baker*, [1976] 1 S.C.R. 254; J. Sopinka, S.N. Lederman and A.W. Bryant, *The Law of Evidence in Canada* (2nd) ed., (Markham, Ont: LexisNexis, 1999) ch. 14: "Privilege".

27 Solicitor and client privilege attaches to communications between lawyer and client in connection with the provision of legal advice. It is a class privilege, does not require a balancing of interests on a case-by-case basis and is subject to limited and defined exceptions: *Ontario (Liquor Control Board) v. Magnotta Winery Corp*. (2009), 97 O.R. (3d) 665, [2009] O.J. No. 2980 (Div. Ct.), at paras. 28-30, aff'd. 2010 ONCA 681, 102 O.R. (3d) 545 ("*Magnotta*").

28 Litigation privilege, also known as "work product privilege", is a broader privilege, but it is not a class privilege. It was described by Carnwath J. for the Divisional Court in *Magnotta* at paras. 31-36:

> Litigation privilege, also called work product privilege, applies to communications between a lawyer and third parties or a client and third parties, or to communications generated by the lawyer or client for the dominant purpose of litigation when litigation is contemplated, anticipated or ongoing. Generally, it is information that counsel or persons under counsel's direction have prepared, gathered or annotated.
>
> Litigation privilege is not a class or absolute privilege and, unlike solicitor-client privilege, has not evolved into a substantive rule of law.
>
> Information sought to be protected by litigation privilege must have been created for the

> dominant purpose of use in actual, anticipated or contemplated litigation.
>
> Litigation privilege can protect documents that set out the lawyer's mental impressions, strategies, legal theories or draft questions. These documents do not have to be from or sent to the client. This is the first broad category of documents that are most often protected by litigation privilege as part of the lawyer's brief. The second broad class of documents includes communications by the lawyer, client or third party, created for the purpose of litigation, e.g., witness statements, expert opinions and other documents from third parties.
>
> Litigation privilege allows a lawyer a "zone of privacy" to prepare draft questions and arguments, strategy or legal theories.
>
> The elements required in order to claim work product or litigation privilege over documents or communications are as follows:
>
> (a) the documents or communications must be prepared, gathered or annotated by counsel or persons under counsel's direction;
> (b) the preparation must be done in a realistic anticipation of litigation;
> (c) if there is more than one purpose or use for the document, facts must reveal that the dominant purpose was for the anticipated litigation;
> (d) there must be no requirement under legal rules governing the proceeding to disclose the documents or facts; and,
> (e) there has been no prior waiver of documents or facts by disclosure to the opposing party ...

29 Settlement privilege protects communications made with a view to settlement. The rationale is that the settlement of disputes is desirable and parties would not enter into settlement negotiations if their communications could be used against them if the negotiations were not successful. The privilege is intended to encourage settlement and to protect the parties to negotiations for that purpose: *I. Waxman & Sons Ltd. v. Texaco Canada Ltd.*, [1968] 1 O.R. 642, 67 D.L.R. (2d) 295 (H.C.J.), aff'd. [1968] 2 O.R. 452 (C.A.) ("*Waxman*"). As Doherty J., as he then was, observed in *Mueller Canada Inc. v. State Contractors Inc.* (1989), 71 O.R. (2d) 397, [1989] O.J. No. 2059 (H.C.J.) ("*Mueller*") at para. 7, the "parties should be free to engage in frank and reasonable negotiations without fear that their offers of peace will be turned on them as admissions against interest should negotiations fail."

30 Rule 24.1.14 of the *Rules of Civil Procedure*, R.R.O. 1990, reg. 194 recognizes the common law settlement privilege and provides that all communications at a mediation session are deemed to be without prejudice settlement discussions.

31 In *Muller v. Linsley & Mortimer* [1996] P.N.L.R. 74, [1994] A.D.R.L.R. 11/30, the English Court of Appeal adopted the following statement, which had been approved by the House of Lords in *Rush & Tompkins Ltd. v. Greater London Council*, [1989] A.C. 1280:

> That the rule rests, at least in part, upon public policy is clear from many authorities and the convenient starting point of the inquiry is the nature of the underlying policy. It is that parties should be encouraged so far as possible to settle their disputes without resort to litigation and should not be discouraged by the knowledge that anything that is said in the course of such negotiations ... may be used to their prejudice in the course of the proceedings. ... The public policy justification, in truth, essentially rests on the desirability of preventing statements or offers

> made in the course of negotiations for settlement being brought before the court of trial as admissions on the question of liability.

32 In order for the privilege to be recognized:

> (a) there must be a litigious dispute in existence or contemplated;
> (b) the communication must be made with the express or implied intention that it would not be disclosed to the court in the event the negotiations failed; and
> (c) the purpose of the communication must be to attempt to effect a settlement.

See Sopinka et al., above, at s. 14.207.

33 In Ontario, it is settled law that litigation privilege applies not only to the immediate parties to litigation, but to subsequent litigation between one of those parties and another party. In the decision of the Court of Appeal in *Waxman*, it was stated, at paras. 2 and 3:

> Admittedly, the issue is one upon which there is no direct and binding authority in this jurisdiction and hence admittedly the question to be resolved is one at large in this jurisdiction. The question, of course, is whether or not discovery can be compelled in the production by one party to the litigation before the Court of letters written by another party to this litigation in previous litigation with a party, a complete stranger, to the present proceedings. To put it another way, are communications written without prejudice and with a view to settlement of issues between A and C compellable at the instance of B in subsequent litigation between A and B on the same subject-matter or subject-matter closely related to that with which the correspondence in question was concerned? We find ourselves in agreement with the conclusions reached by Fraser, J., and also with his analysis, in the main, of the very numerous decisions referred to in his reasons for judgment and, as I have said, discussed in the submissions of counsel before this Court. Specifically, we agree with the learned trial Judge wherein he states his conclusion as follows, and I quote from his reasons [[1968] 1 O.R. 642 at p. 656, 67 D.L.R. (2d) 295 at p. 309]:
>
> > ... I am of opinion that in this jurisdiction a party to a correspondence within the "without prejudice" privilege is, generally speaking, protected from being required to disclose it on discovery or at trial in proceedings by or against a third party.
>
> Fraser, J., expresses the view that the principle upon which he concluded the case is supported in large measure by two Ontario cases referred to by him and in this we also agree. The two Ontario cases are *Pirie v. Wyld* (1866), 11 O.R. 422, and *Underwood v. Cox* (1912), 26 O.L.R. 303, 4 D.L.R. 66, a decision of a Divisional Court of this Province. I may add that although there are numerous decisions elsewhere on subject-matter related to the matters to be decided here, although not specifically in point, we prefer, so far as the principle expressed by Fraser, J., is concerned, the reasoning in four of those cases and apply it by way of analogy to the problem which we are here deciding. Those four cases are *Hoghton v. Hoghton* (1852), 15 Beav. 278, 51 E.R. 545; *Warrick v. Queen's College, Oxford (No. 2)* (1867), L.R. 4 Eq. 254; *Cory v. Bretton* (1830), 4 Cr. & P. 462, 172 E.R. 783, and finally *La Roche v. Armstrong*, [1922] 1 K.B. 485.

34 In *Magnotta*, the Divisional Court endorsed a case-by-case approach to settlement privilege. Carnwath J., writing for the court, stated, at para. 48, that:

> ... a case-by-case analysis must be undertaken, given that the development of settlement privilege continues as is so often the case with the common law. At its current stage, it is not yet a class or

absolute privilege nor has it evolved into a substantive rule of law.

35 He continued, at paras. 51-52, describing what has come to be known as the "Wigmore Test" for the determination of whether a privilege has been established on a case-by-case basis:

> Solicitor-client privilege is a class privilege which never ends unless waived or unless the communication is in furtherance of a crime. Settlement privilege is not a class privilege. Its existence must be established on a case-by-case analysis first applying the "Wigmore" test, as described in *Slavutych v. Baker*, [1976] 1 S.C.R. 254 at 260:
>
> (1) The communications must originate in a confidence that they will not be disclosed.
> (2) The element of confidentiality must be essential to the maintenance of the relationship in which the communications arose.
> (3) The relationship must be one which, in the opinion of the community, ought to be 'sedulously fostered'.
> (4) The injury caused to the relationship by disclosure of the communications must be greater than the benefit gained for the correct disposal of the litigation.
>
> The Supreme Court of Canada re-affirmed the approach in *Slavutych*, making it clear that privilege is to be determined on a case-by-case basis (see: *M.(A.) v. Ryan*, [1997] 1 S.C.R. 157 at para. 20; see also *Rudd v. Trossacs Investments Inc*. (2006), 79 O.R. (3d) 687 at para. 26 (Div. Ct.) ...

36 This decision was affirmed by the Court of Appeal, which described the reasons of the Divisional Court as "thoughtful" and "detailed". The Court of Appeal did not, however, discuss the settlement privilege aspect of the decision.

37 A few months after the decision of the Divisional Court in *Magnotta*, a different panel of the Court released a decision that suggested that settlement privilege is a class privilege. In *Inter-Leasing Inc. v. Ontario (Minister of Finance)* (2009), 256 O.A.C. 83, [2009] O.J. No. 4714 (Div. Ct.), after referring to the extract from Sopinka et al. at para. 32 above, the Divisional Court stated at para. 11:

> A party seeking to introduce in evidence material subject to settlement privilege must show that the communication is relevant and the disclosure is necessary, either to show the agreement of the parties or to address a compelling or overriding interest of justice (*Dos Santos (Committee of) v. Sun Life Assurance Co. of Canada*, [2005] B.C.J. No. 5 (B.C.C.A.) at para. 20). Exceptions to the privilege have arisen where there has been fraud, where production is necessary to meet a defence of laches, lack of notice or the passage of a limitation period, or where parties have made an agreement respecting evidence in the litigation (*Middelkamp v. Fraser Valley Real Estate Board* (1992), 96 D.L.R. (4th) 227 (B.C.C.A.) at 223).

38 The Court found that the necessity test had not been met - at para. 21:

> Moreover, the applicant has not satisfied the necessity test. To satisfy this test, the applicant must demonstrate a compelling or overriding interest of justice that outweighs the public interest in protecting settlement discussions from disclosure. While the applicant argues that disclosure of this information will not affect the issue of its tax liability, settlement privilege exists not only to protect a party against disclosure of information that may affect its position on liability. It extends, as well, to protect other statements against interest made in the course of settlement negotiations that a party may wish to remain confidential.

39 The two decisions referenced by the Divisional Court, *Dos Santos (Committee of) v. Sun Life Assurance Co. of Canada* and *Middelkamp v. Fraser Valley Real Estate Board*, are decisions of the British Columbia Court of Appeal that come down squarely in favour of settlement privilege being a class privilege. No mention was made of *Magnotta.*

40 The following year, in *R. v. McKinnon*, 2010 ONSC 3896, [2010] O.J. No. 3001, the Divisional Court did not find it necessary to decide the issue, as it found that the settlement documentation would be admissible under either the *Wigmore* criteria or as an exception to the class privilege - at paras. 4-6:

> Argument was also directed at whether the settlement documentation in question is subject to a class privilege or whether the presence of a privilege can only be determined on a case by case basis. Again, we do not consider it necessary to decide that issue especially given that the issue is currently scheduled to be argued before the Court of Appeal in September. Whether one concludes that settlement documentation is *prima facie* privileged or can only be found to be privileged on the individual case, we agree with the adjudicator that on either test the material was properly ordered to be produced. Any privilege is not absolute. It is subject to exceptions. One of these exceptions is where the settlement documentation is necessary for the proper disposition of a proceeding. As was said in *Inter-Leasing Inc. v. Ontario (Minister of Finance)*, [2009] O.J. No. 4714 (Div. Ct.) at para. 11:
>
> > A party seeking to introduce in evidence material subject to settlement privilege must show that the communication is relevant and the disclosure is necessary, either to show the agreement of the parties or to address a compelling or overriding interest of justice.
>
> In our view, the adjudicator correctly decided that the settlement documentation in question was relevant and necessary for the proper disposition of the matter that was before him. In particular, we agree with the adjudicator that the decision in *Dos Santos (Committee of) v. Sun Life Assurance Co. of Canada*, [2005] B.C.J. No. 5 (B.C.C.A.) does not require that the documentation in question be the "only way" in which a fact in question can be established. Rather necessity is established if there is a compelling or overriding interest of justice achieved through production of the material in the circumstances of a given case.
>
> There is a compelling interest in having the documentation produced given the nature of the allegations made against the Ministry. Central to the issues currently before the adjudicator is whether the Ministry has failed to abide by earlier orders directed at remedying a serious case of discrimination. Indeed the adjudicator refers to the material as touching upon "matters that lie at the heart of this litigation" and "crucial to a proper resolution of the matters before the Tribunal". The adjudicator provided cogent reasons for those characterizations of the material and why they were necessary to the task before him including that the settlement documentation may provide important evidence suggesting that the Ministry has not been acting in good faith in terms of its implementation of the remedies earlier ordered. These included that the settlements arose out of the same workplace of Mr. McKinnon, that two of them involved a high ranking person within the workplace who has figured as an antagonist to Mr. McKinnon throughout the long saga of his complaint, and that the Ministry might be engaged in a systematic process of trying to protect this person from adverse findings that would figure prominently in the issues that the adjudicator was tasked with determining.

41 The Divisional Court noted that in any case the issue would be before the Court of Appeal later in the year. As it happened, the Court of Appeal did not address the settlement privilege issue in *Magnotta*.

42 It has been suggested, however, that *Magnotta* is at odds with other Canadian authorities. In *Brown v. Cape Breton (Regional Municipality)*, 2011 NSCA 32, [2011] N.S.J. No. 164, the Nova Scotia Court of Appeal concluded that the weight of authority, and sound policy reasons, support the "class approach" - at paras. 54-56:

> *Magnotta* is at odds with the Canadian decisions that have adopted the "class" or "blanket" approach to settlement privilege (e.g. *Heritage Duty Free Shop Inc. v. Canada (Attorney General)*, 2005 BCCA 188; *British Columbia Children's Hospital v. Air Products Canada Ltd.*, [2003] B.C.J. No. 591; *Waxman*; the majority in *Middelkamp*; *Dos Santos (Committee of) v. Sun Life Assurance Co. of Canada*, 2005 BCCA 4). Nova Scotia courts have adopted the class approach: *Berta*, [2007] N.S.J. No. 537, *supra*; *Gay v. UNUM Life Insurance Company of America*, 2003 NSSC 228. Many secondary sources agree: *Sopinka* at p. 1033; David M. Paciocco & Lee Stuesser, *The Law of Evidence*, 5th ed. (Toronto, ON: Irwin Law, 2008) at pp. 248-54; Gordon D. Cudmore, *Civil Evidence Handbook*, loose-leaf, (Toronto, ON: Thomson Reuters, 1994), ch. 6 at 6-30.14(2).
>
> With respect, *Magnotta* and the Ontario cases are not compelling. First, those decisions do not engage all the contrary jurisprudence. Second, despite *Magnotta's* reliance on Supreme Court decisions such as *Slavutych*, no Supreme Court decision suggests that settlement privilege is not a class privilege. For example, one of the cases relied upon in *Magnotta* is *M.(A.) v. Ryan*, [1997] 1 S.C.R. 157. But at paragraph 20 of *Ryan*, McLachlin J. (as she then was) talks about the Wigmore test applying to new situations where "... reason, experience and application of the principles that underlie the traditional privileges so dictate: ..." Again, at para. 32, reference is made to "new" privileges in the context of the Wigmore test. There is nothing new about settlement privilege. *Ryan* did not alter the law for blanket privilege (*Heritage*, *supra*, at para. 29, citing *R. v. McClure*, 2001 SCC 14).
>
> But the fundamental reason that the case-by-case analysis should be rejected is that it does not adequately support the policy underlying settlement privilege. If settlement discussions and agreements are not *prima facie* privileged and therefore are disclosable, the very reason for protecting and fostering informal resolution of disputes is at risk. The price of this approach is uncertainty of application of the rule. For this reason, the words of Binnie J. in *National Post*, [2010] 1 S.C.R. 477 at para. 44, are apposite. When rejecting a class privilege for journalists, Binnie J. noted the importance of certainty:
>
> > ... It is particularly important in the case of class privilege that the rules be clear in advance to all participants so that they may govern themselves accordingly.

43 Similarly, in *Middelkamp v. Fraser Valley Real Estate Board*, (1992), 96 D.L.R. (4th) 227, [1992] B.C.J. No. 1947, the majority of the British Columbia Court of Appeal, speaking through McEachern C.J.B.C., were of the view that settlement privilege is a "class privilege" - at paras. 18-20:

> ... 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 "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.

> 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 related 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.
>
> I recognize that there must be exceptions to this general rule. An obvious exception would be where the parties to a settlement agree that evidence will be furnished in connection with the litigation in which the application is made. In such cases, the public interest in the proper disposition of litigation assumes paramountcy and opposite parties are entitled to know about any arrangements which are made about evidence. Other exceptions could arise out of such matters as fraud, or where production may be required to meet a defence of laches, want of notice, passage of a limitation period or other similar matters which might displace the privilege. As we did not have argument on these matters I prefer to say nothing further about them.

44 The Newfoundland and Labrador Court of Appeal has taken a similar view: *Meyers v. Dunphy*, 2007 NLCA 1, [2007] N.J. No. 5.

45 The significance of the distinction between a "class" privilege and the case-by-case "*Wigmore*" analysis is that in the case of a class privilege, the party seeking disclosure must establish that the case falls within an exception to the privilege. In the case-by-case approach, the burden is on the party asserting privilege to show that it applies. In *Brown v. Cape Breton*, the Nova Scotia Court of Appeal observed at para. 51:

> The "blanket" versus "case-by-case" distinction matters because the question of whether settlement discussions are *prima facie* privileged or not is at issue. If the former, then the settlement communications are inadmissible and an applicant has the burden of establishing an exception to privilege. If the latter, then the claimant of privilege must establish it and the need for an exception to a *prima facie* rule does not arise.

And at para. 60, it concluded that there are sound practical reasons for adopting a class approach:

> If settlement privilege enjoys a "class" status, those seeking an exception carry the burden of establishing an exception. If settlement privilege requires a case-by-case analysis, then the burden rests with the claimant of privilege. As a matter of practice, it would be unwise to send a message to litigants and the bar that communications designed to explore settlement are *prima facie* disclosable unless a judge, applying the Wigmore test, says otherwise. The importance of the doctrine, coupled with the need for relative certainty of application, favours a class approach.

46 In this case, the parties acknowledge that the first three requirements of the *Wigmore* test have been met. They acknowledge that the Mediation Briefs were "produced or created in a 'without prejudice' process in circumstances where the parties had an expectation of confidentiality." Confidentiality is essential to the relationship between parties to settlement discussions and it should be "sedulously fostered" to promote the acknowledged benefits of settlement. The real issue - indeed, the only issue - is whether the injury caused to the relationship by disclosure of the Mediation Briefs will be greater than the benefit to be achieved by the correct disposal of this litigation.

47 This calls for a balancing of the rights and confidentiality expectations of the parties to the settlement against the rights of the party seeking disclosure to properly meet the case against it. The process was described by Master Dash in *Ricci v. Gangbar*, 2010 ONSC 5450, [2010] O.J. No. 4321, at para. 21:

> The fourth Wigmore condition states: 'The injury caused to the relationship by disclosure of the

> communications must be greater than the benefit gained for the correct disposal of the litigation.' In the context of this motion that means that the injury caused to the relationship between the parties who engaged in confidential settlement negotiations in the Will Challenge must be greater than the benefit gained for the correct disposition of the Lawyer Action. It requires a balancing of the rights and confidentiality expectations of the parties to the settlement with the rights of the lawyer in this action to be able to properly meet the claims advanced against him and advance his defence to those claims.

48 In this case, it requires a balancing of the rights and expectations of IPEX and the parties with which it settled, against the right of ATP to meet the claims brought against it by IPEX.

49 Dealing first with the rights and confidentiality expectations of the parties to the settlement, it has been pointed out that the purpose of the settlement privilege was to prevent disclosure of offers of settlement only when the disclosure was to show that a party had made an admission of liability or had acknowledged that it had a weak case - see *Mueller*, at para. 12. Parties can reasonably expect that admissions of liability or confessions of weakness will not be used against them, by the opposite party or by third parties in future litigation. That concern has been specifically addressed by the Master, who said that IPEX would be entitled to "redact any portions of any documents that constitute admissions against IPEX's interest in relation to ATP." Permitting production of the Mediation Briefs with this condition acknowledges the underlying rationale of the privilege. As well, there is no reason to think that the plaintiffs in the settled U.S. Actions would have any reason to be concerned about disclosure of the Mediation Briefs. They have no potential liability to ATP and they assert no claims against ATP. It has not been suggested that they could have made admissions in the course of settlement negotiations that might be used against them in this litigation.

50 I turn then to the benefit to be achieved from the correct disposal of this litigation if the Mediation Briefs are produced. IPEX's claim against ATP will be based on the settlements. Production of the Mediation Briefs is therefore essential to permit ATP to defend the claim. Without that information, it will simply be presented with a dollar amount and told:

> We are claiming this amount, which we had to pay to settle litigation brought against us because the material you sold us was defective. Pay up.

51 Since the actions were settled, there will be no reasons for judgment or jury findings to explain why IPEX was found liable to the plaintiff. It will be impossible to know the extent to which the settlement was due to deficiencies in the pipe caused by the materials supplied by ATP or due to factors, such as dezincification, that had nothing to do with ATP. Unless ATP is permitted to lift the veil on the settlements, and to understand the evidence and arguments that caused IPEX to agree to pay the settlement amounts, it will be unable to defend itself.

52 Unlike many claims for indemnity, which are capable of independent determination, an *ex post facto* claim for recovery of settlement amounts can only be resolved based on an analysis of the terms of the settlement and the circumstances and considerations that led to it. To what extent did it reflect matters for which the defendant had responsibility and to what extent did it reflect other factors including: (a) the fault of other tortfeasors; (b) the contributory fault of the plaintiff; (c) goodwill, contingencies, other risk factors?

53 As there has been no trial on the merits supporting the result, the only way to understand the basis of IPEX's liability, and the quantum claimed, is to examine the evidence, arguments and authorities advanced by the parties to the settlement negotiations. Production of the Mediation Briefs is essential for that purpose.

54 IPEX has put the settlements in issue. The Mediation Briefs have relevance in their own right, not because they contain admissions but because the settlements that flowed from them are the basis of the claim against ATP. The trial judge will be required to determine not only whether the settlements were reasonable, but also whether some or all of the settlement amounts should be recoverable from ATP. In order to defend itself, ATP must be permitted to explore the

settlements, must be permitted to review the factual and expert evidence, the arguments and the law that was presented by both parties and must be entitled to assess what factors, on both sides, were taken into account in coming to the settlement.

55 This is the same rationale that has persuaded other courts that settlement documents should be disclosed in appropriate cases. It engages the fundamental principle of our legal system that a party is entitled to know the case that it must meet and must be given a fair opportunity to meet that case: see *Stevenson v. Reimer*, [1993] O.J. No. 2440 (Gen. Div.); *Robichaud v. Clarica Life Insurance Co*. (2007), 53 C.C.L.I. (4th) 234, [2007] O.J. No. 3648 (S.C.J.). It provides the parties with the "equality of arms", which is so fundamental to our concept of a fair trial: see *Ontario v. Rothmans Inc.*, 2011 ONSC 2504, [2011] O.J. No. 1896.

56 The same result is achieved even if settlement privilege is a class privilege. In *Unilever PLC v. The Procter & Gamble Co.*, [2000] 1 W.L.R. 2436, the English Court of Appeal, referring to *Muller v. Linsley & Mortimer*, [1996] P.N.L.R. 74 (C.A.), identified the following exception as "among the most important instances" of the admissibility of settlement discussions:

> ... whether the claimant had acted reasonably to mitigate his loss in his conduct and conclusions of negotiations for the compromise of proceedings [brought by him]

57 This exception was referred to by the Newfoundland and Labrador Court of Appeal in *Meyers* and by the Nova Scotia Court of Appeal in *Brown.*

58 This exception is necessary to address a compelling or over-riding interest of justice, because without disclosure of details of the process by which the plaintiff settled its claim, the defendant will be unable to effectively defend itself against the plaintiff's claim. It will be unable to meet the case the plaintiff has set up against it.

59 In this case, ATP has pleaded that IPEX failed to take reasonable steps to mitigate its damages, but ATP's defence will go beyond this. An analysis of the settlements will be necessary not only to determine whether IPEX mitigated its damages, but also, as I have noted, to determine whether IPEX settled the claims for reasons that had nothing to do with ATP's alleged manufacturing failures. The over-riding interest of justice demands that ATP be given a fair opportunity to know the underlying factual foundation for IPEX's claim and to properly meet that claim.

60 I therefore conclude that the Mediation Briefs should be produced in all cases where IPEX is claiming contribution or indemnity from ATP for settlement amounts.

61 I have also concluded, however, with respect, that the Master erred in ordering production of Mediation Briefs in all the U.S. Actions, without differentiation. In my view, he ought not to have ordered production of Mediation Briefs in the U.S. Actions that were not subject to a claim for contribution and indemnity from ATP or that had not yet settled. The relevancy of those documents, and the balancing process, results in different conclusions.

62 The Mediation Briefs in actions that are not the subject of a claim for contribution and indemnity are not directly relevant to the disposition of the litigation between IPEX and ATP. They are not required to give ATP "equality of arms" to defend itself from the very claims that are the subject of the action against it. The information might be helpful and interesting to ATP because they might demonstrate that IPEX was settling claims relating to Kitec pipe due to dezincification and not due to the alleged flaws in ATP's product. However, that does not make the reasons for those settlements relevant to the issues between IPEX and ATP.

63 The Master based his decision on this issue on ATP's pleading in para. 21(f)(i) of its statement of defence, in which it pleads that the damage to the Kitec pipe was due to dezincification caused by IPEX's use of brass fittings in the construction of the pipe. ATP does not require these Mediation Briefs to prove that the Kitec pipe failed due to dezincification. ATP will be fully entitled to explore the dezincification issue on discovery, and will be entitled to comprehensive disclosure on the issue as it arises in the actions in which there is a claim for indemnity. The balancing

process does not justify a significant intrusion into the confidentiality of settlements that are not part of the claim against ATP.

64 The same is true for actions that have not yet settled. If the action eventually settles, the Mediation Briefs will be producible. If the action does not settle, and results in a judgment, the judgment and not the settlement negotiations will be relevant for the determination of liability and quantum. Again, the balancing process does not result in the conclusion that disclosure of the Mediation Briefs is necessary in these cases.

Proportionality

65 The same logic leads to the conclusion that, subject to the issue of proportionality, most of the remaining materials in the Litigation Files should be produced, but that Litigation Files that are not the subject of claims for contribution and indemnity are not relevant and need not be produced.

66 Rule 29.2.03 of the *Rules of Civil Procedure* gives express recognition to the principle of proportionality. It provides:

> (1) In making a determination as to whether a party or other person must answer a question or produce a document, the court shall consider whether,
> (a) the time required for the party or other person to answer the question or produce the document would be unreasonable;
> (b) the expense associated with answering the question or producing the document would be unjustified;
> (c) requiring the party or other person to answer the question or produce the document would cause him or her undue prejudice;
> (d) requiring the party or other person to answer the question or produce the document would unduly interfere with the orderly progress of the action; and
> (e) the information or the document is readily available to the party requesting it from another source.
> (2) In addition to the considerations listed in subrule (1), in determining whether to order a party or other person to produce one or more documents, the court shall consider whether such an order would result in an excessive volume of documents required to be produced by the party or other person.

67 As I noted earlier, while I can assume that the Master was aware of, and considered, the proportionality principle in coming to his decision, his reasons do not make his analysis explicit. To the extent that his decision on the issue was discretionary, therefore, I consider that a somewhat modified degree of deference is appropriate. While ATP says that there was no evidence before the Master on which a determination of proportionality could be made, it can reasonably be assumed that the Litigation Files in more than twenty-five complex class action law suits would contain a vast array of written and electronic materials, including emails, correspondence, memoranda and notes.

68 IPEX says that proportionality is not determined by the theoretical amounts at issue in the case; rather, it says that proportionality is at first instance a measure of the effort required and the extent of the material, in relation to its probative value. I do not necessarily accept this submission, particularly because sub-paras. 1(a) and (b) use the words "unreasonable" and "unjustified" in relation to the time and expense required to produce the document. The expense might be unjustified in a case involving $100,000 in damages but very justified in a case involving $100 million in damages. This is confirmed by rule 1.04(1.1):

> In applying these rules, the court shall make orders and give directions that are proportionate to the importance and complexity of the issues, and to the amount involved, in the proceeding.

69 Proportionality is not a concern with respect to the Mediation Briefs because the information is highly relevant

and easily identifiable.

70 Nor is it a concern for many of the other parts of the Litigation Files that the Master ordered produced, including productions and pleadings (both of which IPEX has agreed to produce), motion materials, discovery requests and responses, transcripts from examinations and court orders. These are easily identifiable, clearly relevant, not the subject of lawyer-client privilege and can be produced with relative ease. While they may well be voluminous, in a case involving hundreds of millions of dollars, it cannot be said that the time and expense is disproportionate to the importance of the documents.

71 The same cannot be said, however, with respect to other materials, namely correspondence, written and electronic communications, notes, memoranda and lawyers' work-product. Production of these materials would require a painstaking, document-by-document review for the purposes of privilege. Moreover, a large proportion of the documents would be entirely irrelevant to the matters at issue in this action. Indeed, counsel for ATP did not identify any particular value of such production, other than "context". In my view, this can better be described as a large-scale fishing expedition. IPEX concedes that ATP is free to establish the existence of relevant documents in the Litigation Files and that, if it does so on discovery, it is entitled to move for further production: see *Bow Helicopters v. Textron Canada Inc.* (1981), 23 C.P.C. 212, [1981] O.J. No. 2265 (H.C.). In my view, the Master erred in his apparent failure to give any weight to the principle of proportionality in ordering the broad production of the Litigation Files without any consideration for the relevance of many of the underlying documents and the time, effort and expense involved in the exercise.

Conclusion

72 In summary, and for the foregoing reasons, I conclude:

(a) IPEX shall produce all Mediation Briefs in actions that have resulted in settlements for which it claims contribution and indemnity from ATP;
(b) Such production shall include all offers to settle, settlement agreements, briefs, experts' reports and other materials filed on the mediations;
(c) IPEX is not required to produce Mediation Briefs in actions that have not settled or in actions for which there is no claim for contribution and indemnity from ATP;
(d) IPEX shall produce all Litigation Files in actions for which it claims contribution and indemnity from ATP, including productions, pleadings, transcripts, depositions, court orders, discovery requests and responses, but excluding correspondence, written and electronic communications, notes, memoranda and lawyers' work product.

73 As ordered by the Master, production shall be subject to the deemed undertaking in rule 30.1. The Master ordered that any admissions would be redacted. To this, I would add that this order shall not impinge on the jurisdiction and discretion of the trial judge to rule on the exclusion of admissions or other statements or communications made in the course of settlement discussions. This was the course of action followed by Doherty J. in *Mueller* and by Pepall J. in *Sabre Inc. v. International Air Transport Association.* (2009), 76 C.P.C. (6th) 146, [2009] O.J. No. 903 (S.C.J.).

74 As success has been divided, I am inclined to make no order as to costs. If either party takes a different view, written submissions may be addressed to me care of Judges' Administration. I will leave it to counsel to agree on a schedule for the delivery of such submissions.

G.R. STRATHY J.

cp/e/qllxr/qlvxw/qlced/qlbdp/qlhcs/qlhcs/qlcas

Appendix B

Case Name:

Johnstone v. Locke

RE: Laura Johnstone, Applicant, and
Gary Locke, Sarah Sherrington, Respondents

[2011] O.J. No. 5527

2011 ONSC 7138

15 R.F.L. (7th) 209

210 A.C.W.S. (3d) 162

2011 CarswellOnt 13914

Court File No. FC-09-1622

Ontario Superior Court of Justice

J. Mackinnon J.

Heard: November 30, 2011.
Judgment: December 6, 2011.

(25 paras.)

Civil litigation -- Civil procedure -- Hearsay rule -- Exceptions -- Declarations against interest -- Principled approach -- Necessary and reliable evidence -- Motion by Johnstone for leave to admit into evidence as a communication against interest an email sent to her by the respondent Sherrington dismissed -- Johnstone claimed joint custody and parenting tine with respondents' daughter -- Email sent after Sherrington attended a mediation session respecting custody with child's father and Johnstone -- Email was privileged by settlement privilege -- As other evidence before the court could be used to contradict Sherrignton's pleadings, the email was not necessary.

Motion by Johnstone for leave to admit into evidence as a communication against interest an email sent to her by the respondent Sherrington. At the time the email was sent, Johnstone and the respondent father were engaged in mediation with respect to the issues relating to Johnstone's claim for joint custody and parenting time with the respondents' daughter. Sherrington had been invited to attend a mediation session with them. Subsequently she sent this email setting out the custody terms that she would be agreeable to.

HELD: Motion dismissed. The email was privileged. Settlement discussions in the course of mediation were covered by settlement privilege. There was a dispute in existence between Johnstone and Sherrington at the time the email was sent.

It was within contemplation that their dispute would become litigious if the mediation was not successful. Sherrington was clearly of the view that her involvement in the mediation was on a completely confidential basis and that nothing that she said or wrote in furtherance of the mediation process could be used in court if mediation failed. Johnstone was unable to establish that an exception applied. Disclosure of aspects of the email was not necessary to contradict Sherrington's pleadings that it was not in the child's best interests to have an equal time sharing arrangement with Johnstone or for Johnstone to play a primary role in her life. There was other evidence already before the court that provided Johnstone a basis upon which to contradict Sherrington's pleadings.

Counsel:

Sean Jones, Counsel, for the Applicant.

John Summers, Counsel, for the Respondent Gary Locke.

Ms. S. Shserrington, in person.

ENDORSEMENT

1 **J. MACKINNON J.**:-- Ms. Johnstone proposes to enter into evidence as a communication against interest an email sent to her from Ms. Sherrington. At the time the email was sent, Ms. Johnstone and Mr. Locke were engaged in mediation with respect to the issues between themselves relating to Ms. Johnstone's claim for joint custody and parenting time with the Respondents' daughter McKalya. Ms. Sherrington had been invited to attend a mediation session with them. Subsequently she sent this email setting out the custody terms that she would be agreeable to.

2 Ms. Johnstone submits that the onus is on Ms. Sherrington to establish confidentiality privilege for this document by application of the well known Wigmore analysis. In support of her submission she relies on a decision of the Divisional Court. In *Ontario (Liquor Control Board) v. Magnotta Winery Ltd.* (2009), 97 O.R. (3d) 665, the Divisional Court clearly held that settlement privilege is not a class privilege, rather its existence must be established on a case by case basis by application of the Wigmore test. The significance of the distinction is that with class privilege the onus would be upon Ms. Johnstone to establish that the case falls within an exception to the privilege. If the case by case approach applies then the onus is upon Ms. Sherrington to establish that privilege should apply.

3 In a subsequent Divisional Court case, *Inter-Leasing Inc. v. Ontario (Minister of Finance)* (2009), 256 O.A.C. 83, a different panel suggested that settlement privilege is a class privilege, but without referring to *Magnotta*.

4 The Respondents rely on *Inter-Leasing* and the general policy in favour of encouraging settlement in support of their position that the onus is upon Ms. Johnstone to establish an exception to a recognized class of privilege. They also, note that *IPEX Inc. v. AT Plastics Inc.*, 2011 ONSC 4734, 337 D.L.R. (4th) 63 did not purport to follow one or the other of these Divisional Court decisions rather it considered both approaches and concluded that both resulted in the same outcome on the facts of that case.

5 *Inter-Leasing* dealt with a motion to strike material from an application record on the grounds of settlement privilege. The decision accepts a class privilege for settlement communications. The Divisional Court held at paragraphs 10, 11, 21, and 22:

> 10 Communications, whether oral or written, made in furtherance of the settlement of a litigious dispute are subject to privilege. According to Bryant, Lederman and Fuerst, The Law of Evidence in Canada (at para. 14.322), three conditions must be present for settlement privilege to apply:

1. A litigious dispute must be in existence or within contemplation.
2. The communication must be made with the express or implied intention it would not be disclosed in a legal proceeding in the event negotiations failed.
3. The purpose of the communication must be to attempt to effect a settlement.

11 A party seeking to introduce in evidence material subject to settlement privilege must show that the communication is relevant and the disclosure is necessary, either to show the agreement of the parties or to address a compelling or overriding interest of justice *(Dos Santos (Committee of) v. Sun Life Assurance Co. of Canada*, [2005] B.C.J. No. 5 (B.C.C.A.) at para. 20). Exceptions to the privilege have arisen where there has been fraud, where production is necessary to meet a defence of laches, lack of notice or the passage of a limitation period, or where parties have made an agreement respecting evidence in the litigation (*Middlekamp v. Fraser Valley Real Estate Board* (1992), 96 D.L.R. (4th) 227 (B.C.C.A.) at 223).

...

21 Moreover, the applicant has not satisfied the necessity test. To satisfy this test, the applicant must demonstrate a compelling or overriding interest of justice that outweighs the public interest in protecting settlement discussions from disclosure. While the applicant argues that disclosure of this information will not affect the issue of its tax liability, settlement privilege exists not only to protect a party against disclosure of information that may affect its position on liability. It extends, as well, to protect other statements against interest made in the course of settlement negotiations that a party may wish to remain confidential.

22 The settlement offer in issue was made in the course of a dispute between the parties about the applicant's tax liability. To allow the applicant to use this type of information would place a chill on settlement negotiations and undermine the public interest in promoting settlement discussions. The applicant has not identified an overriding public interest in justice that outweighs the public interest in encouraging settlement (*Dos Santos, supra* at para. 20).

6 *Dos Santos* is a decision of the British Columbia Court of Appeal. Finch CJ stated that, "mere relevance does not provide a sufficiently high threshold to displace the compelling public policy underlying settlement privilege." The court adopted a principled basis for analysis when considering a proposed exception to the settlement privilege namely whether disclosure of the communication is necessary either to achieve the agreement of the parties to the settlement or to address a compelling or overriding interest of justice.

7 See also *Brown v. Cape Breton (Regional Municipality)* (2011), 331 D.L.R. (4th) 307 which did not follow *Magnotta* and instead followed *Dos Santos*.

8 The Ontario Court of Appeal decision, *Rogacki v Belz* (2003), 67 O.R. (3d) 330, is also support for the proposition that the settlement privilege in Ontario is a class privilege. In para. 18, Borins J.A. stated:

[18] In my respectful opinion, the motion judge not only misapprehended the contempt power contained in Rule 60, but he also misinterpreted rule 24.1.14. As I understand his reasons, as reflected in para. 1 of the formal order of the court, the motion judge appeared to interpret rule 24.1.14 as providing for the "confidentiality of the mediation process". (A similar

> misapprehension of rule 24.1.14 is reflected in para. 5 of the order which required the appellant to "conform with the confidentiality provisions of the Rules of Civil Procedure".) This is not what rule 24.1.14 states, nor is there any other subrule within Rule 24.1 that addresses the confidentiality of the mandatory mediation process. By deeming "all communications at a mediation session and the mediator's notes and records . . . to be without prejudice settlement discussions", rule 24.1.14 codifies the principle that communications made without prejudice in an attempt to resolve a dispute are not admissible in evidence unless they result in a concluded resolution of the dispute. As such, rule 24.1.14 is a necessary ingredient of Rule 24.1 as it furthers the public interest in promoting free and frank settlement discussions by protecting communications for that purpose from compelled disclosure in subsequent proceedings involving the parties to the settlement discussions, such as discovery or trial, in circumstances where the mediation fails to resolve the litigation. (Emphasis added).

9 Counsel submitted that the Supreme Court of Canada had approved of the case by case approach to settlement privilege in two decisions, namely *Slavutych v. Baker*, [1976] 1 S.C.R. 254 and *A.M. v. Ryan*, [1997] 1 S.C.R. 157. This is not so. Neither *Slavutych* nor *Ryan* stands for the proposition that every privilege must be analysed according to the Wigmore criteria and neither specifically discusses settlement privilege.

10 In *Slavutych*, the issue was whether privilege applied to language that the appellant had used in a "tenure form sheet" in reference to a fellow staff member. The Supreme Court of Canada considered this issue through application of the Wigmore analysis. In *Ryan*, the victim of a sexual assault brought a civil action for damages allegedly caused by the defendant's sexual conduct. The defendant sought production of the plaintiff's psychiatrist's counselling records and notes. The Supreme Court stated, at para. 20, that "[t]he common law permits privilege in new situations where reason, experience and application of the principles that underlie the traditional privileges so dictate." Those principles are derived from the Wigmore analysis.

11 Based on the differing jurisprudence emanating from the Divisional Court and the view expressed by the Ontario Court of Appeal in *Rogacki*, I conclude that I am not bound by the ruling in *Magnotta*. I prefer the approach taken in *Inter-Leasing* and by the British Columbia Court of Appeal in *Dos Santos* and in *Middlekamp v Fraser Valley Real Estate Board* (1992), 96 D.L.R. (4th) 227 (B.C.C.A). A case by case analysis does not adequately support the policy underlying settlement privilege. The Supreme Court of Canada has described this as an "overriding public interest in favour of settlement.": *Kelvin Energy Ltd. v. Lee*, [1992] 3 S.C.R. 235, quoting with approval, *Sparling v. Southam Inc.* (1988), 66 O.R. (2d) 225. (H.Ct.J.)

12 Alan W. Bryant, Sidney N. Lederman, & Michelle K. Fuerst, *The Law of Evidence in Canada*, 3d ed. (Markham: LexisNexis Canada Inc., 2009), summarize the policy interest at play, at p. 1030:

> s. 14.313 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 compromise without resort to trial.
>
> s. 14.315 In furthering these objectives, the courts have protected from disclosure communications, whether written or oral, made with a view to reconciliation or settlement. In the absence of such protection, few parties would initiate settlement negotiations for fear that any concession they would be prepared to offer could be used to their detriment if no settlement agreement was forthcoming.

13 Settlement discussions in the course of mediation are covered by settlement privilege: *The Law of Evidence in Canada*, at p. 1043. Not everything that is said or done at mediation automatically falls within the description of settlement privilege. Therefore, the Divisional Court in *Rudd v. Trossacs Investments Inc.* (2006), 79 O.R. (3d) 687 ruled that whether a mediator could be compelled to disclose whether or not a particular individual was a party to the settlement agreement reached at the mediation had to be determined by application of the Wigmore principles.

14 The importance of the distinction between recognized class privilege and the case-by-case analysis is expressed in *The Law of Evidence in Canada*, page 1043, at paragraph 14.350:

> The difference in approach affects the burden of proof. If mediation is part of the settlement privilege, the party seeking disclosure must establish that the circumstances fall within an exception such as to prove the existence or terms of a completed settlement agreement. On the other hand, with a case-by-case privilege approach, there is a presumption of disclosure unless the party seeking privilege can establish that the Wigmore criteria have been satisfied.

15 Ms. Johnstone submits that there had been no dispute between herself and Ms. Sherrington up until the point of the May 12, 2009, email and that accordingly the email does not meet the first criteria of settlement privilege. I disagree. I accept the testimony given by Ms. Sherrington that it was not until during the preceding mediation session that she understood the full implications of what was being asked of her in terms of legal custody and decision making. Once she had a more complete understanding her position changed. At the time that she delivered the email there was a conflict between her position and Ms. Johnstone's on those points. The fact that the email itself provided the notice of the dispute to Ms. Johnstone does not change this. With the understanding that she had acquired, Ms. Sherrington was not prepared to accord the full legal custodial status to Ms Johnstone with respect to McKalya that Ms. Johnstone wanted.

16 Ms. Johnstone submits that litigation was not within the contemplation of the parties except in a general way. However she acknowledged that if a settlement was not reached the next step would be litigation. She acknowledged that mediation was an effort to avoid litigation. Both she and Mr. Locke were represented by lawyers during the mediation process. I find that there was a dispute in existence between Ms. Johnstone and Ms. Sherrington at the time the e mail was sent and that it was within contemplation that their dispute would become litigious if the mediation was not successful.

17 Ms. Sherrington was clearly of the view that her involvement in the mediation was on a completely confidential basis and that nothing that she said or wrote in furtherance of the mediation process could be used in court if mediation failed. Neither Ms. Johnstone nor the mediator could contradict this testimony. I accept her testimony and I find that Ms. Sherrington's expectation was reasonable. She was a necessary party to the proposed settlement between Mr. Locke and Ms. Johnstone. This was why she had been asked to attend the mediation and to review the draft agreement that the mediator was preparing.

18 Ms. Johnstone also submitted that any settlement privilege should be limited to the specific issues of legal custody and decision making and that the balance of the email should not be protected. There is nothing in the email or in the other evidence before me on the voir dire to support a conclusion that that a specific issue settlement was under discussion rather than a "package deal" settlement. The email sets out a comprehensive proposal on all issues and the fact that only some of those issues might be disputed by Ms. Johnstone does not change the nature of the communication.

19 The email also includes Ms. Sherrington's expression of reasons for her position. In my view, all of this falls within the description of settlement privilege. See *The Law of Evidence in Canada* at page 1036, paragraph 14.330:

> A reasonable reconciliation of these apparently different approaches and cases is that the communication must be part of a correspondence which the parties intend will reasonably lead to a compromise or settlement of the dispute. Hence, letters designed to open such negotiations, or letters or discussions which attempt to convince the opponent of the strengths of the other's position, but which also recognize weaknesses, in the hope that some settlement can be effected once each other's positions are on the table, should be subject to privilege, whether or not they contain an actual offer of settlement.

20 Accordingly, I conclude that the email is settlement privileged and is not admissible unless Ms. Johnstone is able to establish that an exception applies.

21 Her submission is that disclosure of aspects of the communication is necessary to address a compelling or overriding interest of justice, namely to facilitate rebuttal in Ms. Sherrington's own words of certain portions of her Answer. This is said to be necessary in order to properly and fully present the Applicant's case. Ms. Sherrington's Answer pleads as a fact that the Applicant demanded and forced McKalya to refer to her as 'Momma' "and that Ms. Sherrington herself only ever called her Laura. She pleads as a fact that it is not in McKalya's best interests to have an equal time sharing arrangement with the Applicant or for the Applicant to play a primary role in her life; McKalya's best interests are met by sharing her time equally between her mother and father. The portions of the email communication which are submitted to come within this exception contradict these pleadings.

22 That fact is not sufficient to meet the necessity test. There is other evidence already before the court that provides the Applicant a basis upon which to contradict Ms. Sherrington's pleadings. One example is a mother's day card from Ms. Sherrington to Ms. Johnstone on which she wrote, "I feel blessed that someone as kind, thoughtful and loving as you has come into McKalya's life. You've become a wonderful mother to McKalya and a good friend to me. Thank you for having such a warm heart."

23 In addition several cards from Mr. Locke to Ms. Johnstone on his own and on McKayla's behalf are already in evidence in which he refers to the Applicant as Momma Laura, as Momma, and to McKalya as her daughter.

24 Ms. Sherrington signed a three page letter dated February 25, 2009, which is in evidence together with some draft versions of it. Ms. Sherrington has advised the court that she was only given the signing page. She did sign, but she disputes some of the contents of the letter as being improperly attributed to her. She identified these as being the negative remarks with respect to Mr Locke, which she had wanted removed and the first sentence of the third full paragraph on the second page of the letter which refers to legal rights. Elsewhere in the letter and in the drafts of it, Ms Sherrington refers to the Applicant as McKayla's "momma", says that everyone has come to call her that, and that the Applicant had McKayla's best interests at heart.

25 These admissions were made in February 2009. Accordingly the further statements made by her to similar effect in the settlement communication sent in May 2009 do not meet the test of necessity. The May 12 email is ruled inadmissible.

J. MACKINNON J.

cp/e/qlafr/qlvxw/qlgpr

Appendix C

Indexed as:

Stevenson v. Reimer (Ont. Ct. (Gen. Div.))

Between
Anne Marie Stevenson, Plaintiff, and
Dwight Reimer and Jayda Reimer, Defendants
And Between
Dwight Reimer and Jayda Reimer, Plaintiffs by Counterclaim,
and
Anne Marie Stevenson and John Stevenson, Defendants by Counterclaim
And Between
John Stevenson, Plaintiff by Counterclaim, and
Dwight Reimer and Jayda Reimer, Defendants by Counterclaim

[1993] O.J. No. 2440

43 A.C.W.S. (3d) 356

Action No. 92-CQ-20062

Ontario Court of Justice - General Division
Toronto, Ontario

Mandel J.

Heard: September 29 and 30, 1993.
Written Submissions: October 7, 12 and 15, 1993.
Judgment: October 20, 1993.

(28 pp.)

Practice -- Discovery -- Production of documents -- Privilege -- Jury trial, entitlement to -- Extension of time for service of notice.

An appeal by the defendants from the dismissal of a motion for extension of time for delivery of jury notice and for the production of documents listed in an affidavit of documents. The action was for damages for nuisance, trespass and intentional infliction of mental suffering as a result of an extra-marital affair the plaintiff husband had with the defendant wife. The plaintiffs alleged that the defendants harassed them and caused the plaintiff husband to be wrongfully dismissed. There was a counterclaim for injurious falsehood, inducing breach of contract, intentional

infliction of mental suffering, nuisance, trespass, unlawful interference with economic relations, defamation, conspiracy to injure, invasion of privacy and harassment. The defendants sought production of certain documents with respect to the settlement negotiations between the plaintiff and his employer.

HELD: The appeal concerning the production of documents was allowed in part. Certain of the documents were to be produced. It was proper for the Master to take into account whether a jury trial was forbidden by statute. However, he erred in concluding that the claims here were such there was a statutory impediment to their being heard by a jury. Given there was no prejudice, the appeal was allowed from dismissal of the application to extend time for delivery of the jury notice.

STATUTES, REGULATIONS AND RULES CITED:

Courts of Justice Act, R.S.O. 1990, c. C.43, s. 108.
Ontario Rules of Civil Procedure, Rule 47.02, 47.02(1)(a), 47.02(2).

R.D. Manes, for the Appellants, Dwight Reimer and Jayda Reimer.
M. Cavanaugh, for the Respondents, Anne Marie Stevenson and John Stevenson.

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1 **MANDEL J.**:-- This is an appeal by the Reimers from the decision of the Master with respect to a Motion brought by them

(i) to extend the time for delivery of a jury notice and
(ii) for the production of certain documents listed in the Affidavit of Documents sworn by Mr. Stevenson in respect of which he claimed privilege of which more hereafter.

2 Mrs. Stevenson issued a Statement of Claim against the Reimers on May 5, 1992. In it she claimed

1(a) damages in the amount of $750,000.00 for nuisance, trespass and intentional infliction of mental suffering;

(b) punitive and exemplary damages in the amount of $100,000.00;
(c) an interim, interlocutory and permanent injunction preventing the Defendants or either of them from telephoning, contacting, corresponding with or otherwise harassing the Plaintiff, her spouse or her children.

3 In such Statement of Claim, she alleges that her husband and the female Defendant were involved in an extra-marital affair which had lasted approximately 12 months and ended by July 27, 1991 and that subsequent thereto, there were threats of harm to her children; unsigned letters to the Plaintiff and her spouse, the contents of which are set out in the Statement of Claim; vandalism of the cars of the Plaintiff and her husband; contacting of the spouse's employer; and confrontation at the home of the Plaintiff. She further alleges that the foregoing "wrongful actions and conduct of the Defendants --- together with certain telephone calls made by them are harassment and as such, have interfered with the Plaintiff's enjoyment of her home, her family and her property" and that "the Defendants' course of conduct was and is intended to inflict great suffering and harm on her and has done so."

4 The Defendants, in their Statement of Defence, deny the allegations and set forth their version of the affair. In addition, they alleged that the Stevensons are harassing them by uninvited and harassing telephone calls; making

obscene gestures; staring at the female Defendant from the Stevensons' bathroom window into Reimer's kitchen or back yard (the Plaintiffs and the Defendants are neighbours); harassing the female Defendant whilst she is jogging and whilst she is sunning; and interfering with "the Reimers' efforts to reconcile their marriage." Furthermore, it is alleged that Mr. Stevenson instigated the affair and promised to marry the female Defendant as well as other promises as set out in the Statement of Defence. The Defendants counter-claimed against both Stevensons for

> "14. (a) damages in the amount of $1,000,000.00 for intention of infliction of mental suffering, breach of contract, nuisance, trespass and
> (b) punitive and exemplary damages in the amount of $200,000.00;
> (c) an interim, interlocutory and permanent injunction preventing the Defendants by Counterclaim or either of them from contacting the Plaintiffs by Counterclaim, their children or anyone known to them with respect to the relationship between the parties or in any other harassing manner."

5 Such defence and counterclaim is dated September 28, 1992. In turn, the Stevensons delivered a Defence to the Counterclaim denying the allegations and setting forth their version of the events. In addition, Mr. Stevenson counterclaimed against the Reimers for

> "(a) damages in the amount of $4,000,000.00 for injurious falsehood, inducing breach of contract, intentional infliction of mental suffering, nuisance, trespass, unlawful interference with economic relations, defamation, conspiracy to injure, invasion of privacy and harassment;
>
> (b) punitive and exemplary damages in the amount of $200,000.00;
> (c) an interim, interlocutory and permanent injunction preventing the Defendants or either or them from telephoning, contacting, corresponding with or otherwise harassing him, his wife Anne Marie Stevenson, or his children, or any of his past, present and potential employers;"

6 The claim for inducing breach of contract arises out of the allegation in John Stevenson's counterclaim that in January, 1992, Mr. Reimer wrote to his employer alleging "inter alia that John Stevenson had misappropriated company funds and company time in pursuit of his affair with the Defendant, Jayda Reimer"; that his then employer terminated his employment; and that by letter dated May 7, 1992, such employer confirmed that the circumstances surrounding Mr. Stevenson's departure "were precipitated by an unsolicited communication to the company from Mr. Dwight Reimer". The letter further stated that "but for such circumstances, there was no reason to believe that John Stevenson's departure from the company would have taken place." There were further allegations of "constant harassing conduct". The Statement of Defence to the Reimer Counterclaim and the Counterclaim of John Stevenson are dated October 15, 1992. The Reimers delivered their Statement of Defence to the Stevenson Counterclaim on December 7, 1992.

7 It is common ground that Mr. Stevenson alleged that his employer had wrongfully dismissed him and that he and such employer settled such claim. Mr. Stevenson served an Affidavit of Production in January, 1993. He claimed privilege in respect of

> (a) communications between his solicitors and counsel for his former employer between March 13, 1992 and April 2, 1992 and
> (b) privileged settlement communications between himself and the third party former employer between April 13, 1992 and April 16, 1992.

8 In July, 1993, the Reimers, because of "irreconcilable differences" with their then solicitors, changed solicitors. The Reimers had not previously discussed the serving of a Jury Notice with their previous solicitors. They did discuss it with their present solicitors and instructed them to serve such a notice. Under the Rules, the time for serving a Jury Notice had passed. On July 21, 1993, Mr. Stevenson waived the objection with respect to the communications between his solicitors and counsel for his former employer and their response, being the letters of March 13, 1992 and April 2, 1992.

9 The Reimers then brought a Motion before the Master to extend the time to serve a Jury Notice and for the production of the letters dated April 13, 1992 and April 16, 1992 and the settlement arrangement arrived at between Mr. Stevenson and his former employer. The Master dismissed such Motion and the Reimers have appealed therefrom.

Production of Letters April 13, April 16, 1992 and Settlement Between Mr. Stevenson and his Former Employer.

10 The issue in this aspect of the matter is whether communications between A and B with a view to settlement of issues between them and the settlement arrived at are to be produced at the instance of C in subsequent litigation between A and C on the same subject matter or subject matter closely related to the communications and settlement.

11 In the case at bar, the action of Mr. Stevenson against the Reimers is inter alia a claim for inducing Mr. Stevenson's employer to breach the contract of employment which Mr. Stevenson had with such employer. The letters of April 13 and 16, 1992 are letters between Mr. Stevenson and his employer leading up to the settlement arrived at between them and which is contained in a document entitled FINAL RELEASE and dated May 8th, 1992. The letters and the settlement were produced before the Master. I am informed by counsel that he did not read them as he felt he could determine the matter without so doing. Before me, both counsel agreed that I should read the letters and the settlement. I have done so.

12 The Master's reasons are short and are as follows:

> "As to production of settlement of end of employment.
>
> The purpose of production in my view, is to weaken claim of plaintiff by counterclaim, with respect to cause of cessation of employment and damages. I cannot see any other purpose for disclosure. That is the classical reason against disclosure. See Waxman and Mueller.
>
> Paragraph 2 dismissed as to settlement documents."

13 The first question to be answered is the scope of the appeal. It is clear from such cases as Trigg v. MI Movers International Services Ltd. (1986) 13 C.P.C. (2d) 150 and Mueller Canada Inc. v. State Contractors Inc. 41 C.P.C. (2d) 291 that the question of whether documents are to be produced where privilege is claimed is a matter of law and not of judicial discretion. Accordingly, the principle stated in Marleen Investments Ltd. v. McBride (1979) 23 O.R. (2d) 125 viz that there should be no interference with the Order where judicial discretion is exercised by the Master unless it is clearly wrong is not applicable.

14 In determining the matter, it is necessary to deal separately with the settlement and the letters.

The Settlement

15 As hereinbefore set forth, the Master stated that the disclosure is to weaken Mr. Stevenson's "claim with respect to cause of cessation of employment and damages" and accordingly, he dismissed the Motion. In that regard, the principle expressed in Mueller Canada Inc. supra at p. 296 is as follows:

> "I take the ratio of Waxman (I.) & Sons Ltd. v. Texaco Canada Ltd. to be that generally, the public interest in promoting full and frank settlement discussions will protect communications for that purpose from production in subsequent litigation involving one of the parties to that correspondence and a third party. Waxman (I.) & Sons Ltd., also makes it clear that there are exceptions to the privilege which operate where one of the parties to the negotiations, or a stranger to those negotiations, seeks production. In discussing those exceptions, Sopinka and Lederman, supra, at p. 201 say:

> 'The aforesaid exceptions to the rule of privilege find their rationale in the fact that the exclusionary rule was meant to conceal an offer of settlement only if an attempt was made to establish it as evidence of liability or a weak cause of action, not when it is used for other purposes.'

> The reference to establishing "liability or a weak cause" must refer to liability in relation to the matters which are the subject of the settlement - in this case the alleged wrongs which led to the initial dispute between State and the Kellogg Companies. Where documents referable to the settlement negotiations or the settlement document itself have relevance apart from establishing one party's liability for the conduct which is the subject of the negotiations, and apart from showing the weakness of one party's claim in respect of those matters, the privilege does not bar production. Fraser J. recognized this limitation in the privilege in Waxman (I.) & Sons, supra, when he referred at [[1968] O.R.] p. 646 to the decision of Middleton J. in Pearlman v. National Life Assurance Co. of Canada (1917), 39 O.L.R. 141 (H.C.), as standing for the proposition that: 'where a contractual relationship resulting from the correspondence is in issue, the correspondence is not privileged.'"

16 Thus, where the document in question has "relevance apart from establishing" liability or weakness, the privilege is no bar to production.

17 In the case at bar, Mr. Stevenson's claim is for damages as a result of the Reimers inducing his employer to breach his contract of employment with him. As a result of negotiations, a settlement was arrived at between Mr. Stevenson and his employer. Is such settlement to be produced in the claim for damages brought by Mr. Stevenson against the Reimers?

18 What part any monies or other matters recovered by Mr. Stevenson in the settlement plays in the recovery of any damages from the Reimers, assuming they are liable, is set forth in Garbutt Business College v. Henderson (1939) 4 D.L.R. 151 at 179 (Alta. C of A):

> "Where there is a valid and enforceable contract between A and B, and C, without justification, knowingly induces B to break his contract, A, subject to the rule that the same damages may not be recovered twice, may sue for and recover damages both against B and C in one action in which they are joined as defendants. The remedies are, however, based upon different causes of action, that against B being for breach of contract and the other for the tort of inducing the breach. The damages for the tort may in some cases, but will not generally, exceed those recoverable for the breach and may in some cases be less, where for instance, the wrongdoer is not responsible for a continuation of the breach during which the pecuniary loss continues to arise from the breach of contract."

19 It is seen that the settlement is relevant and must be taken into account. Otherwise, there may be double recovery which is not permissible in law. Thus, as in Jones Bros. (Hunstanton) Ltd. v. Stevens (1955) 1 Q.B. 275 at 283 (Eng. C of A), where a servant paid his former master all of the damages for breach of his contract of employment, which breach was induced by a third party, no action would lie against such third party by the master. Although the damages for the tort of inducement are at large (see McGregor on Damages, 13th edition, paragraph 1336 and 1337 and cases therein referred to), yet in arriving at such damages, a factor which is to be taken into account is the settlement. Vale v. I.L.W.U. 9 C.C.L.T. 262 at 265 to 267.

20 Thus, the settlement is relevant apart from the establishing of "liability or a weak case" and falls within the

exception and privilege is no bar to production. In addition, Mr. Stevenson has put in issue the matter of damages in his claim against the Reimers for their inducing his breach of his employment contract. As was stated in Whyte v. Armstrong 42 C.P.C. (2d) 97 at 100 "A litigant cannot claim a privilege where he or she has put into issue the very matters which are then sought to be clothed with the privilege." (see also Nowak v. Sanyshyn 23 O.R. (3d) 797 at 799.)

21 The Respondent states that the settlement should not be produced because the release specifically states "... I will not discuss nor disclose to other than my immediate family members, legal advisors and financial advisors, the disclosure required by law, the terms of the settlement."

The short answer to the foregoing is that for reasons hereinbefore set forth, "the disclosure is required by law." Further, the disclosure is not as a result of any statute or rule that compels Mr. Stevenson to disclose the settlement. Rather, it is as a result of the action being brought by Mr. Stevenson for damages, thus bringing the settlement into the picture as aforesaid. In such circumstances, what is stated in S & K Processors Ltd. v. Campbell Ave. Herring Producers Ltd. (1983) 53 C.P.C. 146 at 150, cited by counsel for Mr. Stevenson, is clearly distinguishable.

22 The Respondent further stated that the settlement should not be produced because the Applicant would be able to obtain the terms thereof at the Examination for Discovery of Mr. Stevenson. I disagree. There is no difference between viva voce evidence and a written document in circumstances such as this. In my view, either the settlement is privileged or it is not. If it is, then it is not to be disclosed either by producing the document or by viva voce testimony given at discovery. If it is not, then the settlement document is to be produced and the Appellant need not wait until discovery to obtain the contents thereof.

23 Accordingly, the settlement document which I am led to believe is the document entitled "FINAL RELEASE" dated May 8th, 1992 is to be produced.

Letters Dated April 13, 1992 and April 16, 1992

24 As hereinbefore set out and in the Affidavit of Production, these are settlement communications between Mr. Stevenson and his then employer.

25 Also as hereinbefore set forth, the Master stated that they were not to be produced because the purpose of the production is to weaken Mr. Stevenson's claim against the Reimers "with respect to cause of cessation of employment and damages."

26 The defence of the claim of Mr. Stevenson that the Reimers caused him to be dismissed by sending "false allegations to his employer" is threefold and are set forth in the Reimers pleading as follows:

> "11. The Reimers state that the allegations of misuse of company time and money contained in the letter dated January 17, 1992 are true.
> 12. The Reimers state that John Stevenson was dismissed from his employment with H. H. Brown for cause.
> 13. In the alternative, the Reimers state that John Stevenson was wrongfully dismissed."

27 The cause for the dismissal of Mr. Stevenson is in issue. Was he wrongfully dismissed or did the employer have cause? Was the letter sent by the Reimers the only cause for the dismissal or were there other circumstances? Was such letter only one of a number of factors?

28 As hereinbefore stated, the "Final Release" which contains the settlement in the appendix thereto is dated May 8, 1992. There were produced to the Reimers the following documents which are found in the Affidavit of Production of Mr. Stevenson and in respect of which privilege was not claimed:

> (i) Resignation of Mr. Stevenson dated May 6, 1992, the opening sentence of which is

"I accept your proposal to consider my termination of employment ... as a resignation."

(ii) Letter of reference by the employer dated May 6, 1992.

29 Stopping there, the fair and reasonable inference to be drawn from such documents is that they were part of the settlement reached and thus reinforces the conclusion that the complete settlement is to be produced, as hereinbefore and hereafter set forth.

(iii) A letter dated May 7, 1992 from the employer to Mr. Stevenson. It is short and is as follows:

> "This will confirm that the circumstances surrounding your departure from the H. H. Brown Shoe Company were precipitated by an unsolicited communication to the company from Mr. Dwight Reimer, as more completely set forth in our April 13, 1992 letter to you. Had it not been for these circumstances, we have no reason to believe that your departure would have taken place at this time.
>
> In view of the determination regarding your employment set forth in our April 13 letter, we have withheld taking any position regarding Mr. Reimer's communication and your March 31 letter regarding said communication denying any alleged wrongdoing."

30 This is the letter referred to in the pleadings of the Stevensons.

31 Having regard to the date of the letter being the day after the letter of resignation and the letter of reference set forth above, and the day before the execution of the Final Release, the Appellants submit that the fair inference to be drawn without more is that such letter was part of the settlement. Having regard to what is hereafter set forth, it is not necessary for me to draw and I do not draw such inference. It is seen from the claim and pleading of Mr. Stevenson that Mr. Stevenson intends to and will rely on such letter.

32 According to such letter, the circumstances surrounding Mr. Stevenson's departure are "more completely set forth in our April 13, 1992 letter to you."

33 The reason why such letter of April 13, 1992 was not produced is set forth in the Affidavit of Clive Elkin, an associate with the law firm of Mr. Stevenson. Paragraph 5 states:

> "5. The letter of April 13, 1992 noted above encloses a release and refers to a compensation agreement dated January 1, 1988 between John Stevenson and his employer. As referred to in Exhibit "A" above, both of these documents contained non-disclosure provisions. For that reason, John Stevenson is maintaining confidentiality of these documents as the terms thereof."

34 In that regard, the agreement of January 1988 was ordered produced by the Master. There was no appeal therefrom by the Respondent. As hereinbefore set forth, the confidentiality agreement was as to the settlement which was ordered produced for the reasons hereinbefore set forth. The reasons that Mr. Stevenson states for refusing to produce the letter of April 13, 1992 as set forth in the Affidavit hereinbefore recited are no longer valid. That in itself would be enough to order the production of such letter. There is moreover further grounds. The complete circumstances of the termination or resignation, having regard to the resignation letter of May 6, 1992 above set forth, is set forth in such letter of April 13, 1992. The reference to such letter of April 13, 1992 coupled with the reference that the circumstance are more completely therein set forth, in my view resulted in a waiver by implication of any privilege which would otherwise

attach to such letter. As was stated in Waxman (I.) & Sons Ltd. v. Texaco Canada Ltd. (1968) 1 O.R. 642 aff'd (1968) 2 O.R. 452 (C.A.), one may waive privilege (see pages 655 and 657 of (1968) 1 O.R.). The letter of April 13, 1992 set out circumstances other than just the receipt of Mr. Reimer's correspondence. In that regard, what is set forth in Wigmore on Evidence, McNaughton Revision Volume 8, pp. 635-36, is germane viz:

> "What constitutes a waiver by implication?
>
> "Judicial decision gives no clear answer to this question. In deciding it, regard must be had to the double elements that are predicated in every waiver, i.e., not only the element of implied intention, but also the element of fairness and consistency. A privileged person would seldom be found to waive, if his intention not to abandon alone could control the situation. There is always also the objective consideration that when his conduct touches a certain point of disclosure, fairness requires that his privilege shall cease whether he intended that result or not. He cannot be allowed, after disclosing as much as he pleases, to withhold the remainder. He may elect to withhold or to disclose, but after a certain point his election must remain final."

35 And see Harich v. Stamp 27 O.R. (2d) 395 at 400 (C.A.) where reference was usefully made to the following citation from McCormick on Evidence:

> "Waiver includes, as Wigmore points out, not merely words or conduct expressing an intention to relinquish a known right but conduct, such as a partial disclosure, which would make it unfair for the client to insist on the privilege thereafter."

36 And see to the same effect Burnell v. British Transport Commission (1956) 1 Q.B.187 (C.A.) at 190. As was stated by Mustill J., (as he then was) in the unreported case of Nea Karteria Maritime Co. Ltd. v. Atlantic and Great Lakes Steamship Corp., cited with approval by the English Court of Appeal in Great Atlantic Insurance v. Home Insurance (1981) 2 ALL E.R. 485 at 492 viz

> "...where a party is deploying in court material which would otherwise be privileged, the opposite party and the court must have an opportunity of satisfying themselves that what the party has chosen to release from privilege represents the whole of the material relevant to the issue in question. To allow an individual item to be plucked out of context would be to risk injustice through its real weight or meaning being misunderstood."

37 As hereinbefore indicated, the "circumstances" set forth in the letter of April 13, 192 are more than just the receipt and contents of the letter sent by the Reimers to the employer. The fact that the material is found not in one but in several documents is not an answer especially where the document released and upon which the litigant relies refers to another as setting out the complete circumstances.

38 Furthermore as hereinbefore set forth, the Respondents have released Mr. Stevenson's letter of resignation which states "I accept your proposal to consider my termination of employment ..... as a resignation." Such proposal is contained in the letter dated April 13, 1992 (see last page). In such circumstances, the reason of Lord Griffiths as set forth in Rush and Tompkins v. G.R.C. (1988) 3 ALL E.R. 737 at 741 and 742, for the admission of an offer contained in a letter in the case of Stretton v. Stubbs Ltd. (1905) Times 28 February is germane viz that it was part of a correspondence which the Plaintiff had chosen to put in evidence.

39 Accordingly, the letter of April 13, 1992 from the employer to Mr. Stevenson is to be produced. The letter of April 16, 1992 is the reply from Mr. Stevenson to the employer. As this is part of the correspondence and as the picture would not be complete without it, this letter also is to be produced.

Extension of the Time to Serve a Jury Notice

40 Unlike the issue of privilege, the issue as to whether time is to be extended or not is not a matter of law but a matter of judicial discretion (see for example Weir v. Mailett (1983) 34 C.P.C. 194 (Ont. Div. Ct.)) and the principle set forth in Marleen Investments governs viz there should be no interference with the order of the Master unless it is clearly wrong. The exception to such principle set forth in Stoicevski v. Casement 43 O.R. (2d) 436 does not apply to the case at bar. (See p. 438 of the Stoicevski report where the Court of Appeal states that "I agree that this test ..... is the appropriate one where the appeal is taken from an interlocutory order involving matters such as a change of venue, a Jury Notice or a routine amendment to the pleading." Aliter where interlocutory rulings raise questions vital to the final issue of the case.)

41 The reasons of the Master for dismissing this part of the Motion are also short and are the following:

> "A Master's jurisdiction includes extending times. When requested to extend time for a Jury Notice, it is my view that a Master should not do so if the notice is forbidden by Section 108; but he should not enter into a consideration of whether the action "ought to be tried without a jury." In effect, he should be guided by Rule 47.02.
>
> In this case it is my view that the facts upon which counterclaim for injunction is based are the same as those on which counterclaim for damages is based. Section 108 forbids a jury if "facts -- in respect of a claim for --- injunction" are to be tried.
>
> In my view, that applies even where those same facts will support another claim as well as an injunction.
>
> Therefore, extension will not be granted."

42 The Appellant states that the Master should not have taken into consideration whether the "notice is forbidden by Section 108." Rather, the factors to be taken into consideration according to the Appellant are such matters as the reason for the delay in bringing the Motion; the reason why the notice was not served in time; and whether there is any prejudice to the Respondents if time were extended. The Appellant points to the following part of the reasons "but he should not enter into a consideration of whether the action 'ought to be tried without a jury'" as indicating that the Master recognized that he had no jurisdiction to consider whether the Jury Notice would be disallowed for any reason when he considers the question of extending the time.

43 The Master has, at present, jurisdiction to extend the time to serve a Jury Notice. Before 1914, Section 60(1) of The Judicature Act for the extension of time to serve a Jury Notice read "within such other time as may be allowed by the Court or a Judge." By amendment of 1914, the words "the Court" were omitted. As a result, the Master had no power to extend the time. (see Chistoff v. Musicar (1940) O.W.N. 198). This situation existed until the Courts of Justice Act and the Rules made thereunder came into being in January, 1985. There is no longer the provision in effect that only a Judge can extend the time to serve a Jury Notice. A Master has now jurisdiction to extend the time to serve a Jury Notice.

44 Whether the case is proper to be tried by a Jury has long been considered on Applications to extend the time to serve a Jury Notice. Thus, where a Jury Notice was served but through inadvertence, not filed within the proper time, the Notice was allowed to stand as the case was a proper one to be tried by a jury. (Macrae v. News Printing Co. (1895) 16 P.R. 364; Bell v. Union Gas Co. (1945) O.W.N. 423); where through solicitor's inadvertence a Jury Notice was not given within proper time, a notice served and filed outside of the time was allowed to stand where the case was a proper one to be tried by a jury. (Wilson v. Toronto Ry. (1919) 16 O.W.N. 357); but the result was otherwise where the case was not a proper one to be tried by a jury. (Hall v. McPherson (1909) 13 O.W.R. 929 and see A. G. for Ontario v.

Cuttell (1955) O.R. 8 at p. 10 where the following is found:

> "If the issue is one in which the terms of S. 57(4) of the Judicature Act before the Administration of Justice Act of 1873, the Court of Chancery had exclusive jurisdiction, then there is no right to serve a Jury Notice, and there is no discretion in the Court to allow service of such notice.")

45 The grounds for striking out a Jury Notice were found in Rule 47.02 of the Rules of Practice. The grounds germane to this Application are:

> "47.02(1)(a) A statute requires a trial without a jury.
> 47.02(2) A motion to strike out a Jury Notice on the ground that the action ought to be tried without a jury shall be made to a Judge."

46 Under Rule 47.02(1)(a), where a statute requires a trial without a jury, the Master has jurisdiction to strike such notice (Kovalevitch v. Dumanowski (1941) O.W.N. 275 and the commentary in Watson and McGowan Ontario Civil Practice 1993 at p. 603; Carthy, Millar, Cowan Ontario Annual Practice 1993-94 at p. Rule-382).

47 I take the reasons of the Master to mean that where a statute requires a trial without a jury, the Master is to take that into consideration in any motion to extend the time to serve a Jury Notice because he has jurisdiction to determine that and it would be, to say the least, useless to extend the time to serve a Jury Notice where a statute requires a trial without a jury. However, where for reasons other than statutory requirements, the action ought to be tried without a jury, then the Master should not take such grounds (as for example difficult questions of fact and law being raised; see Fulton v. Fort Erie (1982) 40 O.R. (2d) 235) into consideration in determining whether time is to be extended for serving a Jury Notice because a determination of such grounds are not within jurisdiction of a Master.

48 I am not concerned with the question as to whether the time should not be extended because the action "ought to be tried without a jury". It is clear that the Master did not take such a factor into consideration.

49 The question before me is whether, on a Motion to extend the time for service of a Jury Notice, the Master can consider and base his decision on whether a statute requires a trial without a jury. In my view, he can. There is no question of his jurisdiction and even without the authorities hereinbefore cited, it is common sense to take such a factor into consideration.

50 I now turn to the section of the statute in question which is section 108 of the Courts of Justice Act. The predecessor of such section provided that actions in which a claim is made for an injunction shall be heard without a jury. Accordingly, where the action was one for libel but included was a claim for an injunction, the Jury Notice was struck in respect of the action in toto. (see Reichmann v. Toronto Life Publishing 69 O.R. (2d) 242, hereinafter referred to as Reichmann No. 1.)

51 The section in question had changed the law as it had previously existed, namely that where in an action there was a claim for equitable relief and a claim for other relief, the claim for other relief could be tried by a jury. After Reichmann No. 1, the Section of the Courts of Justice Act was amended to restore the pre-Courts of Justice Act 1984 law that a jury was only prohibited in respect of a claim for equitable relief but a jury might still determine the issues of fact with respect to other claims in the action or damages in that regard. (see Reichmann v. Toronto Life Publishing 1 O.R. (3d) 160 which dealt with a Motion for an order reinstating the Jury Notice after the amendment to the Courts of Justice Act as aforesaid, such case is hereinafter referred to as Reichmann No. 2.)

52 Thus, after such amendment where in an action there is a claim for damages in respect of an alleged defamation and a claim for an injunction in respect thereof, a jury is not prohibited with respect to the assessment of damages as to the defamation. Further, in an action where there are claims for damages for breach of contract and an injunction to

restrain further breaches, it is possible to have the damages assessed by a jury (see Holmestead and Watson Ontario Civil Procedure Vol. I, CJA - 154 and 155; Reichmann No. 2 at 162).

53 It is clear from the foregoing that there is at present no statutory impediment to a jury assessing damages for the various torts alleged both in the claims and counterclaims. Such claims for damages are not in respect of a claim for an injunction. It follows that the Master erred in that regard.

54 Having regard to the foregoing, having regard to the right to trial by a jury being a substantive right of great importance and having regard to the Appellants explanation of the delays and there being no prejudice to the Respondents, (see Jackson v. Hautala, (1983) 42 O.R. (2d) 153) the appeal is allowed and the time to serve and file a Jury Notice qua damages is extended to November 1, 1993 without prejudice to the Respondents if so advised to move before a Judge to strike out the Jury Notice on the grounds that "the action ought to be tried without a jury". (See Shiffman v. T.T.C. (1953) O.W.N. 367 at a time when a Master could not extend the time but could strike out the Jury Notice where a statute so required, the matter of the extension was first to be heard by a Judge and then the matter of striking out was to be heard by the Master. As the matter before me is an appeal concerning the discretion of the Master and having regard to Marleen Investments, supra, the alternative set out in the Shiffman case is not applicable.)

55 I may be spoken to if the parties cannot agree as to costs.

MANDEL J.

Appendix D

Indexed as:

Mueller Canada Inc. v. State Contractors Inc.

Mueller Canada Inc. v. State Contractors Inc. et al.

[1989] O.J. No. 2059

71 O.R. (2d) 397

41 C.P.C. (2d) 291

18 A.C.W.S. (3d) 575

Action No. 16124/86

Ontario
High Court of Justice

Doherty J.

November 30, 1989.

Counsel:

Michael Round, for appellants, Kellogg Salada Canada Inc. and Kellogg Company.

Neil Gross, for appellant, State Contractors Inc.

John Olah, for respondent.

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1 **DOHERTY J.**:-- This appeal from the order of Master Garfield raises an interesting question. Can the defendants in this action keep from the plaintiff a document evidencing a prior settlement made between the defendants pertaining to the same claims and events which underlie the action brought by the plaintiff against the defendants?

2 In the early 1980's, Kellogg Salada Canada Inc. ("Kellogg Canada") with the assistance of the Kellogg Company ("Kellogg U.S.") began the construction of a plant in London, Ontario. Kellogg Canada entered into a number of construction contracts, three of which were with State Contractors Inc. ("State"). State, in turn, subcontracted portions of the work to numerous subcontractors including Mueller Canada Inc., formerly known as "Tri-Canada" ("Mueller"). During the construction, both State and Mueller experienced difficulties in the performance of their contracts and alleged that those difficulties were, in part, due to the negligence of and breach of contract by Kellogg Canada and

Kellogg U.S. Kellogg Canada and Kellogg U.S. denied any responsibility for these problems. In June, 1986, State commenced an action against Kellogg Canada and Kellogg U.S. in this court. In its claim, State made allegations similar to those which it and Mueller had been making for some time prior to the actual commencement of the action. In August, 1986, State settled its claims with Kellogg Canada and Kellogg U.S. The details of that settlement are found in a letter which passed between counsel for State and the Kellogg Companies (the settlement letter). The terms of the settlement provided that details of the settlement would not be disclosed to third parties.

3 In December, 1986, some three months after State had settled its action against Kellogg Canada and Kellogg U.S., Mueller commenced an action against Kellogg Canada, Kellogg U.S. and State. In its action, Mueller made allegations and claimed relief which were substantially the same as the allegations made and the relief claimed by State in its earlier action commenced against Kellogg Canada and Kellogg U.S. In addition to these claims, Mueller advanced a claim against State alleging a breach of fiduciary duty. Mueller claimed that State had undertaken to submit Mueller's claims to the Kellogg Companies as part of its claim against those companies. Mueller alleged that State had agreed that it would not settle its claim against the Kellogg Companies without a concurrent settlement of Mueller's claims and that it had agreed to act on Mueller's behalf in pursuing its claims against the Kellogg Companies. Mueller alleged that State breached this agreement when it settled its claims with the Kellogg Companies without reaching a corresponding settlement with respect to Mueller's claims.

4 State acknowledges that it entered into a settlement agreement with the Kellogg Companies which did not purport to settle Mueller's claims, but it denies that it had entered into any agreement with Mueller tying the settlement of its claims to the settlement of Mueller's claims.

5 On discovery, Mueller sought production of the settlement letter. State resisted production. Master Garfield ordered production and State and the Kellogg Companies took this appeal from that order.

6 As this is an appeal from a master in respect of an interlocutory order, I must first address the scope of the appeal. The master's order addresses the ambit of a party's responsibility to produce documents on discovery. The extent of that obligation is a matter of law and not a matter of judicial discretion. Trigg v. M.I. Movers International Transport Services Ltd. (1986), 13 C.P.C. (2d) 150 (H.C.J.), governs and I must determine whether the master's order was correct in law.

7 The resolution of this issue begins with a recognition of the two competing interests. On the one hand, full production of all potentially relevant documents prior to trial is recognized as central to effective and efficient civil litigation: see rule 30.02, O. Reg. 560/84. On the other hand, it is equally recognized that parties should be encouraged to resolve their disputes short of trial. To foster this goal, communications made in furtherance of efforts to settle disputes are, subject to certain exceptions, not admissible or producible against the parties to those communications: Sopinka and Lederman, The Law of Evidence in Civil Cases (1974), pp. 196-9; I. Waxman and Sons Ltd. v. Texaco Canada Ltd., [1968] 1 O.R. 642 at pp. 644 and 656, 67 D.L.R. (2d) 295; affirmed [1968] 2 O.R. 452, 69 D.L.R. (2d) 543 (C.A.). It is said that parties should be free to engage in frank and reasonable negotiations without fear that their offers of peace will be turned on them as admissions against interest should negotiations fail.

8 I accept that but for the privilege against disclosure of communications made in the course of settlement negotiations, the settlement letter would be producible in this action. The potential relevance of the document, apart from Mueller's claim of breach of contract and fiduciary duty, is demonstrated by the ruling of Gibbs J. at trial in Derco Industries Ltd. v. A.R. Grimwood Ltd., [1984] 2 W.W.R. 143, 59 B.C.L.R. 62, 49 C.P.C. 63 at p. 68 (S.C.), a case which is factually very close to the present case. In addition, in this case, the settlement agreement may constitute cogent evidence of the nature and extent of the breach of contract by State should Mueller establish that State agreed that it would not settle its claim against the Kellogg Companies without settling Mueller's claim as well.

9 State and the Kellogg Companies rely heavily on the decision of Fraser J. in I. Waxman and Sons Ltd. v. Texaco Canada Ltd., supra. In that case, Waxman's had purchased a machine from United Steel Corporation Limited. Texaco

Canada Ltd. provided oil for that machine. A mishap occurred and the machine was destroyed. Waxman's and United Steel entered into negotiations with respect to the settlement of certain issues arising out of the accident. It is unclear from the report whether litigation was commenced, and whether the dispute between Waxman's and United Steel was in fact settled as a result of their negotiations. Waxman's eventually sued Texaco Canada. At discovery, Texaco Canada sought production of the letters which had passed between Waxman's and United Steel. Fraser J., in a typically careful judgment, described the correspondence as being marked as written without prejudice and as relating to negotiations between Waxman's and United Steel. He also said [at p. 644]:

> These letters do not constitute or create any new contractual relationship between the parties or any change in the existing one. In my opinion as between the parties to the correspondence they are privileged as being written in the course of without prejudice negotiations between the plaintiff and United Steel Corporation Ltd., the vendor of the press.

10 After a thorough review of the authorities, and the exceptions which had developed to the privilege against disclosure, His Lordship held that Texaco Canada Ltd. was not entitled to production of the correspondence. He said, at p. 656:

> I am of the opinion that in this jurisdiction a party to a correspondence within the "without prejudice" privilege is, generally speaking, protected from being required to disclose it on discovery or at trial in proceedings by or against a third party.
>
> In my opinion the privilege as so often stated, is intended to encourage amicable settlements and to protect parties to negotiations for that purpose. It is in the public interest that it not be given a restrictive application.

(Emphasis added.)

11 The Court of Appeal found itself in agreement with this analysis "in the main" and also put the issue very clearly at pp. 452-3:

> The question, of course, is whether or not discovery can be compelled in the production by one party to the litigation before the Court of letters written by another party to this litigation in previous litigation with a party, a complete stranger, to the present proceedings. To put it another way, are communications written without prejudice and with a view to settlement of issues between A and C compellable at the instance of B in subsequent litigation between A and B on the same subject-matter or subject-matter closely related to that with which the correspondence in question was concerned?

12 I take the ratio of I. Waxman and Sons Ltd. v. Texaco Canada Ltd., supra, to be that generally the public interest in promoting full and frank settlement discussions will protect communications for that purpose from production in subsequent litigation involving one of the parties to that correspondence and a third party. I. Waxman and Sons Ltd., supra also makes it clear that there are exceptions to the privilege which operates where one of the parties to the negotiations, or a stranger to those negotiations, seeks production. In discussing those exceptions, Sopinka and Lederman, op. cit., at p. 201 say:

> The aforesaid exceptions to the rule of privilege find their rationale in the fact that the exclusionary rule was meant to conceal an offer of settlement only if an attempt was made to establish it as evidence of liability or a weak cause of action, not when it is used for other purposes.

13 The reference to establishing "liability or a weak case" must refer to liability in relation to the matters which are

the subject of the settlement -- in this case the alleged wrongs which led to the initial dispute between State and the Kellogg Companies. Where documents referable to the settlement negotiations or the settlement document itself have relevance apart from establishing one party's liability for the conduct which is the subject of the negotiations, and apart from showing the weakness of one party's claim in respect of those matters, the privilege does not bar production. Fraser J. recognized this limitation in the privilege in I. Waxman and Sons, supra, when he referred at p. 646 to the decision of Middleton J. in Pearlman v. National Life Assurance Co. of Canada (1917), 39 O.L.R. 141, as standing for the proposition that "where a contractual relationship resulting from the correspondence is in issue the correspondence is not privileged".

14 To the same effect, see McCormick on Evidence, 3rd ed. (1984) at pp. 812-3.

15 By its pleadings, Mueller has put the contractual relationship of State and the Kellogg companies, as established by the settlement letter, in issue. Mueller says that the agreement constitutes a breach of its contract with State and a breach of fiduciary duty by State. State's admission in its pleadings that the agreement existed cannot deny Mueller access to the document. The settlement letter has potential relevance apart entirely from any force it may have as an admission against interest by either State or the Kellogg Companies in connection with the events relating to the initial dispute between State and the Kellogg Companies.

16 On my reading of I. Waxman and Sons, supra, the settlement agreement comes squarely within one of the exceptions to the rule against disclosure of settlement related documents. It is producible. Its ultimate admissibility is a matter for the trial judge.

17 Mr. Olah, relying on Derco Industries Ltd. v. A.R. Grimwood Ltd., [1985] 1 W.W.R. 541, 57 B.C.L.R. 390, 46 C.P.C. 263 (S.C.); affirmed [1985] 2 W.W.R. 137, 57 B.C.L.R. 395, 47 C.P.C. 82 (C.A.), argued in a most attractive way that the producibility of the settlement agreement should be determined by a balancing of the respective interests of those who were parties to the settlement and favour confidentiality, against the interests of the stranger to that settlement who seeks disclosure. In my view, that balancing process may be appropriate in cases which do not engage the recognized exceptions to the privilege. It is an approach which is consistent with recent pronouncements of the Supreme Court of Canada dealing with the scope of privilege limiting access to production of documents, or the compellability of witnesses in civil proceedings: Carey v. Ontario (1986), 35 D.L.R. (4th) 161, 30 C.C.C. (3d) 498, [1986] 2 S.C.R. 637 at pp. 670-1 and 680-2; MacKeigan v. Hickman, released October 5, 1989, not yet reported [since reported 61 D.L.R. (4th) 688, 50 C.C.C. (3d) 449, 72 C.R. (3d) 129]. As I have found that the settlement letter is not within the privilege, I need not decide whether the balancing approach followed in Derco, supra, is inconsistent with I. Waxman and Sons, supra. I will, however, say that if the approach is available in this province, I regard the balance in this case as tipped in favour of production for the reasons set out in Derco, supra, a case which is factually very similar to this case.

18 The appeal is dismissed. Mueller is entitled to the costs of this appeal in any event of the cause.

Appeal dismissed.

Appendix E

Case Name:

Sabre Inc. v. International Air Transport Assn.

Between
Sabre Inc. and Sabre International, Inc., Plaintiffs,
and
International Air Transport Association and Lufthansa Systems AG and Lufthansa Systems Airlines Services GMBH, Defendants
And between
International Air Transport Association, Plaintiff by Counterclaim, and
Sabre Inc., Sabre International, Inc. and Andrew Seow Kian Wee, Defendants by Counterclaim

[2009] O.J. No. 903

76 C.P.C. (6th) 146

2009 CarswellOnt 1157

Court File No. 07-CL-006825

Ontario Superior Court of Justice
Commercial List

S.E. Pepall J.

March 4, 2009.

(24 paras.)

Civil litigation -- Civil procedure -- Discovery -- Production and inspection of documents -- Privileged documents -- Documents prepared for the purpose of settlement -- A motion by non-party Airlines Reporting Corporation (ARC), to set aside an order requiring production of a settlement agreement between ARC and the plaintiff Sabre Inc., was dismissed -- The plaintiff alleged the defendant breached a duty of confidence by using data it received from the plaintiff -- Sabre had sued ARC over the use of analogous data resulting in the settlement -- There was no evidence ARC would suffer injury as a result of disclosure -- The agreement was producible as an exception to the settlement privilege rule as it had relevance apart from any admission against interest.

Civil litigation -- Civil evidence -- Privilege -- Privileged relationships -- Solicitor and client -- Settlement negotiations

-- A motion by non-party Airlines Reporting Corporation (ARC), to set aside an order requiring production of a settlement agreement between ARC and the plaintiff Sabre Inc., was dismissed -- The plaintiff alleged the defendant breached a duty of confidence by using data it received from the plaintiff -- Sabre had sued ARC over the use of analogous data resulting in the settlement -- There was no evidence ARC would suffer injury as a result of disclosure -- The agreement was producible as an exception to the settlement privilege rule as it had relevance apart from any admission against interest.

Counsel:

Kenneth R. Peel, for the Moving Party, Airlines Reporting Corporation.

Paul F. Monahan, for the Respondent/Defendant and Plaintiff by Counterclaim, International Air Transport Association.

REASONS FOR DECISION

S.E. PEPALL J.:--

Introduction

1 The issue in this case is whether a settlement agreement is protected from production to a third party due to privilege. This case engages two competing values, namely, the need to make adequate disclosure in litigation and the encouragement of settlement of litigation.

Facts

2 On September 16, 2008, Mesbur J. ordered the plaintiffs and defendants by counterclaim, Sabre Inc. and Sabre International, Inc. ("Sabre"), to answer certain questions from the examination for discovery of their representative and to produce for inspection a confidential settlement agreement and release (the "Settlement Agreement") between Sabre and a non-party, Airlines Reporting Corporation ("ARC"). ARC had not been given notice of that motion and she ordered that if it objected to production, it was to bring a motion.

3 ARC now has brought a motion for: an order setting aside Mesbur J.'s finding that the questions be answered and the Settlement Agreement be produced; an order finding that the Settlement Agreement is privileged and that Sabre should not answer the questions nor produce the Settlement Agreement; or alternatively, an order that the disclosure be limited to protect the confidential commercial and financial interests of ARC. Lastly, and in the further alternative, ARC requests that if disclosure is made, it be without prejudice to objections that could be made at trial.

4 The defendant and plaintiff by counterclaim, International Air Transport Association ("IATA"), is a trade association of airlines that represents and serves the airline industry throughout the world. IATA has established billing and settlement plans ("BSPs") to assist airlines and agents. A BSP is the central point through which data and funds flow between agents and airlines. Instead of every agent having an individual relationship with each airline, all of the information is consolidated through a BSP. Agents make one payment to a BSP for all sales and a BSP makes one consolidated payment to each airline.

5 Sabre operates a global distribution system which serves as an intermediary between airlines and travel agents for the distribution of airline services. Agents use companies such as Sabre to make bookings and to issue airline tickets and as part of this process, data is delivered to IATA to effect the billing and settlement. Both Sabre and IATA sell market intelligence products associated with the data involved in the booking of the airline reservation and the issuance

of airline tickets.

6 Sabre has sued IATA alleging, amongst other things, that it has breached a duty of confidence and is unjustly enriched by using data IATA receives from Sabre as part of the operation of its BSPs. It states that IATA has breached a custom in the trade by using BSP data in IATA's market intelligence product.

7 ARC, like IATA, is an airline-owned company that serves the travel industry. It too sells a market intelligence product. Sabre sued ARC in the United States over the use of data allegedly analogous to the data provided by Sabre to IATA. That litigation settled. IATA asked Sabre for particulars of the litigation that was settled including details of whether there was any agreement between Sabre and ARC concerning the transmission of data and whether Sabre charged ARC for the data. IATA stated that this information was relevant because Sabre alleges that IATA has acted in contravention of practice and usage in the travel industry and arrangements between Sabre and ARC are relevant to that practice and usage. Sabre also states that IATA is improperly using confidential information provided by Sabre solely for BSP purposes. As, according to IATA, the data Sabre provides to IATA is analogous to that provided to ARC, the Settlement Agreement is relevant to ascertain whether the data is in fact confidential. Lastly, if ARC pays Sabre for the data, the Settlement Agreement may also be relevant to damages. Mesbur J. determined that the information requested by IATA was relevant to the issues in dispute between the parties to the action.

8 The Settlement Agreement provided that the contents were confidential and that other than the fact of settlement, neither party was to disclose its terms unless there was consent, an action for enforcement, or a court order for disclosure. The Agreement also stated that:

> "Neither the entering into this Settlement Agreement, nor any provision hereof, shall be deemed an admission by any party of any wrongdoing, or of the validity or invalidity of any position taken, or proposed to be taken in the action or any other litigation."

Positions of the Parties

9 Although it filed no affidavit evidence itself, ARC submits that forced disclosure of the Settlement Agreement may imperil its competitive position. It states that privilege attaches and the four part Wigmore test to establish privilege has been met.

10 IATA submits that neither settlement privilege nor common law privilege is applicable particularly given that no evidence has been tendered by ARC. If settlement privilege is applicable, it states that an exception to the privilege has been established.

Discussion

11 In Ontario, the scope of discovery continues to be that a party must disclose all facts and documents that have a semblance of relevance to the matters in issue in the litigation: *Kay v. Posluns*.[1] Mesbur J. has already determined relevance as between the parties to the litigation. Therefore the only issue to decide is whether the Settlement Agreement and questions are protected by privilege.

a) Common Law Privilege

12 Dealing firstly with common law privilege, four conditions must be met as described by the Supreme Court of Canada in *Slavutych v. Baker*[2] (the "Wigmore test"):

> (a) the communications must originate in a confidence that they will not be disclosed;
> (b) this element of confidentiality must be essential to the full and satisfactory maintenance of the relationship between the parties;
> (c) the relation must be one which in the opinion of the community ought to be sedulously

fostered;

(d) the injury that would inure to the relation by the disclosure of the communication must be greater than the benefit thereby gained for the correct disposal of litigation.

13 ARC did not file any sworn evidence and there is no evidentiary support to meet all of the required four elements of the Wigmore test. In particular, there is no evidence that there would be any injury to ARC as a result of any disclosure. I am not prepared to infer such injury from the other materials before me.

b) Settlement Privilege

14 In analyzing settlement privilege, it is helpful to understand the underlying policy rationale. It was described by Fraser J. in *I. Waxman & Sons Ltd. v. Texaco Canada Ltd. et al.*[3] The issue in that case was whether letters written without prejudice and in furtherance of settlement negotiations should be produced in an action brought by a third party.

> "In my opinion the privilege as so often stated, is intended to encourage amicable settlements and to protect parties to negotiations for that purpose. It is in the public interest that it not be given a restrictive application."

In *British Columbia Children's Hospital v. Air Products Canada Ltd.*,[4] the British Columbia Court of Appeal stated that the purpose of settlement privilege was to protect parties from disclosing express or implied admissions made during the course of settlement negotiations. In Sopinka, Lederman and Bryant's *The Law of Evidence in Canada*,[5] the authors write:

> "Some courts have made the overly broad statement that, once a concluded settlement is reached, the privilege is lost. This suggests that it is lost for the purpose of any subsequent suit whether between the parties or strangers, no matter whether the agreement itself was put in issue in subsequent proceedings.
>
> However, the better view is that the privilege applies not only to failed negotiations, but also to the content of successful negotiations, so long as the existence or interpretation of the agreement itself is not an issue in the subsequent proceedings and none of the exceptions are applicable. The rationale behind the privilege supports this position. If parties to settlement negotiations believe that their statements might be used by a third party in subsequent proceedings, whether or not they reached agreement, they might be less frank in those discussions."

15 *McCormick on Evidence*[6] framed the issue this way:

> "The rule is designed to exclude the offer of compromise only when it is tendered as an admission of the weakness of the offering party's claim or defence, not when offered for another purpose."

16 The treatment accorded the application of settlement privilege to settlement agreements has been uneven. Some cases have distinguished between pre-settlement negotiations and completed settlement agreements and have held that the privilege is inapplicable in the latter. *Hudson Bay Mining and Smelting Co. v. Fluor Daniel Wright*[7] made such a distinction and was affirmed on appeal.[8] In turn, *Western Canadian Place Ltd. v. Con-Force Products Ltd.*[9] *and Belitchev v. Grigorov*[10] were to the same effect.

17 Other cases have applied settlement privilege to both pre-settlement negotiations and settlement agreements. In *Hill v. Gordon-Daly Grenadier Securities*,[11] a representative plaintiff in a proposed class action proceeding filed an affidavit in support of a motion for class certification. She included a settlement agreement in her affidavit. The defendants moved to strike the settlement agreement. The Divisional Court found that privilege had been waived,

however, Taliano J. wrote:

> "The appellants also rely on the well established rule that settlement negotiations and settlement agreements are privileged whether or not a settlement is reached. This rule is founded on the public policy of encouraging litigants to settle their differences rather than litigate them to a finish. Litigants are encouraged to freely and frankly put their cards on the table without fear that statements or offers made in the course of negotiations for settlement may be brought before the court of trial as admissions on the question of liability. (See *Rush and Tompkins Ltd. v. Greater London Council*, [1998] 3 All. E.R. 737 (H.L.).)
>
> Such evidence is therefore excluded in subsequent proceedings, even though this may have the effect of excluding evidence that might otherwise be both relevant and probative. Because of this rule, litigants in a civil dispute have a legitimate expectation that their discussions are private and privileged."[12]

18 The issue arose again in *Moyes v. Fortune Financial Corporation*[13] where Nordheimer J. wrote:

> "The principle that discussions and agreements with respect to settlement are generally inadmissible in any subsequent proceeding is one of long standing. The purpose behind the principle is to facilitate settlements of disputes. It recognizes that parties would be reluctant to settle matters or even engage in settlement discussions if the contents of their agreements or discussions could be used against them in subsequent proceedings. The point is made by Madam Justice Simmons in *Sun Life Trust Co v. Dewshi* [1993] O.J. No. 57 (Ont. Gen. Div.) where she said, at p. 4:
>
> "I further accept the view that, as a general matter, the without prejudice rule should preclude the admission into evidence of admissions made for the purpose of or during the course of an attempt to reach a settlement whether or not a settlement is reached and whether or not such admissions are contained in the negotiations leading up to settlement or in any settlement agreement itself."
>
> ... If the principle behind the privilege is to encourage settlement, then presumably the objective is to encourage settlement of all disputes whether they be criminal, civil or regulatory. It is not difficult to foresee the chilling effect that will occur to discussions involving settlements of regulatory or criminal proceedings if settlement agreements reached in those proceedings were to automatically become admissible in subsequent civil proceedings."[14]

19 Similarly, in *Clarke v. Yorkton Securities Inc.*,[15] MacDougall J. noted that settlement agreements were generally inadmissible into evidence in any proceeding.[16] In *British Columbia Children's Hospital v. Air Products Canada Ltd.*,[17] the British Columbia Court of Appeal held that settlement agreements should be accorded a blanket privilege from disclosure.

20 In this case, however, it seems to me that the conceptual approach adopted by Doherty J. in Mueller Canada Inc. v. State Contractors Inc.[18] is appropriate. That case involved a construction contract and a request for production of a settlement agreement. Both State and Tri-Canada had experienced problems performing their contracts and blamed certain Kellogg companies. State and Kellogg settled their dispute but their settlement agreement was confidential. Tri-Canada then sued Kellogg and State alleging that State had agreed to submit Tri-Canada's claims as part of its claims to Kellogg and also had agreed to settle its case against Kellogg concurrently with that of Tri-Canada. It was conceded that the settlement agreement did not include Tri-Canada's claims. Doherty J. discussed the exceptions to the

settlement privilege rule.

> "I. Waxman & Sons Ltd., *supra* also makes it clear that there are exceptions to the privilege which operates where one of the parties to the negotiations, or a stranger to those negotiations, seeks production. In discussing those exceptions, Sopinka and Lederman at p. 201 say:
>
> "The aforesaid exceptions to the rule of privilege find their rationale in the fact that the exclusionary rule was meant to conceal an offer of settlement only if an attempt was made to establish it as evidence of liability or a weak cause of action, not when it is used for other purposes."
>
> The reference to establish "liability or a weak case" must refer to liability in relation to the matters which are the subject of the settlement - in this case the alleged wrongs which led to the initial dispute between State and the Kellogg Companies. Where documents referable to the settlement negotiations or the settlement document itself have relevance apart from establishing one party's liability for the conduct which is the subject of the negotiations, and apart from showing the weakness of one party's claim in respect of those matters, the privilege does not bar production."

He found that the agreement fell within one of the exceptions set forth in *I. Waxman & Sons* as it had relevance apart from "any force it may have as an admission against interest by either State or Kellogg."

21 This reasoning was applied by Bryant J. in *Seanco Investments Inc. v. Betovan Construction Ltd.*[19] in which he stated:

> "A privilege may not exist where negotiations have resulted in a concluded settlement and the evidence is sought for a different purpose."[20]

Similarly, in *Stevenson v. Reimer*,[21] Mandel J. wrote that where the settlement "has relevance apart from establishing liability or weakness, the privilege is no bar to production."[22]

22 It seems to me that this is the correct analysis to be applied in this case. The Settlement Agreement between Sabre and ARC should be producible as an exception to the settlement privilege rule. It has relevance quite apart from any admission against interest by Sabre in that it addresses the issues of custom, confidential information and quantification of damages.

23 In conclusion, I am of the view that an exception to settlement privilege is applicable here and the Settlement Agreement between Sabre and ARC should be produced to IATA. It need not be redacted. It is to be subject to the deemed undertaking rule. Furthermore, IATA has agreed to maintain the agreement in confidence. The questions ordered by Mesbur J. are also to be answered by Sabre and are subject to the deemed undertaking as well. As requested by ARC, disclosure having been ordered, this order is without prejudice to objections that could be made at trial. Put differently, admissibility will be addressed by the trial judge.

24 With the exception of this latter point, ARC's motion is therefore dismissed. The parties have each agreed to bear their own costs of this motion and I so order.

S.E. PEPALL J.

cp/e/qlrpv/qlmxb/qlaxw/qlced

1 (1989), 71 O.R. (2nd) 238 (H.C.).

2 [1976] 1 S.C.R. 254 at 260.

3 [1968] 1 O.R. 642 (H.C.) at 656.

4 (2003) 29 C.P.C. (5th) 16 (B.C.C.A.) at para. 66.

5 2nd ed. (Markham, Ont.: Butterworths, 1999).

6 J.W. Strong *et al.*, eds., *McCormick on Evidence*, 5th ed., vol. 2 (St. Paul, Minn.: West Group, 1999) at 185.

7 [1997] 10 W.W.R. 622 (Man. Q.B.).

8 (1998) 131 Man.R. (2d) 133.

9 *(1998) 26 C.P.C. (4th) 189 (Alta. Q.B.).*

10 *[1998] B.C.J. No. 3152 (S.C.).*

11 (2001), 56 O.R. (3rd) 388 (Div. Ct.).

12 At 395. *Rush and Tompkins Ltd. v. Greater London Council* was a decision of the House of Lords. It dealt with the production of documents that had been exchanged in anticipation of a settlement not with production of the settlement agreement itself.

13 (2002), 22 C.P.C. (5th) 154 (Sup. Ct.).

14 At 161-162.

15 (2003), 46 C.P.C. (5th) 294 (Sup. Ct.).

16 At 302.

17 Supra note 4.

18 (1989), 71 O.R. (2nd) 397 (H.C.).

19 [2006] O.J. No. 274 (Sup. Ct.).

20 At para. 44.

21 [1993] O.J. No. 2440 (Gen. Div.).

22 At para. 16.

Appendix F

Case Name:

Ontario (Minister of Finance) v. Ontario (Information and Privacy Commissioner)

Between
Minister of Finance for the Province of Ontario, Applicant (Appellant), and
Diane Smith, Adjudicator, Information and Privacy Commission/Ontario and John Doe, Requester, Respondents (Respondents in Appeal)

[2012] O.J. No. 815

2012 ONCA 125

289 O.A.C. 61

109 O.R. (3d) 757

109 O.R. (3d) 767

347 D.L.R. (4th) 740

212 A.C.W.S. (3d) 846

Docket: C54157

Ontario Court of Appeal
Toronto, Ontario

M. Rosenberg, K.N. Feldman JJ.A. and K.E. Swinton J. (ad hoc)

Heard: January 18, 2012.
Judgment: February 24, 2012.

(31 paras.)

Administrative law -- Judicial review and statutory appeal -- Standard of review -- Reasonableness -- Appeal by Minister of Finance from decision of Divisional Court upholding, except in one respect, Adjudicator's decision to release requested records allowed -- Requester requested records relating to advice to Minister leading to decision about effective date of amendments to Corporations Tax Act -- In deciding to release records, Adjudicator

misinterpreted and misapplied jurisprudence, which resulted in unreasonable decision -- No requirement that Minister demonstrate that document went to ultimate decision maker -- Protection afforded by s. 13(1) included advice pertaining to advantages and disadvantages of various options -- Freedom of Information and Protection of Privacy Act, s. 13(1).

Government law -- Access to information and privacy -- Access to information -- Inspection of public documents -- Bars and grounds for refusal -- Consultations or deliberations by government officials -- Appeals and judicial review -- Standard of review -- Reasonableness -- Appeal by Minister of Finance from decision of Divisional Court upholding, except in one respect, Adjudicator's decision to release requested records allowed -- Requester requested records relating to advice to Minister leading to decision about effective date of amendments to Corporations Tax Act -- In deciding to release records, Adjudicator misinterpreted and misapplied jurisprudence, which resulted in unreasonable decision -- No requirement that Minister demonstrate that document went to ultimate decision maker -- Protection afforded by s. 13(1) included advice pertaining to advantages and disadvantages of various options -- Freedom of Information and Protection of Privacy Act, s. 13(1).

Appeal by the Minister of Finance from a decision of the Divisional Court upholding, except in one respect, the decision of an Adjudicator to release the requested records. The requester requested the release of records relating to advice the Minister received leading up to a decision by the Minister about the effective date of certain amendments to s. 2 of the Corporations Tax Act. The Ministry located six records that responded to the request. Four of the records were slightly different versions of draft opinion papers. A fifth record outlined the options in the draft papers and expressed a statement as to the preferred option. The sixth record also identified the civil servant's preferred option, included information about a fourth option, and contained factual information about the federal government criteria for retroactive application of tax changes. The Minister agreed to disclose the factual information, but sought redaction of other parts of the document, which discussed the recommendations, and opposed the release of the other five documents on the grounds that the release of the records would reveal advice or recommendations of a public servant. Relying on the jurisprudence of the Court of Appeal, the Adjudicator concluded that records one through five were draft records and there was no clear evidence of communication of the information in the records from one person to another. With respect to the sixth document, the adjudicator concluded that as the Minister had agreed to disclose most of the document, the remainder was not exempt. As a result, she concluded that the records did not qualify as advice or recommendations and she held that the documents had to be disclosed. On the Minister's application for judicial review, the Divisional Court held that with respect to records one through five, the Adjudicator's decision was reasonable. However, it disagreed with the Adjudicator about record six and concluded that the record made a recommendation. Accordingly, it found that the redactions were covered by s. 13(1) of the Freedom of Information and Protection of Privacy Act and were to be withheld.

HELD: Appeal allowed. In deciding to release the requested records, the Adjudicator misinterpreted and misapplied the jurisprudence with the result that she arrived at an unreasonable decision. The Adjudicator erred in holding that there had to be evidence that the information in the records actually went to the final decision maker and in holding that s. 13 of the Act only applied to the suggestion of a single course of action ultimately adopted or rejected by the decision maker. There was no requirement under s. 13(1) that the Minister be able to demonstrate that the document went to the ultimate decision made as s. 13 protected the deliberative process, which included advice and recommendations in drafts of policy papers. Furthermore, the protection afforded by s. 13(1) extended to advice as to the advantages or disadvantages of particular options, not just the single course of action that was ultimately accepted or rejected.

Statutes, Regulations and Rules Cited:

Corporations Tax Act, R.S.O. 1990, c. C.40, s. 2

Freedom of Information and Protection of Privacy Act, R.S.O. 1990, c. F.31, s. 13, s. 13(1)

Appeal From:

On appeal from the order of the Divisional Court (Aston, Linhares de Sousa and Lederer JJ.), dated April 1, 2011.

Counsel:

Sara Blake and Andrea Cole, for the appellant.

William S. Challis, for the respondent Diane Smith, Adjudicator, Information and Privacy Commission of Ontario.

Alex Cameron and Kevin Yip, for the respondent Requester, John Doe.

The judgment of the Court was delivered by

1 M. ROSENBERG J.A.:-- The Minister of Finance for Ontario appeals from the decision of the Divisional Court (Aston, Linhares de Sousa and Lederer JJ.) upholding, except in one respect, the decision of an Adjudicator under the *Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. F.31 [the Act] to release the requested records to the respondent Requester. The records relate to advice to the Minister leading up to a decision by the Minister about the effective date of certain amendments to s. 2 of the *Corporations Tax Act, R.S.O. 1990, c. C.40*. While the Minister's privacy decision originally relied upon several sections of the Act, the case now turns on s. 13(1) of the Act which gives the Minister, as head of the institution, the discretion to refuse to disclose a record "where the disclosure would reveal advice or recommendations of a public servant, any other person employed in the service of an institution or a consultant retained by the institution." In holding that the documents must be disclosed the Adjudicator relied upon this court's decisions in *Ontario (Ministry of Transportation) v. Ontario (Information and Privacy Commissioner)* (2005), 202 O.A.C. 379 (C.A.) [*MOT*] and *Ontario (Ministry of Northern Development and Mines) v. Ontario (Assistant Information and Privacy Commissioner)* (2005), 203 O.A.C. 30 (C.A.) [*MNDM*].

2 In my view, in deciding to release the requested records, the Adjudicator misinterpreted and misapplied the decisions of this court with the result that she arrived at an unreasonable decision. I would allow the appeal and remit the matter to the Information and Privacy Commission.

THE FACTS

3 The Ministry of Finance received a request under the Act for all records or parts of records in the Ministry that consider the issue of retroactivity and the effective date of amendments to s. 2 of the *Corporations Tax Act*, which was effective May 11, 2005. Although the Requester is referred to in the materials as John Doe, there seems to be no dispute that the Requester seeks the records as part of a dispute with the Ministry over tax liability. The Ministry believes that certain corporations had entered into a tax avoidance scheme and amended the *Corporations Tax Act* to prevent "tax leakage".

4 The Ministry located six records that respond to the request. The records are all brief, consisting of one or two pages and may be described as follows. Records I to IV are all titled "Tax Haven Corporations -- Timing of Implementation". They are slightly different versions of what the adjudicator described as draft option papers. Record I has three sections titled option 1, 2 or 3. The record contains a note of a possible fourth option which was considered. Options 1 and 2 and the possible fourth option set out arguments for and against adopting the various options. Option 3 also has arguments for and against, but carries an explicit recommendation from the author(s) of the document. The possible fourth option also carries an express recommendation. Records II and III are similar to Record I, with more or less detail. Record IV is similar to Records I to III, except that reference to the possible fourth option has been dropped,

as has the express recommendation in Option 3.

5 Record V is titled "Tax Avoidance Strategy". It very briefly identifies the possible options that are dealt with in more detail in Records I to IV. It also includes a statement from which one could infer what the civil servants viewed as the preferred option.

6 Record VI is titled "Legislating an End to Tax Haven Loophole". Like Record V it identifies the civil servants' preferred option, but also includes information about what became the fourth option. It includes factual information about the federal government criteria for retroactive application of tax changes. The Ministry agreed to disclose the factual information but sought redaction of the two parts of the document that discuss recommendations.

7 Following the original decision of the Adjudicator, the Minister applied for reconsideration of the decision. In this application, the Minister filed an affidavit from Ann Langleben the Acting Assistant Deputy Minister of the Tax Policy Division. At the relevant time Ms. Langleben was Director of the Corporate and Commodity Tax Branch, Office of the Budget, Taxation and Pensions. She deposed that she was involved in reviewing and advising on the tax policy option papers that are Records I to IV. To the best of her recollection, the records formed part of the Budget brief process and involved briefings of the Assistant Deputy Minister, Office of the Budget and Taxation, the Deputy Minister of Finance, and the Minister of Finance. She attached to her affidavit an excerpt from an Agenda of a meeting with the Minister on April 11, 2005 with the item "Corporate Minimum Tax and Tax Haven Corporations (OBT)". She deposed that this agenda is evidence that the options referred to in the documents went to the Minister and were included for explanation and decision by the Minister. She states: "To the best of my knowledge, all the options were presented as advice and recommendations, with relevant considerations."

THE DECISIONS OF THE ADJUDICATOR

8 The Adjudicator held that to qualify as advice or recommendations within the meaning of s. 13 of the Act, the information in the record must suggest a course of action that will ultimately be accepted or rejected by the person being advised. She held that there was no clear evidence of communication of the information in Records I to V from one person to another. She characterized the records as draft records and it was not apparent that the information in the records was communicated to the person being advised and therefore used in the Ministry's deliberative process.

9 The Adjudicator also held that even if Records I to V were draft versions of the final document and there was evidence that the information was communicated to the person being advised, she would have found that "only the recommendation portion in Option 3 of Records I to III and Record V consisted of information which suggests a course of action that will ultimately be accepted or rejected by the person being advised". As "a preferred option" is not expressly identified and cannot be inferred in the remainder of the information in these records, "there is no suggested course of action and [therefore] no 'advice or recommendations'".

10 As to Record VI, as indicated, the Ministry had agreed to disclose most of the document. The remainder was also not exempt since it did not suggest a course of action that would ultimately be accepted or rejected by the person being advised.

11 The Adjudicator refused to reconsider her decision. She held that the Ministry had not established a fundamental defect in the adjudication process. In any event if she were to reconsider her decision, she would not reach a different conclusion. As to Records I to V, she still found there was no clear evidence of communication of the information in the records from one person to another. As to Record VI, the Ministry had still not provided any substantive information to demonstrate that the information suggests a course of action that will ultimately be accepted or rejected by the person being advised.

THE DECISION OF THE DIVISIONAL COURT

12 In a brief endorsement, the Divisional Court held that the standard of review is reasonableness. The Court

summarized the finding of the Adjudicator respecting Records I to V as "that there was no recommended course of action demonstrated in these documents". This decision fell within the range of possible acceptable outcomes, and thus, is reasonable. Further, her finding that it was not demonstrated that the information in those records had been communicated to the decision-maker was also within the range of possible acceptable outcomes, and thus, reasonable.

13 The Court disagreed with the Adjudicator about Record VI. It held that, on its face, the document makes a recommendation. The redacted matters contain further advice as to how the issue should be dealt with. There was no dispute that there was communication of the advice or recommendation found in the document, within the deliberative process. Accordingly, the redactions were covered by the exemption in s. 13(1) of the Act and were to be withheld.

ANALYSIS

(a) Standard of Review

14 There is no dispute that the standard of review is reasonableness. See *MOT*, at paras. 9-12.

(b) Interpretation of s. 13 of the *Freedom of Information and Protection of Privacy Act.*

15 The parties to this appeal are the Minister as appellant, and the Adjudicator and the Requestor as respondents. All parties relied upon this court's decisions in *MOT* and *MNDM*. However, they have very different interpretations of the holdings in those cases. The Minister submits that there need not be a preferred option identified in the documents to come within s. 13(1). Ms. Blake, counsel for the Minister, submits that imposing such a requirement fundamentally misconceives the role of the civil service in a Parliamentary democracy. Where, as here, the Minister is the decision maker, it is the role of the civil service to present the various options. It is not for the civil service to make the decision. Further, there is no requirement that the advice or recommendations in the documents be communicated to the decision maker. The s. 13(1) exemption envisages a deliberative process in which there may be a series of drafts. What is required is that the records relate to a decision which will ultimately be made.

16 Mr. Challis on behalf of the Adjudicator takes a much different view of the holdings in *MOT* and *MNDM*. He submits that this court's decisions in those cases must be read with the decisions of the Divisional Court and the decisions of the Adjudicators. That package of decisions demonstrates that to qualify as advice or recommendations within s. 13, the information must reveal a suggested course of action that will ultimately be accepted or rejected by its recipient during the deliberative process. Where a preferred option cannot be identified or inferred and a suggested course of action is not otherwise revealed, the exemption does not apply. Mr. Challis gives the analogy of a solicitor acting for a client. The information conveyed to the client could hardly be considered advice if the solicitor did not give an opinion as to the preferred course of action the client should take. Further, the Minister must show that the information has been communicated to the person being advised in the deliberative process.

17 For the following reasons, I agree with the approach of the Minister. In my view, that approach is consistent with the holdings in *MOT* and *MNDM*; the approach of the Adjudicator is not. In particular, Mr. Challis' analogy to a solicitor advising a client fundamentally misconceives the role of the civil service in our democratic process.

18 In *MOT*, the court considered the meaning of the phrase "advice and recommendations" in s. 13(1), and in particular, the government's argument that the two words had to be given different meanings. Thus, the government argued that "advice" did not require a deliberative process and would include information or analysis conveyed without a view to influencing a decision or the adoption of a course of action. Speaking for the court, Juriansz J.A. rejected the government's position. He held that the appropriate rule of interpretation was the associated words rule, where the reader looks for a common feature among the terms. The term "advice" also had to be interpreted in a manner consistent with the purpose of the Act as outlined in s. 1. Juriansz J.A. was satisfied that the Adjudicator had properly interpreted the phrase "advice and recommendations". He adopted this part of the Adjudicator's reasons:

> [A]dvice and recommendations, for the purposes of section 13(1) must contain more than mere information. To qualify as "advice" or "recommendations", the information contained in the records must relate to a suggested course of action, which will ultimately be accepted or rejected by its recipient during the deliberative process (Orders P-94, P-118, P-883 and PO-1894). Information that would permit the drawing of accurate inferences as to the nature of the actual advice and recommendation given also qualifies for exemption under section 13(1) of the Act (Orders P-1054, P-1619 and MO-1264).

19 He also noted, at para. 29, that the Adjudicator's interpretation left room for advice and recommendations to have distinct meanings:

> A "recommendation" may be understood to "relate to a suggested course of action" more explicitly and pointedly than "advice". "Advice" may be construed more broadly than "recommendation" to encompass material that permits the drawing of inferences with respect to a suggested course of action, but which does not itself make a specific recommendation.

20 In *MNDM*, Juriansz J.A., again writing for the court, considered that the interpretation adopted by the Adjudicator in the two orders was reasonable and indistinguishable from the interpretation of the Adjudicator in *MOT*. At paras. 9 and 10, Juriansz J.A. referred to portions of the two orders (PO-2028 and PO-2084) in *MNDM*:

> **PO-2028**
>
> In previous orders, this office has found that the words "advice" and "recommendations" have similar meanings, and that in order to qualify as "advice or recommendations" in the context of section 13(1), the information in question must reveal a suggested course of action that will ultimately be accepted or rejected by its recipient during the deliberative process of government policy-making and decision-making ... In addition, adjudicators have found that advice or recommendations may be revealed in two ways: (i) the information itself consists of advice or recommendations; or (ii) the information, if disclosed, would permit one to accurately infer the advice or recommendations given ...
>
> **PO-2084**
>
> A number of previous orders have established that advice or recommendations for the purpose of section 13(1) must contain more than mere information. To qualify as "advice" or "recommendations", the information must relate to a suggested course of action that will ultimately be accepted or rejected by its recipient during the deliberative process ...

21 There is a slight distinction in the way the adjudicators in *MOT* and *MNDM* interpreted "advice and recommendations". In *MOT* and PO-2084, the adjudicators refer to information that must "relate" to a suggested course of action. In PO-2028, the adjudicator suggested that the information must "reveal" a suggested course of action. He went on to describe two ways that advice or recommendations may be revealed: "(i) the information itself consists of advice or recommendations; or (ii) the information, if disclosed, would permit one to accurately infer the advice or recommendations given". Section 13 itself, speaks of the discretion to refuse to disclose a record where the disclosure would "reveal advice or recommendations".

22 Justice Juriansz went on to hold that the adjudicator in *MNDM* could reasonably hold that the mere fact that a document refers to "options" or "pros and cons" did not determine that the document revealed advice or recommendations. Rather, it depends on the circumstances of each case. He held, at para. 16, that the following was a

reasonable approach:

> The [Adjudicator] proceeded on the basis that whether records that set out "options" and "pros and cons" reveal advice or recommendations depends on the circumstances of each case. He assessed the context in which the records at issue were created and communicated and determined they contained no information that could be said to "advise" the Board in making its decision on funding, nor did they allow one to accurately infer any advice given. He found that the records consisted of "mere information" broken down into various pre-determined categories.

23 Bearing in mind that the standard of review applied by the court in *MOT* and *MNDM* was reasonableness, not correctness, the following conclusions may be drawn about the meaning of s. 13(1). Advice and recommendations, within the meaning of s. 13, must contain more than mere information. If it were enough that the record contained information, s. 13(1) would, as was observed by Juriansz J.A. in *MOT*, at para. 28, severely diminish the public's right to information. The information contained in the records must relate to a suggested course of action that will be ultimately accepted or rejected by its recipient. It is implicit in the various meanings of "advice" and "recommendations" considered in *MOT* and *MNDM* that s. 13(1) seeks to protect a decision-making process. If the document actually suggests the preferred course of action it may be accurately described as a recommendation. However, advice is also protected, and advice may be no more than material that permits the drawing of inferences with respect to a suggested course of action but does not recommend a specific course of action.

24 Whether the material in the document expressly makes a recommendation or simply presents advice on different courses of action, it will be unlikely that the document relates to or reveals only one course of action. Especially where the document is to go to the Minister, it will be unlikely that there is only one possible course of action that the Minister could take in dealing with difficult issues. The civil servants may have a preferred option and this may be obvious from the way in which the document is drafted, but the Minister, as the decision maker, is entitled to advice on a range of possible courses of action. Even where the decision-maker is not a Minister but a senior civil servant, those decision makers are also entitled to confidential policy advice, which may or may not include explicit recommendations as to what the persons reporting to them believe is the preferred course of action.

25 The reasonableness standard requires courts to give deference to the tribunal "with regard to both the facts and the law" (*Dunsmuir v. New Brunswick*, [2008] 1 S.C.R. 190, at para. 48). In my view, the Adjudicator made two fundamental errors in her interpretation of s. 13(1) which led to an unreasonable decision; a decision that was not within "the range of acceptable and rational solutions" (*Dunsmuir*, at para. 47). The first error was in holding that there must be evidence that the information in the records actually went to the final decision maker. The second error was in holding that s. 13 only applies to the suggestion of a single course of action ultimately adopted or rejected by the decision maker. I will deal with each error in turn.

26 There is no requirement under s. 13(1) that the Ministry be able to demonstrate that the document went to the ultimate decision maker. What s. 13 protects is the deliberative process. During that process the position of the civil service will undoubtedly evolve and this evolution will be reflected in the advice and recommendations in the particular document. I agree with the description of that process by Evans J. in *Canadian Council of Christian Charities v. Canada (Minister of Finance)*, [1999] 4 F.C. 245 (T.D.), 53 D.T.C. 5337, at para. 31:

> It would be an intolerable burden to force ministers and their advisors to disclose to public scrutiny the internal evolution of the policies ultimately adopted. Disclosure of such material would often reveal that the policy-making process included false starts, blind alleys, wrong turns, changes of mind, the solicitation and rejection of advice, and the re-evaluation of priorities and the re-weighing of the relative importance of the relevant factors as a problem is studied more closely. In the hands of journalists or political opponents this is combustible material liable to fuel a fire that could quickly destroy governmental credibility and effectiveness.

27 Advice and recommendations in drafts of policy papers that are part of the deliberative process leading to a decision are protected by s. 13(1). There need not be direct evidence that any particular paper made its way to the ultimate decision maker. The circumstantial evidence in this case is overwhelming that all six records were part of the deliberative process that led to a decision by the Minister, based on the advice and recommendations in these policy papers.

28 The unreasonableness of the approach of the Adjudicator is demonstrated by a simple example. Assume Record IV could be shown to unequivocally have been given to the Minister. Assume that Records I to III are earlier drafts of Record IV but, as here, very similar in content. If only Record IV were protected, because it could not be shown who received and acted upon Records I to III, the protection afforded Record IV would be illusory and meaningless. This would be an absurd and unreasonable interpretation and application of s. 13(1), yet it is the inevitable result of the Adjudicator's decision.

29 The second fundamental error made by the Adjudicator in this case was to interpret *MOT* and *MNDM*, and hence s. 13(1), as protecting only information that identified the single course of action recommended to the decision maker. Such an interpretation would all but denude s. 13(1) of any real meaning and is unreasonable. It is inconsistent with the context in which the *Freedom of Information and Protection of Privacy Act* operates, which is to protect a properly functioning democratic process in which the civil service provides advice on a range of options, but is not itself always the decision maker.

30 Section 13(1) protects advice and recommendations. One of the most important functions performed by a civil service in a properly functioning Parliamentary democracy is to provide advice to Ministers of the Crown. Advice comes in different forms and one form is advice as to the range of possible actions. This permits the decision-maker to make the best and most informed decision. It would be counter-productive and inconsistent with the policy behind s. 13(1) to strip away this form of advice and protect only advice which is entirely directory. Yet this is the effect of the decision of the Adjudicator and the Divisional Court. To obtain the protection of s. 13(1), the advice would have to be presented to the decision-maker without advice as to the advantages or disadvantages of a particular option and by presenting the advice in a form that supported only one option.

DISPOSITION

31 Accordingly, I would allow the appeal, set aside the decision of the Divisional Court and the Adjudicator and remit the matter to the Information and Privacy Commissioner to reconsider the Requester's application in light of these reasons. There will be no order for costs.

M. ROSENBERG J.A.
K.N. FELDMAN J.A.:-- I agree.
K.E. SWINTON J. (ad hoc):-- I agree.

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