EB-2013-0029

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

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

REPLY SUBMISSIONS OF THE ONTARIO POWER AUTHORITY REGARDING CONFIDENTIALITY

A - Introduction

1. On February 13, 2013, the Ontario Power Authority (OPA) filed its written submissions in support of the request for confidentiality made in its letter to the Board of February 6, 2013. The OPA made these confidentiality submissions in respect of information redacted from certain documents (referred to herein as, the Redacted Information) filed in this proceeding by the Independent Electricity System Operator (IESO).

2. In response to its written submissions on confidentiality, the OPA received submissions from the following:

(a) the applicants in this proceeding (collectively referred to herein as, the RES Generators).

(b) Board Staff;

(c) the School Energy Coalition (SEC); and

(d) the Building Owners and Managers Association Toronto (BOMA);

3. The OPA will reply to the submissions received from these parties under the headings that follow below.

4. The OPA's over-arching response to these submissions is follows: if documents or other communications substantiating or "lying behind" explicit settlement communications, such as negotiating information and strategy, were required to be to be disclosed, the privilege would prove to be meaningless, since such compelled disclosure would unequivocally put the disclosing party at a negotiating disadvantage.

5. The legal authorities and precedent, including the leading authority of the *Middlekamp* decision, and the common law policy of promoting settlement of disputes, overwhelmingly supports a much broader interpretation of settlement privilege that looks beyond the form and focuses on the substance of communications in order to protect a party's right to keep confidential documents prepared in furtherance of settlement, including the Redacted Information and the Additional Documents (as defined below) at dispute in this proceeding.

B – Settlement Privilege

The Redacted Information Constitutes Settlement Communications

6. In their respective submissions, both the RES Generators and SEC argue that settlement privilege does not apply to the Redacted Information because such documents do not constitute settlement communications. In particular, the Generators and SEC submit that the Redacted Information cannot constitute settlement communications because these documents were not exchanged between the OPA and parties subject to settlement negotiations (i.e., certain of the RES Generators).[1]

7. While SEC does not provide specific authority for this point of law, the RES Generators cite a passage from the Ontario case of *York (County) v. Toronto Gravel Road & Concrete Co.,* (1882), 3 O.R. 584 (Ont. H.C.J.), a more than 100 year old decision written by Proudfoot J.

8. It is respectfully submitted that while Proudfoot J.'s observation that settlement privilege includes *"... overtures of pacification, and any other offers or propositions between litigating parties..."* may be factually applicable to most cases involving settlement privilege, such comments do not describe the modern legal "test" for

[1] RES Generators Reply Submissions on Confidentiality and Cost Awards (February 15, 2013) at paras. 6 - 8; SEC Reply Submissions re: Confidentiality (February 15, 2013) at p.1.

settlement privilege, which each of the RES Generators, SEC and the OPA agree is enunciated in A. Bryant et al, *The Law of Evidence* and cited by multiple Ontario and non-Ontario authorities, including the Ontario Court of Appeal.[2]

9. Furthermore, the (much) more recent 1992 decision of the British Columbia Court of Appeal in *Middlekamp v. Fraser Valley Real Estate Board,* (1992), 71 B.C.L.R. (2d) 276 expressly confirms that settlement privilege protects both communications and documents created for the purposes of settlement negotiations from production to the party(ies) subject to the settlement negotiation *and to "strangers"* (i.e., unrelated third parties), per the dictum of McEachern C.J.B.C. (and as previously referred to in the OPA's initial confidentiality submission, dated February 13, 2013):

> ...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.
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> "In my judgment this privilege protects documents and communications created for such purposes both from production to other parties to the negotiations *and to strangers*, and extends as well to admissibility, and whether or not a settlement is reached. This is because, as I have said, a party communicating a proposal relating to settlement, or responding to one, usually has no control over what the other side may do with such documents. Without such protection, the public interest in encouraging settlements will not be served.[3] (Emphasis added)

10. The 1992 *Middlekamp* decision referenced above has been followed by or referenced in many judicial decisions across Canada, including recent decisions by

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[2]See RES Generators (at para. 9) and SEC (at p.1, by citing the Ontario decision of *IPEX Inc. v. AT Plastics Inc.,* 2011 ONSC 4734 at para. 32), and the OPA (at para. 12 of its confidentiality submissions) that the "test" the Courts apply to determine a finding of settlement privilege includes the satisfaction of the following factors (as enunciated in A. Bryant a et al, *The Law of Evidence in Canada,* 3rd Ed. (Markham: Ontario, Lexis Nexis Canada, 2009) at p.103, para. 14.313:

(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 negotiation failed; and
(c) the purpose of the communication must be to attempt to effect a settlement.

The Ontario Court of Appeal endorsed these conditions as the test for settlement privilege in *Losenno v. Ontario Human Rights Commission,* 2005 CANLII 36441 (Ont. C.A.) at para. 19.

[3] *Middlekamp*, at paras. 17-18.

Ontario Courts,[4] and the 2007 *Starnino* decision of the Ontario Environmental Review Tribunal.[5]

11. In addition, it is worth noting that Board Staff also agreed with the OPA's submissions with respect to *Middlekamp* being a leading Canadian case on the doctrine of settlement privilege, and agreed with the above excerpted statement of law from that decision.[6]

12. In reliance on the above cited legal propositions and recent Ontario judicial precedent, the OPA respectfully submits that, contrary to the position of the RES Generators and SEC, communications (or documents) created or produced for the purpose of settlement negotiations need not to have been disclosed to the parties subject to the negotiations in order to attract the protection of settlement privilege; in other words, the fact that the Redacted Information was shared with "strangers" (the IESO/MOE) and not the RES Generators cannot at law preclude the Board from making a finding that such documentation is privileged.

Settlement Communications Are Not Restricted to "Offers" and "Counter Offers"

13. In its submissions, SEC takes issue with the fact that the Redacted Information, *"... are not presentations of offers or counter-offers to or from the OPA and renewable generators (including the Applicants)."* In addition, they characterize the Redacted Information as *" ... presentations made within and between government agencies (MOE, OPA and IESO)."*[7] Following this logic, these documents purportedly cannot be communications in furtherance of settlement (and thus be eligible for protection from disclosure via settlement privilege).[8]

14. As highlighted above, the *Middlekamp* decision makes no distinction about the form of the document or communication that a party claims is privileged.

15. Another authority directly affirming this legal proposition, is the British Columbia Supreme Court decision of *Linear S.R.L. v. CCC-Canadian Communication Consortium Inc.,* which adopted the following statement of law from *The Law of Evidence in Canada*:

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[4] A couple examples of recent Ontario court decisions include the following: *Leclair v. Ontario (Attorney General),* [2008] O.J. No. 2701 (Ont. S.C.J.) at para. 23, citing the same passage (para. 19) of *Middlekamp* as excerpted above; and *Johnstone v. Locke,* [2011] O. J. No. 5527 (Ont. S.C.J.) at para. 11.

[5] *Starnino Holdings Ltd. v. Ontario (Ministry of the Environment),* [2007] O.E.R.T.D. No. 68, Case No. 05-153, Decision date: November 29, 2007 (Ontario Environmental Review Tribunal), at para. 132.

[6] Board Staff Submission (February 15, 2013) at p.6.

[7] SEC Reply Submissions re: Confidentiality (February 15, 2013) at p.2.

[8] SEC Reply Submissions re: Confidentiality (February 15, 2013) at p.2.

> 14.213 The communication does not have to contain an actual settlement offer in order to attract the privilege. In Pirie v. Wyld, the Court held that the rule "should be held to cover and protect all communications expressed to be without prejudice and fairly made for the purpose of expressing the writer's views on the matter of litigation or dispute, as well as overtures for settlement or compromise". In Phillips v. Rodgers [1988] A.J. No. 843, a letter written by the defendant's insurance adjuster to the defendant inquiring whether a claim would be made was considered as part of the process of negotiating a settlement as it opened the door to the actual negotiation.[9] (Emphasis added).

16. Thus it is respectfully submitted that SEC's observations in respect of the form of the Redacted Information have no legal relevance to the issue of settlement privilege. The fact that the Redacted Information are not "settlement offers" has no bearing on whether such documents are privileged, since the settled case law recognizes that settlement communications need not be in any particular form.

17. Arguably, an even more persuasive policy rationale justifies the same legal conclusion. Settlement privilege would be rendered illusory if a party's negotiation strategy and related documentation were not protected by the privilege, since disclosure of such information would clearly jeopardize a party's negotiating position. Such a result would be at cross-purposes to the general policy of the common law to encourage parties to settle their disputes and the rationale supporting the doctrine of settlement privilege.

Settlement Privilege Applies to Administrative Tribunals

18. At page 7 of its submissions, Board Staff observes that " ... [settlement] *privilege is normally found to arise in the context of court litigation...",* before proceeding to query whether settlement privilege can arise in the context of a potential application for statutory relief to an administrative tribunal.

19. There is precedent for Ontario tribunals considering and applying the common law doctrine of settlement privilege to applications properly within their statutory jurisdiction.

20. The *Starnino* decision of the Ontario Environmental Review Tribunal (ERT) (as referenced above) is one such example, in which the ERT (after quoting from the same above cited passage in *Middlekamp*) made rulings with respect to whether settlement privilege applied to certain documents.[10]

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[9] [2000] B.C.J. No. 2491 (British Columbia Supreme Court) at para. 9, and quoting from the 1999 edition of *The Law of Evidence.*

[10] *Starnino Holdings Ltd. v. Ontario (Ministry of the Environment)*, [2007] O.E.R.T.D. No. 68, Case No. 05-153, Decision date: November 29, 2007 (Ontario Environmental Review Tribunal), at para. 132.

21. In addition to the ERT's *Starnino* decision, the Ontario Municipal Board (OMB) is an example of another Ontario tribunal that has also very recently (in 2012) considered and applied the doctrine of settlement privilege.[11]

22. The OPA respectfully submits that there appears to be no legal or policy reason supporting a Board decision to disregard the law of settlement privilege. This position is reinforced by the above highlighted Ontario decisions of the ERT and OMB, and long cited policy of the common law to encourage parties to settle their disputes.

C – Prejudice to Settlement Negotiations

23. The reply submissions contain several allegations that the OPA has not provided or otherwise disclosed sufficient evidence of the harm it will suffer if the Redacted Information is disclosed.[12]

24. In response to such criticism, the OPA submits it is impossible to quantify or otherwise specify the harm that will ensue if production of the Redacted Information is ordered by the Board.

25. The submissions of Board Staff acknowledge that, *" ... to the extent that there is genuine potential harm in the disclosure of some or all of the information that has been redacted from the OPA Claim Documents, there is merit in according confidential treatment to information, ..."*[13]

26. Disclosure of the information contained in the documents will result in actual, rather than potential, harm, by placing the OPA at a negotiating disadvantage in regards to its settlement negotiations with certain of the RES Generators. Since it is impossible to predict the outcome of such negotiations, it is impossible to foresee the magnitude of the harm that would ensue.

27. What is known at this time is that it would not be in the interests of fairness to force any party into a negotiating disadvantage by requiring the disclosure of confidential information relating to settlement strategy and confidential settlement

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[11] See *Mattamy Realty Ltd. v. Oakville (Town),* [2012] O.M.B.D. No. 215, OMB Case No: PL100041, Decision Date: April 12, 2012 (Ontario Municipal Board) at para. 3.
[12] See RES Generators Reply Submissions on Confidentiality and Cost Awards (February 15, 2013) at para. 14; SEC Reply Submissions re: Confidentiality (February 15, 2013) at p.3; and Board Staff Submission (February 15, 2013) at p.10.
[13] Board Staff Submission (February 15, 2013) at p.10.

information. In other words, the "harm" is simply putting one party at a negotiating disadvantage by compelling disclosure of its confidential information.

28. It is for these reasons that the OPA respectfully submits that it has provided the Board with the requisite proof that harm will ensue if it orders disclosure of the Redacted Information.

D – Confidentiality Claim with respect to Additional Documents

29. The February 15, 2013 submissions of Board Staff identify certain documents (the Additional Documents) that were redacted by the Independent Electricity System Operator (IESO) for reasons of relevance and were listed in Schedule A of the IESO's February 1, 2013 letter filed with the Board. The Additional Documents were identified by Board Staff in their submissions as follows:

Document No.	Title
IESO0003589	Addressing Dispatch and Curtailment of Renewable Facilities – Joint OPA and IESO Presentation (July 13, 2010)
IESO0003634	Integration of Renewables: RES and FIT (October, 2010)

30. The Additional Documents were not specifically referenced in the OPA's February 6, 2013 letter addressed to the Board. The OPA confirms that it requests that these documents be accorded confidential treatment based on the same legal grounds sought with respect to Redacted Information, as set out in the OPA's initial confidentiality submission dated February 13, 2013, and as set out in this reply submission.

31. In addition, the OPA confirms that it intends to file un-redacted versions of the Additional Documents.

E – Conclusion

32. For all of these reasons, the OPA reasserts its submission that the Board should not require disclosure of the Redacted Information and the Additional Documents by the

OPA. The unredacted versions of these documents should be protected from disclosure, first, on the ground of settlement privilege and, second, in accordance with the Practice Direction, because disclosure would prejudice settlement negotiations.

All of which is respectfully submitted.

February 20, 2013

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per A. G.

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