Jay Shepherd
Professional Corporation
2300 Yonge Street,
Suite 806
Toronto, Ontario M4P 1E4

BY EMAIL and RESS

November 1, 2015
Our File No. EB-2015-0073
EB-2015-0108

Ontario Energy Board
2300 Yonge Street
27th Floor
Toronto, Ontario
M4P 1E4

Attn: Kirsten Walli, Board Secretary

Dear Ms. Walli:

Re: EB-2015-0073 and EB-2015-0108 – Submissions on ADR Confidentiality

We are counsel for the School Energy Coalition. Further to Procedural Order #2 in these matters, these are SEC's submissions on the interpretation and application of the *Practice Direction on Settlement Conferences* (the "Practice Direction") with respect to confidentiality and privilege.

Background

Until about a year ago, all parties had a relatively clear understanding of the rules of confidentiality and privilege related to settlement conferences. Although those rules are referred to in the Practice Direction, most parties are represented by experienced counsel, all of whom have prior training in the rules related to settlement discussions. There was rarely a problem.

However, in a proceeding in 2014, and another in 2015, counsel for applicants took the trouble to look at the Board's rules on this point, and reached the conclusion that all of the applicant's personnel who would be privy to any of the negotiations actually had to be physically in the room during those discussions.

Tel: (416) 483-3300 Cell: (416) 804-2767 Fax: (416) 483-3305
jay.shepherd@canadianenergylawyers.com
www.canadianenergylawyers.com

This is a reasonable interpretation of sections 29.09 and 29.10 of the Board's Rules of Practice and Procedures (the "Rules"), and the related Practice Direction, which currently read as follows:

> *"29.09 All persons attending an ADR conference shall treat admissions, concessions, offers to settle and related discussions as confidential and shall not disclose them outside the conference, except as may be agreed.*
>
> *29.10 Admissions, concessions, offers to settle and related discussions shall not be admissible in any proceeding without the consent of the affected parties."*
>
> *"Confidentiality*
>
> *Everyone who attends a settlement conference must treat omissions, concessions, offers to settle and related discussions as confidential and must not reveal any such information outside the conference. In addition, admissions, concessions, offer to settle and related discussions will not be admitted in any Board proceeding without the consent of parties who are affected. Where necessary to support the rationale for a settlement proposal, factual information and evidence may be disclosed to the Board.*
>
> *Role of Board Staff*
>
> *Board staff who participate in the settlement conference in any way are bound by the same confidentiality standards that apply to the parties to the proceeding. In particular, staff will not discuss the content of the settlement proposal or the process by which the settlement was reached with the Board panel hearing the case."*

Many parties were concerned about this interpretation, as it would effectively prevent them from participating in negotiations. (See discussion below.) Therefore, as specifically contemplated by the rules, which say "except as may be agreed", parties started discussing at the outset of settlement conferences, and then including in settlement proposals, specific agreements with respect to the scope of confidentiality and privilege in that proceeding. There have also been a number of discussions between parties about this outside of individual settlements. This issue has also been raised and discussed at the October 2nd meeting of the Board's Regulatory Affairs Standing Committee.

Initially, the easiest part of this on which to agree has been the privilege component (s. 29.10 of the Rules), which matches the same rules in court proceedings. All parties can quickly accept that the rules of settlement privilege apply to ADRs in Board proceedings. Thus, the drafting of some settlement proposals in the last year limits the obligations of parties to the privilege obligation, and excludes confidentiality.

Recently, some parties have expressed concern that this would leave out important components of the obligation, effectively excluding the application of s.29.09 of the Rules. Most parties agree that complete exclusion of that section is not appropriate. To that end, parties have had a number of discussions about a more thorough agreement on confidentiality and privilege, taking into account their actual expectations of each other, and their understanding of what the Board is seeking to address in the Rules and the Practice Direction.

A new wording for inclusion in settlement proposals has now been agreed by a number of parties, and one utility, in the context of the Kingston Hydro negotiations. It is attached for the Board's assistance. The settlement proposal in that case not yet been filed, but the parties have consented to our inclusion of this wording in these submissions. While this wording has not yet been included in a filed settlement proposal, SEC believes that it is appropriate to do so, and would be agreeable to including it in the settlement proposals for Guelph and Waterloo North, in place of the related wording currently included. We are hopeful that the other parties to those agreements will also express their agreement with this revised wording.

In our legal and policy submissions below, SEC seeks to explain and support each of the components of this new wording and the underlying agreement it reflects.

SEC Recommendation

SEC recommends that the Board, if the parties so agree (which we think they will), should insert the attached wording in the settlement proposals of Guelph Hydro and Waterloo North Hydro, in place of the wording currently included.

SEC also recommends that the Board initiate a consultation to amend the Practice Direction and the Rules, with a view to ensuring that there is clarity around confidentiality and privilege in the ADR process.

Legal and Policy Analysis

The Rules set out two distinct requirements with respect to information exchanged in settlement negotiations (herein referred to as "ADR information"):

1. ***Confidentiality.*** S. 29.09 requires that parties treat ADR information as confidential.

2. ***Privilege.*** S. 20.10, on the other hand, requires that parties treat ADR information as privileged.

It is easiest to deal with privilege first. Privilege is a rule of evidence, and "settlement privilege", which is the privilege being referred to here, is a subset of that rule. Settlement privilege prohibits the disclosure of ADR information to the adjudicator, in this case the Board panel seized of the matter.

There are two purposes for settlement privilege. First, it seeks to prevent the adjudicator from being influenced by what parties think of their own case. If a party is willing to settle some issues and not others, for example, there is the perceived risk that adjudicators will see the evidence on those issues as "softer", or less compelling.

Second - essentially the complement to that -, settlement privilege seeks to assure parties that they can talk freely, and that offers to settle will not come back to bite them later by implying that they have less than complete confidence in their case.

The underlying concept of settlement privilege has nothing to do with confidentiality. It is driven by the need to ensure the fairness and objectivity of adjudication, and to allow parties to have frank discussions without influencing the adjudicative process.

While settlement privilege has some apparent similarities to confidentiality, those are illusory. It is true that settlement privilege would prevent parties from making offers public, but that is only because that would create the possibility that they would get back to the adjudicator. It is not because of any inherent secrecy in the offers themselves. Parties to negotiations regularly report "outside the room" to affected persons on the ebb and flow of the negotiations. Negotiations would not be possible without this right.

Similarly, it is not common for parties under a settlement privilege to impose formal document handling procedures, similar to those used for handling confidential information, on ADR information. Privilege implies a different kind of information control.

Confidentiality is a much more complex and problematic area of law. The three main areas of confidentiality law are distinguished by a) how the obligation of confidentiality arises, and b) whether the obligation is directed primarily to secrecy, or is directed primarily to how the information is to be used.

Confidentiality arises from three main legal roots:

1. ***Fiduciary Obligation.*** A fiduciary obligation will often extend to the use of information received in a fiduciary capacity, such as a director of a corporation, or the executor of an estate. There have been numerous Canadian and international cases where this relationship has been discussed in detail, and the nature of the overlap in the duties is parsed. The focus in this category is on the use of the information, rather than its secrecy. Thankfully, the confidentiality of ADR information does not arise out of fiduciary obligations, and negotiating parties rarely (there are some exceptions) have fiduciary obligations to each other. Indeed, it is very rare that any information in the Board's proceedings is confidential because of fiduciary obligations.

2. ***Proprietary and Similar Rights.*** Information is often confidential because it is, in various ways, "owned" by one person to the exclusion of others. A good example is trade secrets, but it is not limited this narrowly. Information that, if disclosed, could harm your competitive position is generally interpreted as being owned (in a somewhat broader sense than true property rights) by the person who holds it. The focus in this category is both use and secrecy, but in both cases in the context of ownership. A, as owner, is the only person allowed to know it because they are the only person allowed to use it. This is another area of law in which there is much complexity and debate, but generally that does not cause a problem for the Board. Much of the information provided to the Board in confidence under the Practice Direction on Confidential Filings comes under this category. There is also sometimes information provided in an ADR that comes under this category, but that is

generally not the preferred approach by the parties. In order to be properly protected, most utilities with this type of information will file it under the Practice Direction on Confidential Filings, rather than deliver it directly in an ADR. Most intervenors would not accept the information, if it is of this type, unless it had been filed in that way. The ADR rules do not protect the parties if this information is exchanged. The Practice Direction on Confidential Filings protects everyone in a proper manner.

3. ***Duty of Confidence.*** The courts have also recognized a third basis for confidential information, often called (perhaps with some equivocation) the "duty of confidence". This is easiest thought of as an obligation in contract (or in some cases arising in equity, much like a kind of implied contract) that comes about because of the circumstances under which information is provided to you. If someone provides you with a document on condition that you keep it secret, the law recognizes an obligation to keep it secret, whether or not there is a non-disclosure document or other formal evidence of that secrecy obligation. Similarly, the law will imply a duty of confidence, even without an express condition, when the circumstances of disclosure make clear that secrecy was expected. For example, personal secrets told to a lover have in some cases been held to be subject to a duty of confidence, even though the lover is not a fiduciary, and the information itself is not proprietary in any way. The focus in this category is on secrecy, and use of the information is rarely relevant. Almost all of the information exchanged by parties in a settlement negotiation would come within this category, and in our submission the Practice Direction on Settlement Conferences is intended to ensure that parties receiving ADR Information maintain a level of secrecy appropriate for that information and consistent with the reasonable expectations of the parties and the Board.

Focusing, then, on the third category, SEC believes that it is important to understand in a practical way what level of secrecy is required and appropriate. That is driven by the answer to the question "To whom does ADR information need to be disclosed?"

In our submission, negotiating parties, in order to be effective, must be able to disclose ADR information to three categories of people:

Advisors and Experts. Not everyone with the technical knowledge necessary to negotiate a deal will be in the room. Intervenors, Board Staff and utilities all need to be able to have access to experts and advisors outside of the room who will assist those in the room in coming to agreement. Often intervenors or Board Staff have someone outside the room who is a specialist in an area (load forecasts, for example, or cost allocation), but the most common need in this area is by the utilities. Very often utilities, in order to respond to an offer, have to get their subject matter experts back at their head office to model the impacts of the offer, or generate scenarios as to how the offer could be operationalized. By its very nature, this process involves telling people not physically in attendance what has been offered, and in some detail.

Related to this is exchanges of information over time. For example, if a utility is coming into an ADR, they will (if they are wise) get their personnel and counsel who were in the last ADR to run through how it unfolded. This allows them to develop a sound negotiating strategy, and to maintain consistency where that is appropriate. Intervenors are in the same position. SEC has two counsel, and usually we alternate responsibility for a utility's rate cases. If one counsel took

the lead in 2011, that counsel has to be able to brief the other counsel, taking the lead in 2015, so that the new counsel is well prepared. Also, during the negotiations, they have to be able to talk to each other.

More controversial is conversations between parties to different negotiations. Two reps of different intervenors, one in negotiation with Utility A, and one in negotiation with Utility B, may wish to be able to discuss their respective positions, and the positions of the utilities, in order to understand the context of issues more fully and reach consistent results. The same would be true of two utilities, who may wish to discuss with each other how they respond to particular proposals they receive from common intervenors. This is even more relevant for Board Staff. If Staff cannot say to their peers "Intervenor A is again raising the issue of X, which we have accepted in the past", they cannot have an open discussion internally about how to remain consistent. Not all parties will agree that this category of disclosure is appropriate, or whether there should be restrictions placed around it. Guidance from the Board on limits in this area would be helpful.

Persons Giving Instructions. While every ADR starts with the request that parties confirm they have "authority to settle in the room", every party always adds a caveat that they will need to get instructions from others before accepting or not accepting some offers. For intervenors, it is their clients. For Board Staff, who are expected to advise whether they will oppose a settlement, it is senior management. For the utility, it is often the CEO, but sometimes the Board of Directors or even in some cases the shareholder. For particular issues, it may be executives in other areas of the company (for example, "can you defer project Z from 2017 to 2019?"). It is not practical to have all of the final decision-makers in the room. Yet in getting a decision on whether to accept or reject an offer or some component of an offer, it is usually necessary to describe some of the details of the negotiation, so that the decision-maker can make their assessment with the full context.

Reporting. After a settlement is completed, and perhaps even after it is filed, most parties have to justify to some or all of those affected why the settlement was the right answer. This will inevitably involve some description of what was said in the settlement conference, thus disclosing ADR information. For utilities, this can include reporting to a Board of Directors or shareholder. For an intervenor, it can include reporting to members of the organization particularly affected by the settlement.

SEC is a good example. Our top goal – and main instruction from the client - in regulatory participation is "Always look for win-win solutions". This is why SEC is so focused on settlements, and it is a result that member school boards have come to expect. If we do reach a settlement, SEC has to explain to the affected school boards why that settlement was the right answer. It will inevitably include some things they don't like, so it is essential SEC be able to describe the trade-offs that were made, and why they made sense. Even more important, in those cases where a settlement is not reached, we have to justify that lack of settlement. This will involve both describing the available offers we rejected, and providing our assessment of what was in fact achievable, if anything.

In our submission, the above three categories are the groups of people to whom disclosure is essential if parties are to participate in settlement negotiations.

We note that, in some cases, those in the room will not be making those disclosures. This is particularly true in the case of reporting, where the people in the room may disclose details to the person giving instructions, but then that person may disclose some or all of that information in the context of their reporting to a Board of Directors or affected persons. Since in our view those to whom disclosure is given must accept the same confidentiality obligation as those in the room, the scope of the freedom to disclose must include consideration of those secondary situations.

The Proposed New Wording

In light of the above analysis, parties in the Kingston Hydro case sought to formulate a clear statement of the obligations of confidentiality and privilege they agreed to take on when they negotiated towards a settlement. The attached new wording has the following key components:

- ***"The Parties acknowledge that this settlement proceeding is confidential in accordance with the Board's Practice Direction on Settlement Conferences (the "Practice Direction"). The Parties understand that confidentiality in that context does not have the same meaning as confidentiality in the Board's Practice Direction on Confidential Filings, and the rules of that latter document do not apply."*** The latter practice direction, in s. 7.1.1, says:

  > "This Practice Direction does not apply to ADR conferences. Confidentiality in the context of ADR conferences shall be governed by the Board's *Rules of Practice and Procedure,* Settlement Guidelines and any other applicable Practice Guidelines."

  This has the effect of excluding the operation of the rules with respect to handling of documents, notice, etc., but does not make clear that the concept of confidentiality for ADR Information is different. Normal rules of construction would require the Board or a court interpreting a settlement proposal or the actions of a party to have regard to the Board's definition of confidentiality in the Practice Direction on Confidential Filings, since it is much more specific in defining the concept than the Practice Direction on Settlement Conferences. This creates a risk to parties that they would be held to responsibilities (for example, of non-disclosure) in an ADR that are appropriate for a confidential filing, but are not appropriate for ADR. This provision makes clear that confidentiality in the context of ADR is not the same thing as confidentiality in the context of confidential filings.

- ***"Instead, in this settlement conference, and in this Agreement, the Parties have interpreted "confidential" to mean that the documents and other information provided during the course of the settlement proceeding, the discussion of each issue, the offers and counter-offers, and the negotiations leading to the settlement – or not – of each issue during the settlement conference are strictly privileged and without prejudice. None of the foregoing is admissible as evidence in this proceeding, or otherwise, with one exception, the need to resolve a subsequent dispute over the interpretation of any provision of this Settlement Proposal."*** This provision reflects, in somewhat more detail, the provisions of s. 29.10 of the Rules regarding privilege. This is

consistent with wording relating to privilege that has been approved by the Board and parties many times, and is not the subject, to our knowledge, of any dispute.

- ***"Further, the Parties shall not disclose those documents or other information to persons who were not attendees at the settlement conference. However, the Parties agree that "attendees" is deemed to include, in this context, persons who were not physically in attendance at the settlement conference but were…"*** The confidentiality provisions in s. 29.09 of the Rules and the Practice Direction refer to disclosure "outside of the conference". This wording does not attempt to usurp that principle, but instead seeks to interpret it to include, as if present – and therefore allow disclosure to – three categories of persons as described above. The use of the term "deemed" means specifically that, while those persons would not qualify as attendees on a normal interpretation of the word, they qualify in the context of the intent of the provision and the agreement of the parties.

- ***"a) any persons or entities that the Parties engage to assist them with the settlement conference…"*** This is intended to include the category of "advisors and experts" discussed in more detail above.

- "***b) any persons or entities from whom they seek instructions with respect to the negotiations…"*** This is intended to include the second category discussed earlier, such as CEO, or intervenor client, or managers at the Board.

- ***"…and c) any persons or entities to whom they are expected to report the results of the negotiations, and/or the reasons for the positions they have taken…"*** This would bring in Boards of Directors, shareholders, members of client organization, and senior management at the Board.

- ***"…in each case provided that any such persons or entities have agreed to be bound by the same confidentiality provisions."*** This makes clear that a person in the room receiving ADR information has and retains the responsibility to get agreement from any person to whom they disclose to accept the same obligation of confidentiality. This is necessary legally precisely because those other persons are not in the room. If an intervenor representative discloses ADR information to their client, they have a positive obligation to ensure that the client accepts the same obligation. If they fail to do so in an effective manner, it will be the intervenor rep that has liability, since they were the ones in the room agreeing to the confidentiality terms. (This is a common clause in commercial non-disclosure agreements, as well.)

SEC submits that each of the sentences and clauses in the proposed new wording has a specific meaning, and is essential in order to ensure that the true spirit and intent of the Board's Rules and Practice Direction are implemented properly. This will in turn ensure the integrity of the ADR process.

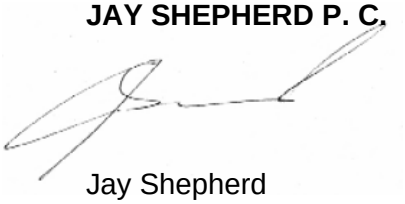
Conclusion

SEC therefore submits that the Board should accept the wording attached as an amendment to the settlement proposals in EB-2015-0073 and EB-2015-0108, assuming all parties agree.

SEC also submits that it would assist the Board, and all parties, if the Practice Direction were to be amended to reflect more specifically the confidentiality and privilege parameters described above, and accepted in practice by parties. SEC therefore requests that the Board propose, for comment by all interested parties outside of these two proceedings, amendments to the Practice Direction to achieve that result.

All of which is respectfully submitted.

Yours very truly,
JAY SHEPHERD P. C.



Jay Shepherd

cc: Wayne McNally, SEC (email)
Interested Parties (email)

The Parties acknowledge that this settlement proceeding is confidential in accordance with the Board's Practice Direction on Settlement Conferences (the "Practice Direction"). The Parties understand that confidentiality in that context does not have the same meaning as confidentiality in the Board's Practice Direction on Confidential Filings, and the rules of that latter document do not apply. Instead, in this settlement conference, and in this Agreement, the Parties have interpreted "confidential" to mean that the documents and other information provided during the course of the settlement proceeding, the discussion of each issue, the offers and counter-offers, and the negotiations leading to the settlement – or not – of each issue during the settlement conference are strictly privileged and without prejudice. None of the foregoing is admissible as evidence in this proceeding, or otherwise, with one exception, the need to resolve a subsequent dispute over the interpretation of any provision of this Settlement Proposal. Further, the Parties shall not disclose those documents or other information to persons who were not attendees at the settlement conference. However, the Parties agree that "attendees" is deemed to include, in this context, persons who were not physically in attendance at the settlement conference but were a) any persons or entities that the Parties engage to assist them with the settlement conference, b) any persons or entities from whom they seek instructions with respect to the negotiations, and c) any persons or entities to whom they are expected to report the results of the negotiations, and/or the reasons for the positions they have taken; in each case provided that any such persons or entities have agreed to be bound by the same confidentiality provisions.