Without prejudice?

Settlement privilege across the border

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Canada and the United States share a common public policy of encouraging compromise and settlement in legal disputes. The two countries diverge, however, in their approach to promoting that policy. The distinctions are significant and can lead to different litigation outcomes on either side of the border.

Public policy favours settlement in Canada and the United States

Canadian and US courts alike have long recognized a strong public interest in the settlement of disputes and litigation.[1] In Canada,

> there is an overriding public interest in favour of settlement. This policy promotes the interests of litigants generally by saving them the expense of trial of disputed issues, and it reduces the strain upon an already overburdened provincial court system.[2]

Likewise, in the United States, "[s]ettlements before reaching a trial foster a more efficient, cost-effective, and significantly less burdened judicial system."[3]

Despite similar public policies favouring settlement, the countries do not share common rules to encourage settlements. While Canadian courts have established a "settlement privilege" akin to the solicitor–client privilege, United States courts, in all but a handful of jurisdictions, employ a narrower evidentiary rule that limits only the admission of certain settlement communications at trial. For parties doing business – and litigating

disputes – on both sides of the border, the disparity can result in unanticipated and potentially harmful consequences.

Canada's settlement privilege

To promote the public policy favouring settlements, Canadian courts, including in Quebec, have established a "settlement privilege." Such a privilege prohibits the disclosure or admission into evidence of settlement communications and completed agreements, including the amount of settlement.[4]

The Canadian settlement privilege began as the "without prejudice" rule adopted from English common law. According to the rule, communications made "without prejudice" in the course of settlement negotiations were inadmissible in evidence. The rule "was based on the understanding that parties will be more likely to settle if they have confidence from the outset that their negotiations will not be disclosed."[5] Initially, Canada's "without prejudice" rule protected only communications expressly stated as such and only when those communications did not result in a completed settlement.[6]

Over time, Canadian courts determined that the "without prejudice" rule should be a "class" or "blanket" privilege.[7] This broader "settlement privilege" has been extended to all settlement communications and documents, including those not expressly stated to be "without prejudice,"[8] and also protects completed settlement agreements.[9]

The Canadian settlement privilege can be overcome if a competing public interest outweighs the interest in encouraging settlements.[10] Employing this standard, Canadian courts have overridden the settlement privilege when its proponent has engaged in misrepresentation or fraud – or made threats to do so.[11] In *Berry v. Cypost*, for example, the defendant's witness admitted during a settlement negotiation that he had lied in an affidavit previously submitted to the court. The BC Supreme Court ruled that the plaintiff could testify at trial and cross-examine the defendant's witness about the admission despite its having been made as a settlement communication. The court reasoned, "It cannot be the case that an admission that a false affidavit had been sworn would be protected by the privilege associated with any honest attempt at settlement."[12]

Exceptions are also made to prevent a plaintiff from being overcompensated or when necessary to prove the existence or scope of a settlement.[13]

US Evidentiary rules on settlements

Unlike Canada, the United States has not widely adopted a broad settlement privilege in its federal or state courts. Although US courts routinely affirm the importance of encouraging settlements, they have concluded that "an across-the-board recognition of a broad settlement negotiation privilege is not necessary to achieve settlement."[14] The United States balances the policy favouring settlements against discovery rules that, by and large, reach farther than those in Canada.[15]

> US courts have rarely addressed, at least in published decisions, whether documents protected by the Canadian settlement privilege are discoverable in a US proceeding.

Only one US jurisdiction, the federal Court of Appeals for the Sixth Circuit, which covers the federal trial courts in Kentucky, Michigan, Ohio and Tennessee, has adopted a settlement privilege.[16] "The public policy favouring secret negotiations, combined with the inherent questionability of the truthfulness of any statements made therein, leads us to conclude that a settlement privilege should exist. . . ."[17] Even the Sixth Circuit, however, has not extended the privilege as far as Canadian courts, having held only that "communications made in furtherance of settlement are privileged"; completed agreements and settlement amounts are fair game for discovery and admission in evidence.[18]

With the exception of the Sixth Circuit, US courts have declined to recognize a broad settlement privilege because Congress and many state legislatures have already addressed the issue – and did not create a privilege. The principal authorities concerning settlement communications are Federal Rule of Evidence 408 and parallel evidentiary rules enacted by many states.[19] Rule 408 and its state-law counterparts do not establish a privilege and do not address pre-trial discovery. Rather, they provide that evidence of an offer or acceptance of valuable consideration in settlement of a disputed claim is not admissible to prove or disprove the validity or amount of the claim.[20] Rule 408 therefore only precludes the use of settlement communications for certain purposes at trial. In addition, Rule 408(b) identifies numerous exceptions that permit the admission of settlement communications "for another purpose, such as proving a witness's bias or prejudice, negating a contention of undue delay, or proving an effort to obstruct a criminal investigation or prosecution."[21]

Because Rule 408 concerns only the admissibility of settlement evidence, the substantial majority of US courts to address the issue have concluded that there is no prohibition over the pre-trial discovery of settlement communications, agreements or amounts.[22] One court concisely explained the distinction:

> Congress clearly enacted [Rule 408] to promote the settlement of disputes outside the judicial process. However, it is equally plain that Congress chose to promote this goal through limits on the *admissibility* of settlement material rather than limits on *discoverability*. . . . In fact, the Rule on its face contemplates that settlement documents may be used for several purposes at trial, making it unlikely that Congress anticipated that discovery into such documents would be impermissible.[23]

Therein lies the fundamental difference between Canada and the United States: Canada limits all access to settlement evidence in service of the public policy, while the United States limits only the admissibility of such evidence and, even then, for certain purposes.

Settlement communications in the context of a mediation may receive greater protection in the United States, but a hodgepodge of statutes, court rules and private agreements govern the scope and applicability of such measures. The *Uniform Mediation Act* (UMA) provides that a "mediation communication is privileged" and "is not subject to discovery or admissible in evidence," however only nine states and Washington DC have enacted the UMA.[24] The UMA's privilege also does not reach completed settlement agreements.

A clash of competing interests

US courts have rarely addressed, at least in published decisions, whether documents protected by the Canadian settlement privilege are discoverable in a US proceeding. In the leading case to do so, a Washington DC federal court determined that the bulk of settlement-related documents generated in connection with a Canadian government investigation should remain protected.[25] Although the decision in *In re Vitamins Antitrust Litigation* demonstrates that US courts can invoke principles of international comity to respect the Canadian settlement privilege, its influential value in a strictly private or commercial context is uncertain because of the role that the substantial interests of the Canadian government played in that case.

The *Vitamins* decision resolved a motion to compel the production of documents that defendant Bioproducts had provided to law enforcement agencies in Canada and Europe as well as Bioproducts' written communications with those agencies. Notably, the court ordered production of Bioproducts' submissions to the European Commission (EC) but denied the motion with respect to all but a few documents provided to the Canadian government.[26]

Owing to an earlier ruling by the court with respect to other defendants' EC documents, the court relied on "law of the case" to conclude that Bioproducts was required to produce such documents to the plaintiffs. In the prior decision, which the court reaffirmed, an argument that an "investigative privilege" protected the EC documents from disclosure was rejected. No party suggested that the EC recognized a settlement privilege akin to the Canadian doctrine.[27]

With respect to the Canadian documents, the court adopted the following five-prong comity analysis initially employed by the court-appointed Special Master:

1. the importance to the investigation or litigation of the documents or other information requested;
2. the degree of specificity of the request;
3. whether the information originated in the United States;
4. the availability of alternative means of securing the information; and
5. the extent to which noncompliance with the request would undermine important interests of the United States, or compliance with the request would undermine important interests of the state where the information is located.[28]

The Special Master found, and the court agreed, that the first four factors weighed in favour of disclosing the Canadian documents.[29] The fifth factor proved decisive, however, in the court's determination to deny disclosure of most of the documents:

> The Special Master acknowledged that the documents would be protected from disclosure under Canadian law as they were exchanged during settlement negotiations, and conducted his analysis under each category [of documents] to ascertain whether, as Canada asserted, disclosure would substantially reveal Canada's negotiating positions and potentially affect Canada's ability to negotiate settlements with other potentially cooperating parties.[30]

The Special Master, with the court's concurrence, concluded that an executed plea agreement and drafts of the plea agreement, an agreed statement of facts, indictment, prohibition order, immunity letter and cover letter, as well as letters of Bioproducts' counsel commenting on these drafts and related matters, should be protected from disclosure. "Noting that the issue is close," the Special Master and the court resolved that "such documents would reveal Canada's negotiating positions and potentially interfere with Canada's power to settle antitrust cases within its borders."[31] The court further observed that the Canadian government had agreed to treat the documents as confidential. These circumstances, the court noted, distinguished the Canadian documents from the EC documents it had ordered Bioproducts to disclose.[32]

The Canadian settlement privilege, therefore, was an important basis to deny disclosure of documents falling within its scope in a US proceeding. However, its precedential value is far from certain for several reasons. The decision was not affirmed by an appeals court

and has not been cited in subsequent cases. In fact, the *Vitamins* case appears to be the only reported US decision addressing the impact of the Canadian settlement privilege on the disclosure of information in a US proceeding. The Canadian government's direct public interest in the *Vitamins* case further complicates the matter. On the one hand, the court undoubtedly credited the risk to Canada's ability to settle antitrust cases and heavily weighed "the Canadian government's interest in protecting the viability of its practices and procedures."[33] On the other hand, the court distinguished the Canadian government's interest in *settling* cases from the EC's interest in *investigating* them, suggesting that its analysis turned on the nature of the privilege asserted and not the involvement of a governmental agency.

Impact and recommendations

The *Vitamins* case shows that the Canadian settlement privilege may protect settlement-related materials in a US proceeding. That said, the court observed that the "issue is close," and the decision has not been followed in any reported decision.

Therefore, the discoverability vs. admissibility dichotomy between the Canadian and US doctrines can have practical impacts, particularly in litigation that arises out of an earlier settlement or relates to previously settled litigation with a common set of facts. Consistent with Rule 408 and similar state law provisions, litigants in the United States typically are entitled to obtain settlement communications and agreements from their adversaries. That result is very different from the one in Canada, where litigants are rarely entitled to obtain such materials owing to the settlement privilege.

A party who receives discovery of its adversary's settlement communications and agreements can obtain a substantial advantage. Even if factual concessions in those communications are not admissible at trial, the materials can provide insight into a party's strategies; its real or perceived weaknesses; and the party's appetite to settle by paying monetary compensation. The settlement materials can also be used to obtain testimony and admissions that are admissible at trial.

A Canadian party, particularly one with cross-border activities, therefore could be required to disclose information in US litigation that it would not have contemplated having to disclose under Canadian law. Although such disclosure may be unavoidable, a Canadian party can take the following precautionary steps during the course of settlement negotiations to mitigate the impact in related US litigation:

- Keep written settlement communications to a minimum and avoid making factual concessions in writing.
- Conduct settlement negotiations within the context of a confidential mediation.
- Include lawyers in internal communications concerning the settlement of disputes to enhance protection under the solicitor–client and litigation (or work product) privileges.
- Require that settlement agreements, including the fact of the settlement, are confidential and disclosure can be made only with the consent of the counterparty.

Because most US jurisdictions simply do not treat settlement communications as privileged – and generally treat settlement agreements as ordinary contracts – these measures are by no means foolproof. Perhaps the most important advice to Canadian parties is to be aware of the dissimilar rules on either side of the border and plan accordingly to avoid surprise.

Notes

1. See *Sable Offshore Energy Inc v Ameron Int'l Corp*, [2013] 2 SCR 623 [Sable Offshore]; *United States v Contra Costa County Water Dist*, 678 F2d 90, 92 (9th Cir 1982).
2. *Sable Offshore*, ibid at para 11, quoting *Sparling v Southam Inc* (1988), 66 OR (2d) 225, at 230 (HCJ); Alan W Bryant, Sidney N Lederman and Michelle K Fuerst, *Sopinka, Lederman & Bryant: The Law of Evidence in Canada* (Markham, ON: LexisNexis Canada, 2014) § 14.316 ("It has long been recognized as a policy interest worth fostering that parties be encouraged to resolve their private disputes without recourse to litigation or, if an action has been commenced, encouraged to effect a compromise without resort to trial").
3. *Goodyear Tire & Rubber Co v Chiles Power Supply, Inc* 332 F3d 976, 980 (6th Cir 2003) [*Goodyear*]. See also Fed R Evid 408, Advisory Committee Notes (evidence of settlement offers are inadmissible owing to the "promotion of the public policy favoring the compromise and settlement of disputes").
4. See *Sable Offshore*, supra note 1 at paras 17–18. See also *1 Waxman & Sons Ltd v Texaco Canada Ltd* (1968), 2 OR 452 (HC), *aff'd* (1968) 69 DLR 543 (Ont CA); *Middlekamp v Fraser Valley Real Estate Bd* (1992), 71 BCLR (2d) 276 (CA); *Brown v Cape Breton (Regional Municipality)* 302 NSR (2d) 84 (CA); *Globe and Mail v Canada (Attorney General)*, 2010 SCC 41, [2010] 2 SCR 592 (common-law settlement privilege applies in Quebec).
5. *Sable Offshore*, *supra* note 1 at para 13, citing David Vaver,"'Without Prejudice' Communications – Their Admissibility and Effect" (1974), 9 UBC L Rev 85, 88.
6. *Sable Offshore*, *ibid* at paras 13, 15; Vaver, *ibid* at 143–44.
7. *Sable Offshore*, *ibid* at para 12.
8. See *Middlekamp*, *supra* note 4 at paras 19–20.
9. *Sable Offshore*, *supra* note 1 at para 18 ("[T]he negotiated amount is a key component of the 'content of successful negotiations,' reflecting the admissions, offers, and compromises made in the course of negotiations").
10. *Ibid* at para 19, quoting *Dos Santos Estate v Sun Life Assurance Co of Canada* (2005), 207 BCAC 54, at para 20.
11. *Ibid*. See also *Berry v Cypost* (2003), 21 BCLR (4th) 186 (SC) (categorizing the recognized exceptions to the settlement privilege).
12. *Berry*, *ibid* at para 25.
13. *Ibid* at para 19(C); *Sable Offshore*, *supra* note 1 at para 19.
14. *In re MSTG Inc*, 675 F3d 1337, 1345 (Fed Cir 2012); *Matsushita Elec Indus Co v Mediatek, Inc*, 2007 WL 963974 at *5 (ND Cal Mar 30, 2007) ("[W]hile there is a public policy of promoting settlement [of] disputes outside the judicial process, it [is] far from clear that a federal settlement privilege would result in increased likelihood of settlements so substantial that it would justify an exception to the production of evidence in support of the truth-finding process").
15. *In re Subpoena Issued to Commodity Futures Trading Comm'n*, 370 F Supp 2d 201, 211 (DDC 2005), quoting 2 *Weinstein's Federal Evidence* § 408.07, at 408–26 (2005).
16. See *Goodyear*, *supra* note 3.
17. *Ibid* at 981. The Sixth Circuit also observed that the public interest favouring secrecy of settlement communications applies "whether settlement negotiations are done under the auspices of the court or informally between the parties" (*ibid* at 980). At least one lower court, however, has concluded that the privilege does not extend to the settlement of a dispute without a pending lawsuit. Compare *Michigan v Little River Band of Ottawa Indians*, 2007 WL 851282 at *2 (WD Mich Mar 16, 2007) ("[T]he settlement privilege recognized by the Sixth Circuit in Goodyear has not been shown to apply in the absence of the existence of an actual case between the parties") with *Snap-On Bus Sols, Inc v Hyundai Motor Am*, 2011 WL 6957594 at *1 n2 (ND Ohio Feb 3, 2011) ("While the *Little River* court's analysis and criticism of the Settlement Privilege is provocative, the undersigned believes it may not jibe with explicit language in *Goodyear*, where the privilege was first recognized"). The Canadian settlement privilege requires only that a litigious dispute be within contemplation, not that proceedings have commenced. See Bryant, Lederman and Fuerst, *supra* note 2 at § 14.325.
18. *Ibid* at 983.
19. See e.g. Fed R Evid 408; Cal Evid Code § 1152; Ill R Evid 408; NY CPLR § 4547.
20. Fed R Evid 408(a).
21. *Ibid*. Rule 408(b).
22. See *In re General Motors Corp Engine Interchange Litig*, 594 F 2d 1106, 1124 n20 (7th Cir 1979) ("Inquiry into the conduct of the [settlement] negotiations is also consistent with the letter and the spirit of Rule 408 ... [which] only governs admissibility"); *In re MSTG*, 675 F 3d at 1343 ("In adopting Rule 408 ... Congress directly addressed the admissibility of settlements but in doing so did not adopt a settlement privilege").
23. *In re Subpoena*, 370 F Supp 2d at 211(emphasis in original).
24. The nine states are Hawaii, Idaho, Illinois, Iowa, Nebraska, New Jersey, Ohio, Vermont and Washington.
25. *In re Vitamins Antitrust Litig*, 2002 WL 3449952 (DDC Dec 18, 2002).
26. *Ibid* at *15.
27. *Ibid* at *5–*10.
28. *Ibid* at *11, quoting Restatement (Third) of Foreign Relations Law of the United States § 442(1)(c) (1987), at 348.
29. *Ibid* at *12.
30. *Ibid*.
31. *Ibid* at *13.
32. *Ibid*.
33. *Ibid* at *14.