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Settlement Privilege and its Exceptions

By Emily Koch

In the practice of Family Law there are few things that are more frustrating than when you and opposing counsel reach what you believe to be an agreement on an issue, only for the opposing party to renege on that agreement, or to refuse to act on that agreement. This is especially frustrating when one party changes their mind before you are able to formalize the consensus into a binding Agreement or into a Consent Order. Settlement discussions and meetings to discuss settlement are presumptively without prejudice and subject to settlement privilege, however settlement privilege is not without exceptions. The below is an overview of the law in Alberta regarding settlement privilege, and the exceptions to the same.

Settlement Privilege is defined in *Costello v Calgary (City),* [1997] A.J. No. 888 as follows:

(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 communication must be to attempt to effect a settlement."

However, *Bellatrix Exploration Ltd. V Penn West Petroleum Ltd.,* [2013] A.J. No. 10 states clearly that "The notation "without prejudice" is not conclusive in establishing privilege. If the contents of a communication are truly in furtherance of settlement, and therefore privileged, it makes no difference whether the communication is marked "without prejudice" or not. A communication that is not in substance privileged does not become so just because one party places "without prejudice" on it. Likewise, the absence of the words "without prejudice" means nothing if the communication is truly privileged." The communication marked "without prejudice must meet the three part test as described in *Costello* to be truly privileged. Even if it does meet the three part test, *Belatrix* goes on to state that among the exceptions to the settlement privilege rule are

(a) where the communications are unlawful, containing for example, threats or fraud; or

(b) to prove that a settlement (an accord and satisfaction) was reached, or to determine the exact terms of the settlement.

Belatrix states at para 30 that "using without prejudice communications to prove that a settlement was actually achieved is not inconsistent with the policy behind the privilege."

The Court in *Bellatrix* also notes "In our view, communications sent during the period of time that the parties are involved in settlement discussions does not necessarily bring every communication within the protection of the settlement privilege." The Court states that a party stating their position is not privileged information – there mut be an element of compromise in the communication for settlement privilege to apply.

The principles above can be applied to bring an Application to enforce an agreement reached between the parties or between counsel, and can also be helpful to inform counsel as to what should and should not properly be included as evidence in filed Court documents.