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BY E-MAIL

November 2, 2015

Kirsten Walli
Board Secretary and Manager
Ontario Energy Board
2300 Yonge Street, 27th Floor
Toronto, ON M4P 1E4

Dear Ms. Walli:

**Re: Guelph Hydro Electric System Inc. and Waterloo North Hydro Inc.
OEB File Numbers EB-2015-0073 and EB-2015-0108
OEB Staff Submission**

Further to Procedural Order No. 2 issued on October 28, 2015 in this matter, please find attached OEB staff's submission with respect to the issue of the use of the term 'privilege' in the Guelph Hydro Electric System Inc.'s (Guelph Hydro) and Waterloo North Hydro Inc.'s (Waterloo North Hydro) settlement proposals.

The attached document has been forwarded to Guelph Hydro and Waterloo North Hydro and to all other registered parties to these two proceedings.

Yours truly,

Original Signed By

Lynne Anderson
Vice President, Applications

2016 ELECTRICITY DISTRIBUTION RATES

OEB STAFF SUBMISSION

Pursuant to Procedural Order No. 2

Guelph Hydro Electric Systems Inc.

EB-2015-0073

and

Waterloo North Hydro Inc.

EB-2015-0108

November 2, 2015

OEB staff makes this submission in response to the OEB's Procedural Order No.2 in the Guelph Hydro Electric Systems Inc. (Guelph Hydro)¹ and Waterloo North Hydro Inc. (Waterloo North Hydro)² cases, issued October 28, 2015.

OEB staff has some concerns about certain provisions contained in the Guelph Hydro and Waterloo North Hydro settlement proposals with respect to the privileged or confidential nature of settlement discussions in both cases.

The settlement proposals in both cases includes the following provision:

The role adopted by OEB staff is set out in page 5 of the Guidelines. Although OEB staff is not a party to this Settlement Proposal, as noted in the Guidelines, OEB staff who did participate in the settlement conference are bound by the same confidentiality and privilege rules that apply to the Parties to the proceeding. [Emphasis added]

And,

*These settlement proceedings are subject to the rules relating to **privilege** contained in the Guidelines. The Parties understand this to mean that the documents and other information provided, the discussion of each issue, the offers and counter-offers, and the negotiations leading to the settlement – or not – of each issue during the settlement conference are strictly **privileged** and without prejudice. None of the foregoing is admissible as evidence in this proceeding, or otherwise, with one exception, the need to resolve a subsequent dispute over the interpretation of any provision of this Settlement Proposal. [Emphasis added]*

As indicated OEB staff's Supplemental Submissions filed on October 26, 2015 (Guelph Hydro) and October 27, 2015 (Waterloo North Hydro), the Practice Direction

¹ EB-2015-0073

² EB-2015-0108

on Settlement Conferences (Practice Direction) refers to 'confidentiality' and not 'privilege'.³

OEB staff does not object to parties in the settlement proposal stating, for greater certainty, that settlement discussions are privileged, but staff disagrees with the apparent attempt to thereby narrow or substitute the confidentiality provisions of the Practice Direction and Rules.

In its Supplemental Submissions OEB staff pointed out that privilege is a fairly narrow legal doctrine that protects specific categories of information from disclosure in court (or before a tribunal). OEB staff's view is that the purpose of the confidentiality provisions in the OEB Rules of Practice and Procedure⁴ and the Practice Direction is to allow parties in the settlement conference to conduct discussions on a without prejudice basis but to also protect the confidentiality of information exchanged in the settlement conference that is not on the public record of the proceeding.

This submission will further elaborate the distinction between the concepts of confidentiality and privilege and reiterate OEB staff's view that confidentiality of the

³ **Practice Direction on Settlement Conferences**, April 24, 2014, Page 4, states:

Confidentiality

Everyone who attends a settlement conference must treat omissions, concessions, offers to settle and related discussions as confidential and must not reveal any such information outside the conference. In addition, admissions, concessions, offer to settle and related discussions will not be admitted in any Board proceeding without the consent of parties who are affected. Where necessary to support the rationale for a settlement proposal, factual information and evidence may be disclosed to the Board.

Role of Board Staff

Board staff who participate in the settlement conference in any way are bound by the same confidentiality standards that apply to the parties to the proceeding. In particular, staff will not discuss the content of the settlement proposal or the process by which the settlement was reached with the Board panel hearing the case.

⁴ The **Rules of Practice and Procedure**, as amended April 24, 2014 state:

29.09 All persons attending an ADR conference shall treat admissions, concessions, offers to settle and related discussions as confidential and shall not disclose them outside the conference, except as may be agreed.

29.10 Admissions, concessions, offers to settle and related discussions shall not be admissible in any proceeding without the consent of the affected parties.

settlement process prevails, notwithstanding the parties' agreements in settlement proposals.

The Law of Privilege

Privilege is, primarily, a rule of evidence that prevents admission into evidence (in a court or tribunal proceeding) of certain types of information and communications. The category of privilege that is applicable to settlement discussions is "settlement privilege" which protects from disclosure in a court or tribunal those communications made for the purpose of effecting settlement. Settlement privilege is a common law evidentiary rule that applies to settlement negotiations regardless of whether parties have expressly invoked it.⁵

In the most recent jurisprudence of the Supreme Court of Canada, *Union Carbide v. Bombardier*, the court stated:

"At common law, settlement privilege is a rule of evidence that protects communications exchanged by parties as they try to settle a dispute. It applies even in the absence of statutory provisions or contract clauses with respect to confidentiality. The rule promotes honest and frank discussions between the parties, which can make it easier to reach a settlement. "In the absence of such protection, few parties would initiate settlement negotiations for fear that any concession they would be prepared to offer could be used to their detriment if no settlement agreement was forthcoming".⁶

The Supreme Court decision in *Union Carbide v. Bombardier* also makes it clear that settlement privilege and confidentiality in mediation are not the same.⁷

⁵ *Sable Offshore Energy Inc. v. Ameron International Corp.* [2013] S.C.J. No. 37 (*Sable v. Ameron*) and *Union Carbide Canada Inc. v. Bombardier Inc.* [2014] S.C.J. No. 35 (*Union Carbide v. Bombardier*) at para 34

⁶ *Union Carbide Canada Inc. v. Bombardier*, *supra* at 31 and quoting from A. W. Bryant, S. N. Lederman and M. K. Fuerst, *The Law of Evidence in Canada* (3rd ed. 2009) at para. 14.315

⁷ *Union Carbide v. Bombardier*, at para. 45 (copy attached)

Confidentiality of Settlement Discussions

Unlike the more restrictive doctrine of privilege, the confidentiality of the mediation process can extend beyond settlement privilege.

As discussed above, the common law rule of settlement privilege applies even when parties do not specifically invoke it, although parties may also sign mediation agreements that provide for the confidentiality of communications made in the course of the mediation process.⁸

In civil litigation, parties that go to mediation will sign contracts which usually contain strongly worded confidentiality clauses. In OEB proceedings, where the same parties and representatives usually appear, instead of executing a contract for every mediation those parties attend the OEB has instituted the confidentiality of the settlement process in its Rules and the Practice Direction.

OEB staff is of the view that settlement proceedings are cloaked with confidentiality in general, for good reasons clearly established in the jurisprudence and academic writings. In *The Law of ADR in Canada: An Introductory Guide*, mediation is described as "a collaborative and strictly **confidential** process in which parties contract with a neutral, referred to as a mediator, to assist them in settling their dispute".⁹ As the Supreme Court noted in *Union Carbide v. Bombardier*:

"38. It is unsurprising that confidentiality is mentioned in the very definition of mediation. Confidentiality is often described as one of the factors that induce parties to opt for mediation...."

39. A form of confidentiality is inherent in mediation in that the parties are typically discussing a settlement, which means that their communications are protected by the common law settlement privilege (Bryant, Lederman and Fuerst,

⁸ *Sable v. Ameron, supra*

⁹ *The Law of ADR in Canada: An Introductory Guide* (2011) at page 10

at para. 14.348; see also L. Boulle and K. J. Kelly, *Mediation: Principles, Process, Practice* (1998), at pp. 301-4). But mediation is also a "creature of contract" (Glaholt and Rotterdam, at p. 13), which means that parties can tailor their confidentiality requirements to exceed the scope of that privilege and, in the case of breach, avail themselves of a remedy in contract."¹⁰

In *Union Carbide v. Bombardier*, the Supreme Court also examined the rationale for the confidentiality of settlement discussions and mediation:

"40.the reasons why parties might want to protect information exchanged in the mediation process are not limited to litigation strategy...."

Owen V. Gray states the following in this regard in "Protecting the Confidentiality of Communications in Mediation" (1998), 36 Osgoode Hall L.J. 667:

When [the parties] have resorted to mediation in an attempt to settle pending or threatened litigation, they will be particularly alert to the possibility that information they reveal to others in mediation may later be used against them by those others in that, or other, litigation. The parties may also be concerned that their communications might be used by other adversaries or potential adversaries, including public authorities, in other present or future conflicts... . Parties may also be concerned that disclosure of information they reveal in the mediation process may prejudice them in commercial dealings or embarrass them in their personal lives. [Emphasis added; p. 671.]

*Incentives for choosing confidential mediation include both "a disinclination to 'air one's dirty laundry' in the neighborhood" and legitimate concerns such as the protection of trade secrets (L. R. Freedman and M. L. Prigoff, "Confidentiality in Mediation: The Need for Protection" (1986), 2 Ohio St. J. Disp. Resol. 37, at p. 38)."*¹¹

¹⁰ *Union Carbide v. Bombardier* at para. XX

¹¹ *Union Carbide v. Bombardier* at paras. 38 and 39

OEB staff does not object parties specifying in their settlement proposals that attendees at the Alternative Dispute Resolution conference may need to share confidential settlement discussions with persons that have a 'need to know', namely:

- 1) persons or entities that are assisting the parties at the settlement conference (eg. consultants, experts and legal counsel) who may not be in attendance; and
- 2) persons or entities from whom attendees must seek instructions with respect to the negotiations.

OEB staff believes that the above-noted exceptions are reasonable, if parties agree, and consistent with Rule 29.09. However, OEB staff is of the view that settlement proceedings are still cloaked with confidentiality in general, for reasons clearly established in the jurisprudence and academic literature. The legitimate expectations of parties in settlement proceedings is that the communications and information disclosed in the settlement proceeding will not be disclosed to competitors, adversaries or potential adversaries in future conflicts (for example, in subsequent rate cases or in potential civil litigation); that information will not be disclosed and thereby prejudice them in commercial dealings or future settlement processes at the OEB; or that settlement discussions in other proceedings, either previous or concurrent, will be used in any given settlement proceeding.

Conclusion

OEB staff is of the view that frank and open settlement discussions are aided by the confidentiality requirement and result in the most effective settlement proposals for the OEB's consideration in setting just and reasonable rates.

OEB staff is therefore of the view that, parties can tailor their settlement proposals to supplement matters not specified in the OEB Rules and Practice Direction by setting out for greater clarity the common law rule of settlement privilege and any necessary exceptions to that rule. Notwithstanding the additional provisions to which parties are agreeing to be bound, OEB staff submits that those provisions cannot be interpreted to

substitute or narrow the general confidentiality provided for in the Rules and Practice Direction and that those instruments should prevail and remain enforceable.

All of which is respectfully submitted

**** Preliminary Version ****

Case Name:
Union Carbide Canada Inc. v. Bombardier Inc.

**Union Carbide Canada Inc. and Dow Chemical, Canada Inc. (now
known as Dow Chemical Canada ULC), Appellants;
v.
Bombardier Inc., Bombardier Recreational Products Inc. and
Allianz Global Risks US Insurance Company, Respondents, and
Attorney General of British Columbia and Arbitration Place
Inc., Interveners.**

[2014] S.C.J. No. 35

[2014] A.C.S. no 35

2014 SCC 35

[2014] 1 S.C.R. 800

[2014] 1 R.C.S. 800

457 N.R. 279

55 C.P.C. (7th) 1

373 D.L.R. (4th) 626

239 A.C.W.S. (3d) 941

2014 CarswellQue 3600

2014EXP-1508

J.E. 2014-849

EYB 2014-236800

File No.: 35008.

Supreme Court of Canada

Heard: December 11, 2013;

Judgment: May 8, 2014.

**Present: McLachlin C.J. and LeBel, Rothstein, Cromwell,
Moldaver, Karakatsanis and Wagner JJ.**

(69 paras.)

Appeal From:

ON APPEAL FROM THE COURT OF APPEAL FOR QUEBEC

*Civil procedure -- Alternative dispute resolution -- Mediation -- **Settlement privilege** -- **Confidentiality** -- Exception -- Appeal by Union Dow from a QuÉbec Court of Appeal judgment that set aside a decision confirming the **confidential** nature of mediation -- It was open to contracting parties to create their own rules with respect to **confidentiality** that entirely displaced the common law **settlement privilege** -- However, the mere fact of signing a mediation agreement that contained a **confidentiality** clause did not automatically displace the privilege and the exceptions to it -- In this case, the clause does not deviate from the rule that **settlement privilege** could be dispensed with in order to prove the terms of a settlement -- The production of evidence is permitted as it is necessary in order to prove the terms of the settlement.*

Appeal by Union Carbide Canada Inc. and Dow Chemical Canada Inc. (Dow) from a QuÉbec Court of Appeal judgment that set aside a decision of the Superior Court confirming the **confidential** nature of mediation. For decades, Dow and Bombardier inc. were entangled in a multi-million dollar civil suit about defective gas tanks used on personal watercraft. The parties agreed to private mediation and a standard mediation agreement was signed which contained a clause regarding the **confidentiality** of the process. Dow submitted a settlement offer subsequently accepted by Bombardier. Shortly after, a disagreement arose over to the scope of the settlement. Bombardier considered that the settlement amount was for the Montréal litigation only, whereas Dow considered it to be a global settlement amount. Dow not having disbursed the discussed settlement amount, Bombardier filed a motion for homologation of the transaction. Dow brought a motion to strike out the allegations contained in six paragraphs of the motion on the ground that they referred to events that had taken place in the course of the mediation process, which was in violation of the **confidentiality** clause in the mediation agreement. The trial judge held that in light of the **confidentiality** clause in the mediation agreement, the mediation proceedings were covered by art. 151.21 of the Code of Civil Procedure. The Court of Appeal set aside the trial judge's decision and held that **settlement privilege** did not prevent a party from producing evidence of **confidential** communications in order to prove the existence of a dis-

puted settlement agreement arising from mediation or to assist in the interpretation of such an agreement.

HELD: Appeal dismissed. This appeal concerned the interaction between these two protections: confidentiality of communications provided for in a private mediation contract, and the common law settlement privilege. At issue was whether a mediation contract with an absolute confidentiality clause displaced the common law settlement privilege, including this exception, thereby foreclosing parties from proving the terms of a settlement. It was open to contracting parties to create their own rules with respect to confidentiality that entirely displaced the common law settlement privilege. However, the mere fact of signing a mediation agreement that contained a confidentiality clause did not automatically displace the privilege and the exceptions to it. Where an agreement could have the effect of preventing the application of a recognized exception to settlement privilege, its terms had to be clear. Confidentiality was inherent in mediation in that the parties were typically discussing a settlement. This meant that their communications were protected by the common law settlement privilege. But mediation was also a "creature of contract", which meant that parties could tailor their confidentiality requirements to exceed the scope of that privilege and, in the case of breach, avail themselves of a contractual remedy. Although the confidentiality provided for in a clause of a mediation contract could be broader, and set out in greater detail, than the common law settlement privilege, such a clause nevertheless did not represent a "watertight" approach to confidentiality. A communication that led to a settlement would cease to be privileged if disclosing it was necessary in order to prove the existence or the scope of the settlement. Once the parties had agreed on a settlement, the general interest of promoting settlements required that they be able to prove the terms of their agreement. On its face, the mediation contract at issue in the case at bar showed a common intention on the part of the parties to be bound by confidentiality in respect of anything that could transpire in the course of the mediation, but did not establish their intention to disregard the usual rule that settlement privilege could be dispensed with in order to prove the terms of a settlement. Consequently, in the course of the motion for homologation, parties could produce evidence insofar as it was necessary in order to prove the terms of the settlement.

L'Égislation citée :

Civil Code of Québec, S. 1414, S. 1425, S. 1426, S. 1427, S. 1431

Code of Civil Procedure, CQLR, c. C-25, S. 151.16, S. 151.21

Commercial Mediation Act, S.N.S. 2005, c. 36,

Commercial Mediation Act, 2010, S.O. 2010, c. 16, Sch. 3,

Subsequent History:

NOTE: This document is subject to editorial revision before its reproduction in final form in the Canada Supreme Court Reports.

Court Catchwords:

*Civil procedure -- Offer to settle -- **Settlement privilege** -- Exception -- Allegations in motion for homologation of settlement opposed on ground that mediation contract prevented parties from referring to events taking place during mediation process -- Whether mediation contract with absolute **confidentiality** clause can displace common law **settlement privilege**, including exception to privilege where party seeks to prove existence or scope of settlement -- Whether clause permitted parties to use **confidential** information to prove terms of settlement -- Code of Civil Procedure, CQLR, c. C-25, art. 151.21.*

Court Summary:

The parties are entangled in a decades-long, multi-million dollar civil suit about defective gas tanks used on Sea-Doo personal watercraft. B claimed that the tanks supplied by D were unfit for the use for which they had been intended and commenced an action for damages against D in Montréal, in the Quebec Superior Court. The parties agreed to private mediation and a standard mediation agreement was signed. It contained the following clause regarding the confidentiality of the process: "Nothing which transpires in the Mediation will be alleged, referred to or sought to be put into evidence in any proceeding". The next day D submitted a settlement offer which B subsequently accepted. Two days after B's acceptance, counsel for D stated that his client considered this to be a global settlement amount. Counsel for B replied that the settlement amount was for the Montréal litigation only. D did not send the discussed settlement amount, and B then filed a motion for homologation of the transaction in the Superior Court. D brought a motion to strike out the allegations contained in six paragraphs of the motion for homologation on the ground that they referred to events that had taken place in the course of the mediation process.

The motion judge held that in light of the **confidentiality** clause in the mediation agreement, the mediation proceedings were covered by art. 151.21 of the *Code of Civil Procedure*. She granted D's motion to strike in part, ordering that four of the six allegations be struck because they referred to discussions that had occurred or submissions that had been made in the context of the mediation. The Court of Appeal allowed the appeal and found that the rules of the *Code of Civil Procedure* with respect to **confidentiality** do not apply to extrajudicial mediation proceedings. It observed that when mediation has resulted in an agreement, communications made in the course of the mediation process cease to be privileged and held that **settlement privilege** does not prevent a party from producing evidence of **confidential** communications in order to prove the existence of a disputed settlement agreement arising from mediation or to assist in the interpretation of such an agreement. The court declined to strike the allegations and left it to the judge hearing the motion for homologation to consider whether the impugned paragraphs were relevant to the identification of the terms of the agreement, in which case the exception to the common law **settlement privilege** would apply.

Held: The appeal should be dismissed.

At common law, **settlement privilege** is a rule of evidence that protects communications exchanged by parties as they try to settle a dispute. It applies even in the absence of statutory provisions or contract clauses with respect to **confidentiality**. The rule promotes honest and frank discussions between the parties, which can make it easier to reach a settlement. However, a communication that has led to a settlement will cease to be privileged if disclosing it is necessary in order to prove the existence or the scope of the settlement.

Both the common law privilege and this exception to it form part of the civil law of Quebec, which applies in this case.

A form of confidentiality is inherent in mediation in that the parties are typically discussing a settlement. This means that their communications are protected by the common law settlement privilege. However, parties can tailor their confidentiality requirements by contract, to exceed the scope of that privilege. Settlement privilege and a confidentiality clause are not the same, and they may in some circumstances conflict. One is a rule of evidence, while the other is a binding agreement; they do not afford the same protection, nor are the consequences for breaching them necessarily the same. While allowing parties to freely contract for confidentiality protection furthers the valuable public purpose of promoting settlement, contracting out of the exception to settlement privilege that applies where a party seeks to prove the terms of a settlement might prevent parties from enforcing the terms of settlements they have negotiated.

To determine whether an absolute confidentiality clause in a mediation agreement displaces this common law exception to settlement privilege, one must begin with an interpretation of the contract. It must be asked whether the confidentiality clause actually conflicts with settlement privilege or with the recognized exceptions to that privilege. Where parties contract for greater confidentiality protection than is available at common law, the will of the parties should presumptively be upheld absent such concerns as fraud or illegality. However, the mere fact of signing a mediation agreement that contains a confidentiality clause does not automatically displace the privilege and the exceptions to it. Where an agreement could have the effect of preventing the application of a recognized exception to settlement privilege, its terms must be clear.

Here, the mediation contract shows on its face 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. However, the nature of the contract, the circumstances in which it was formed and 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. The mediation agreement was signed on the eve of the mediation with the apparent purpose of settling an ongoing dispute. It was a standard form contract provided by the mediator, and neither party amended it or added any provisions relating to confidentiality. There is no evidence that the parties thought they were deviating from the settlement privilege that usually applies. Absent an express provision to the contrary, it is unreasonable to assume that parties who have agreed to mediation for the purpose of reaching a settlement would renounce their right to prove the terms of the settlement. Consequently, in the course of the motion for homologation, parties may produce evidence insofar as it is necessary in order to prove the terms of the settlement. If sensitive information should not be made available to the public, an application can be made to the motion judge for a confidentiality order and to consider the evidence *in camera*.

Cases Cited

Applied: *Sobeys Québec inc. v. Coopérative des consommateurs de Sainte-Foy*, 2005 QCCA 1172, [2006] R.J.Q. 100; *Quebec (Agence du revenu) v. Services Environnementaux AES inc.*, 2013 SCC 65, [2013] 3 S.C.R. 838; **considered:** *Slavutych v. Baker*,

[1976] 1 S.C.R. 254; *Sierra Club of Canada v. Canada (Minister of Finance)*, 2002 SCC 41, [2002] 2 S.C.R. 522; **referred to:** *Sable Offshore Energy Inc. v. Ameron International Corp.*, 2013 SCC 37, [2013] 2 S.C.R. 623; *Globe and Mail v. Canada (Attorney General)*, 2010 SCC 41, [2010] 2 S.C.R. 592; *Ferlatte v. Ventes Rudolph inc.*, [1999] Q.J. No. 2735 (QL); *Kosko v. Bijimine*, 2006 QCCA 671 (CanLII); *Kelvin Energy Ltd. v. Lee*, [1992] 3 S.C.R. 235; *Sparling v. Southam Inc.* (1988), 41 B.L.R. 22; *Luger v. Empire, cie d'assurance vie*, [1991] J.Q. no 2635 (QL); *Bloom Films 1998 inc. v. Christal Films productions inc.*, 2011 QCCA 1171 (CanLII); *Stewart v. Stewart*, 2008 ABQB 348 (CanLII); *R. v. Gruenke*, [1991] 3 S.C.R. 263.

Statutes and Regulations Cited

Civil Code of Québec, arts. 1414, 1425, 1426, 1427, 1431.

Code of Civil Procedure, CQLR, c. C-25, arts. 151.16, 151.21.

Commercial Mediation Act, S.N.S. 2005, c. 36.

Commercial Mediation Act, 2010, S.O. 2010, c. 16, Sch. 3.

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United Nations. Commission on International Trade Law. *UNCITRAL Model Law on International Commercial Conciliation with Guide to Enactment and Use 2002*. New York: United Nations, 2004, art. 9.

History and Disposition:

APPEAL from a judgment of the Quebec Court of Appeal (Thibault, Rochette and Morissette JJ.A.), 2012 QCCA 1300, SOQUIJ AZ-50874424, [2012] J.Q. no 6890 (QL), 2012 CarswellQue 7252, setting aside a decision of Corriveau J., 2012 QCCS 22, SOQUIJ AZ-50819121, [2012] J.Q. no 39 (QL), 2012 CarswellQue 72. Appeal dismissed.

Counsel:

Richard A. Hinse, Robert W. Mason and Dominique Vallières, for the appellants.

Martin F. Sheehan and Stéphanie Lavallée, for the respondents.

Jonathan Eades and Mark Witten, for the intervener the Attorney General of British Columbia.

William C. McDowell and Kaitlyn Pentney, for the intervener Arbitration Place Inc.

The judgment of the Court was delivered by

WAGNER J.:--

I. Introduction

1 This Court recently confirmed the vital importance of the role played by **settlement privilege** in promoting the settlement of disputes and improving access to justice: *Sable Offshore Energy Inc. v. Ameron International Corp.*, 2013 SCC 37, [2013] 2 S.C.R. 623. **Settlement privilege** is a common law evidentiary rule that applies to settlement negotiations regardless of whether the parties have expressly invoked it. This privilege is not the only tool available to parties, however, as parties like the appellants and the respondents in the case at bar often sign mediation agreements that provide for the **confidentiality** of communications made in the course of the mediation process.

2 This case concerns the interaction between these two protections: **confidentiality** of communications provided for in a private mediation contract, and the common law **set-**

tlement privilege. More specifically, it relates to a common law exception to settlement privilege that applies where a party seeks to prove the existence or the scope of a settlement. At issue is whether a mediation contract with an absolute confidentiality clause displaces the common law settlement privilege, including this exception, thereby foreclosing parties from proving the terms of a settlement.

3 Ironically, both the appellants and the respondents argue that the Court's answer could negatively affect the development of mediation in Canada, either by undermining its confidential nature or by frustrating its main objectives. I disagree. I reach this decision bearing in mind the overriding benefit to the public of promoting the out-of-court settlement of disputes regardless of the legal means employed to reach a given settlement. For the reasons that follow, I find that parties are at liberty to sign mediation contracts under which the protection of confidentiality is different from the common law protection. This enables parties to secure the safeguards they deem important and fosters the free and frank negotiation of settlements, thereby serving the same purpose as settlement privilege: the promotion of settlements. However, I reject the presumption that a confidentiality clause in a mediation agreement automatically displaces settlement privilege, and more specifically the exceptions to that privilege that exist at common law. The exceptions to settlement privilege have been developed for public policy reasons, and they exist to further the overall purpose of the privilege. 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.

4 Because this dispute arose in Quebec, Quebec contract law applies. I find that although it was open to the parties to contract out of the exception to settlement privilege, they did not do so. They therefore retain their right to produce evidence of communications made in the mediation context in order to prove the terms of their settlement. I would affirm the Court of Appeal's decision, albeit for different reasons.

II. Facts

5 The parties are entangled in a decades-long, multi-million dollar civil suit about 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 Canada ULC ("Dow Chemical"), manufacture and distribute gas tanks for personal watercraft. The respondent Bombardier Inc. manufactured and distributed Sea-Doo personal watercraft before selling its recreational products division to the respondent Bombardier Recreational Products Inc. (jointly, "Bombardier"). A dispute arose over the fitness of the gas tanks as a result of consumer complaints.

6 This appeal results from an allegation by Bombardier that two gas tank models supplied by Dow Chemical were unfit for the use for which they had been intended. More specifically, Bombardier alleged that the material used and recommended by Dow Chemical for the gas tanks had been cracking and that this had in some cases caused explosions as a result of which owners and users of the watercraft had suffered property damage and bodily injury. Bombardier recalled the watercraft equipped with the gas tanks in question in 1997, 1998 and 2003, and it has been sued by a number of consumers.

7 In March 2000, Bombardier Inc. commenced an action against Union Carbide Canada Inc. in the Quebec Superior Court (file No. 500-05-056325-002) for \$9,980,612.07 in damages. Dow Chemical Canada Inc. was subsequently added as a defendant, as a result of its merger with Union Carbide. They filed their defence to the action on May 6, 2003. On May 29, 2007, Bombardier Inc. amended the declaration to add Bombardier Recreational Products Inc., which had since acquired its recreational products division, and Allianz Global Risks US Insurance Company as co-plaintiffs (Allianz is also a respondent to this appeal). In this amended declaration, the amount of the claim was raised to \$30,019,505, and an additional claim for \$1,786,445.23 was made on behalf of Allianz. Finally, on or about July 31, 2008, Dow Chemical filed an amended defence.

8 Bombardier claimed three separate amounts: (1) \$15,153,394 for the cost of the safety recall campaigns; (2) \$13,474,142 for the cost of settlements with and lawsuits by consumers for damage and injuries caused by the gas tanks; and (3) \$1,391,969 for other costs incurred by Bombardier.

9 After signing a joint list of admissions on the value of the claims, the parties agreed to private mediation to be conducted in Montréal by lawyer Max Mendelsohn. On April 26, 2011, before the mediation commenced, a standard mediation agreement was signed. It contained the following clause regarding the confidentiality of the process:

2. Anything which transpires in the Mediation will be confidential. In this regard, and without limitation:
 - (a) Nothing which transpires in the Mediation will be alleged, referred to or sought to be put into evidence in any proceeding;
 - (b) No statement made or document produced in the Mediation will become subject to discovery, compellable as evidence or admissible into evidence in any proceeding, as a result of having been made or produced in the Mediation; however, nothing will prohibit a party from using, in judicial or other proceedings, a document which has been divulged in the course of the Mediation and which it would otherwise be entitled to produce;
 - (c) The recollections, documents and work product of the Mediator will be confidential and not subject to disclosure or compellable as evidence in any proceeding.

10 The agreement also contained a clause regarding the mediator's role:

4. The Mediator will have no decision-making power, but will merely assist the parties in attempting to arrive at a settlement of their dispute.

11 At the mediation session on April 27, 2011, Dow Chemical submitted a settlement offer for \$7 million. Counsel for Bombardier asked Dow Chemical to keep this offer open for 30 days, as he had to ask his client for instructions, and Dow Chemical agreed to do

so. On May 17, 2011, before the 30 days expired, counsel indicated to Dow Chemical that Bombardier was accepting the offer:

My clients, BRP, Bombardier and Allianz have given me instructions to accept Dow Chemical's offer to settle the above-mentioned case for an amount of CAN\$ 7 million in capital, interest and costs.

I would ask that you request a check from your client to the order of Fasken Martineau in trust at your earliest convenience or have the amount wired to our trust account using the following coordinates.

...

In the meantime, I will prepare a draft release that I will forward to you very shortly. Of course, Fasken Martineau will undertake to hold the sums until the release documents have been signed and returned to Lavery.

12 Two days later, on May 19, 2011, counsel for Dow Chemical emailed counsel for Bombardier, stating that his client considered this to be a global settlement amount. Dow Chemical thus wanted Bombardier to sign a release absolving it of liability in any future litigation not only in Quebec and with respect to the two gas tank models at issue, but anywhere in the world and involving any gas tank models:

It is my client's expectation that this settlement will put an end to all present and future litigation arising out of any fuel tanks supplied to Bombardier, BRP et al by Wedco, Union Carbide and Dow Chemicals et al. My client realizes that it may be conceivably named as a co-defendant with your client in matters arising out of one of the fuel tanks delivered, but expects that the settlement document will be clear so that neither party would institute a warranty or third party proceedings against the other. It is my client's feeling that litigation with respect to fuel tanks supplied by Wedco, Union Carbide, Dow Chemicals et al has been going on long enough and has proven to be very expensive for both parties and it wants to put an end to the dispute once and for all.

13 After a short follow-up email from Dow Chemical's counsel on June 1, 2011, counsel for Bombardier replied, on June 6, 2011, that the settlement amount was for the Montréal litigation only. His email also detailed further courses of action:

As you well know, the object of the discussions at the mediation and the offer that Dow presented at that time never encompassed the type of release referred to in your e-mail of May 19th. The numbers exchanged were always based on the claim before the Superior court of the district of Montreal and the third party claims covered by that action. These were limited to existing claims at the time the admissions were made and no other... .

I therefore enclose a release that reflects the scope of your offer and our binding acceptance. For the purpose of buying the peace, BRP has agreed to extend the release to any existi[ng] or potential claims involving 109 and 183 tanks manufactured by Wedco regardless of whether or not they existed at the time the admissions were made. However, they will not go so far as to settle existing or potential claims for fuel tanks that are not the object of the Montreal litigation.

It appears to me we now have 3 choices:

- 1) Dow significantly increases its offer to cover the release it now wants;
- 2) We settle the Montreal action and attempt to settle the other existing and potential claims you now want to settle (with or without the assistance of a mediator). If you wish to go this latter route I suggest Dow obtain settlement authority before we engage in the process to avoid a take it or leave position as occurred last time around.
- 3) Dow refuses to settle and BRP will either a) continue the suit or b) decide to file an homologation action. [Emphasis in original.]

14 On June 14, 2011, counsel for Bombardier sent counsel for Dow Chemical a demand letter for payment of the \$7 million settlement amount. Counsel for Dow Chemical replied on June 16, 2011, reiterating their position on the release sought by their client:

Your clients were fully aware of the nature of the release that our clients required and at no time suggested that they would provide a narrower release. If your clients are not prepared to grant the release that we have outlined to you, then no payment will be forthcoming and any proceedings will be contested.

I remind you of the confidentiality provisions of the mediation agreement signed by yourself on your own behalf and on behalf of your clients on April 26, 2011. Any attempt to violate the confidentiality of what transpired in the mediation will be met with the appropriate proceedings.

15 Counsel for Bombardier replied to that letter on June 29, 2011, stating that they would proceed by filing a motion if they did not receive the payment:

We understand that your client is no longer willing to abide by the agreement that was reached in the above-mentioned matter.

As such, unless Dow Chemical revisits its position, BRP will have no other choice but to file the attached Motion.

We have considered the arguments raised in your letter with regard to the confidentiality of discussions that may have taken place during the mediation. However, these are without merit.

First of all, as you know, there is an exception to confidentiality when settlement discussions have led to a transaction.

Moreover, the contract between the parties is not applicable in this case as Dow Chemical agreed to keep its offer open for consideration after the mediation and the acceptance of BRP was sent outside of the mediation forum.

16 In a further letter dated July 6, 2011, counsel for Dow Chemical argued that neither the correspondence from Bombardier nor the draft motion had addressed the issue of the consideration to be provided by Bombardier in return for the sum to be paid by Dow Chemical. Counsel for Dow Chemical reiterated that in their client's opinion, there was "no agreement and no transaction".

17 Dow Chemical did not send the discussed settlement amount, and Bombardier then filed a motion for homologation of the transaction on July 8, 2011, in the Superior Court, District of Montréal. The motion detailed the history of the dispute between the parties and referred to both the mediation and the subsequent settlement discussions.

18 Dow Chemical brought a motion to strike out the allegations contained in six paragraphs of the motion for homologation on the ground that they referred to events that had taken place in the course of the mediation process, which was in violation of the confidentiality clause in the mediation agreement. The paragraphs at issue were the following:

[TRANSLATION]

17. The Joint List of Admissions was the sole basis for discussion by the Parties at the mediation session of April 27, 2011;
18. All the discussions in the course of the mediation related exclusively to the Covered Claims and the other costs claimed in the Re-amended Action R-4. No claims concerning tanks other than tanks 275 500 109 and 275 500 183 were ever discussed;
19. Moreover, the mediation related exclusively to the existing dispute between the parties as described in the Pleadings, as can be seen from a copy of the mediation contract signed by the Parties on April 26, 2011 that is attached hereto as Exhibit **R-8**;
20. The mediation was terminated unsuccessfully on April 27, 2011 when Dow Chemical submitted to BRP and Allianz an offer to settle the Re-amended Action for \$7,000,000 in capital, interest and costs, but indicated to BRP and to the mediator that it had no authority to increase this offer;
21. Yves St-Arnaud, in-house counsel for BRP, asked Dow Chemical to keep this offer open for thirty (30) days and promised to get back to them shortly. Dow Chemical acceded to this request;
22. On May 17, 2011, that is, twenty (20) days after the end of the mediation, counsel for BRP and for Allianz advised counsel for Dow Chemical that the applicants accepted the settlement offer for \$7,000,000 in capital, interest and costs in full and final settlement

of the claims made in the case bearing court file No. 500-05-056325-002 (the "**Transaction**"), as can be seen from a copy of an email attached hereto as Exhibit **R-9**;

19 In oral argument in this Court, counsel for Dow Chemical stated that no settlement had been reached between the parties. This is not completely accurate. The record of communications between the parties shows that there was a settlement offer and that it was accepted, but that the parties subsequently disagreed on the scope of the release. In short, Bombardier's view is that the settlement is limited to the ongoing Montréal litigation, and seeks to admit evidence from the mediation session to enable it to prove this. Dow Chemical disagrees on the scope of the settlement, viewing it as a global settlement, and argues that the evidence from the mediation session on which Bombardier seeks to rely in its motion for homologation is inadmissible by virtue of the confidentiality agreement.

III. Judicial History

A. *Quebec Superior Court, 2012 QCCS 22 (CanLII) (Corriveau J.)*

20 Corriveau J. based her analysis on art. 151.16 of the *Code of Civil Procedure*, CQLR, c. C-25 ("*CCP*"), as well as on art. 151.21, which provides that anything said or written during a settlement conference is confidential. She cited cases from the Quebec Court of Appeal which confirmed the confidential nature of mediation or settlement conferences, and reasoned that those cases applied regardless of whether the mediation was conducted by a judge or, as in the instant case, by a lawyer. She held that in light of the confidentiality clause in the mediation agreement, the mediation proceedings were covered by art. 151.21 of the *CCP*.

21 On this basis, Corriveau J. granted the appellants' motion to strike in part, ordering that four of the six allegations (paras. 17, 18, 20 and 21) be struck from the respondents' motion for homologation because they referred to discussions that had occurred or submissions that had been made in the context of the mediation. She denied Dow Chemical's request to strike para. 22 from the motion for homologation, as it referred to the settlement offer itself, which had been kept open after the mediation session. Having struck the four paragraphs in question, Corriveau J. explained that Bombardier could continue to rely on the remainder of the motion for homologation relating to the claim, the mediation contract and the discussions that followed the mediation. Bombardier applied to the Quebec Court of Appeal for leave to appeal, which was granted on March 16, 2012.

B. *Quebec Court of Appeal, 2012 QCCA 1300 (CanLII) (Thibault, Rochette and Morissette J.J.A.)*

22 Thibault J.A., writing for a unanimous court, allowed the appeal and, contrary to the motion judge, found that the rules of the *CCP* with respect to **confidentiality** do not apply to extrajudicial mediation proceedings. Given the absence of legislation in this regard, two factors must be considered to determine whether mediation proceedings presided over by someone other than a judge are **confidential**: (1) the mediation contract agreed to by the parties, and (2) the common law **settlement privilege** as recognized in Quebec law. In the Court of Appeal's view, the language of the contract ("Nothing which transpires in the Mediation will be alleged, referred to or sought to be put into evidence in any proceeding") in-

licated that what was said in the course of the mediation session was subject to an obligation of **confidentiality**, and this obligation applied to some of the facts Bombardier sought to rely upon.

23 The Court of Appeal then restated the general rule that settlement negotiations are **confidential**, even in the absence of a legislated rule of procedure. It cited *Globe and Mail v. Canada (Attorney General)*, 2010 SCC 41, [2010] 2 S.C.R. 592, to reiterate that the purpose of **settlement privilege** is to enable parties to have frank discussions about a possible settlement without worrying that what they disclose in the course of the negotiations will be used against them in litigation. The court noted that **settlement privilege** is based on public policy considerations, as it is preferable, in the interests of the proper administration of justice, that parties try to resolve their own disputes before resorting to litigation.

24 Where mediation has resulted in an agreement, the Court of Appeal observed, communications made in the course of the mediation process cease to be privileged. It supported this comment by quoting various authors, from both civil law and common law backgrounds (at paras. 35-38), as well as two decisions of the Quebec Superior Court, including *Ferlatte v. Ventes Rudolph inc.*, [1999] Q.J. No. 2735 (QL), in which that court had commented as follows, at para. 12:

Unchallenged judicial authority in Quebec, the common law provinces and in England holds that privilege protects communications between opposing counsel aimed at settling a dispute. Therefore offers of settlement cannot be introduced in evidence unless they are accepted. In that case they are admissible, not as proof that the offerors admit responsibility for the offerees' claims, but that they choose to end their conflict by settling on the terms of the offers. Such communications benefit from the protection of privilege on the policy ground that without it, disputing parties would be reluctant to attempt settlement negotiations, fearing their initiatives will come back to haunt them at trial if they fail. [Emphasis added.]

25 Thibault J.A. argued that, if a dispute arises regarding the existence or the terms of a transaction, the obligation of confidentiality of communications made in the course of the mediation process is no longer necessary given that the underlying purpose of confidentiality -- to further the achievement of a settlement -- is no longer relevant. If an agreement was not in fact reached, on the other hand, such communications cannot of course be admitted in evidence for any other purpose.

26 The Court of Appeal held that **settlement privilege** does not prevent a party from producing evidence of **confidential** communications in order to prove the existence of a disputed settlement agreement arising from mediation or to assist in the interpretation of such an agreement. It considered three cases cited by Dow Chemical in support of the proposition that the **confidentiality** of discussions and communications from an extrajudicial mediation process is absolute where the mediation agreement contains a **confidentiality** clause, but it noted that those cases did not call into question the application of the exception to **settlement privilege** that enables a party to produce evidence of such dis-

cussions and communications in order to prove the existence or the scope of a settlement agreement. Reversing the motion judge's ruling, the Court of Appeal held that the allegations at issue should not be struck from the motion for homologation. It left it to the judge hearing that motion to consider whether the impugned paragraphs were relevant to the identification of the terms of the agreement, in which case the exception to the common law settlement privilege would apply.

IV. Analysis

27 In my view, there are two questions to answer in this appeal. The first is whether a confidentiality clause in a private mediation contract can override the exception to the common law settlement privilege that enables parties to produce evidence of confidential communications in order to prove the existence or the scope of a settlement. The second question, which arises only if the answer to the first is yes, is whether the confidentiality clause at issue in the case at bar displaces that exception. If it does, the information referred to in the impugned paragraphs cannot be disclosed. If it does not, that information may be disclosed if it meets the criteria of the exception.

28 The appellants argue that a court must give effect to a confidentiality clause in a mediation agreement to which both parties have freely consented, and that there are no public policy reasons to nullify the clause. The respondents counter that a standard form confidentiality clause cannot displace the exception to the common law settlement privilege and that, even if it could do so, the clause at issue in this case, if correctly interpreted, does not preclude the application of that exception.

29 I see value in the submissions of both the appellants and the respondents. On the first question, I agree with the appellants that a court must give effect to a confidentiality clause to which both parties have agreed, and that it is open to the parties to contract out of common law rules, including the exception to settlement privilege. Parties may desire that the protection of confidential information disclosed in the mediation process be broader than that afforded by the common law privilege, and disregarding this desire would undermine one of the main features that encourage parties to opt for this oft-used form of alternative dispute resolution. On the second question, however, I agree with the respondents that, on the facts of this case, overriding the common law exception was not what the parties intended when they signed their mediation agreement, which means that the parties *can* produce communications from the mediation process to prove the terms of their settlement.

A. *Does a Confidentiality Clause Supersede the Exception to the Common Law Doctrine of Settlement Privilege?*

30 This case requires a review both of the common law settlement privilege in the mediation context and of the use of confidentiality clauses in mediation agreements. In my view, it will be helpful to consider each of these distinct concepts -- including their application in Quebec -- in turn, before discussing how they overlap.

(1) Settlement Privilege

31 Settlement privilege is a common law rule of evidence that protects communications exchanged by parties as they try to settle a dispute. Sometimes called the "without prejudice" rule, it enables parties to participate in settlement negotiations without fear that information they disclose will be used against them in litigation. This promotes honest and frank discussions between the parties, which can make it easier to reach a settlement: "In the absence of such protection, few parties would initiate settlement negotiations for fear that any concession they would be prepared to offer could be used to their detriment if no settlement agreement was forthcoming" (A. W. Bryant, S. N. Lederman and M. K. Fuerst, *The Law of Evidence in Canada* (3rd ed. 2009), at para. 14.315).

32 Encouraging settlements has been recognized as a priority in our overcrowded justice system, and settlement privilege has been adopted for that purpose. As Abella J. wrote in *Sable Offshore*, at para. 12, "[s]ettlement privilege promotes settlements." She explained this as follows, at para. 13:

Settlement negotiations have long been protected by the common law rule that "without prejudice" communications made in the course of such negotiations are inadmissible (see David Vaver, "'Without Prejudice' Communications -- Their Admissibility and Effect" (1974), 9 *U.B.C. L. Rev.* 85, at p. 88). The **settlement privilege** created by the "without prejudice" 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. As Oliver L.J. of the English Court of Appeal explained in *Cutts v. Head*, [1984] 1 All E.R. 597, at p. 605:

... parties should be encouraged so far as possible to settle their disputes without resort to litigation and should not be discouraged by the knowledge that anything that is said in the course of such negotiations ... may be used to their prejudice in the course of the proceedings. They should, as it was expressed by Clauson J in *Scott Paper Co v. Drayton Paper Works Ltd* (1927) 44 RPC 151 at 157, be encouraged freely and frankly to put their cards on the table.

What is said during negotiations, in other words, will be more open, and therefore more fruitful, if the parties know that it cannot be subsequently disclosed.

33 There have been other occasions on which this Court discussed the importance of encouraging parties to settle their own disputes. For example, LeBel J., writing for the Court in *Globe and Mail* cited *Kosko v. Bijimine*, 2006 QCCA 671 (CanLII), a case in which the Quebec Court of Appeal had commented as follows, at paras. 49-50:

The protection of confidentiality of these "settlement discussions" is the most concrete manifestation in the law of evidence of the importance that the courts assign to the settlement of disputes by the parties them-

selves. This protection takes the form of a rule of evidence or a common law privilege, according to which settlement talks are inadmissible in evidence.

The courts and commentators have unanimously recognized that, first, settlement talks would be impossible or at least ineffective without this protection and, second, that it is in the public interest and a matter of public order for the parties to a dispute to hold such discussions.

(See also *Kelvin Energy Ltd. v. Lee*, [1992] 3 S.C.R. 235, at p. 259, citing *Sparling v. Southam Inc.* (1988), 41 B.L.R. 22, at p. 28.)

34 **Settlement privilege** applies even in the absence of statutory provisions or contract clauses with respect to **confidentiality**, and parties do not have to use the words "without prejudice" to invoke the privilege: "What matters instead is the intent of the parties to settle the action Any negotiations undertaken with this purpose are inadmissible" (*Sable Offshore*, at para. 14). Furthermore, the privilege applies even after a settlement is reached. The "content of successful negotiations" is therefore protected: *Sable Offshore*, at paras. 15-18. As with other class privileges, there are exceptions to **settlement privilege**:

To come within those exceptions, a defendant must show that, on balance, "a competing public interest outweighs the public interest in encouraging settlement" (*Dos Santos Estate v. Sun Life Assurance Co. of Canada*, 2005 BCCA 4, 207 B.C.A.C. 54, at para. 20). These countervailing interests have been found to include allegations of misrepresentation, fraud or undue influence (*Unilever plc v. Procter & Gamble Co.*, [2001] 1 All E.R. 783 (C.A. Civ. Div.), *Underwood v. Cox* (1912), 26 O.L.R. 303 (Div. Ct.)), and preventing a plaintiff from being overcompensated (*Dos Santos*).

(*Sable Offshore*, at para. 19)

35 The exception to settlement privilege at issue in the case at bar is the rule that protected communications may be disclosed in order to prove the existence or scope of a settlement. This exception is explained by Bryant, Lederman and Fuerst:

If the negotiations are successful and result in a consensual agreement, then the communications may be tendered in proof of the settlement where the existence or interpretation of the agreement is itself in issue. Such communications form the offer and acceptance of a binding contract, and thus may be given in evidence to establish the existence of a settlement agreement. [para. 14.340]

The rule is simple, and it is consistent with the goal of promoting settlements. A communication that has led to a settlement will cease to be privileged if disclosing it is necessary in order to prove the existence or the scope of the settlement. Once the parties have agreed

on a settlement, the general interest of promoting settlements requires that they be able to prove the terms of their agreement. Far from outweighing the policy in favour of promoting settlements (*Sable Offshore*, at para. 30), the reason for the disclosure -- to prove the terms of a settlement -- tends to further it. The rule makes sense because it serves the same purpose as the privilege itself: to promote settlements.

36 In *Globe and Mail*, this Court confirmed that the common law settlement privilege applies in Quebec. As the Court of Appeal demonstrated in its reasons in the instant case, the exception for the purpose of proving the terms of a settlement also clearly applies in Quebec. The Court of Appeal cited a number of Quebec authors and cases on this point, and I find it helpful to reiterate how J.-C. Royer and S. Lavallée explain the application of the exception:

[TRANSLATION] **1137** --*Limits of this privilege* -- This rule for the exclusion of evidence is grounded in a desire to promote the out-of-court settlement of disputes. The privileged nature of the communication is accordingly limited to facts related to the negotiation of a settlement. Thus, an expert's report is privileged if it is transmitted with a communication made for the purpose of settling a dispute. Moreover, a litigant cannot object to evidence of a fact that is independent of and separate from a settlement offer. Such an objection will be dismissed *a fortiori* if the fact is contrary to public order or to public morals, or if it is likely to cause serious injury to the recipient of the communication. Thus, a threat made by a debtor in a settlement offer, or a statement by a debtor that he or she cannot pay his or her creditors, would not be privileged. A communication ceases to be privileged if it resulted in a transaction that one of the parties wishes to prove. The existence of negotiations between the parties and of settlement offers can also be proven in order to prove certain relevant facts needed to resolve a question with respect to prescription, to prove fraudulent acts or to explain and justify a delay in pursuing litigation. [Emphasis added.]

(*La preuve civile* (4th ed. 2008))

37 Although this rule has not been codified in Quebec, it is discussed in the academic literature on the law of evidence and forms part of the civil law of Quebec. The Court of Appeal cited two cases in which the Superior Court has applied the exception: *Ferlatte* and *Luger v. Empire, cie d'assurance vie*, [1991] J.Q. no 2635 (QL). In Quebec law, as at common law, settlement privilege is an evidentiary rule that relates to the admissibility of evidence of communications. It does not prevent a party from disclosing information; it just renders the information inadmissible in litigation.

(2) Confidentiality in the Mediation Context

38 Mediation is one of several forms of alternative dispute resolution that are available to parties in a legal dispute. It is defined by D. W. Glaholt and M. Rotterdam in *The Law of ADR in Canada: An Introductory Guide* (2011) as "a collaborative and strictly confidential

process in which parties contract with a neutral, referred to as a mediator, to assist them in settling their dispute" (p. 10). It is unsurprising that confidentiality is mentioned in the very definition of mediation. Confidentiality is often described as one of the factors that induce parties to opt for mediation (J. Thibault, *Les procédures de règlement amiable des litiges au Canada* (2000), at para. 197), and as one of the benefits of mediation (M. P. Silver, *Mediation and Negotiation: Representing Your Clients* (2001), at p. 82).

39 A form of **confidentiality** is inherent in mediation in that the parties are typically discussing a settlement, which means that their communications are protected by the common law **settlement privilege** (Bryant, Lederman and Fuerst, at para. 14.348; see also L. Boulle and K. J. Kelly, *Mediation: Principles, Process, Practice* (1998), at pp. 301-4). But mediation is also a "creature of contract" (Glaholt and Rotterdam, at p. 13), which means that parties can tailor their **confidentiality** requirements to exceed the scope of that privilege and, in the case of breach, avail themselves of a remedy in contract.

40 As both the appellants and the intervener Arbitration Place Inc. mention, the reasons why parties might want to protect information exchanged in the mediation process are not limited to litigation strategy. Owen V. Gray states the following in this regard in "Protecting the Confidentiality of Communications in Mediation" (1998), 36 Osgoode Hall L.J. 667:

When [the parties] have resorted to mediation in an attempt to settle pending or threatened litigation, they will be particularly alert to the possibility that information they reveal to others in mediation may later be used against them by those others in that, or other, litigation. The parties may also be concerned that their communications might be used by other adversaries or potential adversaries, including public authorities, in other present or future conflicts... Parties may also be concerned that disclosure of information they reveal in the mediation process may prejudice them in commercial dealings or embarrass them in their personal lives. [Emphasis added; p. 671.]

Incentives for choosing confidential mediation include both "a disinclination to 'air one's dirty laundry' in the neighborhood" and legitimate concerns such as the protection of trade secrets (L. R. Freedman and M. L. Prigoff, "Confidentiality in Mediation: The Need for Protection" (1986), 2 *Ohio St. J. Disp. Resol.* 37, at p. 38).

41 It is therefore no surprise that mediation contracts often contain strongly worded confidentiality clauses that place limits on the disclosure of communications exchanged in the course of the mediation process. Such clauses have been upheld by courts, though not in a context in which the parties were trying to prove the existence of a settlement. In *Bloom Films 1998 inc. v. Christal Films productions inc.*, 2011 QCCA 1171 (CanLII), the Quebec Court of Appeal upheld a confidentiality clause in a case in which a party was seeking to introduce evidence arising out of the mediation process. The clause in question specifically prohibited the use of such evidence for any purpose other than homologation or judicial review. And in *Stewart v. Stewart*, 2008 ABQB 348 (CanLII), another case involving a confidentiality clause with respect to communications made in the course of a

mediation process, albeit in a family law context, the Alberta Court of Queen's Bench refused to admit evidence arising out of that process.

42 Although the confidentiality provided for in a clause of a mediation contract may be broader, and set out in greater detail, than the common law settlement privilege, several authors caution that such a clause nevertheless does not represent a "watertight" approach to confidentiality and that a court may refuse to enforce it after balancing competing interests, such as the role of confidentiality in encouraging settlement, and evidentiary requirements in litigation (see Boule and Kelly, at pp. 309 and 312-13; F. Crosbie, "Aspects of Confidentiality in Mediation: A Matter of Balancing Competing Public Interests" (1995), 2 C.D.R.J. 51, at p. 70; K. L. Brown, "Confidentiality in Mediation: Status and Implications", [1991] J. Disp. Resol. 307; E. D. Green, "A Heretical View of the Mediation Privilege" (1986), 2 Ohio St. J. Disp. Resol. 1, at pp. 19-22; Freedman and Prigoff, at p. 41).

43 The intervener Arbitration Place suggests that the four-part Wigmore test, sometimes used by common law courts to determine whether evidence of communications is admissible, be applied to balance the competing interests. The four parts of the test are:

- (i) The communications must originate in a confidence that they will not be disclosed.
- (ii) The element of confidentiality must be essential to the maintenance of the relationship in which the communications arose.
- (iii) The relationship must be one which, in the opinion of the community ought to be "sedulously fostered."
- (iv) The injury caused to the relationship by disclosure of the communications must be greater than the benefit gained for the correct disposal of the litigation.

(I.F., at para. 4, citing *Slavutych v. Baker*, [1976] 1 S.C.R. 254, at p. 260.)

This Court applied this test in *Slavutych* to determine whether a confidential document signed by the appellant at the request of the university authorities should remain privileged in dismissal proceedings subsequently taken against the appellant. The Court also applied it in *R. v. Gruenke*, [1991] 3 S.C.R. 263, to determine whether religious communications should remain privileged in a criminal context.

44 The intervener Attorney General of British Columbia, on the other hand, suggests that the plain meaning of an unambiguous confidentiality agreement should prevail, barring extreme circumstances. As for the respondents, they say that courts should look beyond the plain meaning to account for the wishes of the parties. I agree with these approaches. In principle, there is relatively little that can displace the intent of the parties once it is clearly established. Only the fourth step of the Wigmore test -- the balancing of interests -- is potentially relevant in this case. In my view, the first three steps of the Wigmore test are redundant where parties have not only opted for a confidential dispute resolution process, but have also signed a confidentiality agreement.

(3) Can a **Confidentiality** Clause in a Mediation Agreement Displace the Exception to **Settlement Privilege** That Applies Where a Party Seeks to Prove the Terms of a Settlement?

45 The common law **settlement privilege** and **confidentiality** in the mediation context are often conflated. They do have a common purpose: facilitating out-of-court settlements. But as we saw above, **confidentiality** clauses in mediation agreements can also have different purposes. In most cases involving such clauses, the status of the common law **settlement privilege** will not arise, because the two protections generally serve the same purpose, namely to foster negotiations by encouraging parties to be honest and forthright in reaching a settlement without fear that the information they disclose will be used against them at a later date. However, as I mentioned above, **settlement privilege** and a **confidentiality** clause are not the same, and they may in some circumstances conflict. One is a rule of evidence, while the other is a binding agreement; they do not afford the same protection, nor are the consequences for breaching them necessarily the same.

46 The differences between these protections may be muddled in a case like this one in which both of them could apply, but to different parts of the sequence of events. The parties met for the mediation session on April 27, 2011, the day after they had signed an agreement with a **confidentiality** clause. The clause in question applied to discussions that took place in the course of the mediation session and prohibited the disclosure of information about those discussions at any time in the future. A settlement offer was made at the mediation session, was kept open for 30 days after that date, and was discussed by the parties' lawyers after the session. Any additional information that came up in the course of these subsequent discussions falls outside the protection of the **confidentiality** clause -- however, since it formed part of negotiations aimed at reaching a settlement, it is protected by **settlement privilege**. As regards the timing of the communications, the scope of **settlement privilege** is broader, because it is not limited to the duration of the mediation session.

47 On the other hand, there are recognized exceptions to **settlement privilege** at common law that limit the scope of its protection, but such exceptions may be lacking in the case of a **confidentiality** clause. The question is whether an absolute **confidentiality** clause in a mediation agreement displaces the common law exception, thereby preventing parties from producing evidence of communications made in the mediation process in order to prove the terms of a settlement.

48 There is indeed a delicate balance to be struck. The concerns articulated by commentators about the uncertainty of confidentiality clauses in mediation contracts are legitimate. Boulle and Kelly accurately identify the most important of these concerns:

The principle of sanctity of contract supports the maintenance of confidentiality where the parties have committed themselves to it. If, however, the confidentiality is too wide, it will sterilise too much evidence and seriously undermine the trial process. If the confidentiality is too narrow, it will discourage parties from entering mediation and from using their best endeavours to settle once there. A balance is required between supporting

mediation, on one hand, and not freezing litigation or upholding illegality, on the other. [pp. 312-13]

49 In my view, the inquiry in each case will begin with an interpretation of the contract. It must be asked whether the confidentiality clause actually conflicts with settlement privilege or with the recognized exceptions to that privilege. Where parties contract for greater confidentiality protection than is available at common law, the will of the parties should presumptively be upheld absent such concerns as fraud or illegality. I have discussed reasons why parties might desire greater confidentiality protection, and allowing parties to freely contract for such protection furthers the valuable public purpose of promoting settlement. As Professor Green states,

if a written confidentiality agreement exists, the parties are in a stronger position to argue that the court should exercise its discretion to grant a protective order assuring confidentiality because protecting the confidentiality of mediation statements furthers the expressed intentions of the parties as well as the public policy of encouraging extra-judicial settlements. [p. 22]

50 But contracting out of the exception to settlement privilege that applies where a party seeks to prove the terms of a settlement is a different matter. As I mentioned above, a failure to apply this common law exception could frustrate the broader purpose of promoting settlements in that it might prevent parties from enforcing the terms of settlements they have negotiated. Thus, whereas contracting for broader protection than is afforded by the common law settlement privilege may further the overall purpose of that privilege in most circumstances, contracting out of the exceptions to the privilege might undermine that purpose. This may be what was behind the Court of Appeal's decision, as it largely favoured the exception to settlement privilege over the confidentiality clause.

51 In my respectful opinion, the Court of Appeal did not devote adequate attention in its analysis to freedom of contract. It is open to contracting parties to create their own rules with respect to confidentiality that entirely displace the common law settlement privilege. This furthers both freedom of contract and the likelihood of settlement, two important public purposes. However, the mere fact of signing a mediation agreement that contains a confidentiality clause does not automatically displace the privilege and the exceptions to it. As I mentioned above, these protections do not have the same scope. For instance, settlement privilege applies to all communications that lead up to a settlement, even after a mediation session has concluded. It cannot be argued that parties who agree to confidentiality in respect of a mediation session thereby deprive themselves of the application of settlement privilege after the conclusion of the mediation session. The protection afforded by the privilege does not evaporate the moment the parties contract for confidentiality with respect to the mediation process, unless that is the contract's intended effect.

52 I would note that there has been some international agreement on this approach to confidentiality in the mediation context. Jurisdictions in 14 countries with both common law and civil law systems, including Ontario (S.O. 2010, c. 16) and Nova Scotia (S.N.S. 2005, c. 36), have adopted the United Nations Commission on International Trade Law's Model Law on International Commercial Conciliation. Article 9 of the Model Law states:

Unless otherwise agreed by the parties, all information relating to the conciliation proceedings shall be kept confidential, except where disclosure is required under the law or for the purposes of implementation or enforcement of a settlement agreement. [Emphasis added.]

(*UNCITRAL Model Law on International Commercial Conciliation with Guide to Enactment and Use 2002* (2004), at p. 5)

53 This article, with which my approach is consistent, recognizes the need for **confidentiality** in the settlement context, but also provides that parties may enter into their own agreements in this regard. Furthermore, it indicates widespread acceptance in both common law and civil law jurisdictions that an exception to **settlement privilege** applies where a party seeks to prove the existence or the terms of a settlement.

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. This practice is specifically contemplated in art. 1414 of the *Civil Code of Québec*, which provides that "[w]here a particular or solemn form is required as a necessary condition of formation of a contract, it shall be observed". Such a stipulation would underscore the binding nature of any agreement reached in the course of the mediation process.

55 I wish to emphasize that my analysis concerns one exception to the common law settlement privilege -- the one that applies where a party seeks to prove the terms of a settlement. I have not discussed other exceptions, such as the one with respect to fraudulent or unlawful communications, as they are not at issue in this case. Nor will I consider whether the mediator could be compelled to testify in a situation such as this one. The evidence before this Court is limited to the impugned paragraphs of the motion for homologation, so I will not address the appropriate legal threshold for permitting or compelling direct testimony by the mediator. I will leave that question for another day.

56 In my opinion, the information the respondents seek to disclose with the impugned paragraphs of their motion for homologation is protected by the **confidentiality** clause, and not solely by **settlement privilege**. It was open to the parties to displace **settlement privilege**, including the exceptions to it. The question is whether they did so.

57 The mediation contract was signed and performed in Quebec. It must be interpreted in accordance with the *Civil Code of Québec* and with the law of obligations.

B. *Does This Mediation Contract Permit the Parties to Use Confidential Information in Order to Prove the Terms of a Settlement?*

58 I have concluded that it is generally open to parties, in the mediation context, to contract for **confidentiality** that exceeds that of the common law **settlement privilege**; in particular, parties may contract out of the exception to that privilege that enables a party to disclose **confidential** information in order to prove the terms of a settlement. I will now inquire into whether that is what the parties did in this case. What is the effect of the mediation contract at issue here?

59 In Quebec, contractual interpretation is centered on the intention of the parties. As J.-L. Baudouin and P.-G. Jobin explain, where the parties disagree about the scope of a contract clause, the judge must determine what the parties originally intended, at the time of formation of the contract (*Les obligations* (7th ed. 2013), by P.-G. Jobin and N. Vézina, eds., at pp. 488-89). This rule of contractual interpretation is codified in a number of provisions of the *Civil Code of Québec*:

1425. The common intention of the parties rather than adherence to the literal meaning of the words shall be sought in interpreting a contract.

1426. In interpreting a contract, 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, are all taken into account.

1427. Each clause of a contract is interpreted in light of the others so that each is given the meaning derived from the contract as a whole.

1431. The clauses of a contract cover only what it appears that the parties intended to include, however general the terms used.

60 The Quebec Court of Appeal explained this interpretive approach in *Sobeys Quebec inc. v. Coopérative des consommateurs de Sainte-Foy*, 2005 QCCA 1172, [2006] R.J.Q. 100:

[TRANSLATION] To establish the true will of the parties, and their common intention within the meaning of article 1425 C.C.Q., it is of course necessary to consider the actual words of the contract, but it is also necessary, as required by article 1426 C.C.Q., to consider 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.

Deciphering the parties' intention is of course a delicate exercise, especially where that intention conflicts with the intention expressed in a writing that is by all appearances clear. Moreover, it can happen, which does not make things easier, that a review of the contract itself, of its context, of the circumstances in which it was formed, of the subsequent conduct of the parties, and so on, shows that there was no real common

intention. Pineau and Gaudet [*Théorie des obligations* (4th ed. (2001)), at pp. 401-02] explain this as follows:

... Moreover, the principle stated in article 1425 C.C.Q. presupposes that there is always a common intention to "find". But that is not always the case. Of course, for there to be a contract, there must be a minimal common intention, but it is very possible that the parties, although they had a genuine common intention regarding the essential elements of the contract, also agreed on certain incidental clauses that each of them, in his or her heart of hearts, interpreted differently. In such a case, it is of course impossible to rely on the common intention of the parties, as there is none. All that can then be done is to adopt the interpretation that can most readily be reconciled with the rest of the contract and with the circumstances in which it was concluded. [paras. 59-60]

61 This approach was also confirmed by this Court in *Quebec (Agence du revenu) v. Services Environnementaux AES inc.*, 2013 SCC 65, [2013] 3 S.C.R. 838: "... the determination of the common intention, or will, of the parties represents a true exercise of interpretation" (para. 48; see also D. Lluelles and B. Moore, *Droit des obligations* (2nd ed. 2012), at paras. 1587-90; S. Grammond, A.-F. Debruche and Y. Campagnolo, *Quebec Contract Law* (2011), at paras. 297-301).

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.

63 The nature of the contract is that of a mediation agreement signed on the eve of the mediation with the apparent purpose of settling an ongoing dispute that was the subject of an action in the Quebec Superior Court. The word "settlement" appears twice in the mediation agreement, the first time in a clause relating to the mediator that reads "[t]he Mediator will have no decision-making power, but will merely assist the parties in attempting to arrive at a settlement of their dispute", and the second time in the mediator's concluding words: "I look forward to working with you, and hope that the Mediation will give rise to a settlement of the dispute."

64 The nature of the contract must be considered together with the circumstances in which it was formed. Neither of the parties drafted the mediation contract or the **confidentiality** clause. It was a standard form contract provided by the mediator, who sent it to both parties to sign on the eve of the mediation. Neither party amended the standard mediation

agreement or added any provisions relating to **confidentiality** when they signed it. There is no evidence that the parties thought they were deviating from the **settlement privilege** that usually applies to mediation when they signed the agreement.

65 It is my opinion that the parties entered into this mediation process with the intention of settling their dispute and that they had no reason to assume that they were signing away their ability to prove a settlement if necessary. There is no evidence that they had any expectation for this mediation other than that it might help them settle the dispute. Lluellès and Moore write that, [TRANSLATION] "[i]f the spirit pervading a contract is considered to be the best guide in this regard (art. 1425) ..., the common intention of the parties can sometimes be self-evident, and a question of logic" (para. 1589). Absent an express provision to the contrary, I find it unreasonable to assume that parties who have agreed to mediation for the purpose of reaching a settlement would renounce their right to prove the terms of the settlement. Such a result would be illogical.

66 I therefore find that the mediation contract does not preclude the parties from producing evidence of communications made in the course of the mediation process in order to prove the terms of a settlement. However, I would note that this exception is a narrow one. Parties may produce such evidence only insofar as it is necessary in order to prove the terms of the settlement. The judge who hears the motion for homologation will consider the impugned paragraphs of the motion individually to determine whether each of them is necessary for that purpose. If either party would prefer that potentially sensitive information tendered in support of those paragraphs not be made available to the public, an application can be made to the motion judge for a confidentiality order and to consider the evidence *in camera*, as long as the parties meet the test from *Sierra Club of Canada v. Canada (Minister of Finance)*, 2002 SCC 41, [2002] 2 S.C.R. 522. Not all cases will meet that test, which requires parties to show

- (a) [that] such an order is necessary to prevent a serious risk to an important interest, including a commercial interest, in the context of litigation because reasonably alternative measures will not prevent the risk; and
- (b) [that] the salutary effects of the confidentiality order, including the effects on the right of civil litigants to a fair trial, outweigh its deleterious effects, including the effects on the right to free expression, which in this context includes the public interest in open and accessible court proceedings.

(*Sierra Club*, at para. 53)

In camera hearings such as this should be reserved for cases in which there is a genuine dispute about the scope of the confidentiality agreement.

67 I find that it is open to parties, in agreeing to **confidentiality** for a mediation process, to go so far as to limit their ability to prove the terms of any settlement. When any such limit is placed on the usual rule in this regard, however, it must be clear, on applying the principles of contractual interpretation of the relevant jurisdiction, that that is what the parties intended. In this case, the principles of Quebec contract law applied because the

agreement at issue was entered into in Quebec. Had the law of another jurisdiction applied, the question whether the parties intended to renounce the common law exception to **settlement privilege** that applies where a party seeks to prove the terms of a settlement would have been decided in accordance with the principles applicable in that jurisdiction.

68 Although I find that the Court of Appeal failed to conduct the necessary contractual interpretation exercise before applying the exception to the common law settlement privilege that enables parties to prove the terms of a settlement, I nevertheless uphold the result it reached. The parties did not renounce the common law rule, which also applies in Quebec, that communications made in the course of negotiations can be used to prove the terms of a settlement.

V. Conclusion

69 For the foregoing reasons, the appeal is dismissed with costs throughout.

Appeal dismissed with costs throughout.

Solicitors:

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Solicitor for the intervener the Attorney General of British Columbia: Attorney General of British Columbia, Victoria.

Solicitors for the intervener Arbitration Place Inc.: Lenczner Slaght Royce Smith Griffin, Toronto.

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