

February 20, 2025
Office of the Information and Privacy Commissioner
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Edmonton, Alberta
T5K 2J8

Sent via email to registrar@oipc.ab.ca
Attention: Mr. John Gabriele
Adjudicator

Justice
Central Intake – Access Services/General and Privacy Requests
402, 10405 Jasper Avenue
Edmonton, AB T5J 4R7

Sent via email to brandi.noddin@gov.ab.ca and sa.foip-centralintake@gov.ab.ca
Attention: Ms. Brandi Nonin
Acting FOIP Coordinator

Canadian National Railway Company
c/o Mr. Keith Guinn and Mr. Nicholas Hughes
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Sent via email: kguinn@mccarthy.ca and nhughes@mccarthy.ca

Re: Notice of Inquiry Part 2 Case File Number 007391

This constitutes the Applicant's written submission to the Commissioner in the written inquiry for case number 007391 (the 'Inquiry'). This submission is filed in accordance with the instructions set out in the Notice of Inquiry Part 2 dated May 23, 2024.

The Applicant notes at the outset that this matter was initiated with a request for records made by the Applicant on July 12, 2017. We are approaching the 8-year mark of these proceedings, notwithstanding that the Commissioner ordered the Public Body to release all responsive records to the Applicant in Order F2021-45. The outset of Notice of Inquiry Part 2 provides a useful summary of continued attempts by the Public Body to resist disclosure of records, including a failure to comply with Order F2021-45, seeking judicial review of Order F2021-45, and engaging in litigation by instalment by changing the grounds for non-disclosure after Order F2021-45 was

issued. Additionally, we now have an affected third party in the proceedings raising additional issues that were never raised by the Public Body. The Applicant continues to object to participation of the affected third party in this proceeding, and in this regard notes that on September 17, 2017 the Public Body indicated that consultations with third parties would be required and presumably undertook those consultations before releasing responsive records (redacted) on November 14, 2017. The Applicant should not be prejudiced by any failure on the part of the Public Body to adequately undertake consultations before releasing responsive records in this matter. In addition to all of the foregoing, the Public Body has never disclosed all of the responsive records to the Commissioner – despite an explicit request by the Commissioner for same and Order F2021-45 requiring disclosure to the Applicant. The Applicant submits that a reasonable observer would view the conduct of the Public Body in this matter to be bringing the administration of justice into disrepute.

What follows is the Applicant's submissions to the issues as stated in the Notice of Inquiry Part 2 dated May 23, 2024. To begin, the Applicant restates relevant context to the request for records subject to this proceeding.

Background and the Public Interest in Creative Environmental Sentencing

The relevant facts in this matter are as set out in the initial Notice of Inquiry under the heading 'Background' on pages 1 and 2 of the Notice. In addition, the Applicant directs your attention to the summary of issues and concerns set out in the Applicant's Request for Inquiry dated October 5, 2018.

The records in question pertain to a creative environmental sentence order issued by the Provincial Court on or about June 2, 2017 under section 234 of the *Environmental Protection and Enhancement Act*, RSA 2000, c E-12 (EPEA). The purpose of the Applicant's request for records was to investigate the rationale for the quantum of sentence, the process by which the beneficiary of the creative sentence was selected, why the beneficiary was selected, and how the stated project objectives serve the objectives of the sentence.

An environmental offence is characterized by Canadian courts as a contravention of the public welfare. The impugned conduct is considered to be wrong because it offends our collective interest in maintaining the health or integrity of our environment. Accordingly, the principle underlying this request for records is that a creative sentence developed and proposed to the Court by the Attorney General for a regulatory offence under EPEA is a matter of the public interest and the process by which this sentence was developed and implemented should be transparent to the public.

The environment is a recognized as a matter of public interest in sections 32(1)(a) and 93(4)(b) of the *Freedom of Information and Protection of Privacy Act*, RSA 2000, c F-25 (FOIP Act) – as it was in 2017. It is well-settled in Canada that all prosecutions must serve the public interest.

A creative environmental sentence can include orders such as prohibiting the offender from certain activities, revoking a license, requiring the offender to publish an apology, or directing the remediation of environmental harm caused by the offence. The 'creative' aspect of an

environmental sentence is generally considered to be the imposition of additional sanctions beyond a fine. The specific origin of creative environmental sentencing in Canada is unknown, but it is generally understood that Canadian legislators turned to these ‘non-fine’ measures in the late 1980s in an attempt to improve the effectiveness of environmental enforcement. All of the provinces and territories, as well as the federal government, have statutory provisions which provide a sentencing court with authority to order some form of creative environmental sentence. In Alberta, this authority is provided by section 234 of EPEA.

The particular form of creative environmental sentence which is the focus of this request for records is an order which requires the offender to provide funds to a third party to pay for the conduct of an environmental remedial project. This is the most common type of creative environmental sentencing order because this type of order leads to remedial projects which best serve the instrumental purpose of an environmental sanction and align closely with the regulatory character of an environmental offence.

Creative sentences have been a regular feature of environmental prosecutions in Alberta since EPEA was enacted in 1993. It is the Applicant’s understanding that in cases where a creative sentence is being considered, the prosecutor works with a liaison at either Alberta Environment and Parks (AEP) or the Alberta Energy Regulator (AER) to develop a proposal for a creative sentencing order and, in the case of an order which will direct funds be paid to a third party for environmental remedial work, to identify a proposed recipient of the funds. AEP serves as the liaison for all environmental offences other than for an offence committed by an energy company, in which case the sentencing liaison is the AER.

The sentence which is the subject of this request for records is the result of a guilty plea by the Canadian National Railway Company (CN Rail) with respect to a release of hydrocarbons into the North Saskatchewan river that occurred in April 2015. The penalty imposed on CN Rail under EPEA was a total of \$125,000, consisting of \$15,000 in fines and a creative funding order directing CN Rail to make a \$110,000 payment to the Edmonton and Area Land Trust to support conservation in the Edmonton region with a focus on aquatic and riparian habitat. An unsigned agreement between the Crown and the Land Trust was appended to the sentencing order, with no specific terms on the project objective or details on how or why the Land Trust was chosen as the recipient for the fund and no third party monitoring or reporting requirements on how the funds are spent by the Land Trust. The final report on project outcomes is available on the AEP website (see https://www.alberta.ca/system/files/custom_downloaded_images/ep-cn-bissell-cs-project-final-report.pdf) and the report discloses conservation work conducted with the sentencing funds however, of note, it appears from this final report that little or none of the funds were used for conservation in aquatic habitat.

The Applicant submits that an environmental offence is a contravention of the public interest, and remediation of the harm caused, or efforts undertaken to help prevent similar infractions in the future, is inherently a matter of public concern. The Applicant submits that the development and implementation of a creative sentence for an environmental offence ought to ascribe to the same principles that inform the decision to prosecute: fairness, consistency, flexibility, and transparency. For justice to not only be done, but to be seen to be done, the public needs to have access to

information to allow for scrutiny on the suitability of the sentence imposed for an environmental offence and accountability to ensure the objectives of the sentencing order were met.

The Applicant submits that consideration should have been given by the Public Body to the factors of accountability and transparency in deciding whether to disclose records in response to the Applicant's request.

With respect to the creative sentencing order in this matter, the Applicant submits that transparency would allow the public to better understand how and why the Edmonton and Area Land Trust was selected as the beneficiary of sentencing funds, as well as how or why the particular project or type of remedial work was decided upon. Moreover, the absence of a transparent nexus between the sentence and the offence also raises concerns over how the outcome is ultimately perceived; for example, in the absence of full transparency there is a risk that funding for remedial work may be improperly construed as an act of generosity or corporate social responsibility on the part of the offender. Transparency can also help to facilitate more consistency in sentencing, which in turn inspires confidence and legitimacy in the administration of environmental justice.

The Applicant submits the foregoing establishes that full disclosure of records requested in this matter is clearly in the public interest, and submits this is important context for the Applicant's overall submission that settlement privilege does not apply to these records.

What follows is the Applicant's submissions on each of the 8 issues identified in the Notice of Inquiry Part 2.

Issues 1, 3, and 4: Is the Commissioner functus officio in this matter and is it too late for the Public Body to be seeking to apply section 27 in relation to an assertion of settlement privilege?

1. Yes. The Commissioner concluded its investigation into the dispute between the Applicant and the Public Body over the request for records, with the issuance of Order F2021-45. The Applicant is of the understanding that the Public Body has never complied with Order F2021-45, nor has the Public Body provided the adjudicator with a copy of the records as requested. The Public Body had two lawful options available to it upon the issuance of Order F2021-45: (1) comply with the Order; (2) seek judicial review of the Order and, if desired, an interim stay of the Order. Nowhere in the FOIP Act does it provide the Public Body with an opportunity to initiate a new Inquiry into the request for records made by the Applicant.
2. In addition to the foregoing, the Adjudicator must make the determination as to whether the information at issue in this Inquiry is subject to settlement privilege and is entitled to inspect the records at issue. Section 56(2) and (3) of *FOIP* make it clear the commissioner may inspect and record despite "any privilege of the law of evidence". The Public Body has no authority to provide only an affidavit of records to the adjudicator. It has been recognised in this country for more than a century that a trier of fact "must necessarily be entitled to look at the document in order to determine whether the conditions, under which

the ["without prejudice"] rule applies, exist.”¹ Solicitor-client privilege is now more than a rule of evidence and is a rule of substance, and receives different protection.² Settlement privilege is only a common law rule of evidence.³ If the Public Body has refused to disclose to the Adjudicator the records over which they insist settlement privilege applies the Adjudicator should refuse to consider the public body’s arguments and order the records disclosed. The Public Body is not entitled to refuse an order to provide a copy of records from the adjudicator, provide only an affidavit of records, and not seek judicial review. It would make a mockery of the office of the information and privacy commissioner and the *Freedom of Information Act* to allow public bodies to simply ignore the Commissioner’s authority to review records during an inquiry under *FOIP* section 56.

Issue 2: Who determined that information should be withheld on the basis of settlement privilege?

3. The Applicant is not privy to any information that would assist the Commissioner in deliberating on this issue. Accordingly, the Applicant makes no submissions on this issue.

Issue 5: Has settlement privilege been waived?

4. The Applicant’s position is that settlement privilege does not apply to these records, accordingly there was no privilege to waive.

Issue 6: Is the information withheld subject to settlement privilege?

5. The Applicant’s position is that settlement privilege does not apply to these records. A creative environmental sentence is not a settlement.
6. It is important at the outset to recall what information is being sought in this Inquiry. The Applicant’s Request for Inquiry of October 5, 2018, Appendix A of the Request included the following clarification:

The records requested pertain to a creative environmental sentence order issued by the Provincial Court on or about June 2, 2017 under section 234 of the *Environmental Protection and Enhancement Act (EPEA)*. I am interested in information that demonstrates the rationale for the quantum of the creative sentence, the process by which the Edmonton and Area Land Trust was chosen as the beneficiary of the sentencing funds, why the Land Trust was chosen as the beneficiary, and how the

¹ *Bank of Ottawa v. Stamco Ltd.* 1915 CanLII 102 (SK KB), citing from *Daintrey (Re)*; *Ex parte Holt*, [1893] 2 Q.B. 116.

² *Alberta (Information and Privacy Commissioner) v. University of Calgary*, 2016 SCC 53 at paras 38-40.

³ *Union Carbide Canada Inc. v. Bombardier Inc.*, 2014 SCC 35, at para 31 [*Union Carbide*].

stated project objectives serve the sentencing objectives (e.g. deterrence or remediation).

7. The purpose of the Applicant's request for records was to investigate the rationale for the quantum of sentence, the process by which the beneficiary of the creative sentence was selected, why the beneficiary was selected, and how the stated project objectives serve the objectives of the sentence.
8. The information that is being sought by this freedom of information request relates to the development and issuance of a creative environmental sentence order under s. 234 of *EPEA* and does not attract settlement privilege.
9. Settlement privilege is a common law evidentiary rule.⁴ Wagner J. recently articulated the privilege in *Union Carbide*: "Settlement privilege is a common law rule of evidence that protects communications exchanged by parties as they try to settle a dispute. Sometimes called the "without prejudice" rule, it enables parties to participate in settlement negotiations without fear that information they disclose will be used against them in litigation."⁵
10. The Alberta Court of Appeal stated in *Bellatrix Exploration Ltd. v. Penn West Petroleum Ltd.*: "As settlement privilege operates to preclude admission of evidence that might otherwise be relevant, it competes with the court's truth-seeking function. For that reason, courts must ensure the communications come within the tripartite test before applying the privilege."⁶
11. This provides two useful means by which to evaluate whether the information sought is subject to settlement privilege.
12. First, it is a useful thought experiment to consider whether any given responsive file in this Inquiry could have been relevant as evidence in the case that existed against the Third Party. For example, any information related to the decision to select the Edmonton and Area Land Trust as beneficiary of the sentencing funds could not have been in any way relevant to the case against the Third Party. We suggest that, for the reasons that follow, the information sought by this access to information request could not meet this condition.
13. Second, for information to be subject to settlement privilege it must come within the tripartite test. The accepted three-part test for settlement privilege is:

(1) A litigious dispute must be in existence or within contemplation;

(2) The communication must be made with the express or implied intention that it would not be disclosed to the Court in the event that negotiations failed; and

⁴ *Ibid*, at para 1, 31, 45.

⁵ *Ibid*, at para 31.

⁶ 2013 ABCA 10 at para 26, [emphasis added] [*Bellatrix*].

(3) The purpose of the communication must be to attempt to effect a settlement.⁷

14. The information sought by this freedom of information request does not meet the third element of the test as it was not made for the purpose of attempting to effect a settlement.
15. The information sought concerning the creative environmental sentence order is distinct from information and communications that arose in the plea bargain process that led to the entry by the Third Party of a guilty plea on the two counts against it.
16. Any negotiation between the parties with regard to settling the charge against the Third Party would have been made in the context of the commission of an offence under s. 227(j) of *EPEA* and included consideration of sentencing principles, caselaw and statutory provisions (such as s. 718 of the *Criminal Code*, *R. v. Terroco*, and s. 228(2) of *EPEA*, as referenced at page 2 of the Public Body's submission to Judge Doyle of May 24, 2017).
17. However, a court's discretion to impose a creative environmental sentence order arises under s. 234(1) of *EPEA*:

Court orders relating to penalty

234(1) When a person is convicted of an offence under this Act, in addition to any other penalty that may be imposed under this Act, the court may, having regard to the nature of the offence and the circumstances surrounding its commission, make an order having any or all of the following effects: ...

18. Development of the creative environmental sentence order arises through a distinct statutory process and should not be conflated with negotiation between prosecutors and the Third Party to settle the charge against the Third Party.
19. This is further supported by the fact that the information that is the subject of this inquiry would not contain an admission of guilt, present any risk of future litigation or harm to the Third Party, or include a compromise on their part – all elements that attract settlement privilege and reasons for which the privilege exists.
20. The ABCA stated in *Bellatrix*:

Courts appear to have accepted that the types of communications covered by the settlement privilege require at least a hint of potential compromise or negotiation: see, for example, *Hansraj* at para 20. However, an unconditional assertion of rights without any connection to the possibility of settlement or negotiation do not fall within the scope of the rule: *Buckinghamshire County Council v Moran*, [1990] 1 Ch 623, [1989] 3 All ER 225 (CA), cited in *Hansraj* at para 19. Communications

⁷ *Phoa v Ley*, 2020 ABCA 195 at para 11; *Rumancik v Hardy*, 2024 ABKB 670, at para 22.

of this type do not offer any potential for compromise, which is the interest the privilege is intended to protect.⁸

21. The information that is the subject of this Inquiry does not contain ‘a hint of compromise or negotiation’ in furtherance of settlement because it does not concern the settlement – it concerns the details of the creative environmental sentence order that was made after the charge was settled. It is difficult to conceive of the possibility that the decision to select the Edmonton and Area Land Trust as beneficiary involved compromise or concession on the part of the Third Party.

22. The Government of Alberta’s website describes a creative environmental sentence as something solely for the sentencing judge to decide:

Judges presiding over cases decide if they want a creative sentence and if the proposed ideas are suitable. The judge alone can approve the creative sentencing recommendations brought forward by the Crown prosecutor and defence counsel.⁹

23. A creative environmental sentence is not a settlement between the parties.

24. This point is further exemplified by the following statement by the Government of Alberta which helps to properly contextualise creative environmental sentencing:

Creative sentencing is not like an out-of-court settlement and does not imply a less serious punishment. Creative sentencing is part of the punishment an environmental offender can face after a finding of guilt. While there are statutorily recognized diversion programs available for Criminal Code offences, creative sentencing does not fall into that category. Participation in a creative sentencing project can never justify withdrawing charges or agreeing to a reduced sentence.¹⁰

25. Unduly applying settlement privilege to creative environmental sentencing orders is contrary to the open court principle, the Charter, and the public interest.

26. Court sentencing in Canada is transparent and open to the public through the operation of the open court principle as well as provisions of the *Criminal Code* and caselaw from the Supreme Court of Canada.¹¹

⁸ *Bellatrix*, at para 24 [emphasis added].

⁹ Government of Alberta, “Environmental compliance – Creative sentencing – Overview, online: <https://www.alberta.ca/environmental-compliance-creative-sentencing-overview>.

¹⁰ Government of Alberta, “Environmental compliance – Creative sentencing – Overview” (2025), online: < [alberta.ca/environmental-compliance-creative-sentencing-overview](https://www.alberta.ca/environmental-compliance-creative-sentencing-overview)>, [emphasis added].

¹¹ See *Criminal Code*, RSC 1985, c C-46, s 726.2 as well as *R. v. Sheppard*, 2002 SCC 26 for discussion of the provision of transparent, accessible reasons for judgements.

27. The open court principle is protected by the *Canadian Charter of Rights and Freedoms*.¹² The Department of Justice Canada states the following with respect to s. 2(b) protection of the principle:

3. The open court principle

Section 2(b) protects the “open court principle”, a strong presumption in favour of open courts that allows the public and the press to attend hearings, to consult court files, and to inquire into and comment on the workings of the courts (*Sherman Estate v. Donovan*, [2021 SCC 25](#)). The open court principle is embedded in the common law tradition and is protected by section 2(b) because it promotes the full and fair discussion of public institutions, which is vital to any democracy [citations omitted]. In particular, open courts discourage mischief and ensure confidence in the administration of justice through transparency (*Sherman Estate*, *supra* at paragraphs 39, 44).

...

The open court principle applies to all judicial proceedings, whatever their nature (*Sherman Estate*, *supra* at paragraph 44).¹³

28. Judicial proceedings include sentencing decisions, such as the creative environmental sentencing order decision at the heart of this Inquiry.
29. Alberta courts are bound by and follow the open court principle. See for example the ABCA’s ‘Policy for Public Access to the Court Record’. The first three guiding principles of that Policy are:

1. The open court principle is a hallmark of any democratic society. Public access to court proceedings fosters many fundamental values including public confidence in the judicial system, understanding of the administration of justice and judicial accountability.

2. The open court principle is inextricably linked to the freedom of expression and freedom of the press as protected by s. 2(b) of the *Canadian Charter of Rights and Freedoms*.

3. Included within the open court principle is the public’s right to access court records.¹⁴

30. Application of settlement privilege to all information related to a creative environmental sentencing order made pursuant to s.234 of *EPEA* would have the effect of hiding the

¹² Part 1 of the *Constitution Act*, 1982, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11.

¹³ Department of Justice Canada, “Section 2(b) – Freedom of expression” (2025) online: <justice.gc.ca>, [citations omitted for brevity; emphasis added] [Justice].

¹⁴ *Policy for Public Access to the Court Record*, Court of Appeal of Alberta, (2025) available online at: albertacourts.ca/ca/publications/other, at page 1.

reasons and rationale of any such sentencing decisions from the public. Limiting public access to judicial proceedings in this way serves only to encourage mischief, limit transparency, and erode confidence.¹⁵

31. It is untenable that s.234 of *EPEA* was intended to operate so as to limit transparency and public access to the administration of justice. The Department of Justice Canada makes it clear that “[l]egislative enactments that automatically limit court openness require justification under s. 1 of the Charter following the *Oakes* test (*Toronto Star Newspapers Ltd. v. Canada*, [2010] 1 S.C.R. 721 at paragraph 18).”¹⁶
32. There is no provision or justification in *EPEA* intended to limit court openness – to do so would require justification under s.1 of the Charter.
33. The information sought in this Inquiry concerns a creative environmental sentence issued for a public welfare offence that included the disbursement of public funds and attracts strong public interest considerations. Transparency in this matter is paramount.
34. In the alternative, if the information was subject to settlement privilege, the privilege expired with the end of the litigation.
35. As stated above, settlement privilege is a common law evidentiary rule.¹⁷ Settlement privilege “ensures that communications made in the course of settlement negotiations are generally not admitted into evidence”¹⁸.
36. The Supreme Court has recognized that evidentiary privileges and confidentiality are distinct¹⁹: “In Quebec law, as at common law, settlement privilege is an evidentiary rule that relates to the admissibility of evidence of communications. It does not prevent a party from disclosing information; it just renders the information inadmissible in litigation.”²⁰ The Supreme Court has noted that confidentiality can be provided by different tools and that parties can “sign mediation agreements that provide for the confidentiality of communications made in the course of the mediation process.”²¹
37. Alberta Justice’s submissions fail to distinguish evidentiary privilege from confidentiality, they therefore misunderstand the purpose and function of settlement privilege and misread and misunderstand caselaw. Alberta Justice is incorrect that settlement privilege provides or promises confidentiality against settlement communications becoming public. The public policy bargain of settlement privilege is to provide parties who engage in settlement negotiations an evidentiary privilege against those settlement communications being placed as evidence before the Court, not a confidentiality against the public. That is not the bargain.

¹⁵ See reference to *Sherman Estate v. Donovan* 2021 SCC 25, at paras 39, 44 in *Justice*, *supra* note 9.

¹⁶ *Justice*, *supra* note 13.

¹⁷ *Union Carbide*, at para 1, 31, 45.

¹⁸ *Bellatrix*, at para 21.

¹⁹ *Union Carbide*, at para 45.

²⁰ *Ibid*, at para 37 [emphasis added]. The reference to Quebec law is because the *Union Carbide* arose in Quebec.

²¹ *Ibid*, at para 1.

38. Alberta Justice's submissions consistently conflate evidentiary privilege and confidentiality. Alberta Justice argued that:

The public body's claim to settlement privilege is fair to the parties to this case, which include an affected party who, like the public body, has privileged information at stake. It is also consistent with sound public policy, which the courts have recognized requires that parties be able to discuss potential resolutions secure in the knowledge that their discussions will remain confidential.²²

And further:

[to have settlement privilege] cease automatically as soon as the litigious dispute ends would leave parties without any assurance that discussions undertaken in a settlement context would remain protected. This would be unfair to both parties who are, based on the state of the law, proceeding on the basis that their negotiations are subject to legal privilege.²³

These statements are incorrect as they conflate a privilege of the law of evidence with a contract for confidentiality. Once all litigious disputes relating to the settlement have come to an end without the settlement discussions having been placed in evidence, the parties have obtained the full benefit of settlement privilege. It produces no unfairness for the settlement discussions to later be disclosed to the public.

39. The accepted three-part test for settlement privilege is:

- (1) A litigious dispute must be in existence or within contemplation;
- (2) The communication must be made with the express or implied intention that it would not be disclosed to the Court in the event that negotiations fail; and
- (3) The purpose of the communication must be to attempt to effect a settlement.²⁴

40. The first element is no longer met. The litigious dispute is entirely in the past and no longer exists. There is no court considering the litigious dispute or that will consider the litigious dispute in the future before which these records may be placed. The purpose and role of settlement privilege is spent.

41. The Alberta Court of Appeal clearly explained why settlement privilege ends with the litigation in *Mahe v Boulianne*, 2010 ABCA 74:

[9] Not all privileges are of perpetual duration. For example, the litigation privilege ends when the litigation (and any collateral litigation) is over: *Blank v. Canada*

²² Alberta Justice's submission of June 24, 2024 at para 3.

²³ Alberta Justice's submission of June 24, 2024 at para 63.

²⁴ *Phoa v Ley*, 2020 ABCA 195 at para 11; *Rumancik v Hardy*, 2024 ABKB 670, at para 22.

(*Minister of Justice*), 2006 SCC 39, [2006] 2 S.C.R. 319. The primary purpose of the “without prejudice” settlement privilege is to encourage efforts to resolve the dispute, by giving assurances that any concessions of fact or liability in the negotiations and the offer will not be shown to the trier of fact. Once the litigation (and any related litigation) is concluded, the reason for the privilege is ordinarily spent. As the Court held in *Blank* at para. 34 with respect to litigation privilege: “Once the litigation has ended, the privilege to which it gave rise has lost its specific and concrete purpose - and therefore its justification”. So absent any specific agreement between the parties (or other special circumstances) the “without prejudice” privilege is presumed to expire once the merits of the dispute have been decided.

42. The second element of the three-part test reiterates what settlement privilege is about: that the settlement communications will not be disclosed to other parties during litigation or placed into evidence before the Court deciding the issue that is the subject of the negotiations. If settlement privilege were about confidentiality, the second part would say something about confidentiality.
43. Nothing in *Union Carbide* or *Sable Offshore Energy Inc. v Ameron International Corp.* supports the view that litigation privilege survives the end of the litigious disputes.²⁵ *Union Carbide* and *Sable Offshore* both address special situations where the settlement did not end the litigious dispute.
44. *Sable Offshore* arose in multi-party litigation featuring Pierringer agreements, which are negotiated settlements between only some parties to the litigation. Pierringer agreements are settlement agreements that do not end the overall litigious dispute.²⁶ Further, Alberta Justice incorrectly reads the Supreme Court’s use of ‘protection’ in *Sable Offshore* in the context of settlement privilege as meaning *confidentiality* instead of *privilege*, the distinction between which was detailed above.²⁷
45. In *Union Carbide*, the parties had reached a settlement, but subsequently disagreed about the terms of the settlement, so that the settlement had failed to end the litigious dispute.²⁸
46. The Court of Appeal provided an explanation of *Sable Offshore* and *Union Carbide* in *Imperial Oil Limited v Alberta (Information and Privacy Commissioner)*.²⁹ The Court of Appeal identified that in both cases, settlement privilege continued because the negotiated settlement had not concluded the related litigious dispute.
47. *Union Carbide* and *Sable Offshore* affirm that settlement privilege applies even after a settlement is reached, where the settlement did not end the litigious dispute. The reason *Union Carbide* or *Sable Offshore* went to the Supreme Court was because of the lack of

²⁵ *Sable Offshore Energy Inc. v. Ameron International Corp.*, 2013 SCC 37.

²⁶ *Ibid*, at para 4-7, and 21-24.

²⁷ *Ibid*, see para 18 for a clear use of ‘protection’ meaning *privilege* not *confidentiality*.

²⁸ *Union Carbide*, at para 19.

²⁹ 2014 ABCA 231 at paras 59-62.

clarity on that precise scope of when settlement privilege ends. If settlement privilege were endless, the outcomes of both *Union Carbide* and *Sable Offshore* would have been simple.

48. The Supreme Court used clear language to establish that solicitor-client privilege has unlimited duration: “Solicitor-client privilege is permanent”³⁰ and “the principle “once privileged, always privileged”, so vital to the solicitor-client privilege, is foreign to the litigation privilege.”³¹ If the Supreme Court intended to make settlement privilege permanent, they would have used such clear language in *Union Carbide* and *Sable Offshore*. The Supreme Court chose not to.

49. *Kaufmann v Edmonton (City) Police Service* does not support the public body’s position.³² The Court of Appeal wrote:

We also reject the appellant’s contention that once a matter is resolved, any privilege that attaches to without prejudice settlement offers disappears. If negotiations are successful, the privilege continues to apply: *Union Carbide* at para 34.³³

We are aware that the success of negotiations does not end settlement privilege, the issue is whether settlement privilege ends once the entire ‘litigious dispute’ has concluded. The Alberta Court of Appeal’s comment in *Kaufmann* only reiterated the finding of *Union Carbide*.

50. Further, the Court of Appeal in *Kaufmann* was implicitly aware that settlement privilege and the related sealing order at issue in *Kaufmann* would end, as the Court of Appeal wrote:

[T]he chambers judge stated that he was putting into place the sealing order until the cost determination was made and then he would “decide whether or not they should be released”. As the chambers judge has not made a final determination in regards to the sealing order, this ground of appeal is premature.³⁴

51. The OIPC has previously recognized that settlement privilege expires once the merits of the disputes have been settled, or judgment has been rendered.³⁵

52. Alberta Justice has identified only one decision that partially supports their position that settlement privilege survives the end of a litigious dispute: *McDiarmid Estate v. Alberta (Infrastructure)*.³⁶ The court in *McDiarmid Estate* cites only *Union Carbide* and another decision citing *Union Carbide*.³⁷ *McDiarmid Estate* represents only a misreading of *Union Carbide*, and it is the actual Supreme Court decision in *Union Carbide* that is

³⁰ *Lizotte v Aviva Insurance Company of Canada*, 2016 SCC 52 at para 22.

³¹ *Blank v Canada (Minister of Justice)*, 2006 SCC 39 at para 37.

³² *Kaufmann v Edmonton (City) Police Service*, 2019 ABCA 272 [*Kaufmann*].

³³ *Ibid*, at para 20.

³⁴ *Ibid*, at para 23.

³⁵ *Re Edmonton (Police Service)*, F2017-57 <<https://canlii.ca/t/h4xt2>>, at paras 184-187; partially overturned on other grounds in *Edmonton Police Service v Alberta (Information and Privacy Commissioner)*, 2020 ABQB 10.

³⁶ 2023 ABKB 14, at para 22 [*McDiarmid Estate*].

³⁷ *Buck v. Canada (Attorney General)*, 2022 CanLII 19523 (FC).

binding, not the misinterpretation in *McDiarmid Estate*. Further, *McDiarmid Estate* did allow the settlement negotiations into evidence, partially because their age meant there would be limited prejudice from allowing them into evidence.³⁸

53. The issue of settlement privilege arose before the Alberta OIPC most recently in *Re Alberta (Justice)*.³⁹ That case is currently subject to an appeal set to be heard in June 2025.⁴⁰

Issue 7 and 8: Did the public body properly apply section 27(1)(a) (privileged information) to the information or records? & Issue 8: Does section 27(2) of the Act (privileged information of a person other than a public body) apply to the information in the records?

54. No. Settlement privilege does not apply to these records.

Sincerely,



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³⁸ *McDiarmid Estate*, at para 34-39.

³⁹ F2023-37.

⁴⁰ ABKB Registry no. 2303 18103.