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Is your mediation confidentiality clause watertight?

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In *Union Carbide Canada Inc. v. Bombardier Inc.*[2], the Supreme Court of Canada struck a delicate balance between two key elements of mediation: settlement privilege and confidentiality. The Court held that parties in mediation can contractually displace the exception to settlement privilege which would otherwise allow disclosure of communications that have led to a settlement agreement to the extent necessary to prove the terms thereof. However, the contractual exclusion must be clearly and expressly stipulated in order to be enforceable.

Background

Following consumer complaints, a dispute arose in 2000 over the fitness of certain gas tanks supplied by the defendants, Union Carbide and Dow Chemical Canada, to Bombardier, for use on Bombardier's recreational watercraft products. In March 2000, Bombardier commenced a lawsuit in the Quebec Superior Court. Eleven years later, in order to put an end to this lengthy litigation, the parties agreed to participate in private mediation. To that end, they signed a standard-form mediation agreement, which contained the following confidentiality clause:

> *Nothing which transpires in the Mediation will be alleged, referred to or sought to be put into evidence in any proceeding.*

While the process led to a settlement, a disagreement arose as to whether its scope covered all present and future litigation arising out of the allegedly defective fuel tanks, or only the case pending before the Quebec Superior Court. Bombardier moved before the court to homologate the settlement transaction, but Union Carbide argued that Bombardier was barred by the confidentiality clause from invoking statements made in mediation to prove the scope of the settlement in court.

The Decision

Settlement privilege is a legal doctrine that protects communications exchanged by the parties as they try to settle a dispute. It applies in both common law provinces and in Quebec, regardless of whether or not the parties have contractually agreed to confidentiality. The rule has a limited exception, however: communications that have led to a settlement may be disclosed to the extent required to prove the existence and scope of the settlement.

In *Union Carbide*, the Supreme Court confirmed the general rule and its exception, but held that parties can contractually tailor their confidentiality requirements to exceed the scope of the privilege and displace the exception to privilege if they wish. However, in light of the public policy of encouraging out-of-court settlements and because contracting out of this exception to settlement confidentiality might prevent the

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[2] 2014 SCC 35

parties from proving or enforcing the terms of such a settlement, their intention to do so must be clear and explicit. In effect, the Supreme Court held that there is a presumption against displacing the exception:

> *[54] Where an agreement could have the effect of preventing the application of a recognized exception to settlement privilege, its terms must be clear. It cannot be presumed that parties who have contracted for greater confidentiality in order to foster frank communications and thereby promote a settlement also intended to displace an exception to settlement privilege that serves the same purpose of promoting a settlement. Parties are free to do this, but they must do so clearly. To avoid a dispute over the terms of a settlement, they may also choose to stipulate that, to be valid, any settlement agreed to in the mediation must be immediately put into writing. [...]*

The Court then examined the nature of the mediation agreement and the circumstances in which it was formed: it was a boiler-plate contract signed without modifications on the eve of the mediation. The Supreme Court found that it was clear that the parties intended to be bound by confidentiality for anything that might transpire in mediation, but that there was no evidence that the parties thought they were deviating from the settlement privilege (and the exception to it) that usually applies. Absent an express provision to the contrary, the Court concluded that it would be unreasonable to assume that the parties have renounced their right to prove the terms of the settlement.[3] The Supreme Court summarized its analysis and core finding as follows:

> *[62] On its face, the mediation contract at issue in the case at bar shows a common intention on the part of the parties to be bound by confidentiality in respect of anything that might transpire in the course of the mediation. But the question to be answered is more specific and concerns an incidental aspect of the contract, for which the common intention of the parties is not immediately clear: Was the confidentiality clause intended to exceed the protection of the common law settlement privilege and, more specifically, to displace the exception to that privilege that applies where a party seeks to prove the existence or the scope of a settlement? I find that a review of the nature of the contract, of the circumstances in which it was formed and of the contract as a whole reveals 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 settlement.*

Commentary

In its decision, the Supreme Court tried to reconcile the fundamental principles of party autonomy and freedom of contract with the public policy of encouraging alternative dispute resolution and out-of-court settlements. The fulcrum in this balance is the confidentiality clause itself, and whether it expressly and clearly displaces the exception to settlement privilege. In deciding whether it does, regard must be had to the rules of contractual interpretation.

Of course, it is true that beyond the words on paper, a court interpreting a contract must also take into account the nature of the contract, the circumstances in which it was formed, the interpretation which has already been given to it by the parties or which it may have received, and usage.[4] Yet, in coming to its conclusion in this case, the Supreme Court seems to have downplayed another well-established principle: a clear contractual provision does not require any interpretation to begin with.[5] As the Quebec Court of Appeal recently put it:

[3] *Ibid.*, at paras. 64 and 65

[4] Art. 1426 C.c.Q.; *Sobeys Quebec inc. v. Coopérative des consommateurs de Sainte-Foy*, 2005 QCCA 1172, para. 59.

[5] Jean-Louis Beaudoin & Pierre-Gabriel Jobin, *Les obligations*, 7th ed., (Cowansville, Qc: Yvon Blais) at 491. See e.g. *Bisignago c. Système électronique Rayco ltée*, 2014 QCCA 292; *Bastien c. Piché*, 2002 R.D.I. 51 (CA); *Fortier c. Bertrand*, 1997 CanLII 10588 (QC CA)

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> *As this Court pointed out more than once, for contractual interpretation to be needed, there must first be some ambiguity.*[6]

In *Union Carbide*, the language seemed rather unambiguous: "*Nothing ... will be alleged, referred to or sought to be put into evidence in any proceeding*". There is no language carving out an exception to this general prohibition against disclosure, but even so the Court read the clause as permitting disclosure to prove the scope of the settlement.

The Supreme Court also made a suggestion: to avoid a dispute over the terms of a settlement, parties may choose to stipulate that, to be valid, any settlement agreed to in the mediation must be immediately put into writing. While this is a practical workaround likely to reduce the possibility of a contested settlement, it is not an actual exclusion of the exception to settlement privilege. Disputes over the proper interpretation to be given to written terms are frequent enough and so circumstances can still arise where what was said or done in confidence in the course of the mediation may end up being disclosed in open court insofar as it is necessary to prove the terms and scope of the settlement, even when it is set forth in writing.

In any event, the outcome of this case is an important lesson that litigators and in-house counsel alike must heed: to sign away the exception to settlement privilege, there must be clear and express language in the mediation agreement precisely to the effect that the exception to settlement privilege is excluded. After all, the clause in the *Union Carbide* matter was clear enough that disclosure was prohibited, and that still was not enough to bar disclosure to prove the scope of the settlement. Without proper care, a dispute about whether a settlement was concluded, or regarding the scope of any such settlement, can thus lead to disclosure of confidential information.

Finally, *Union Carbide* is an important jurisprudential development in light of the fact that one of the main goals of the new *Code of Civil Procedure*[7] in Quebec is to facilitate out-of-court settlement. Indeed, the new Code's very first provisions advocate for private settlement through "private dispute prevention and resolution processes" such as negotiation, mediation and arbitration. A good grasp of the legal principles applicable to such processes will therefore become even more important for any attorney involved in litigation.

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http://www.lkd.ca/en/equipe/maniatis-dimitri-2/
http://www.lkd.ca/en/equipe/archambault-pascal-2/

[6] *Bisignano c. Système électronique Rayco ltée*, 2014 QCCA 292 at para. 11 (this is an unofficial translation of the original French text of the decision)
[7] The new Code of Civil Procedure was assented to on February 21, 2014 and will come into force in the fall of 2015.