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The Road to Settlement is Paved with Admissible Communications

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By Max Skrow

In a decision released earlier this year, the Ontario Court of Appeal affirmed that "without prejudice" communications are admissible to prove the existence of a settlement, even where those communications pertain to offers to settle which were not accepted and do not form the settlement at issue.

In *Idea Notion Development Inc. v CTO Boost Inc.*, 2022 ONCA 14, the appellant, CTO Boost Inc. ("**CTO**") hired the respondent, Idea Notion Development Inc. ("**Idea Notion**") to provide software development services. Idea Notion completed its work and submitted invoices in respect of same, and CTO sought to pay them via cheques, many of which were returned for "Non-Sufficient Funds". The parties then entered into negotiations with respect to the payment of Idea Notion's invoices, during which CTO made two offers to settle which Idea Notion rejected. CTO then made a third offer to settle, which Idea Notion accepted. In the process of papering the settlement, CTO purported to abandon the settlement on the basis that Idea Notion's invoices were fraudulent and inflated. Idea Notion then sued on the original contract, and later amended its claim to seek to enforce the settlement reached between the parties. Idea Notion also sued CTO's principals for breach of trust.

Idea Notion then moved for summary judgment before Justice Papageorgiou, who granted judgment in favour of Idea Notion. On the summary judgment motion (*Idea Notion Development v. CTO Boost Inc.*, 2021 ONSC 289), CTO took the position that its settlement communications with Idea Notion prior to CTO's third offer were privileged and should not be considered by the Court. Justice Papageorgiou rejected this argument, relying on the decision of the Supreme Court of Canada in *Union Carbide Canada Inc. v Bombardier Inc.,* 2014 SCC 35, wherein Justice Wagner (writing for a unanimous seven-judge panel) held as follows:

The rule is simple, and it is consistent with the goal of promoting settlements. A communication that has led to a settlement will cease to be privileged if disclosing it is necessary in order to prove the existence or the scope of the settlement. Once the parties have agreed on a settlement, the general interest of promoting settlements requires that they be able to prove the terms of their agreement.

CTO also argued that the alleged settlement did not set out all essential terms because it did not specify whether it was between CTO and Idea Notion only, or between CTO, Idea Notion and CTO's principals. To resolve this, Justice Papageorgiou considered evidence of CTO's first two offers, which offers Idea Notion had rejected, because they made clear that the parties were negotiating a settlement only between CTO and Idea Notion.

CTO appealed. In a *per curium* decision of the Ontario Court of Appeal, the Court ruled in Idea Notion's favour and upheld the decision of Justice Papageorgiou. Specifically, the Court held that Justice Papageorgiou was entitled to consider the "without prejudice" communications between the parties, including those with respect to prior offers made by CTO, because said communications "were also relevant to whether the parties had reached an agreement [following the third offer]" and therefore "fell squarely within the exception to the exclusionary rule described in *Union Carbide*." Accordingly, the Court dismissed CTO's appeal.

Takeaway

This decision affirms the principle from *Union Carbide* that where the existence of a settlement is at issue, the Court is entitled to consider privileged communications between the parties where such communications are necessary to prove the existence or scope of the agreement. It further demonstrates that this principle can, in appropriate circumstances, apply to communications pertaining to prior, rejected offers to settle. The road to settlement is paved with admissible communications; do not be surprised when the Courts examine them brick-by-brick.

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