



# PUBLIC LANDS APPEAL BOARD

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2021 ABPLAB 2

April 14, 2021

## Via E-Mail & Mail

JH Drilling Inc. (2006)  
#200, 3428 – 99 Street NW  
Edmonton, AB T6E 5X5  
(Appellant)

Ms. Alison Altmiks  
Alberta Justice and Solicitor General  
Environmental Law Section  
8<sup>th</sup> Floor, Oxbridge Place  
9820 – 106 Street  
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(Counsel for Director, AEP)

Dear Ms. Altmiks and JH Drilling:

**Re: Decision Letter<sup>1</sup> - JH Drilling Inc./Refusal to Issue SML 130074  
Our File No. PLAB 20-0013**

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This is the decision of Gordon McClure, Chair of the Public Lands Appeal Board (the “Board”), regarding a preliminary motion in PLAB 20-0013, JHD Drilling Inc. (the “Appellant”) raised by the Director, Lands Coordination and Delivery North, Alberta Environment and Parks (the “Director”), to “strike portions of the Appellant’s preliminary motion submissions dated March 4, 2021 on the grounds that they improperly contain references to confidential mediation and settlement discussion on the present file, as well as mediation on a previous matter (PLAB 14-0004).”<sup>2</sup> The Director submitted the Appellant’s disputed references are unnecessary, prohibited under the doctrine of *res judicata*, and undermine the integrity of the Board’s process.

## Facts

On November 4, 2013, the Appellant applied for a Surface Material Lease (“SML”) under the *Public Lands Act*, R.S.A. 2000, c. P-40 (the “Act”). On September 24, 2020, the Director advised the Appellant the application was refused as it did not meet all of the departmental requirements for issuance of a disposition. The Appellant appealed the decision of the Director on October 3, 2020.

On October 19, 2020, the Appellant appealed a September 29, 2020 email from the Director. The Board later determined the two appeals were of the same matter and combined them under one appeal number, PLAB 20-0013.

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<sup>1</sup> Cite as: *JH Drilling Inc. v. Director, Lands Coordination and Delivery North, Alberta Environment and Parks* (14 April 14, 2021), Appeal No. 20-0013-ID1 (A.P.L.A.B.), 2021 ABPLAB 2

<sup>2</sup> Director’s Application to Strike, March 10, 2021, at page 1.

The Board scheduled a mediation meeting on February 2, 2021 by videoconference, but the parties were unable to reach an agreement.

The Appellant made over forty preliminary motion applications. The Board scheduled a preliminary motions hearing by video conference for April 15, 2021, and requested the Director and the Appellant (collectively the "Parties") provide written submissions in advance of the preliminary motions hearing. The Appellant submitted a written submission on March 4, 2021. On March 10, 2021, the Director applied to have the Board strike portions of the Appellant's March 4, 2021 submission on the grounds it improperly contained references to confidential mediation and settlement discussions on the present file, as well as mediation on a previous matter (PLAB 14-0004). The Board requested the Parties to provide written submissions on the Director's motion. The Board considered the submissions and made a decision on the Director's motion to strike.

### Issues

There are two issues the Board must determine in this preliminary motion:

- (a) Is the Appellant's reference to confidential mediation settlement discussions in PLAB 20-0013 permissible? and
- (b) Is the Appellant's reference to the mediation agreement in PLAB 14-0004 permissible?

### Submissions

#### 1. *Appellant*

The Appellant submitted the mediated agreement from 14-0004, which the Appellant refers to as the "Rocky Resolution," did not have a confidentiality stamp on it. The Appellants said they would not have signed the mediation agreement if it had a confidentiality stamp and they would not have agreed to withdraw their appeal.

The Appellants stated, "[i]f the word confidentiality had been prominently stamped on each page then the Board might not have accepted it for implementation in order to withdraw the appeal."<sup>3</sup>

The Appellant said one purpose of the mediated agreement was to withdraw the appeal. The Appellant stated, "[t]he agreement was intended to be used by the parties. It was intended to be implemented.... The contract was an effective instrument, all by itself, to produce and cause the withdrawal of that appeal. The contract was not confidential."<sup>4</sup> The Appellant submitted the agreement was used to withdraw the appeal and would be insufficient if it was confidential, and that confidentiality ended upon the parties signing the 14-0004 Resolution.

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<sup>3</sup> Appellant's Submission, March 16, 2021, at paragraph 7.

<sup>4</sup> Appellant's Submission, March 16, 2021, at paragraph 20.



The Appellant said:

"At the time of signing, it was contemplated by both parties, that very agreement would be utilized, implemented. Otherwise, Her Majesty the Queen would have asked for a separate withdrawal document, so they could use that withdrawal document without showing the Report and Recommendation. But that was not the intention of the parties at the time. There was no separate withdrawal document provided or requested."<sup>5</sup>

The Appellant stated, "[b]y submitting the agreement itself, rather than a separate withdrawal document, Her Majesty the Queen waived any confidentiality of the original [agreement]."<sup>6</sup>

## 2. Director

The Director stated:

"The Appellant's references to the mediation and the Resolution in PLAB 14-0004 are unnecessary ...The Appellant's preliminary motion submissions about the Alberta Aggregate (Sand and Gravel) Allocation Policy, 2006 are substantially the same as ...in numerous previous proceedings."

The Director submitted the Appellant's submissions demonstrated the Appellant knew the Board had previously ruled the 14-0014 Resolution was confidential.<sup>7</sup> The Director submitted the Appellant's attempt to re-litigate is vexatious and an abuse of process.

The Director submitted the Appellant's submissions have the potential to undermine the credibility of the Board's appeal and mediation processes and to erode the willingness of parties to engage in mediation.

The Director submitted there has been no waiver of confidentiality and confidentiality is an essential aspect of mediation with what is discussed in mediation not being discussed outside mediation without the consent of all parties.

The Director stated, "[a] document prepared in the context of mediation, is captured under the mediation confidentiality agreement initially signed by the parties."<sup>8</sup>

The Director cited, *Imperial Oil Ltd v Calgary (City)*, stating, the Alberta Court of Queen's Bench held that a "Final Agreement" reached during mediation was covered within the boundaries of the parties' confidentiality agreement. The release of the agreement would "harm the credibility of the mediation process..."<sup>9</sup> It was found that "any breach of confidentiality, or even the perception of a breach could stifle any trend toward mediated agreements."<sup>10</sup>

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<sup>5</sup> Appellant's Submission, March 16, 2021, at paragraph 26.

<sup>6</sup> Appellant's Submission, March 16, 2021, at paragraph 29.

<sup>7</sup> See: *JH Drilling Inc. v. Alberta (Environment and Sustainable Resource Development)*, 2014 ABPLAB 14-0004, 2014 CanLII 76872 (AB PLAB).

<sup>8</sup> *Kohlman, Re*, [2011] AWLD 3777, 2011 CarswellAlta 1329 at paragraph 47

<sup>9</sup> *Imperial Oil v. Calgary (City)*, 2013 ABQB 393, 2013 CarswellAlta 1200, at paragraph 145.

<sup>10</sup> *Imperial Oil v. Calgary (City)*, 2013 ABQB 393, 2013 CarswellAlta 1200, at paragraph 145



The Director cited confidentiality provisions of the Agreement to Mediate signed by the parties, stating, he participated openly in the mediation and drafting of the Resolution on the basis of the understanding that the mediation and Resolution are confidential.

The Director submitted that in regards to confidentiality in PLAB 14-0004 the Board confirmed on June 11, 2014 that the resolution agreement:

- is confidential;
- may only be released, in whole or in part, if the parties to it consent;
- may be released without consent only to the extent required for implementation of the agreement.<sup>11</sup>

The Director submitted the Board should strike from the Appellant's submissions the following:

- (a) the copy of the 14-0004 Resolution and any references to it; and
- (b) references to the mediation and without prejudice to settlement communications in PLAB 20-0013 and 0015.

### Analysis

- (a) Is the Appellant's reference to confidential mediation settlement discussion in PLAB 20-0013 permissible?

The leading case on the applicability of mediation confidentiality is the Supreme Court of Canada's decision in *Bombardier v. Union Carbide Canada*. The Court said:

"Mediation is one of several forms of alternative dispute resolution that are available to parties in a legal dispute. It is defined by D. W. Glaholt and M. Rotterdam in *The Law of ADR in Canada: An Introductory Guide* (2011) as 'a collaborative and strictly confidential process in which parties contract with a neutral, referred to as a mediator, to assist them in settling their dispute' (p. 10). It is unsurprising that confidentiality is mentioned in the very definition of mediation. Confidentiality is often described as one of the factors that induce parties to opt for mediation and as one of the benefits of mediation."<sup>12</sup>

Confidentiality in mediation is also referred to as "settlement privilege," which the Court stated:

"Settlement privilege applies even in the absence of statutory provisions or contract clauses with respect to confidentiality, and parties do not have to use the words 'without prejudice' to invoke the privilege: 'What matters instead is the intent of the parties to settle the action.... Any negotiations undertaken with this purpose

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<sup>11</sup> *JH Drilling Inc. v. Alberta (Environment and Sustainable Resource Development)*, 2014 ABPLAB 14-0004, 2014 CanLII 76872 (AB PLAB).

<sup>12</sup> *Bombardier v. Union Carbide Canada*, 2014 SCC 35, at paragraph 38.

are inadmissible.’ Furthermore, the privilege applies even after a settlement is reached.”<sup>13</sup>

The Court noted there are exceptions to the confidentiality rule, such as when the public interest in disclosure outweighs the public interest in encouraging settlement, but those situations are focused on situations of “misrepresentation, fraud, or undue influence, and preventing a plaintiff from being overcompensated.”<sup>14</sup> Confidentiality may also not apply to the extent that is necessary to establish an agreement exists. None of these exceptions apply to the mediation meetings held in PLAB 20-0013.

The Board finds that any references to confidential communications made in the mediation meetings for PLAB 20-0013 are inappropriate and prohibited under the confidentiality clauses of the Agreement to Mediate signed by the Appellant.

(b) Is the Appellant’s reference to the mediation agreement in PLAB 14-0004 permissible?

*Res judicata* has been defined as follows: “*Res judicata* (‘the matter is judged’) is an equitable principle that, when its criteria are met, precludes the relitigation of a matter.”<sup>15</sup> A subcategory of *res judicata* is “issue estoppel,” which is a legal principle that prevents the relitigation of a matter if the following three requirements are satisfied:

- “(1) that the same question has been decided;
- (2) that the judicial decision which is said to create the estoppel was final; and,
- (3) that the parties to the judicial decision or their privies were the same persons as the parties to the proceedings in which the estoppel is raised or their privies.”<sup>16</sup>

In considering the Director’s preliminary motion the Board has applied the above test.

In a decision dated June 26, 2014, JH Drilling, the same appellant as in this matter, had argued the resolution agreement reached between the parties in a mediation meeting was not confidential. The Board determine that the resolution agreement was confidential and binding upon the parties. In this appeal, the Appellant is again arguing the resolution agreement reached in PLAB 14-0004 is not confidential. The Board determined in its decision in PLAB 14-0004 the following:

“After reviewing the submissions and considering relevant case law the Board determined that the resolution agreement was confidential except to the extent

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<sup>13</sup> *Bombardier v. Union Carbide Canada*, 2014 SCC 35, at paragraph 34.

<sup>14</sup> *Bombardier v. Union Carbide Canada*, 2014 SCC 35, at paragraph.

<sup>15</sup> Robert W. Macaulay, James L.H. Sprague, Lorne Sossin, *Practice and Procedure Before Administrative Tribunals* (Toronto: Thomson Reuters Canada, 2021) at 12.19B.

<sup>16</sup> *Angle v. Minister of National Revenue*, [1975] 2 S.C.R. 248, at page 254.



needed for implementation of the agreement. The Board also determined that the resolution agreement was binding upon the parties.”<sup>17</sup>

The Board finds the Appellant has not provided sufficient evidence to demonstrate this is a new matter that the Board should hear. The Board finds:

1. The same question has been decided;
2. The Board’s decision on the confidentiality of the mediation agreement was final;
3. The parties to PLAB 14-0004 are the same as the parties in PLAB 20-0013.

The Board finds any reference to the resolution reached in PLAB 14-0004 is prohibited under the doctrine of *res judicata* and issue estoppel.

The Board notes the Supreme Court of Canada decision in *Bombardier v. Union Carbide* was delivered May 8, 2014, just over a month before the Board issued its decision on PLAB 14-0004. The Board was unaware of the Court’s decision, and has since reviewed it, particularly with regards to comments on the exception to confidentiality. The Board notes the exceptions relate to the extent that it is necessary to prove an agreement existed and the scope of that agreement.

The Parties are clearly in disagreement regarding the extent of the confidentiality requirements for the mediation agreement, but the Board notes the mediation agreement states it “governs all aspects of the mediation process governs all aspects of the mediation process ...and any post mediation communications or conferences relating to the mediation.” The agreement also states “all communications made during the mediation are ‘without prejudice’” and “Any exceptions to this Agreement must be in writing and signed by all the Parties.”<sup>18</sup>

The Board finds the exception to the confidentiality rule does not apply to the mediation agreement reached in PLAB 14-0004. Even if an exception to confidentiality did exist, the Board does not have the jurisdiction to hear matters that go beyond the scope of the issues of appeal, such as the intent and purpose of AEP’s gravel policies.

## Decision

The Board grants the Director’s preliminary motion to strike from the Appellants’ submissions dated March 4, 2020:

- (a) any reference to the mediated agreement in PLAB 14-0004, which is referred to by the Appellant as the “Rocky Resolution”; and
- (b) any reference to confidential mediation and settlement discussion in PLAB 20-0013.

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<sup>17</sup> *JH Drilling Inc. v. Alberta (Environment and Sustainable Resource Development)*, 2014 ABPLAB 14-0004, 2014 CanLII 76872 (AB PLAB).

<sup>18</sup> Letter from the Public Lands Appeal Board, PLAB 14-0004, April 28, 2014, pages 4-5.

The Board notes sections 123(2) and (3) of the Act state:

- “(2) Prior to conducting a hearing of an appeal, the appeal body may, in accordance with the regulations, determine which matters included in notices of appeal properly before it will be included in the hearing of the appeal.
- (3) Where the appeal body determines that a matter will not be included in the hearing of an appeal, no representations may be made on that matter at the hearing.”

The Board has determined references to any mediated agreement in PLAB 14-0004, including the so-called “Rocky Resolution,” and any references to confidential discussions in the mediation meeting for PLAB 20-0013, are matters that will not be heard in the appeal.

The Board cautions the parties that any references to the prohibited matters as indicated above, may be considered “improper, vexatious or unnecessary” under section 232(4)(i) of the *Public Lands Administration Regulation*, A.R. 187/2011.

Yours truly,



Gordon McClure  
Board Chair

Any information requested by the Public Lands Appeal Board is necessary to allow the Board to perform its function. The information is collected under the authority of the *Freedom of Information and Protection of Privacy Act*, section 33(c). Section 33(c) provides that personal information may only be collected if that information relates directly to and is necessary for the processing of this appeal. The information you provide is considered a public record.