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Commercial Litigation Insights: Settlement Privilege and the Limits of 'With Prejudice' Communications in Ontario

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During a litigious dispute, parties often have strategic reasons to send communications on a 'with prejudice' basis – i.e. with the intention of later relying on those communications in court. Parties may want to clearly state a position on the record to avoid any confusion down the line or warn an opposing party that there will be consequences if an opposing party does a certain thing. Among other things, strategic communications sent 'with prejudice' can help parties frame their cases effectively, put opposing parties on notice, and form the basis of a strong evidentiary record to put before the court.

A recent court decision in Ontario provides some clarity on when 'with prejudice' communications can be relied on in court. In particular, the decision addresses the situation where a settlement offer is labelled 'with prejudice' and what happens when the 'with prejudice' label comes into conflict with claims of settlement privilege. This new decision makes it clear that marking a settlement offer as being made 'with prejudice' will not necessarily remove the offer from the umbrella of settlement privilege.

Settlement Privilege

Settlement privilege is an important pillar of the Canadian justice system which has long been protected by the courts. It allows parties the freedom to engage in settlement negotiations, including making admissions for the purposes of facilitating settlement discussions, without worrying that the contents of those negotiations may be used against them in court proceedings. Without settlement privilege, it would be nearly impossible for parties to engage in honest and frank discussions aimed at resolving their disputes. Canadian courts protect settlement discussions from being used in court because there is an overriding public interest in favouring settlements.[1] Settlement discussions and offers can only be considered by the court once all issues other than costs have been determined. At that point, the public interest in favouring settlements is engaged by Ontario's Rule 49 – which provides that a party who makes an offer to settle and 'beats' that offer at trial is presumptively entitled to payment of its legal costs on an enhanced scale. This encourages parties to make and accept reasonable settlement offers. Other than this limited use, communications that are settlement privileged cannot be disclosed to the court.

When Does Settlement Privilege Apply?

In Ontario, the test for whether communications are settlement privileged is whether:

1. There is a litigious dispute;
2. The communications were made with the express or implied intention that they would not be disclosed in a legal proceeding in the event that negotiations failed; and
3. The purpose of the communications is to attempt to effect a settlement.[2]

There are two important nuances that parties must keep in mind about settlement privilege. The first is that settlement privilege belongs to both parties in a litigation. The second is that labels on correspondence are not necessarily a sure fire way to determine whether settlement privilege applies.

On the first point, both parties enjoy the protection of settlement privilege. One party cannot unilaterally waive settlement privilege, otherwise it would be all too easy for a party to rely on damaging admissions or communications that were provided in the spirit of trying to negotiate a compromise. If a party could unilaterally waive settlement privilege, there would be no protection for anyone who is negotiating honestly and candidly, and it would be significantly more difficult to reach a negotiated resolution.

On the second point, settlement communications are often labelled 'without prejudice' – i.e. the communication is being sent without prejudice to the party's position in ongoing or contemplated litigation. The label 'without prejudice' is generally correlated with the communication being protected by settlement privilege because it clearly satisfies the second element of the test. However, a 'without prejudice' label is not necessarily determinative of whether settlement privilege will protect the communication from being used in court. Conversely, a communication that is not labelled 'without prejudice' does not necessarily fall outside the protection of settlement privilege. The courts are more concerned with the content and the substance of the communications than the labels given to the communications.

Admissibility Of 'With Prejudice' Settlement Offers

The importance of content and substance was dealt with in the Ontario Superior Court's recent decision in *Canadian Flight Academy Ltd. v. The Corporation of the City of Oshawa*, 2024 ONSC 2756. In that decision, the court was considering an objection to the introduction of a 'with prejudice' letter as evidence at trial. The plaintiff, Canadian Flight Academy ("**CFA**"), had delivered a settlement offer in the form of a letter marked 'with prejudice' to the defendant, the City of Oshawa ("**Oshawa**"). CFA attempted to introduce the 'with prejudice' letter as evidence at trial. Oshawa objected to the inclusion of the letter on the basis that it was subject to settlement privilege. Even though the letter was marked 'with prejudice', the trial judge held that the letter would not be admitted as evidence at trial. The fact that the letter was marked 'with prejudice' did not change its character as a communication in furtherance of settlement and the trial judge found that the letter was "very clearly an offer to settle the litigation". The trial judge found that "even one offer" communicated in furtherance of settlement is sufficient to trigger settlement privilege. In this case, settlement privilege attached to the letter and could not be unilaterally waived by either party. CFA was not entitled to disclose the 'with prejudice' offer during the trial proceeding.

Takeaways

This decision makes it clear that courts are highly reticent to allow any communications discussing settlement to be used as evidence in court. Even labelling a communication as 'with prejudice' (typically an indication to the court that the communication is being made with the intent that it may later be disclosed or relied upon) may not be sufficient to dislodge the protection of settlement privilege. It may be possible to deliver a 'with prejudice' settlement offer that can be used in court but this recent decision makes it clear that courts will not lightly dismiss claims of settlement privilege. Parties seeking to strategically send communications 'with prejudice', especially communications that touch on settlement discussions, must carefully consider the possible invocation of settlement privilege if they intend to rely on those 'with prejudice' communications during the litigation and prepare those communications with clarity of purpose and position.

[1] *Union Carbide Canada Inc. v. Bombardier Inc.*, 2014 SCC 35, [2014] 1 S.C.R. 800, at para. 31.

[2] *Re Hollinger Inc.*, 2011 ONCA 579, 107 O.R. (3d) 1, at para. 16.

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