Information and Privacy Commissioner,
Ontario, Canada

Commissaire à l'information et à la protection de la vie privée,
Ontario, Canada

ORDER PO-4398

Appeals PA20-00171 and PA20-00787

Financial Services Regulatory Authority of Ontario

May 29, 2023

Summary: These appeals relate to two separate decisions of the Financial Services Regulatory Authority of Ontario (FSRA) to deny access to a Notice of Proposal to Revoke Licences/ Impose Administrative Penalties. FSRA claimed that the record qualified for exemption under section 19(b)(settlement privilege). The appellants appealed the decision to the Information and Privacy Commissioner of Ontario (IPC).

In this order, the adjudicator finds that the record does not qualify for exemption under section 19(b). As FSRA relies on no other exemption, it is ordered to disclose the record to the appellants.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. F.31, as amended, section 17(1); *Mortgage Brokerages, Lenders and Administrators Act, 2006* S.O. 2006, c. 29, sections 19, 21 and 39.

Cases Considered: *Liquor Control Board of Ontario v. Magnotta Winery Corporation*, 2010 ONCA 681, *Sable Offshore Energy Inc. v. Ameron International Corp.*, 2013 SCC 37, *R. v. Barreau*, 2021 ONSC 5694 (CanLII), *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65 and *Newfoundland and Labrador Nurses' Union v. Newfoundland and Labrador (Treasury Board)* 2011 SCC 62, [2011] 3 S.C.R. 708.

OVERVIEW:

[1] The Financial Services Regulatory Authority of Ontario (FSRA) is responsible for supervising and regulating a number of different sectors, including the mortgage brokering sector under the *Mortgage Brokerages, Lenders and Administrators Act, 2006 (the MBLAA or MBLA).*

[2] The enforcement process overview of FSRA's public website indicates that if a

regulated individual or company has not complied with a legal requirement, FSRA may initiate enforcement proceedings by issuing a notice proposing a sanction against the regulated individual or company. The notice contains unproven allegations and proposed sanctions. The individual or company receiving a notice has 15 days to request a hearing with the Financial Services Tribunal (tribunal), failing which FSRA issues an order reflecting the terms of the notice. The tribunal decides if the proposed sanction or any other sanction should be imposed. At any stage of the process, the individual or company can settle the enforcement action with FSRA. When there is a settlement, FSRA may issue a final order which may be different from the sanction proposed in the notice of proposal.

[3] In 2018, the Financial Services Commission of Ontario issued a series of orders imposing licence revocations and monetary administrative penalties against four named companies and four named individuals under the *MBLAA*. The Financial Services Commission of Ontario (FSCO) has now been replaced by the FSRA.

[4] Two separate requests were filed under the *Freedom of Information and Protection of Privacy Act (the Act)* to FSRA for the Notice of Proposal to Revoke Licences/ Impose Administrative Penalties (notice of proposal) and minutes of settlement related to the 2018 orders. The requesters are the appellants in this appeal.

[5] FSRA issued decision letters denying the appellants access to the notice of proposal and minutes of settlement, claiming broadly that the discretionary legal privilege exemption under section 19 applies to both records. FSRA also took the position that the minutes of settlement qualified for exemption under the mandatory third-party information exemption under section 17(1).

[6] The appellants appealed FSRA's decisions to the Information and Privacy Commissioner of Ontario (IPC) and a mediator was assigned to explore settlement with the parties. During mediation of each appeal, the appellants indicated that they did not wish to pursue access to the minutes of settlement.[1]

[7] At the end of mediation, FSRA confirmed its position that it continues to rely on the discretionary legal privilege exemption in section 19 to withhold the notice of proposal. As no further mediation was possible, the file was transferred to the adjudication stage of the appeals process.

[8] During the inquiries into the appeals, FSRA and the appellants provided representations in support of their positions and the parties' representations were shared with one another in accordance with the IPC's *Code of Procedure and Practice Direction 7*.[2] Each appellant, through counsel, filed near identical representations and the FSRA's representations in both appeals were virtually the same. Therefore, and because of the appellants' relationship to one another, I have decided to dispose of both appeals in one order.

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[1] Withheld under the mandatory third party information exemption under section 17(1).

[2] Portions of the FSRA's representations were withheld from the appellants in accordance with the confidentiality criteria found in *Practice Direction 7.*

[9] In this decision, I find that the legal statutory privilege relied upon by FSRA does not apply to the notice of proposal. Accordingly, I order FSRA to disclose it to the appellants.

RECORD:

[10] The record in each appeal is the same Notice of Proposal to Revoke Licences/ Impose Administrative Penalties, dated December 14, 2017 (81 pages) (notice of proposal).

DISCUSSION:

[11] I begin by noting that in *Canada (Minister of Citizenship and Immigration) v. Vavilov*,[3] the Supreme Court of Canada reaffirmed its finding in *Newfoundland and Labrador Nurses' Union v. Newfoundland and Labrador (Treasury Board)*[4] that an administrative decision maker is not required to explicitly address every argument raised by the parties. Moreover, the fact that a decision maker's reasons do not address all arguments will not, on its own, impugn the validity of those reasons or the result.[5]

[12] I wrote this order with this principle in mind, and though I have reviewed all of the information that has been put before me during the inquiry, I only summarize the points I find to be directly related to the issue of whether the notice of proposal qualifies for exemption under section 19(b).

[13] Section 19 contains three different legal privilege exemptions, which the IPC has referred in previous decisions as making up two "branches."[6] The institution must establish that at least one branch applies.

[14] In its representations, FSRA takes the position that the notice of proposal "lands squarely with the second branch of the section 19 exemption to the *Act*." The relevant section, section 19(b), reads:

> A head may refuse to disclose a record,
>
> > b) that was prepared by or for Crown counsel for use in giving legal advice or in contemplation of or for use in litigation[.]

[15] The branch 2 exemption is a statutory privilege that applies where the records were "prepared by or for Crown counsel for use in giving legal advice or in contemplation of or for use in litigation." The statutory privileges under section 19(b)

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[3] 2019 SCC 65, at paragraphs 128 and 301 [*Vavilov*].
[4] 2011 SCC 62, [2011] 3 S.C.R. 708 [*Newfoundland Nurses*].
[5] *Vavilov, supra* note 4, at paragraph 91; *Newfoundland Nurses, ibid,* at paragraph 16.
[6] The first branch, found in section 19(a), (subject to solicitor-client privilege") has been found to incorporate the common law solicitor-client communication and litigation privileges, and was not claimed by FSRA.

and common law privileges under section 19(a), although not identical, exist for similar reasons.[7]

[16] In this case, FSRA argues that the notice of proposal falls under section 19(b) (branch 2). FSRA submits that the notice of proposal was used "in contemplation of or for use in litigation". The parties agree that the notice of proposal issued by the Superintendent of FSCO was "prepared for Crown counsel." However, the appellants question whether the notice of proposal was prepared in contemplation of or for use in litigation. They also dispute whether it falls within the requisite 'zone of privacy' for section 19(b) to apply.

[17] The crux of the appellants' arguments is that FSRA should not be allowed to rely on the section 19(b) statutory privilege to withhold the notice of proposal because FSRA seeks to claim the privilege retroactively. The appellants take the position that the notice of proposal is similar to the type of documents the courts have held fall outside the "zone of privacy."

Decision and analysis

[18] The statutory privilege under branch 2 applies to records prepared by or for Crown counsel "in contemplation of or for use in litigation." *Liquor Control Board of Ontario v. Magnotta Winery Corporation (Magnotta)* stands for the proposition that the scope of the statutory privilege under section 19(b) extends to protect records prepared for use in the mediation or settlement of litigation.[8]

[19] In the non-confidential portions of its representations, FSRA states:

> [T]he Notice of Proposal facilitated ongoing settlement negotiations and, ultimately, settlement of the dispute or further litigation should settlement fail. Therefore, the Notice of Proposal was prepared [in] contemplation of or for use in litigation.
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> …
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> An issued notice would ordinarily fall outside section 19 of the *Act*. However, in this instance, the Notice of Proposal was integral to settlement discussions between the Superintendent[9] and the Parties. The parties specifically documented their intention to treat the Notice of Proposal as settlement privileged and confidential. Since settlement

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[7] For example, in contrast to the scope of common law "litigation privilege" arising under section 19(a), termination of litigation relating to a criminal prosecution was found **not** to end the scope of the statutory privilege under section 19(b) as it related to records in a Crown prosecutor's file. *See Liquor Control Board of Ontario v. Magnotta Winery Corporation*, 2010 ONCA 681 at para 40, citing *Ontario (Attorney General) v. Holly Big Canoe,* 2002 CanLII 18055 (ON CA) at paras 7-8.

[8] 2010 ONCA 681 at paras 43-44.

[9] The term "Superintendent" was used by the parties in its representations and refers to the superintendent of the Financial Services Commission of Ontario (FSCO). With FSRA having taken over FSCO's responsibilities, the FSRA's Chief Executive Officer is now responsible for FSRA's management and administration.

> was achieved, the Notice of Proposal was withdrawn and did not give rise to a proceeding before the Financial Services Tribunal.
>
> The Superintendent issued the Notice of Proposal to preserve its ability to make an order under the *MBLAA* while settlement discussions occurred.

[20] FSRA also says that the withheld record "falls within the "zone of privacy" which allowed potential litigation to be resolved" and also cites *Magnotta*.[10]

[21] In *Magnotta*, the Court of Appeal drew a line between correspondence exchanged between counsel during litigation and the type of documents used by Crown counsel to assist with mediation and settlement discussions. In that decision, the Court of Appeal found that the records before it were:

> … prepared by, or delivered to, Crown counsel to assist with mediation and settlement discussions, a part of the litigation process. Furthermore, the Disputed Records were explicitly cloaked in confidentiality. Before undertaking the mediation, the parties signed a mediation agreement that contained a confidentiality provision and the settlement documents were replete with extensive confidentiality provisions. Clearly, the Disputed Records fall within any reasonable "zone of privacy".[11]

[22] In the confidential portions of its representations, FSRA provided a copy of an agreement executed between the parties to the settlement agreement (before the notice of proposal was issued and before the settlement agreement was reached) which it says "documented their intention to treat the Notice of Proposal as settlement privileged and confidential." FSRA refers to this agreement as the "Extension Agreement" in the non-confidential portion of its representations and says that the extension agreement:

> … documented the intent of the Parties and the Superintendent (the predecessor regulator) to settle regulatory proceedings. The Extension Agreement explicitly incorporated the (soon to be issued) Notice of Proposal into these Settlement discussions.[12]

[23] FSRA argues that by keeping the notice of proposal confidential, the parties to the settlement agreement were able to resolve and avoid "lengthy and complex litigation before the Financial Services Tribunal."

[24] The appellants argue that the notice of proposal does not fall "within a reasonable zone of privacy as it is a "pleading" and say the notice is:

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[10] 2010 ONCA 681 at 44.
[11] *Ibid* at 44.
[12] FSRA representations, dated June 3, 2022.

> … an originating document that FSRA is statutorily required to issue to impose penalties under the *MBLA*. Its purpose is to give the Parties notice of the allegations against them.

The parties do not dispute that the notice of proposal was prepared by Crown counsel

[25] The parties agree that the notice of proposal was prepared "by" Crown counsel and therefore I will accept that to be the case for the purposes of this order.[13] I do not need to examine the issue closely, given that I find for the reasons that follow that the settlement privilege claims fails in any event.

Was the notice of proposal prepared for use in contemplation of settlement of litigation?

[26] The appellants take the position that "while the Notice of Proposal was prepared by Crown Counsel for use in litigation, it does not fall within the "zone of privacy" required under section 19". The appellants also argue that the lending practices which gave rise to the notice of proposal generated significant media attention that was critical of both the lenders and FSRA. FSRA says in its representations that "lengthy and complex litigation" had been anticipated. Without disclosing the contents of the extension agreement, I agree that the agreement shows that litigation was contemplated by the parties to the settlement.

[27] However, the issue is whether the notice of proposal was prepared in contemplation of, or for use in the *settlement* of contemplated litigation. I see considerable merit in the appellant's argument that the notice is a statutory requirement of the *MBLAA,* rather than an aid to settlement. While the notice was issued around the time settlement discussions took place, this is not enough, in my view, to find that the notice was issued "for use in" or even "in contemplation of" the settlement of litigation.

[28] Sections 19, 21 and 39(2) of the relevant version of the *MBLAA*[14] state, in part:

> 19(1) The Superintendent may, by order, revoke a licence in any of the circumstances in which he or she is authorized by clause 18 (1) (a), (b), (c) or (d) to suspend the licence. 2006, c. 29, s. 19 (1).
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> (2) If the Superintendent proposes to revoke a licence without the licensee's consent, the Superintendent shall take the steps required by section 21 or 22. 2006, c. 29, s. 19 (2).

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[13] The *Mortgage Brokerages, Lenders and Administrators Act*, 2006, S.O. 2006, c. 29 provides that it is the Superintendent who "shall give notice of the proposal". Although the notice itself may be prepared by counsel, it is the CEO's responsibility to issue the notice. In these circumstances, it is not clear that the Notice of Proposal was "prepared by Crown counsel" within the meaning of section 19(b).

[14] The *Mortgage Brokerages, Lenders and Administrators Act*, 2006, S.O. 2006, c. 29, sections 19, 21 and 39(2) as they read on December 14, 2017 (the date the proposal was issued).

(3) If, in the Superintendent's opinion, the interests of the public may be adversely affected by any delay in the revocation of a licence as a result of the steps required by section 21, the Superintendent may, without notice, make an interim order suspending the licence and may do so before or after giving the notice required by subsection 21 (2). 2006, c. 29, s. 19 (3).

21(1) This section applies if the Superintendent proposes to do any of the following things:

1. Refuse to issue a licence.

2. Issue a licence and, without the applicant's consent, impose conditions.

3. Amend a licence without the licensee's consent.

4. Refuse to renew a mortgage broker's or agent's licence.

5. Renew a mortgage broker's or agent's licence and, without the applicant's consent, amend the conditions to which the licence is subject.

6. Suspend a licence without the licensee's consent, except by an interim order authorized by subsection 18 (3) or 19 (3).

7. Revoke a licence without the licensee's consent.

8. Refuse to allow the surrender of a licence.

9. Allow the surrender of a licence and, without the applicant's consent, impose conditions concerning its surrender. 2006, c. 29, s. 21 (1).

(2) The Superintendent shall give written notice of the proposal to the applicant or licensee, including the reasons for the proposal; the Superintendent shall also inform the applicant or licensee that he, she or it can request a hearing by the Tribunal about the proposal and shall advise the applicant or licensee about the process for requesting the hearing. 2006, c. 29, s. 21 (2).

39(2) If the Superintendent proposes to impose an administrative penalty under this section, the Superintendent shall give written notice of the proposal to the person or entity, including the details of the contravention or failure to comply, the amount of the penalty and the payment requirements; the Superintendent shall also inform the person or entity that he, she or it can request a hearing by the Tribunal about the proposal and shall advise the person or entity about the process for requesting a hearing. 2006, c. 29, s. 39 (2)

[29] What is clear from these provisions is that a notice of proposal is an enforcement tool. Section 39 contains a limitation period – the Superintendent has two years to issue the notice once they become aware of a contravention or failure to comply with a requirement under the *MBLAA*.[15] I accept that the Superintendent may well have issued the notice of proposal to preserve enforcement rights in the event settlement discussions failed. In my view, however, that does not satisfy the requirement of section 19 of the *Act* that the record has been prepared "for use in" or even "in contemplation of" the settlement of litigation. The notice, while prepared "in the course of" settlement discussions, was not prepared in contemplation of or for use in such settlement discussion. Rather, it was issued in contemplation of enforcement action should the negotiations fail.

[30] I also find for the reasons that follow that the settlement privilege claims fails in any event, because the notice of proposal was not prepared in the zone of privacy that is required for section 19 to apply.

A reasonable "zone of privacy" does not surround the notice of proposal

[31] The appellants argue that the notice of proposal does not fall within the "zone of privacy" required by section 19 and state that there "is nothing privileged or confidential about this document." In support of its position, the appellants argue that the notice of proposal is similar to the type of document the Court of Appeal in *Magnotta* affirmed does not fall within the zone of privacy and state:

> … in *Magnotta* the Court of Appeal affirmed that a letter prepared by plaintiff's counsel listing undertakings, advisements and refusal was not covered by section 19, even though it was prepared by Crown counsel for use in litigation, because it did not fall within the zone of privacy required to attract privilege.[16] The same reasoning would also apply to pleadings in the *Magnotta* action and, by extension, the Notice of Proposal in this case.

[32] The court in *Magnotta* looked at two Divisional Court decisions[17] and concluded that its findings were not inconsistent with the Divisional Court's interpretation of the second branch of section 19. The Court of Appeal stated:

> I do not view the Divisional Court decisions in Big Canoe 2006 and Goodis 2008 as inconsistent with the Divisional Court's interpretation of the second branch of s. 19 in the present case. In Big Canoe 2006, simple correspondence between counsel during the course of a prosecution was held to be outside the scope of the second branch. Simple correspondence is not a document that was prepared "for use in the litigation". Rather, it was a document that was prepared during the course of litigation. Nor would counsel reasonably expect that

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[15] Section 39(4).

[16] *Magnotta* at para. 46 cited in the appellants' representations.

[17] *Ontario (Attorney General) v. Big Canoe*, [2006] O.J. No. 1812 (Div. Ct.) *(Big Canoe 2006*) and *Ontario (Correctional Services) v Goodis v. Ontario*, 2008 CanLII 2603 (*Goodis* 2008).
S.C.R. 32, [2006] S.C.J. No. 31

> simple correspondence would fall within the "zone of privacy". Contrast that with the Disputed Records in the present case. The Disputed Records are documents prepared by, or delivered to, Crown counsel to assist with mediation and settlement discussions, a part of the litigation process. Furthermore, the Disputed Records were explicitly cloaked in confidentiality. Before undertaking the mediation, the parties signed a mediation agreement that contained a confidentiality provision and the settlement documents were replete with extensive confidentiality provisions. Clearly, the Disputed Records fall within any reasonable "zone of privacy".
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> Similarly, in Goodis 2008 the Divisional Court held that a letter prepared by plaintiff's counsel listing undertakings, advisements and refusals given on behalf of the Crown was not within the ambit of the second branch. Again, in my view, while such a letter is prepared during the course of litigation, it was not prepared for "use in litigation" in the sense that counsel would reasonably expect such a letter to fall within the "zone of privacy".[18]

[33] As the Court of Appeal noted, what distinguishes these cases from one another is whether the parties reasonably expected the document to fall within the zone of privacy that has been found to cloak settlement discussions.

[34] Accordingly, whether or not the notice of proposal qualifies for exemption under section 19(b) turns on whether it also is cloaked within the requisite reasonable "zone of privacy." The appellants answer this question in the negative and argue:

> [T]he fact that FSRA withdrew the Notice of Proposal and never pursued it is of no moment. That is no different than a plaintiff in civil litigation serving a Statement of Claim but then withdrawing it after achieving a settlement. That does not render the Statement of Claim privileged or confidential, even if the parties agree to treat it as such. Once the Notice of Proposal was issued pursuant to FSRA's obligations under the *MBLA*, it no longer attracted a "zone of privacy" required to shield it from production under section 19.

[35] In support of their position, the appellants rely on *Sable Offshore Energy Inc. v. Ameron International Corp. (Sable)*[19] in which the Supreme Court of Canada confirmed that the purpose of settlement privilege is to promote settlement and stated:

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[18] *Magnotta* at para. 45.
[19] 2013 SCC 37.

> The privilege wraps a protective veil around the efforts parties make to settle their disputes by ensuring that communications made in the course of these negotiations are inadmissible.[20]

[36] The appellants emphasize the words "made in the course of these negotiations" and argue that for the notice of proposal to qualify for settlement privilege, it must have been "made" while negotiations took place.

[37] The appellants also argue that the notice of proposal is akin to a pleading and should be public for this reason.

[38] The FSRA, on the other hand, says that the parties to the settlement agreement "agreed prior to issuance that the Notice of Proposal would be cloaked in the zone of privacy." I have reviewed the extension agreement referenced by the FRSA in the confidential portion of its representations, and I agree that it documented the parties' intention to treat the notice of proposal as settlement privileged and confidential.

[39] One of the appellants argues that the reasoning in *R v Barreau (Barreau)*[21] is "instructive" and should be applied to the facts in this matter.[22] In that decision, the Ontario Superior Court of Justice agreed with a lower court judge's conclusion that a draft statement of claim was not covered by settlement privilege, "because it was not made with the intention that it would not be disclosed in legal proceedings in the event that the negotiations failed."[23]

[40] FSRA distinguished *Barreau* in its reply representations stating that the circumstances differ as the extension agreement "clearly denoted the circumstances in which FSRA could disclose the Notice of Proposal." However, in my view, the reasoning in *Barreau* is instructive and I adopt it for the purposes of this appeal. I find that the fact that the notice of proposal is to be relied upon by FSRA if settlement fails puts into question FSRA's claim that it is cloaked in a "zone of privacy".[24]

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[20] *Sable*, para 2.
[21] 2021 ONSC 5694 (CanLII)
[22] The applicants in *R v Barreau* in the Ontario Court of Justice court matter sought to quash the lower court judge's decision that the draft statement of claim was not subject to settlement privilege which would overturn the judge's finding that disclosure of the draft statement of claim to defence counsel did not attract the third-party records production regime in the *Criminal Code*.
[23] *Ibid* para 10.
[24] Settlement privilege is a common law rule of evidence that protects the confidentiality of communications and information exchanged for the purpose of settling a dispute [*Union Carbide Canada Inc. v. Bombardier Inc.,* 2014 SCC 35 (CanLII) ("*Union Carbide*") at para. 1] It applies to agreements made as a result of settlement discussions as well as offers and compromises made during negotiations [Magnotta and Sable]. It applies presumptively if the following three criteria are met:

> 1. A litigious dispute must be in existence or within contemplation;
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> 2. The communication must be confidential and made with the express or implied intention that it would not be disclosed in a legal proceeding in the event negotiations failed; and

[41] Without relying on the FSRA's confidential representations outlining the specific terms of the extension agreement, public policy dictates that if settlement could not be achieved, there was a reasonable expectation that FSRA would preserve its statutory ability to pursue the sanctions set out in the notice of proposal on behalf of the public. It would be absurd to conclude that FSRA would not be able to rely on the notice of proposal to pursue sanctions against those alleged to have committed infractions under the *MBLAA* if mutual settlement discussions broke off. As one of the appellants argues in its representations "[t]here would be no incentive for a party to agree to a settlement if it knew that the underlying Notice of Proposal could not be acted upon."

[42] For the reasons above, I conclude that the notice of proposal was not prepared within the requisite "zone of privacy" and thus is not protected by the settlement privilege in section 19(b).

[43] Accordingly, I find that in the particular circumstances of this case, the notice of proposal is not protected by the statutory legal privilege in branch 2 and order its disclosure to the appellants.

ORDER:

1. I order FSRA to disclose to the appellants the notice of proposal by **June 29, 2023**.

2. In order to verify compliance with this order, I reserve the right to require FSRA to provide me with a copy of the records disclosed to the appellants.

Original signed by: May 29, 2023

Jennifer James
Adjudicator

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