

# BRIEFING NOTE

## Confidentiality, settlement privilege and mediation agreements

*Union Carbide Canada Inc. v Bombardier Inc.*, 2014 SCC 35

Most mediation agreements contain some form of confidentiality terms. The usual language provides clauses that have the effect of establishing that:

- the mediation proceedings and all documents exchanged for the mediation are confidential;
- no party will introduce into evidence any of the discussions, admissions or communications made during the mediation; and
- the mediator is not compellable as a witness.

But what happens if there is a disagreement over the scope of a settlement reached at mediation? The Supreme Court of Canada recently dealt with that issue in the *Union Carbide* decision. The court held that absent a clear intention to the contrary, typical confidentiality clauses in a mediation agreement do not displace a common law exception to settlement privilege. That exception allows parties to use those privileged documents and communications to prove either the existence or scope of a settlement.

Settlement privilege is a form of privilege that has arisen to address the importance of out-of-court settlements. Communications made for the purpose of settlement are privileged. The privilege applies regardless of whether a settlement is actually reached. The idea is that settlement privilege fosters more open and frank settlement discussions. Often such communications may use a “without prejudice” label, but that label is neither necessary nor sufficient for the privilege to attach.

In *Union Carbide*, the parties conducted a mediation subject to a mediation agreement with standard confidentiality terms. At the mediation a settlement offer was made that was kept open for thirty days. It was eventually accepted. After acceptance of the settlement a dispute arose over what was actually agreed upon.

In determining whether the parties were at liberty to introduce documents and evidence from the mediation, the court found that:

- parties can contract out of the common law exception to settlement privilege and stipulate that documents and communications exchanged at mediation cannot be used, even to prove the scope of a settlement;

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- the standard confidentiality terms in a mediation agreement are likely not sufficient to achieve this result; and
- to displace this common law exception to settlement privilege, the parties must be clear in their intention to do so.

In *Union Carbide*, the Supreme Court found that the parties did not intend broader protection to their settlement discussions than that afforded by common law settlement privilege. The parties were at liberty to provide evidence of communications made at the mediation insofar as was necessary to establish the scope of their settlement.

The standard terms of a mediation agreement are often overlooked. Consideration should be given to the confidentiality terms that are agreed upon as they affect the rights of the parties. Settlement privilege coupled with contractual confidentiality is often sufficient protection to promote the interests of mediation and settlement. However, parties should be on the lookout for more stringent terms that could preclude introducing mediation communications to prove the existence or scope of a settlement.

If some reason exists for wanting a higher level of protection, the mediation agreement needs to be appropriately drafted to ensure that intention is clearly expressed. Of course, the majority of such disputes can be avoided if the terms of any settlement are clearly reduced to writing at mediation.

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