

# **New Brunswick Human Rights Commission**

## **Guideline on Privilege and the Human Rights Commission**

**Adopted December 11, 1995**

### **1.0 GENERAL**

**1.1** This policy of the New Brunswick Human Rights Commission (the Commission) provides guidance to the Commission for its use of "without prejudice" communications in its internal proceedings and in its relationship with Boards of Inquiry.

**1.2** The Commission affirms the importance the *Human Rights Act* and the common law place on the conciliation/settlement of complaints and the attendant rule of privileged communications that encourages parties to engage in frank and open discussions in conciliation/settlement. The Commission also recognizes the importance of the privacy protection of the parties involved in settlement negotiations, and wishes to continue to promote the amicable and speedy settlement of disputes without recourse to the formal Board of Inquiry provisions of s. 20 of the *Human Rights Act*.

### **2.0 DEFINITIONS**

**2.1** *Privileged communication* – A statement made by a person within a relationship which the law protects from forced disclosure in a proceeding.

**2.2** *Privileged evidence* – In addition to privileged communications, privileged evidence may also include grand jury proceedings, certain types of accident reports, and attorney's work product.

**2.3** *Without prejudice communication* – For the purposes of the Commission, a "without prejudice" communication is any written or oral transaction between the disputing parties which has transpired during the conciliation stage of the complaint process. This includes a document in which the strengths and weaknesses of the case are assessed by a Commission employee, notes taken by a Commission employee regarding a conciliation meeting, and a report prepared for the purpose of litigation (including a Board of Inquiry). A communication can be made "without prejudice" either expressly or impliedly.

**2.4** *Conciliation* – The adjustment and settlement of a dispute in a friendly, unantagonistic manner. It is used by the Commission to promote the legislative purpose of the *Human Rights Act* prior to a Board of Inquiry. However, for the purposes of the Commission, and as per s. 18 of the *Human Rights Act*, settlement/conciliation begins upon receipt of the complaint and can occur at any stage of the complaint procedure; i.e.,

communications can be made "without prejudice" from the time of initial contact to the final resolution of the dispute.

### **3.0 THE HUMAN RIGHTS COMMISSION**

**3.1** The Commission may use all the information before it to evaluate the merits of a complaint, providing the confidentiality of the parties is respected and the contents of a privileged document are not included in any document that becomes part of the record of a Board of Inquiry or other proceeding. The careless disclosure of privileged information to a Board of Inquiry can create an injustice that may significantly disrupt the adjudication of a complaint.

**3.2** When a Human Rights Officer provides information to the Commission based on a "without prejudice" meeting, conversation, document, or other communication, one must be aware of the evidentiary implications of this type of communication and the weight to be afforded it. The weight afforded to a "without prejudice" communication is a matter within the Commission's discretion; however, it must be remembered that a "without prejudice" communication is one made primarily to "buy peace" or to effect a compromise, and has a lesser evidentiary weight than an admission of a fact or an allegation of responsibility. The Commission members should be mindful of the rationale for the limited use of this type of information.

**3.3** The Commission's disclosure of a document, report, or other communication to the parties to a dispute should be limited to "reasonable information" about the matter. The "reasonable information" requirement would be fulfilled by giving the respondent sufficient information about the allegations in the complaint to permit the preparation of an answer to them. However, disclosure of a "without prejudice" communication will be allowed if a party has given an express authorization to disclose the communication to another party or if such permission is implicit in the nature of the communication.

### **4.0 THE BOARD OF INQUIRY**

**4.1** A Board of Inquiry shall not have access to a report, note or other communication that has been expressly or impliedly made "without prejudice". A communication attracts the "without prejudice" privilege when:

- (a) a litigious dispute (including a Board of Inquiry) exists or is within contemplation;
- (b) the communication is made with the express or implied intention that it not be disclosed to the Board of Inquiry/court in the event negotiations fail; and
- (c) the purpose of the communication is to effect a settlement.

**4.2** The disclosure of a "without prejudice" communication should be allowed if its non-disclosure would be extremely detrimental to one of the parties. A communication should be produced before a Board of Inquiry when:

- (a) the communication contains an unlawful statement (e.g., a threat);
- (b) the recipient would be prejudiced by the rejection of an offer contained in the communication;
- (c) the existence of a concluded settlement agreement is in issue;
- (d) a limitation period is in issue; or
- (e) costs are in question.

**4.3** The Commission shall make the initial decision of whether the disclosure or non-disclosure of a "without prejudice" communication to the Board of Inquiry would detrimentally affect one of the parties. Moreover this decision is subject to review by the Board of Inquiry or a court.

## **5.0 SUBSEQUENT PROCEEDINGS**

**5.1** The "without prejudice" privilege extends to unrelated proceedings subsequent to the dispute the parties have attempted to settle. This is because any possibility of subsequent adverse use could deter full and frank discussion during conciliation efforts. However, the disclosure of privileged communications may be required if its non-disclosure would be detrimental to a third party. [See also the Commission's policy on *Disclosure of File Information in Criminal Prosecutions*.]