

16/5/18

Court File No: T-894-18

FEDERAL COURT

BETWEEN

GABRIEL FONO

FEDERAL COURT COUR FÉDÉRALE	
FILED	MAI 14 2018 L. BÉLANGER
OTTAWA, ON	

Applicant

-and-

CANADA MORTGAGE AND HOUSING CORPORATION

Respondent

APPLICATION UNDER S.18.1 OF THE FEDERAL COURT ACT

NOTICE OF APPLICATION

TO THE RESPONDENT:

A PROCEEDING HAS BEEN COMMENCED by the applicant. The relief claimed by the applicant appears on the following page.

THIS APPLICATION will be heard by the Court at a time and place to be fixed by the Judicial Administrator. Unless the Court orders otherwise, the place of hearing will be as requested by the applicant. The applicant requests that this application be heard at (place where Federal Court of Appeal (or Federal Court) ordinarily sits).

IF YOU WISH TO OPPOSE THIS APPLICATION, to receive notice of any step in the application or to be served with any documents in the

application, you or a solicitor acting for you must prepare a notice of appearance in Form 305 prescribed by the Federal Courts Rules and serve it on the applicant's solicitor, or where the applicant is self-represented, on the applicant, WITHIN 10 DAYS after being served with this notice of application.

Copies of the Federal Courts Rules information concerning the local offices of the Court and other necessary information may be obtained on request to the Administrator of this Court at Ottawa (telephone 613-992-4238) or at any local office.

IF YOU FAIL TO OPPOSE THIS APPLICATION, JUDGMENT MAY BE GIVEN IN YOUR ABSENCE AND WITHOUT FURTHER NOTICE TO YOU.

Date: May 09, 2018

Issued by: _____
(Registry Officer)

Address of local office: 90 Sparks Street/90, rue Sparks
Ottawa, Ontario / Ottawa, Ontario
K1A 0H9

TO: The Administrator

AND TO: Janice Payne
Lawyer
Nelligan O'Brien Payne LLP
50 O'Connor, Suite 300, Ottawa ON K1P 6L2

Tel: 613-231-8245
Fax: 613-788-3655

Solicitors for the Respondent

AND TO:

Canada Mortgage and Housing Corporation

c/o

Evan Siddall

Chief Executive Officer

700 Montreal Road,

Ottawa ON K1A 0P7

APPLICATION

This is an application for judicial review in respect of the Adjudicator decision rendered by Me E. Joy Noonan, appointed as per the Canada Labor Code Part III, Section XIV (hereafter “Adjudicator”), dated April 13, 2018 and received by Gabriel Fono’s (“Applicant”) lawyer on the same day (hereafter “the Decision”).

This decision flows from the November 23, 2017 award (the “Award”) in this case. This decision awarded \$32,067.92 which are the applicant fees on a partial indemnity basis up to August 20, 2016. On the basis that “CMHC’s August 20, 2016 offer of settlement soundly exceed the ultimate award on both a monetary and professional/added components basis” [quote from the Adjudicator decision].

The Adjudicator also found in her decision that CMHC August 2016 “settlement offers” are protected by settlement privilege.

The Adjudicator also found in her decision that CMHC did not waive settlement privilege by relying on the August 11 and 20th “settlement offers” in its costs submission.

The Adjudicator also ordered that the CMHC settlement documents referenced above be sealed, in order to preserve the confidentiality of the documents from third parties.

THE APPLICANT MAKES APPLICATION FOR:

One or more Orders in accordance with section 18, 18.1 and 18.2 of the Federal Courts Acts:

1. Setting aside the finding of the Adjudicator that CMHC August 2016 “settlement offers” are protected by settlement privilege;

2. Setting aside the decision of the Adjudicator ordering that the CMHC settlement documents referenced above be sealed, in order to preserve the confidentiality of the documents from third parties.;
3. Such further and other relief as this Honorable Court deems just.

THE GROUNDS FOR THE APPLICATION ARE:

1. The “offer of settlement”, as labelled by the Adjudicator is not subject to settlement privilege;
2. If the “offer of settlement” is subject to settlement privilege, which is disputed by the applicant, the exception of settlement privilege applies, such as it makes settlement privilege to no longer applies;
3. Alternatively if the “offer of settlement” is subject to settlement privilege, CMHC has waived the settlement privilege and can no longer relied on settlement privilege;
4. The Adjudicator incorrectly applied the law of settlement privilege on the fact of this case;
5. The Adjudicator erred in law and/or made and unreasonable decision when applying the law and the jurisprudence on this case to reach her conclusion;
6. The Adjudicator erred in law and/or made and unreasonable decision when granting the sealing order and rely on inappropriate consideration when granting the sealing order;
7. In August 2016 CMHC sent several letters to the applicant setting the terms and condition of the employment of the applicant. those conditions were not

negotiable;

8. CMHC's lawyer informed the applicant lawyer that they will rely on these "offers" for the purpose of cost;
9. There is no specific agreement between the parties prior or after the August 2016 letter were sent to the applicant which could have put restriction on the applicant or its lawyer, which the applicant consented to;
10. The Adjudicator by allowing CMHC to selectively rely on information about these letters has run counter to the principle of fairness governing waiver of privilege. fairness requires that if CMHC chooses to rely upon its "offer to settle" in its submissions on costs, it cannot be allowed to maintain privilege or assert confidentiality over certain information contained in these letters;
11. The Adjudicator by allowing CMHC to pick and choose the information about the "settlement offers" that they wish to bring to the public's attention has flouted the principle of open and accessible court proceedings;
12. The Adjudicator finding run against good administration of justice requiring that the contents of the "settlement offers" which be referred to by the Adjudicator in the costs decision as they may become relevant in the event the Adjudicator's reasons are reviewed by the Court in an open and transparent way;
13. Such further and other grounds as the applicant may advise and this honorable Court may permit.

THE APPLICATION WILL BE SUPPORTED BY THE FOLLOWING MATERIAL:

1. The Affidavit of Gabriel Fono and exhibits attached thereto; and

2. Such other material as applicant may advise and the Court permit.

The Applicant requests that the Adjudicator provides a certified copy of the full record considered in its decision, including any and all submissions, reports, recommendations, notes and documents considered in its decision dated April 13, 2018, or assembled relating to the decision by the Adjudicator;

DATED May 09, 2018 at Ottawa, Ontario.



Gabriel Fono
1104 Bathgate Drive
Ottawa ON K1J8G1

Tel: 613-406-2254
Applicant