



Capital
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Tribunal

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Citation: *Phemex Limited (Re)*, 2025 ONCMT 6
Date: 2025-04-01
File No. 2023-22

**IN THE MATTER OF
PHEMEX LIMITED and PHEMEX TECHNOLOGY PTE. LTD.**

**REASONS FOR DECISION ON A MOTION
(Rule 8(4) of the *Capital Markets Tribunal Rules of Procedure*)**

Adjudicators: Cathy Singer (chair of the panel)
Russell Juriansz
Mary Condon

Hearing: March 3, 2025

Appearances: Alvin Qian For the Ontario Securities Commission
Ran He For Phemex Limited and Phemex
Technology Pte. Ltd.

REASONS FOR DECISION ON A MOTION

1. OVERVIEW

- [1] The Ontario Securities Commission sought to strike out certain portions of the material filed by the respondents in connection with the sanctions and costs hearing in this matter, including an affidavit affirmed by a representative of Phemex Limited (the **Xu Affidavit**) and written submissions, on the basis that both contained references to communications protected by settlement privilege that made them presumptively inadmissible at the hearing.
- [2] The respondents (collectively referred to below as **Phemex**) objected to the motion, arguing that the material in dispute was subject to recognized exceptions to settlement privilege.
- [3] Following a hearing on March 3, 2025, we ordered,¹ with reasons to follow, that all portions of the material that disclosed settlement discussions be struck. We dismissed the Commission's request to strike portions of the material that claim that Phemex repeatedly cooperated with the Commission throughout the proceeding on the basis that those claims did not offend settlement privilege.

2. BACKGROUND

- [4] On February 20, 2025, the respondents served and filed the Xu Affidavit and their submissions on sanctions and costs. The Commission immediately notified the Tribunal, via the registrar, that in its view, the respondents repeatedly referred to unsuccessful "without prejudice" settlement communications between counsel for the Commission and counsel for the respondents. The Commission subsequently filed its motion to strike certain portions of the material on February 26, 2025.
- [5] At the request of the Commission, we considered the motion without the public present on March 3, 2025 – the scheduled date for the sanctions and costs hearing. The Commission submitted that proceeding in the absence of the public was necessary in order to protect settlement privilege. The respondents consented to proceeding in this manner, and we agreed.

¹ (2025) 48 OSCB 2183

- [6] The issues we had to decide on the motion were:
- a. whether the material in dispute is subject to settlement privilege and therefore inadmissible for the sanctions and costs hearing; and
 - b. whether the material in dispute is subject to a recognized exception to settlement privilege, and therefore admissible for the sanctions and costs hearing.

3. ANALYSIS

3.1 Law on settlement privilege

- [7] Settlement privilege is a class privilege based on longstanding common law principles that communications made in the course of settlement negotiations by any party are inadmissible, regardless of whether a settlement was reached.²
- [8] Settlement privilege is based on the understanding that parties will be more likely to settle if they have confidence from the outset that their negotiations will not be disclosed.³
- [9] Settlement privilege extends beyond documents and communications expressly designated to be “without prejudice”. Those precise words are not required to invoke the privilege. Any negotiation with the purpose of reaching a settlement is inadmissible.⁴
- [10] Settlement privilege belongs to all parties to the settlement negotiation, and it cannot be unilaterally waived by any single party.⁵
- [11] There are exceptions to settlement privilege. A party seeking to establish an exception must show that, on balance, “a competing public interest outweighs the public interest in encouraging settlements.”⁶ Exceptions to settlement privilege are to be construed narrowly, and may only be given effect where

² *Sable Offshore Energy Inc v Ameron International Corp*, 2013 SCC 37 (**Sable**) at paras 12 and 15-17

³ *Sable* at para 13; *Union Carbide Canada Inc v Bombardier Inc*, 2014 SCC 35 at paras 31-33

⁴ *Sable* at para 14

⁵ *Canadian Flight Academy Ltd v The Corporation of the City of Oshawa*, 2024 ONSC 2756 at para 11

⁶ *Sable* at para 19

another policy objective can be shown to outweigh any impact on the settlement objective.⁷

3.2 Application to this case

[12] The respondents recognized much of the material in dispute breached settlement privilege but sought to rely on three exceptions to the settlement privilege. Therefore, our analysis below focuses on whether any of these exceptions apply to the material in dispute.

[13] First, Phemex argued the interest of the respondents to make full answer and defence in this proceeding takes precedence over the public interest in encouraging settlement, and the material in dispute ought to be admissible for such an important purpose.

[14] We were not satisfied, assuming such an exception is available in these administrative proceedings, that such an exception would apply in the circumstances. Phemex had full opportunity to make full answer and defence at the merits hearing. The Tribunal has already found⁸ that Phemex has breached the *Securities Act*⁹ and is considering the appropriate sanctions and costs to order against the respondents. The respondents' written submissions show that Phemex intends to argue that the amounts the Commission is seeking for an administrative penalty and costs order are excessive. Reliance on material subject to settlement privilege is simply not necessary for Phemex to be able to advance those arguments.

[15] Second, Phemex argued that the material is admissible for a purpose other than that which settlement privilege protects. Specifically, Phemex submitted the material was necessary to respond to the Commission's submission that the admissions Phemex made in the merits hearing "came only at the 11th hour" and did not result in any efficiencies that would justify lowering its requested sanctions.

⁷ *Phoa v Ley*, 2020 ABCA 195 at para 24; *Singh v Progressive Conservative Party of Ontario*, 2018 ONSC 203 (Div Ct) at para 57

⁸ *Phemex Limited (Re)*, 2024 ONCMT 30

⁹ RSO 1990, c S.5

- [16] On our reading, the material that Phemex tendered related to proposed settlement that, if accepted, would involve admissions. We saw in the material no actual admissions on any issue. We were not persuaded that the material is probative enough to warrant excepting them from the application of settlement privilege.
- [17] Third, Phemex argued that the material was relevant in assessing the costs requested by the Commission. Phemex alluded to the practice in civil proceedings in which a party faces adverse cost consequences for failing to accept a reasonable offer of settlement.
- [18] We did not find Phemex’s submission that that practice should be adopted in proceedings before this Tribunal compelling. In any event, we did not have to decide the question as the tendered material does not enable us to assess whether Phemex did make an offer to settle that was reasonable when compared to any final sanctions that may be imposed.

4. CONCLUSION

- [19] We concluded that all portions of the material that disclosed settlement discussions were inadmissible and must be struck. The respondents did not establish that any exceptions to settlement privilege were available in this case.
- [20] The Commission did not persuade us that claims by Phemex that it has consistently cooperated with the Commission throughout the proceeding offended settlement privilege. We refused to strike these claims.
- [21] We ordered the respondents to file revised versions of their material in accordance with our decision. Only the revised versions will be publicly available.

Dated at Toronto this 1st day of April, 2025

"Cathy Singer"

Cathy Singer

"Russell Juriansz"

Russell Juriansz

"Mary Condon"

Mary Condon