

BRITISH COLUMBIA SECURITIES COMMISSION

Securities Act, RSBC 1996, c. 418

Citation: Re Morabito, 2023 BCSECCOM 226

Date: 20230504

**Global Crossing Airlines Group Inc. (formerly known as Canada Jetlines Ltd.)
and Mark Morabito**

Panel	Judith Downes	Commissioner
	James Kershaw	Commissioner
	Marion Shaw	Commissioner

Submissions completed March 14, 2023

Ruling date April 3, 2023

Reasons date May 4, 2023

Counsel

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Reasons for Paragraph 16(a) order in Second Supplemental Ruling on Disclosure

I. Introduction

- [1] By notices of application dated March 24, 2022 and April 19, 2022 respectively (Disclosure Applications), Mark Morabito (Morabito) and Global Crossing Airlines Group Inc. (Global) sought orders requiring the executive director to disclose a broad range of materials in his possession on the basis that the executive director had failed to disclose to the respondents all relevant documents in his possession or control.
- [2] To date, this panel has issued four rulings (Rulings) on the Disclosure Applications:
- (a) *Re Morabito*, 2022 BCSECCOM 433 (First Ruling),
 - (b) *Re Morabito*, 2022 BCSECCOM 440, which extended the deadline set in the First Ruling for the filing of certain documents and information,
 - (c) *Re Morabito*, 2023 BCSECCOM 83 (Supplemental Ruling), and
 - (d) *Re Morabito* 2023 BCSECCOM 150 (Second Supplemental Ruling).

II. Procedural History

- [3] The First Ruling required, among other things, the executive director to provide lists of certain documents and categories of documents not disclosed by the executive director, describing those documents and categories of documents in sufficient detail so that the grounds upon which the executive director had not disclosed them could be assessed.
- [4] On November 7 and 16, 2022, in response to the First Ruling, the executive director provided additional disclosure documents to the respondents as well as reasons for non-disclosure of certain documents and categories of documents. The information with respect to the grounds for non-disclosure was contained in an appendix to a letter from counsel for the executive director (Information Appendix).
- [5] The Information Appendix included descriptions of 12 documents relating to communications with a former CEO of Global (Former CEO), which had not been disclosed by the executive director. The basis for non-disclosure with respect to four of those documents (Settlement Documents) was a claim of settlement privilege.
- [6] By letter dated January 3, 2023, Morabito advised that, after reviewing the Information Appendix, he was limiting the scope of the further disclosure sought in his Disclosure Application to the documents listed in ten schedules, Schedules A to J, identified in the letter (Morabito Schedules).
- [7] Schedule I of the Morabito Schedules included the Settlement Documents.
- [8] In his January 3, 2023 letter, Morabito also disputed that the executive director had established settlement privilege with respect to the Settlement Documents and argued that all of the documents listed in Schedule I, including the Settlement Documents, were relevant and ought to be disclosed.
- [9] On January 6, 2023, the panel advised the parties that it would consider submissions on the issue of settlement privilege and, on January 12, 2023, the respondents provided their submissions.
- [10] On January 17, 2023, as part of his reply submissions on the issue of settlement privilege, the executive director provided to the respondents, among other things, the Settlement Documents in redacted form.
- [11] On February 17, 2023, the Commission issued the Supplemental Ruling which required the executive director, among other things, to file with the Hearing Office the redacted Settlement Documents.
- [12] On February 28, 2023, the executive director provided information and documentation to the parties and provided the redacted Settlement Documents to the Hearing Office, both in response to the Supplemental Ruling.

- [13] On March 14, 2023, in response to a direction from the panel, the executive director provided to the Hearing Office, among other things, an unredacted copy of one of the Settlement Documents.
- [14] On April 3, 2023, the Commission, after reviewing the documents and submissions provided by the parties, issued the Second Supplemental Ruling ordering that:
- (a) the executive director had established his claim for settlement privilege over the redacted portions of the Settlement Documents (the Settlement Privilege Ruling), and
 - (b) the executive director had met his disclosure obligations with respect to the documents in the Morabito Schedules and the redacted materials within those documents need not be disclosed.
- [15] On April 19, 2023, Morabito requested that reasons be given with respect to the Settlement Privilege Ruling. As stated in the First Ruling, it was the panel's intention to issue reasons for the Rulings. Given the public interest in conducting proceedings expeditiously, it is common for Commission panels to issue reasons with respect to rulings made in preliminary applications with their findings on liability. However, that is not always the practice. We have considered the Commission's goal, as captured in section 1.2 of BC Policy 15-601 - *Hearings*, to conduct its proceedings fairly, flexibly and efficiently. In the circumstances before us, we have decided that it is appropriate to issue reasons now, as requested, with respect to the Settlement Privilege Ruling.
- [16] These are our reasons with respect to the Settlement Privilege Ruling.

III. Applicable law

Settlement privilege

- [17] Settlement privilege protects communications and documents created for the purpose of settlement from disclosure to persons who are not party to the settlement discussions.
- [18] The elements required to establish settlement privilege over documents or communications are as follows:
- (a) a litigious dispute must be in existence or in contemplation,
 - (b) there is an express or implied intention that the communication must not be disclosed to the court if negotiations fail, and
 - (c) the purpose of the communication is to effect a settlement.¹
- [19] A mere assertion of privilege is insufficient to establish settlement privilege without further evidence.²

¹ Lederman, Bryant & Fuerst, *The Law of Evidence Canada*, 5th Ed(2018) para 14.348

² *P.M. & C. Specialist Contractors Inc. v. Horton CBI Limited*, 2015 ABQB 209

[20] Settlement privilege does not attach to a document simply because it is marked “without prejudice”.³ In *Tuck v. Supreme Holdings Ltd.*, 2014 CanLII 64136 (N.L. S.C.), the Court addressed this concept, quoting at paragraph 25 from another decision of the Newfoundland Supreme Court, *Meyers v. Dunphy*, 2005 NLTD 166 (affirmed 2007 NCLA 1):

31. Courts have repeatedly found ... that it is not whether the words “without prejudice” or some other limiting or qualifying language are used that is determinative. Rather, it is the nature of the discussion or correspondence that governs. The second condition [that the communication must be made with the express or implied intention that it not be disclosed to the court in the event negotiations fail] raises the question of how the parties signified their intent that their communications would have been subject to the privilege, and would remain confidential. Certainly parties may signify their intention of issuing a privileged document by inserting the words “Without Prejudice”, or a similar disclaimer, in any communication. ...

32. Notwithstanding the use of the disclaimer, the party claiming the privilege has the onus of showing the communication was made in circumstances which raise privilege. In *051766 N.B. Ltd. v. Wilbur*, 2004 CarswellNB 150, 2004 NBQB 122 (N.B.Q.B.) the issue was whether documents containing the disclaimer were automatically subject to the privilege. Rideout J. discussed this issue and noted the words alone do not raise the privilege. The communication must be made in circumstances which raise a context of negotiations or settlement.

[21] Settlement privilege does not attach to routine correspondence. However, preliminary correspondence relating to settlement negotiations may be privileged. In *Tuck* at paragraph 26, the Court said that as settlement negotiations have to begin somewhere, preliminary correspondence, such as inviting the other party to enter into a process for settlement, may be privileged. The Court cited *Meyers* at paragraph 46:

In *Hansraj v. Ao et al.*, 2002 ABQB 385 (CanLII), 8 WWR 725, 314 AR 262, ...while confirming the existence of a settlement privilege, a more nuanced approach was taken. It acknowledges that documents marked “without prejudice” will be privileged, even in the absence of specific terms or offers of settlement, if they are the “opening shot” in discussion intended to lead to settlement...

[22] Settlement privilege survives the death of a litigant. In *Flock Estate v. Flock*, 2019 ABCA 194 at paragraph 37, the Court found that the death of one of the litigants does not displace settlement privilege.

IV. Parties’ submissions ***Settlement Documents***

[23] The respondents made submissions regarding settlement privilege in other applications which were the subject of the Rulings. We took those submissions into consideration with

³ *Reum Holdings Ltd. v. 0893178 B.C. Ltd.*, 2015 BCSC 2022

respect to the Settlement Privilege Ruling. We also focused on the submissions made by the parties in response to the panel's January 6, 2023 invitation to provide submissions on the issue. These submissions were based on the summary of the four Settlement Documents set out in the Information Appendix.

- [24] The Information Appendix included a description of the category of documents not disclosed, the nature and content of the document in issue and the reason for non-disclosure. With respect to the Settlement Documents, the reason for non-disclosure was the same for each document: a notice of hearing was in contemplation, communication was made with the express intention that it would not be disclosed and the purpose of the communication was an attempt to effect a settlement.
- [25] Morabito submitted that the reasons for non-disclosure set out in the Information Appendix with respect to the Settlement Documents were "boiler plate" justifications without elaboration or evidentiary support. He stated that a mere assertion of privilege is insufficient to establish settlement privilege. He argued that the executive director bore the burden of establishing that each element of the test for settlement privilege had been met with respect to each document over which he claimed privilege and that the executive director had failed to do so.
- [26] Morabito also submitted that the Settlement Documents were relevant and should be disclosed as it was relevant to his defence to know what the Former CEO, who Morabito asserts was the person ultimately responsible for Global's disclosure, said to the executive director. He said that there was no other way he could obtain this information, as the Former CEO had since died.
- [27] Global also submitted that the executive director had not established that each of the four Settlement Documents satisfied each element of the test for settlement privilege. Global argued specifically that the executive director had failed to establish that each communication was made with an express or implied intention that it would not be disclosed if negotiations failed and that the purpose of each communication was to effect a settlement.
- [28] Global submitted that settlement privilege does not attach to a document simply because it is marked "without prejudice" and that the content of the document must be examined to determine if it contains a settlement offer or refers to settlement indirectly by inviting compromise or some other approach. Global said that the descriptions in the Information Appendix contained no indication that a settlement offer or compromise was being discussed and there was no evidence that the communications included in the Settlement Documents were "on the road to settlement discussions".
- [29] Global also submitted that the initial communications with the Former CEO included in the Settlement Documents contained statements regarding routine matters such as introductions, arranging times for further calls and initial discussions about the matter and investigation of the claims. They said, as such, these communications were routine correspondence and were not subject to settlement privilege.

[30] As noted above, the executive director provided the respondents with redacted copies of the Settlement Documents with his reply submissions. The executive director stated that he provided these documents in the interests of the efficiency and flexibility of the proceedings but that he maintained his position that, among other things, he was under no obligation to disclose the Settlement Documents on the basis of settlement privilege.

[31] The redacted versions of the Settlement Documents comprise the following:

- (a) Notes made by counsel for the executive director dated June 3, 2021 regarding a telephone conversation with the Former CEO on that date. The redacted version of that document includes the following statements:
 - I spoke to [the Former CEO] on a without prejudice basis
 - He is [redacted] discussing settlement
 - He asked that I send him an email enclosing a summary of the allegations against him
 - We will have a further conversation tomorrow morning.
- (b) An email from counsel for the executive director dated June 3, 2021 with the salutation “Dear [Former CEO]”. There are no redactions to the content of the email other than the recipient’s email address. It is headed “without prejudice”. It references the call earlier in the day, confirms that the executive director will be issuing a notice of hearing naming the Former CEO, among others, as respondents, summarizes the allegations that would be included in the notice of hearing and confirms the time of the call the next day.
- (c) An email from counsel for the executive director dated June 3, 2021 with the salutation “Dear [Former CEO]”. There are no redactions to the content of the email other than the recipient’s email address. It is headed “without prejudice”. The email seeks certain information from the Former CEO “for the purposes of settlement discussions”.
- (d) Notes made by counsel for the executive director dated June 4, 2021 regarding a telephone call with the Former CEO on that date. The notes include a statement that in the call the Former CEO advised he wants to seek legal advice before discussing settlement and to make inquiries as to the availability of directors’ and officers’ liability insurance. The response of counsel to these comments is redacted.

[32] On January 18, 2023, after receipt of the redacted documents from the executive director, Morabito advised that he sought disclosure of unredacted copies of all of the documents in the other Morabito Schedules including the Settlement Documents. Among other things, he argued that certain of the redacted information appeared to include the Former CEO’s response to the allegations to be made against him, which allegations were the same as the allegations made against the respondents. Morabito did not make specific submissions as to why this should mean that these documents should be disclosed. We assume that it was on the basis of his submission outlined in paragraph 26.

V. Analysis

- [33] While the Settlement Documents do not contain the terms of a settlement offer, it is clear that the purpose of the communications contained therein was to initiate discussions to effect a settlement. All of the Settlement Documents either refer to the initiation of these discussions or relate to steps to be taken to initiate them.
- [34] Preliminary correspondence relating to initiation of settlement discussions has been found to be subject to settlement privilege. As noted above in *Tuck*, the Court cited a quote from *Hansraj* which stated that documents marked “without prejudice” will be privileged, even in the absence of specific terms or offers of settlement, if they are the “opening shot” in a discussion intended to lead to settlement. It is clear from their content that the Settlement Documents were “opening shots” in discussions between the executive director and the Former CEO regarding settlement.
- [35] There is no issue that a litigious dispute was in contemplation at the time of the communications contained in the Settlement Documents. The initial June 3 call to the Former CEO and the follow-up email both refer to the imminent issuance of a notice of hearing in which the Former CEO will be named as respondent and the follow-up email summarizes the proposed allegations.
- [36] The communications between counsel for the executive director and the Former CEO set out in the Settlement Documents described in paragraph 31(a) to (c) were identified as being on a “without prejudice” basis. While that is not the case with the Settlement Document identified in paragraph 31(d), the telephone call described therein reflects a continuation of discussions relating to the initiation of the settlement discussions referenced in the preceding communications.
- [37] The phrase “without prejudice” is commonly used to express an intention that the communication not be disclosed in court as evidence against the interests of the relevant party if settlement negotiations fail. While those words alone are not determinative, the use of the phrase in the context of the initiation of negotiations reflected in the Settlement Documents supports the conclusion that there was an express or implied intention of the parties that the communications in each of the Settlement Documents not be disclosed if settlement discussions failed.
- [38] Once it has been established that documents are subject to settlement privilege, the fact that they are relevant does not make them subject to disclosure. Settlement privilege is only an issue if the documents are relevant and would otherwise be disclosable.
- [39] The fact that the Former CEO is dead does not make documents that have been established as being subject to settlement privilege subject to disclosure. As stated in *Flock*, the death of a litigant does not displace settlement privilege.
- [40] In the circumstances, we found that the executive director had established each of the elements required to claim settlement privilege for each of the Settlement Documents

and, accordingly, we found that the redacted portions of the Settlement Documents need not be disclosed.

May 4, 2023

For the Commission

Judith Downes
Commissioner

James Kershaw
Commissioner

Marion Shaw
Commissioner