CITATION: 2461351 Ontario Inc. v. Anderson, 2026 ONSC 187
COURT FILE NO.: CV-18-031
DATE: 2026/01/09

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:	
2461351 Ontario Inc. Plaintiff	Sang Joon Bae, Counsel for the Plaintiff
– and –	
Michael J. Anderson, Chief Building Official of Township of Brudenell, Lyndoch and Raglan and the Corporation of the Township of Brudenell, Lyndoch and Raglan Defendant	Allison Russell, Counsel for the Defendant
	HEARD: August 8, 2025

DECISION ON MOTION TO STRIKE PLEADINGS REFERRING TO SETTLEMENT DISCUSSIONS

SOMJI J

Overview

[1] This motion by the defendants to strike portions of the plaintiff's pleadings arises in the context of an Action brought by plaintiff 2461351 Ontario Inc. against the Chief Building Official for the Township of Brudenell, Lyndoch and Raglan ("Township") and the Corporation of the Township. The plaintiff seeks declarations as well as damages against the Township for bad faith conduct and negligence in issuing compliance orders for the plaintiff's failure to apply for a building permit which adversely affected the plaintiff's ability to operate a chip truck. The plaintiff claims the chip wagon was not a building and therefore, did not require a building permit.

[2] The Director of the plaintiff company is Ikuyo Higuchi. Her spouse, Ilkyoung Kim, is an employee of the company. Mr. Kim filed an affidavit in support of the plaintiff company's position on this motion.

[3] The defendants, the moving parties, seek an order to strike certain paragraphs of the plaintiff's Amended Amended Statement of Claim and Amended Reply on the grounds that these paragraphs refer to settlement discussions.

[4] The plaintiff argues that this motion is ill-conceived for several reasons. First, the time to complete the motion expired based on the timetable ordered by James J. on October 16, 2023, on consent of the parties. Second, the impugned paragraphs are neither inadmissible nor subject to settlement privilege. Third, the defendants have put into issue the limitation defence in their Amended Statement of Defence and, consequently, even if the impugned paragraphs refer to settlement discussions, they are necessary for the plaintiff to address the limitation defence.

[5] The issues to be decided are:

[a] Is the defendant out of time to bring this motion to strike?

[b] If not, should paragraph 50 of the plaintiff's Amended Amended Statement of Claim and paragraphs 4, 5, 6, 7, 7(a), and 8 of the plaintiff's Amended Reply be struck or amended pursuant to Rule 25.11 and Rule 49.06(1) because of reference to settlement discussions?

History of the Proceedings

[6] The history of the proceedings is set out in another motion decision of McNamara J. of May 24, 2019. Below, I summarize key paragraphs from that decision as well as other relevant facts on the history of these proceedings as set out in the motion records filed.

[7] In May 2016, the plaintiff purchased a chip wagon and brought it onto a business property owned by Ms. Higuchi and Mr. Kim located in the Township. The Township took the position that the chip wagon was a "building" as defined in the *Building Code Act, 1992,* S.O. 1992, c. 23 ("Act"), and that any work or operations pertaining to the chip wagon had to be conducted in compliance with the Act. On May 6, 2016, issued an Order to Comply requiring the plaintiff to apply for a building permit to make any structural changes to the chip wagon.

[8] The plaintiff did not apply for a permit and, consequently, the Township reiterated in a letter dated May 17, 2016, that the chip wagon was a building, explained the structural deficiencies that needed to be made for the unit to comply with the Act, and reiterated that the plaintiff needed to apply for a building permit in relation to any structural changes being made. The letter also indicated that the location of the chip wagon was not in compliance with zoning by-laws. The letter indicated that a transient trader licence would not be issued for the chip wagon until all required permits and zoning requirements were met. On May 24, 2016, the Township issued two further orders relating to non-compliance, namely a Stop Work Order and an Order to Uncover a water line and grey water line installed without a permit (the three orders hereafter referred to as the "Compliance Orders").

[9] In response, the plaintiff commenced an Application on June 10, 2016, against the Township seeking a declaration that the chip wagon was not a building as defined by the Act, an order that the Compliance Orders be quashed, and other relief.

[10] The defendant responded to the Application. In the summer of 2016, the parties exchanged documentary evidence, attended cross-examinations, and dealt with a refusal motion.

[11] The matter was then dormant until sometime in 2018.

[12] In the interim, the plaintiff made modifications to the chip wagon including adding four wheels and a trailer hitch which effectively turned the unit into a mobile chip wagon. The timing of whether these modifications were made before or after the issuance of the Compliance Orders and whether these modifications were the reason for the Township's subsequent rescission of the Compliance Orders, as discussed below, are issues in dispute.

[13] Sometime in 2018, exact dates unclear, the plaintiff and Township entered resolution discussions related to the Application.

[14] The matter eventually became a topic at Municipal Council. On May 25, 2018, the Township wrote and indicated that it would take no further action against the plaintiff if they opened the chip stand. On June 28, 2018, the Township issued a transient trailer licence to the plaintiff for the period up to December 31, 2018. On June 29, 2018, the Chief Building Official

sent an email to Mr. Kim indicating that that the Township had directed him to rescind the Compliance Orders.

[15] This did not end matters. Unbeknownst to the defendants, the plaintiff had issued a Statement of Claim on April 30, 2018, seeking all the same relief in the Application, but adding a claim for general, special, and punitive damages ("Action"). The Action provides more detail than the original Application to support the plaintiff's request for damages. The claim was not served on the defendants until August 2018.

[16] On October 10, 2018, the defendants filed a Statement of Defence and, on October 16, 2018, the plaintiffs filed a Reply.

[17] The defendants sought to stay the Action because the Application had already proceeded through various legal and evidentiary steps with the only remaining step left being the hearing. On May 24, 2019, McNamara J. found that, pursuant to Rule 1.04 of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, the most expeditious, least expensive, and most proportionate way to deal with the two matters would be to stay the Application and proceed with the Action with the production and cross-examinations conducted to form part of the record in the Action.

[18] In addition, McNamara J. found that the Action contained requests for relief that were not necessarily addressed by the Township upon cancellation of the Compliance Orders. For example, there were outstanding issues in the Application such as the request for a declaration that the chip wagon was not a building within the meaning of the Act. Given there had been no ruling on these issues or concessions by the Municipality regarding them, His Honour found the issues in the Application were not moot and could proceed as part of the Action.

[19] Further amendments were made to the pleadings. For ease of reference, I outline the dates of the filings of the parties' pleadings:

[a] April 30, 2018: plaintiff's Statement of Claim

[b] October 10, 2018: defendants' Statement of Defence

[c] October 16, 2018: plaintiff's Reply

[d] October 11, 2019: plaintiff's Amended Statement of Claim

[e] October 30, 2019: defendant's Amended Statement of Defence

[f] November 11, 2019: plaintiff's Amended Reply

[g] December 6, 2024: on consent of both parties and pursuant to the terms of an Order, the plaintiffs file an Amended Amended Statement of Claim.

[h] December 12, 2024: on consent of both parties, the defendants filed an Amended Amended Statement of Defence.

[20] On October 16, 2023, the parties consented to a timetable for the Action.

[21] On February 14, 2025, the plaintiff set the matter down for trial.

[22] A trial date has been set for April 13, 2026.

Issue 1: Is the Defendant out of time to bring this motion to strike?

[23] Rule 48.04 states that a party who has set an action down for trial shall not initiate or continue a motion or form of discovery without leave of the court. Consequently, the defendants require leave of the court to bring a motion to strike the impugned paragraphs now that the matter has been set down for trial. The plaintiff argues that the deadline of February 15, 2025, is further reinforced by the fact that James J. ordered the defendants as part of the timetable to bring said motion before the Action was set down for trial.

[24] On October 16, 2013, James J. ordered, on consent of the parties, a timetable for the proceedings which included terms that:

[a] The defendants must complete their suggested motion to strike paragraph 50 of the plaintiff's Amended Statement of Claim before the action is set down for trial.

[b] The timetable for the steps to be taken by the parties may be varied by mutual consent of all the parties.

[c] The plaintiff must set the matter down for trial by February 25, 2025.

[25] The language in paragraph 50 of the Amended Amended Statement of Claim is identical to paragraph 50 of the Amended Statement of Claim filed on October 11, 2019. Hence, the dispute over the language of paragraph 50 was a live issue as early as 2019 and the subject of concern in 2023 when the timetable was drafted.

[26] Paragraphs 4, 5, 6, 7, 7(a), and 8 of the plaintiff's Amended Reply were not addressed within the timetable. However, the plaintiff's Amended Reply was filed on November 11, 2019, and, consequently, the defendants were aware for almost six years of these provisions.

[27] The plaintiff set the Action down for trial on February 14, 2025, and confirmed with opposing counsel the filing of the trial record. The plaintiff did not agree to vary the timetable. Consequently, the plaintiff argues that the period for the defendants to bring a motion to strike paragraph 50 of the Amended Amended Statement of Claim, the language of which is identical to the Amended Statement of Claim, expired six months prior to the motion hearing date of August 20, 2025. Furthermore, the plaintiffs highlight that the defendants have had since October 11, 2019, when the Amended Statement of Claim was filed, a period of almost six years, to address paragraph 50 if they took issue with its wording.

[28] In contrast, the defendants argue that, when the plaintiff set the matter down for trial in February 2025 and provided them with the trial record, counsel for the defendants specifically informed opposing counsel that they would be bringing a motion to strike the impugned paragraphs. In fact, the defendants' counsel had already filed and served the motion materials on plaintiff's counsel on January 24, 2025, and in the correspondence between the parties on/around that date, both counsel were in discussions about prospective dates for the motion to strike to be heard in accordance with their schedules. At the time the plaintiff moved to set the matter down for trial, the defendants were still awaiting a motion hearing date from the court.

[29] Hence, I find that when plaintiff's counsel moved to set the matter down for trial, he understood a motion to strike the pleadings was forthcoming and that the parties were simply awaiting a motion hearing date. In these circumstances, notwithstanding the extensive delay in bringing the motion to strike since at least 2019, it would be unfair to find the defendants out of time because the motion hearing date was only confirmed after February 15, 2025.

[30] Leave is granted for the defendants to bring this motion to strike the pleadings.

Issue 2: Should the impugned paragraphs in the plaintiff's pleadings be struck or amended because of reference to settlement discussions?

[31] The defendants argue that the following paragraphs of the plaintiff's pleadings should be struck, or the portions amended, because they refer to settlement discussions:

A. Amended Amended Statement of Claim:

> Paragraph 50, which alleges: "In or about April 2017, the parties started negotiating the settlement, but the negotiation settled only part of the action. More particularly, the defendants admitted that the three orders they issued against the plaintiff were without base and admitted that the chip truck was not a building, but the parties failed to agree up on the quantum of the damages."

B. Amended Reply:

> Paragraph 4: "With respect to paragraphs 7, 8, 9 and 10 of the Defence, the plaintiff and the defendants were in the process of settling the application with its court file no. 16/409 and the issues of settlement included but were not limited to the following:
>
> (a) All issues raised by the said application;
>
> (b) Claims of various damages which will have to be included in the plaintiff's proposed statement of claim, if not settled."
>
> Paragraph 5: "The negotiation of the settlement lasted almost one year and the limitation period for the plaintiff's claim was about to expire."
>
> Paragraph 6: "The parties continued their efforts to settle the issues, but, in the meant time [sic], on April 30, 2018, the plaintiff issued their statement of claim."
>
> Paragraph 7: "During the negotiation, the parties accomplished the following resolutions:…"
>
> Paragraph 7(a): "On April 12, 2018, one of the councillors of the defendant Township of Brudenell, Lyndoch and Raglan ("Township") sent a text message to the plaintiff, and told him that

> the Township agrees that the subject chip truck is a chip truck and not a building;
>
> Paragraph 8: "The parties could not agree upon the amount of damages and costs of the application to be paid to the plaintiff."

[32] Rule 25.11(b) states that the court may strike out or expunge all or part of a pleading, with or without leave to amend, on the ground that the pleading is scandalous, frivolous or vexatious. It is settled law that referring to settlement offers or discussions, which are the subject to settlement privilege, may be considered scandalous, frivolous, or vexatious: *Renzone v. Onyx Homes Inc.,* 2020 ONSC 7722, at para. 15; see also *I. Waxman & Sons Ltd. v. Texaco Canada Ltd. et al.*, [1968] 1 O.R. 642 (H.C.), at p. 644, aff'd [1968] 2 O.R. 452 (C.A.); Sidney N. Lederman, Michelle K. Fuerst & Hamish Stewart, *Sopinka, Lederman & Bryant*: *The Law of Evidence in Canada*, 6th ed., Toronto: LexisNexis, 2022).

[33] The principle behind this is that if settlement discussions are inadmissible in a civil trial, referring to them in a party's pleadings would be similarly inadmissible: *2030945 Ontario Ltd. v. Markham Village Shoppes Limited*, 2013 ONSC 1020, at para. 8, citing *Canadian Gateway Development Corporation v. National Capital Commission*, 2002 CarswellOnt 2725, at p. 3.

[34] To determine if a pleading contains privileged settlement discussions that should be struck, the Court of Appeal for Ontario set out a three-part test in *Hollinger Inc. (Re),* 2011 ONCA 579, 107 O.R. (3d) 1, at para. 16, leave to appeal refused, [2011] S.C.C.A. No. 473. The judge must find that:

> [a] a litigious dispute must be in existence or within contemplation;
>
> [b] the communication must be made with the express or implied intention that it would not be disclosed to the court in the event negotiations failed; and,
>
> [c] the purpose of the communications must be to attempt to affect settlement.

[35] Considering the first factor, the plaintiff seeks as part of the relief in this Action a declaration from the court that the chip wagon is not a building. Hence, I find one of the litigation

issues for trial is whether the chip wagon constitutes a building under the Act. The settlement discussions referred to in paragraph 50 refer to this very issue.

[36] In paragraph 50 of the Amended Amended Statement of Claim, the Plaintiff indicates that settlement discussions commenced in April 2017 but without success and goes on to state that the parties failed to agree on quantum of damages. These two aspects of that paragraph clearly refer inappropriately to not only the fact that settlement discussions occurred but the content of what was or was not agreed upon (i.e., damages). It is self-evident that the defendants would not have intended that the contents of their settlement discussions would be disclosed and the purpose of the communications, including offers relating to damages, would be to affect settlement. As stated by Cavanagh J., "[i]t is not always necessary that a party who asserts settlement privilege over a communication must swear or affirm an affidavit to prove the requisite intent": *Stronach v. Belinda Stronach in her Personal Capacity and as Trustee of the Andrew Stronach 445 Family Trust*, 2021 ONSC 3801, at para. 31.

[37] As per the jurisprudence, the references in paragraph 50 to the settlement discussions, the failure to settle, and the failure to agree on damages have no place in the pleadings and should be struck. The sanctity of settlement privilege discussions and the need to keep them out of litigation before the court is further reinforced by Rule 49.06(1), which states that the fact that an offer to settle has been made shall not be contained in a pleading. Similarly, Rule 49.06(2) states where an offer to settle is not accepted, no communication respecting the offers shall be made to the court at the hearing of the proceeding until all questions of liability and relief are decided.

[38] In paragraph 50, the plaintiff goes on to plead further that the defendants admitted the Compliance Orders were "without base" and that "the chip truck was not a building." This suggests an admission by the defendants on a key issue in dispute. However, the plaintiff does not specify in the paragraph who amongst the defendants – was it a representative of the Township or the Chief Building Official – made such an admission and, furthermore, in what context the admission was made. If the admission was made by one or more of the defendants as part of a settlement negotiation, it should not have been included. It is common for parties to make admissions for the purpose of advancing settlement discussions and why such discussions are subject to settlement privilege. The purpose of settlement privilege is to promote settlement and, consequently, 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": *Sable Offshore Energy Inc. v. Ameron International Corp.*, 2013 SCC 37, [2013] 2 S.C.R. 623, at para. 2. The privilege applies even where a settlement is not reached.

[39] While the plaintiff does not specify which "defendant" in paragraph 50 made the admission, the plaintiff argued that the reference to the defendants' admissions comes from various sources which were not intended to be "secretive" and thus, do not constitute admissions made in the context of settlement. The first source of the admission is a text message exchange between Mr. Kim and councillor Rick Clement dated April 12, 2018, as follows:

> Mr. Kim: Good morning, Rick. Just before contacting the lawyer, any news from last meeting?
>
> Mr. Clement: Yes, counsel all 100% agrees on resolution
>
> Agree, it is a chip truck, not a building
>
> Only remaining issue is a minor variance
>
> Researching resolution to that
>
> Back to u later today
>
> I may want to talk to Andrea to get assistance on that issue
>
> Mr. Kim: Thank you Rick! See you soon.

[40] If Mr. Clement is the defendant that the plaintiff is referring to at paragraph 50, then it is important to note that Mr. Clement is not named as one of the defendants nor has it been established that he as an individual councillor represents the position of the Township. While Mr. Kim may have relied on Mr. Clement's text message, it does not necessarily reflect the position of the Township. Furthermore, Mr. Clement's reference to "resolution" and Mr. Kim's own reference to "before talking to the lawyers" suggests that the parties' were engaged in settlement discussions at the time. Who precisely participated in such settlement discussions is unclear. Therefore, I find that the reference in paragraph 50 "the defendants admitted that the three orders they issued against the plaintiff were without base and admitted that the chip truck was not a building" should be struck in its entirety.

[41] This does not mean that the plaintiff cannot refer to statements made by councillors upon whom they relied to work on or put into operation the chip wagon. For example, in paragraph 51 of the Amended Amended Statement of Claim, the plaintiff pleads that "[i]n or about April, 2018, one of the councillors of the Township admitted that the chip truck was not a building." The date referenced suggests that the plaintiff is referring again to the text message of Mr. Clement. However, the pleading is made without reference to settlement negotiations. The defendants take no issue with the wording of paragraph 51.

[42] Furthermore, it is important to note that the determination of whether the chip wagon is or is not a building within the Act is a legal determination to be made based on the definition of the word "building" in the legislation and a determination of the specifications of the chip wagon, particularly at the time of the issuance of the 2016 Compliance Orders and before modifications were made. In other words, a councillor's opinion is not necessarily determinative of the issue and their opinion is a matter of weight.

[43] The plaintiff also argues that the reference in paragraph 50 to admissions made by the defendants that the chip wagon is not a building is contained in correspondence from the Township to Mr. Kim dated May 25 and June 29, 2018, appended to Mr. Kim's affidavit. However, upon review of that correspondence, there is nothing contained therein where the Township admits that the chip wagon is not a building. The fact that the Township may have rescinded the Compliance Orders or issued a transient trader's licence does not in and of itself constitute an admission that the chip wagon was not a building at the time of the issuance of the Compliance Orders in May 2016. The plaintiff is correct that the Township's correspondence was not intended to be "secretive," but it also does not contain the admission claimed in paragraph 50.

[44] For all these reasons, I find paragraph 50 of the Amended Amended Statement of Claim contains references to settlement discussions and contains language that is scandalous, frivolous, or vexatious, and it should be struck in its entirety.

[45] For similar reasons, I find that the impugned paragraphs in the Amended Reply should also be struck for referring to settlement discussions. Paragraphs 4, 5, 6, 7, 7(a), and 8 offer a chronology of the settlement negotiations and refer to the failure of the parties to agree on damages

and costs. The plaintiff also refers at paragraph 7(a) to the same text message sent by Mr. Clement suggesting that this constituted an admission by the Township, that the chip truck is not a building. However, as already noted, Mr. Clement does not necessarily represent the Township.

[46] Finally, I disagree with the plaintiff that even if the impugned paragraphs contain reference to settlement discussions, an exception should be made because they are necessary for the plaintiff to respond to a limitation defence. The plaintiff does not articulate how the settlement discussions impacted "discoverability" of the claim. The triggering events which the plaintiff alleges impacted his ability to operate his chip wagon and which resulted in financial damages occurred in/around May 2016 when the Chief Building Official instituted Compliance Orders for the plaintiff's failure to obtain a building permit. At that time, the plaintiff opted to bring an Application rather than an Action. That settlement negotiations ensued on the Application thereafter or that a councillor made an informal admission does not alter the discoverability of the claim.

[47] This is not to suggest that the plaintiff may not have a viable defence against a limitation argument, but the plaintiff has failed to demonstrate how the reference to settlement discussions in the impugned paragraphs are relevant to the issue of discoverability and the triggering of the limitation period. Plaintiff's counsel has also not explained if there was a suspension of the limitation period by way of agreement: *Abrahamovitz v. Berens*, 2018 ONCA 252 at paras 35 to 38. Having said this, I am mindful that Rules 26.01 and 26.02 permit a party to amend their pleadings with leave of the court. Should the plaintiff have a sound basis for why the settlement negotiations are relevant to the application of the limitation defence, they may seek leave of the trial judge at the outset of trial to amend their pleadings accordingly.

[48] In conclusion, the defendants' motion to strike is granted. Paragraph 50 of the Amended Amended Statement of Claim and paragraphs 4, 5, 6, 7, 7(a), and 8 of the plaintiff's Amended Reply are struck in their entirety pursuant Rules 25.11 and 49.06(1) and the jurisprudence on settlement privilege.

Costs

[49] The defendants are the successful party on the motion and presumptively entitled to costs. The parties are encouraged to resolve the issue of costs. If the parties cannot resolve the issue of

costs for this proceeding, they may file brief written submissions not exceeding two pages exclusive of Bills of Costs. The defendants shall file their submissions by January 30, 2026, and the plaintiffs shall file their submissions by February 13, 2026. Costs submissions are to be sent to scj.assistants@ontario.ca and to my attention. Alternatively, the parties may agree to address the issue of costs on this motion following trial along with the other outstanding cost claims from earlier motions.

N Somji

Justice N. Somji

Released: January 9, 2026

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Defendant

COUNSEL:

Sang Joon Bae, for the Plaintiff

Allison Russell, for the Defendant

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