



Supreme Court of Canada renders key judgment on out-of-court mediation¹

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On 8 May 2014, the Supreme Court of Canada rendered a unanimous decision on the interaction between the common law privilege that protects discussions regulations and private contracts that provide for the confidentiality of mediation. The decision answers the question whether a mediation agreement stipulating the confidentiality of anything said or written during a mediation displaces the recognized exception to the privilege that allows the parties to prove the terms of a settlement agreement that has been concluded. It also stresses the importance of confidentiality in the mediation process while noting that it can be modulated and determined by the parties.

On May 8, 2014, the Supreme Court of Canada issued a unanimous judgment (reasons by the Honorable Mr. Justice Wagner) that is important for anyone who participates in private mediations.

In *Union Carbide Canada Inc. v. Bombardier Inc.*², the Supreme Court of Canada considered the interaction between the protection granted by private agreements providing for confidentiality of the mediation process and the common law privilege that covers settlement discussions. Specifically, the Supreme Court addressed the issue of whether a mediation agreement stipulating the confidentiality of anything said or written during a mediation displaces the recognized exception to the privilege that allows the parties to prove the terms of a settlement agreement that has been concluded.

The pith and substance of the Supreme Court decision is that a confidentiality clause in "a mediation contract will not deprive parties of the ability to prove the terms of a settlement by producing evidence of communications made in the mediation context unless a court finds, applying the appropriate rules of contractual interpretation, that that is the intended effect of the agreement"³. Thus, "where an agreement could have the effect of preventing the application of a recognized exception to settlement privilege, its terms must be clear"⁴.

The Supreme Court thus confirms the importance of the public policy objective of promoting the settlement of disputes by recognizing the possibility of concluding verbal agreements in mediation while respecting the principle of contractual freedom, which allows parties to enter into more specific agreements.

The facts that gave rise to the judgment are as follows:

Bombardier Recreational Products ("BRP") sued Dow Chemical Canada Inc. ("Dow") in the Superior Court of Quebec on the grounds that certain gas tank models supplied by Dow in the past proved unsuitable for the use for which they were intended. The damages sought included recall costs as well as

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² 2014 SCC 35.

³ *Id.*, par. 3.

⁴ *Id.*, par. 54

the costs of defending and settling specific lawsuits brought by third parties against BRP which lawsuits alleged that the tanks were defective.

An out-of-court mediation presided by a private mediator was scheduled for April 27 and 28, 2011. The mediation agreement signed by the parties referred to the litigation between the parties that was before the Superior Court. The agreement provided that "anything that may be said or written during the mediation is confidential" and "nothing which transpires in the Mediation will be alleged, referred to or sought to be put into evidence in any proceeding". Dow submitted a settlement offer to the appellants, which, at the request of BRP, was kept open for acceptance for 30 days beyond the mediation.

Within the agreed-upon period, BRP notified Dow that it accepted its offer in full and final settlement of the action pending before the Superior Court. In reply to the e-mail notification of acceptance of the offer, Dow stated that as far as it was concerned, the release and discharge covered all existing and potential claims between the parties for all tanks supplied by Dow over the years and therefore could not be limited only to the case before the Superior Court.

Since Dow refused to pay the amount of the settlement without obtaining a broader discharge, BRP filed a motion to homologate the transaction. Dow filed a motion to strike the allegations that referred to events that took place in the course of the mediation on the grounds that they were confidential.

The judge of first instance granted the motion in part, holding that anything said or written in mediation is confidential by operation of law (art. 151.21 C.C.P.) and pursuant to applicable case law. The Court of Appeal reversed that decision on the grounds that there is no legislation that governs out-of-court mediation and that the common law privilege recognized in Quebec no longer applies once a settlement agreement has been reached. The result is that anything said or written in the course of the mediation process could be used to prove the scope or the existence of a settlement agreement reached on that occasion.

The Supreme Court of Canada confirmed the public policy objective of encouraging the settlement of disputes. It reiterated that settlement privilege applies in Quebec as does the exception to such privilege which allows the proof of such discussions to establish the terms or the existence of a settlement.

The Court noted that mediation is one method of dispute resolution that is available to the parties and that it is first and foremost a contractual creature. The Supreme Court is of the view that under the principle of freedom of contract, it is open to the parties to agree to exceed or disregard the common law rules, including the exception to settlement privilege, which allows the parties to prove the existence of a settlement agreement.

However, in the absence of a clear intention from the parties to that effect, it would be unreasonable to assume that the parties to a mediation agreement had waived their right to prove the terms of a settlement.

In *Union Carbide*, the mediator used a generic mediation agreement and the parties made no attempt to modify or negotiate it before signing it. The nature of the contract and the circumstances in which it was formed reveal that the parties did not intend to disregard the usual rule that settlement privilege can be dispensed with in order to prove the terms of a settlement⁵.

The Supreme Court reiterated that there is an exception to the privilege pertaining to settlement discussions where a settlement agreement is reached and the parties wish to prove it. That exception serves the same purpose that underlies the existence of settlement privilege, namely the promotion of out-of-court settlements⁶.

In short, the Supreme Court recognizes the importance of confidentiality in the mediation process while noting that it can be modulated and determined by the parties. This means that in the absence of an agreement to the contrary, the settlement privilege and its exceptions will apply and proof of a verbal agreement reached in the course of a mediation can be validly made.

⁵ *Id.*, par. 62

⁶ *Id.*, par. 35

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