Litigation - Canada

The Hollinger sealing order – using the *Sierra Club* test to protect settlement privilege

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Introduction

In a recent decision released in the Hollinger Inc Companies' Creditors Arrangements Act (CCAA) proceeding,(1) the Ontario Court of Appeal upheld a sealing order that protects from public disclosure the settlement amounts to be paid by Torys LLP and KPMG LLP under their respective settlement agreements with Hollinger, until such time as the settlements receive court approval. This decision is one of the few in which a sealing order has been granted in order to protect settlement privilege. While sealing orders are often used to protect commercially sensitive information, they have not typically been granted to protect settlement negotiations or settlement agreements.

This update outlines the court's decision in *Hollinger (Re)* and discusses the types of information and contexts that most often engage the subject of confidentiality orders. While settlement privilege has been protected by sealing orders in previous cases, such cases are uncommon. This update also attempts to explain why the court upheld the sealing order in this case, despite the limited precedent. Arguably, it may have done so, in part, because of the narrow and time-limited nature of the order.

Sealing order

The Hollinger CCAA proceeding commenced in August 2007. At that time, a litigation trustee was appointed by court order to deal with the assets available to Hollinger's creditors, which consist primarily of Hollinger's claims against its former officers, directors (including Conrad Black), and advisers (including Torys and KPMG). Following confidential settlement discussions and mediations, Hollinger, the litigation trustee, Torys and KPMG entered into two separate settlement agreements which both required court approval. The settling parties circulated the agreements to all parties, with the settlement amounts redacted, and Hollinger subsequently moved for a sealing order in respect of the settlement figures.

The sealing order granted by the motion judge provided for the immediate full disclosure of all terms of the settlements, other than the settlement amounts to be paid, and the details as to the manner of payment under the Torys settlement agreement. The sealing order also provided that any non-settling party could gain access to the redacted information upon signing a confidentiality agreement, enabling such party to use the redacted information in the settlement approval hearing. The sealing order would terminate upon final approval of the settlements.

Conrad Black appealed the sealing order on the following three grounds:

- The evidence was insufficient to justify a sealing order and the sealing order represented a departure from the open court principle;
- The requirement that a party seeking disclosure of the settlement amounts sign a confidentiality agreement imposed an undue burden; and
- Hollinger, KPMG and Torys had waived settlement privilege.

In determining whether to uphold the sealing order, the court of appeal relied on the test set out by the Supreme Court of Canada in *Sierra Club of Canada v Canada (Minister of Finance)*.(2) Under the *Sierra Club* test, a confidentiality order should be granted only where:

- the order is necessary to prevent a serious risk to an important interest, including a

commercial interest, in the context of litigation because reasonably alternative measures will not prevent the risk; and

- the salutary effects of the order, including the effects on the right of civil litigants to a fair trial, outweigh its deleterious effects, including the effects on the right to free expression, which includes the public interest in open and accessible court proceedings.

The court then analysed whether the information sought to be protected in this case was subject to settlement privilege, and whether settlement privilege could be protected by a sealing order. The court began by explaining the public purpose of settlement privilege and its requirements.

It is well established that in order to foster the public policy favouring the settlement of litigation, the law will protect from disclosure communications made where:

- there is a litigious dispute;
- the communication has been made "with the express or implied intention it would not be disclosed in a legal proceeding in the event negotiations failed"; and
- the purpose of the communication is to attempt to effect a settlement.(3)

The court held that the requirements of settlement privilege were met: "Hollinger, Torys and KPMG have a legally protected interest in being afforded a zone of confidentiality to shelter the most sensitive aspect of their proposed settlement."(4)

The court also concluded that settlement privilege "constitutes a social value of super-ordinate importance capable of justifying a sealing order that limits the open court principle".(5) There is a strong public interest in the settlement of disputes and the avoidance of litigation, and a concern that parties would be reluctant to engage in settlement processes unless there was some assurance that their negotiation efforts would not be used against them in litigation if they failed to resolve their disputes.(6) In other words, Hollinger, KPMG and Torys' interest in maintaining the confidentiality of the settlement amounts would constitute an important interest under the first part of the *Sierra Club* test.

With respect to the second part of the *Sierra Club* test, the court noted that the sealing order would have only a minimal intrusion on the open court principle, as it protected only the settlement amounts and gave the non-settling parties access to the settlement amounts upon signing a confidentiality agreement. The salutary effects of the order outweighed its deleterious effects.(7)

The court did not accept Black's submission that the settlement agreements were concluded agreements in respect of which litigation settlement privilege was spent. As the settlement agreements will have no legal effect until they are approved, the threat of disclosure of the tentative settlements requiring court approval would likely discourage parties from attempting to settle.(8) However, the court was careful to "leave to another day" the question of whether settlement privilege always attaches to other settlements requiring court approval - for example, class action settlements or settlements involving minors.

The court also disagreed with Black's argument that settlement privilege had been waived by the inclusion of almost all of the terms of the settlements in the public record and by disclosing the redacted portions to the parties who signed confidentiality agreements. The court held:

"The terms of the order said to amount to a waiver of privilege were plainly motivated to ensure that the sealing order was minimally intrusive on the open court principle. To accept Black's submission that those terms of the order constitute waiver would be to require sealing orders to be more restrictive than necessary to protect the public interest in fostering settlements."(9)

Sealing orders and settlement privilege case law

Cases involving confidentiality orders have not typically been granted to protect settlement privilege. In *Fairview Donut Inc v TDL Group Corp*,(10) where the defendants in a proposed class action moved for a confidentiality order restricting public access to certain documents, the Ontario Superior Court outlined the types of cases and interests typically protected by confidentiality orders, as follows:(11)

- trade secret and IP cases (which are likely to involve important public and private interests);
- CCAA cases (where the release of commercial information would undermine the efficacy of the proceedings or prejudice the position of stakeholders);
- cases involving minors or persons under disability;
- commercial cases (where there is a general interest that goes beyond the interest of the party); and

- class action cases (to protect commercially sensitive market information, private medical information, names of victims of sexual assault, financial information of defendants, names of investors and shareholders and information concerning young offenders).

Absent from this list are cases where sealing orders have been granted to protect information or documents that are subject to settlement privilege. In fact, in his factum, Black argued:

"Neither the Applicants nor the motion judge cited any authority for the proposition that a concluded settlement agreement that requires court approval remains privileged until that approval is granted. There is no support for that proposition…

The motion judge has created an unprecedented type of privilege if this decision stands, namely, that a concluded settlement, contingent on court approval, remains subject to privilege until the court approves the settlement… There is no authority for this proposition in any proceeding."

One explanation for the lack of cases addressing whether confidentiality orders can be used to protect settlement privilege is that documents that are subject to settlement privilege (or indeed any privilege) are not typically required to be produced and therefore the question as to whether a confidentiality order is necessary does not often arise. That said, there are cases that address this issue and, contrary to Black's submission, confidentiality orders have been used to protect settlement privilege, including settlement agreements themselves.

In *K v K (E)*,(12) for example, where two parties disputed whether a settlement had been reached, one party sought a sealing order to prevent the public disclosure of the alleged settlement details. The Alberta Court of Queen's Bench granted the sealing order, recognising the established settlement privilege and its public policy purpose of encouraging parties to engage in settlement discussions. The sealing order protected not only the settlement communications, but also the details of the settlement numbers. As in *Hollinger (Re)*, the sealing order was time limited (in that case until the court determined whether there was an enforceable settlement agreement between the parties).

Likewise, in *Noonan v Alpha-Vico*,(13) the Ontario Superior Court held that settlement privilege applied to settlement negotiations between the plaintiffs and a party that had been sued by the same plaintiffs in respect of the same incident in a different proceeding, and protected the negotiations with a sealing order. The court also described an existing confidentiality order that protected the minutes of settlement that resulted from the aforementioned settlement negotiations. The court noted:

"In a remarkable effort to keep the terms of settlement secret, the parties in the school board action did not bring a motion in that action. Instead they brought a separate free standing application for approval of the settlement… [T]he court in Brockville issued a consent order approving the minutes of settlement and also sealing the Brockville court file. The approval application and the order itself are therefore not matters of public record. Because the defendants in the products liability action were not parties to the school board action and were not served with the notice of application, they could make no submissions to the judge hearing the matter about the propriety of sealing the file. Nor, obviously, could they request terms."(14)

This decision is not publicly available, as it was sealed from the public record, making it difficult to know why the order was granted. However, it demonstrates that there is some (albeit limited) precedent for using confidentiality orders to protect settlement privilege – even where other parties will be adversely affected.

Finally, in *Histed v Law Society of Manitoba*,(15) which concerned a motion by the Manitoba Law Society to seal a court file, the Manitoba Court of Appeal considered whether correspondence between two lawyers, which contained the substance of settlement negotiations and which were marked as being 'without prejudice', could be the subject of a confidentiality order. The court held that the correspondence fell into the category of settlement negotiations, and as such was protected from disclosure. The court emphasised the public policy reasons for protecting settlement privilege:

"Encouraging settlements is an important goal in the administration of justice. It is in the public's interest that as many legal disputes as possible be settled by the parties themselves in a consensual way… The confidentiality surrounding settlement negotiations support that goal."(16)

Comment

These cases demonstrate that there is precedent in Canada for using sealing orders to protect settlement privilege – including settlement figures. However, there is no doubt that this precedent is limited and that the *Hollinger (Re)* decision represents an important addition thereto.

The Ontario Court of Appeal's decision is not surprising in the circumstances. A close look at the sealing order requested reveals why the court was willing to grant it in this instance. Specifically, the sealing order inwas narrow, in that it applied only to the settlement figures themselves, the non-settling parties could access the figures if they signed confidentiality agreements and the order was time limited until such time as the settlements are approved. Given how little Hollinger, KPMG and Torys sought to redact, it would have been difficult for the court to find that the intrusion on the public interest in open and accessible court proceedings was more than minimally affected.

Further, the limited use of sealing orders to protect settlement privilege in the past does not imply that settlement privilege does not represent an 'important interest' under the first part of the *Sierra Club* test. As the court noted in *Sierra Club*, in order to qualify as an important commercial interest, the interest in question cannot merely be specific to the party requesting the order; the interest must be one which can be expressed in terms of a public interest in confidentiality. In this case the court made it very clear that settlement privilege is a fundamental doctrine, in which there is an important public interest.

However, it is unclear whether or how future decisions will rely on the *Hollinger (Re)* precedent. The Onatario Court of Appeal specifically stated that it would "leave to another day" the question of whether settlement privilege always attached to other settlements requiring court approval - for example, class action settlements or settlements involving minors. It remains to be seen whether (and to what extent) other courts will rely on the court of appeal's reasoning in *Hollinger (Re)* in cases where sealing orders are sought in respect of class action settlements and settlements involving minors.

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Endnotes

(1) *Hollinger Inc (Re)*, 2011 ONCA 579 [*Hollinger (Re)*].

(2) [2002] 2 SCR 522 [*Sierra Club*].

(3) *Hollinger (Re), supra* note 1 at Paragraph 16.

(4) *Ibid* at Para 17.

(5) *Ibid* at Para 20.

(6) *Ibid* at Paras 18-19.

(7) *Ibid* at Para 23.

(8) *Ibid* at Para 24.

(9) *Ibid* at Para 29.

(10) [2010] OJ No 502 (SCJ).

(11) *Ibid* at Paras 43-59.

(12) [2004] AJ No 1322 (QB).

(13) [2010] OJ No 2807 (SCJ).

(14) *Ibid* at Para 16

(15) [2005] MJ No 327 (CA).

(16) *Ibid* at Para 43.