

## Litigation - Canada

### When does a confidentiality clause displace the exception to settlement privilege?

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#### Introduction

In *Union Carbide Canada Inc v Bombardier Inc*<sup>(1)</sup> the Supreme Court of Canada considered whether a mediation contract with an absolute confidentiality clause displaced the common law settlement privilege and, more specifically, the exception to that privilege which enables parties to disclose evidence of confidential communications in order to prove the existence or terms of a settlement agreement.

The Supreme Court determined that parties to a mediation agreement are free to contract for greater confidentiality protection than is otherwise available at common law. In the absence of fraud or illegality, the parties' bargain is presumptively enforceable. However, where a mediation agreement is to preclude the application of the exception to settlement privilege, the terms must be clear and unequivocal.

While at first blush the Supreme Court's decision may seem surprising, *Union Carbide* appears to be consistent with the general rule that a party may produce privileged communications in order to demonstrate the existence or terms of a settlement agreement.

#### Background

For many years, the parties were involved in a multimillion-dollar proceeding regarding defective gas tanks used on Sea-Doo personal watercraft.

The appellants, Dow Chemical Canada Inc and Union Carbide Canada Inc (now known as Dow Chemical ULC) (collectively, 'Dow Chemical'), manufactured and distributed gas tanks for personal watercrafts. The respondent, Bombardier Inc, manufactured and distributed Sea-Doo personal watercraft. Bombardier alleged that the gas tanks manufactured by Dow Chemical were defective and in some instances caused explosions. Bombardier sued Dow Chemical for, among other things, the cost of its safety recall campaigns and the cost of lawsuits brought by consumers for damages and bodily injuries caused by the defective gas tanks.

The parties agreed to private mediation and executed a standard-form mediation contract, which contained the following confidentiality clause: "Anything which transpires in the Mediation will be confidential... Nothing which transpires in the Mediation will be alleged, referred to or sought to be put into evidence in any proceeding."<sup>(2)</sup>

During the mediation session, Dow Chemical submitted a settlement offer which was subsequently accepted by Bombardier. Yet shortly after Bombardier's acceptance, a dispute arose as to whether the settlement constituted a global settlement amount or whether it was limited to the proceedings in Quebec.

Bombardier filed a motion for enforcement of the settlement agreement, and in turn Dow Chemical brought a motion to strike out the allegations that referred to events that took place during the mediation process.

The Quebec Superior Court granted Dow Chemical's motion to strike, in part, and ordered that several allegations be struck from Bombardier's motion for enforcement on the basis that they referred to confidential discussions that were made in the context of the mediation. The Quebec Court of Appeal overturned the motion judge's decision and held that settlement privilege does not prevent a party from disclosing evidence of confidential discussions in order to prove the existence of a disputed settlement agreement.

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## Confidentiality of settlement communications: a delicate balance

Settlement privilege is an evidentiary rule that protects the confidentiality of communications exchanged by parties as they attempt to settle a dispute. The protection of statements made in furtherance of settlement enables parties to engage in honest and frank discussions. Indeed, few parties would participate in settlement negotiations if the information that they disclosed could subsequently be used against them in the litigation.

However, there are recognised exceptions to settlement privilege. Indeed, communications that lead to a settlement will no longer be privileged if disclosing them is required in order to prove the existence or terms of the settlement agreement. This exception is sound, as it promotes the same policy objective as the privilege itself; that is, facilitating out-of-court settlements.

Confidentiality is an essential aspect of mediation. As a form of alternative dispute resolution, mediation is a collaborative process in which the parties contract with a neutral third party to assist them in arriving at a mutually comprehensible solution. In the mediation context, the common law settlement privilege operates to protect the parties' discussions of settlement. However, mediation is also a "creature of contract", which means that the parties can agree to confidentiality requirements that go beyond the scope of settlement privilege.<sup>(3)</sup>

According to the Supreme Court, "[i]t is open to contracting parties to create their own rules with respect to confidentiality that entirely displace the common law settlement privilege".<sup>(4)</sup> This bolsters both freedom of contract and the promotion of settlement. However, the Supreme Court recognised that there is a delicate balance to be achieved:

*"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."*<sup>(5)</sup>

The critical inquiry as to whether a mediation agreement with an absolute confidentiality clause displaces the exception to settlement privilege is, therefore, an exercise of contractual interpretation.

Dow Chemical and Bombardier executed and performed the mediation agreement in Quebec. As a result, the Supreme Court indicated that the parties' contract must be analysed in accordance with the civil law of that jurisdiction. In Quebec, contractual interpretation is focused on the intention of the parties at the time of formation of the bargain.<sup>(6)</sup>

On the facts, the Supreme Court determined 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."*<sup>(7)</sup>

Notwithstanding the clear language of the absolute confidentiality clause, the Supreme Court was of the view that the parties entered into the mediation process with the intention of settling their dispute and that they had no basis to assume that they were prohibited from proving the terms of the settlement if necessary.

## Comment

The decision of the Supreme Court in *Union Carbide* demonstrates that a standard-form mediation contract with an absolute confidentiality clause does not confer absolute confidentiality.<sup>(8)</sup>

However, on its face the absolute confidentiality clause at issue was hardly ambiguous: "Nothing which transpires in the Mediation will be alleged, referred to or sought to be put into evidence in any proceeding."<sup>(9)</sup> It could be questioned whether the Supreme Court would have arrived at the same decision under the principles of contractual interpretation that are brought to bear in the common law jurisdictions. In Ontario, for example, contracts are generally interpreted as a whole with a view to understanding the intention of the parties by giving effect to the natural meaning of the language chosen. This is an objective approach. Quebec civil law, however, examines the parties' subjective intentions.<sup>(10)</sup>

*Union Carbide* stands for the proposition that although parties to a mediation contract can agree to confidentiality such as to prevent their ability to prove the terms of a settlement agreement, if necessary, any limit that is placed on the exception to settlement privilege must be clear. Moving forward, if parties intend to contract out of the exception to settlement privilege, their mediation contract should include express language to that effect.

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## Endnotes

<sup>(1)</sup> *Union Carbide Canada Inc v Bombardier Inc*, 2014 SCC 35.

- (2) *Ibid* at para 9.
- (3) *Ibid* at para 39.
- (4) *Ibid* at para 51.
- (5) *Ibid* at para 54.
- (6) *Ibid* at para 59. See also *Civil Code of Québec*, arts 1425-1432.
- (7) *Union Carbide*, *supra* note 1 at para 62.
- (8) *Ibid* at para 42.
- (9) *Ibid* at para 9.
- (10) Geoff R Hall, *Canadian Contractual Interpretation Law*, 2nd ed (Markham, ON: LexisNexis Canada Inc, 2012) at 36.

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