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Is There Absolute Confidentiality in Mediation?

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Your client's family law case has settled by minutes of settlement following a mediation. It is possible that at some point in the future the parties may disagree about the terms of settlement and need judicial intervention. How will enforcing or interpreting minutes of settlement play out in court after a mediation? To what extent will the court puncture the confidentiality of the mediation process? Mediation is a valuable alternative dispute process because it is confidential. Without protecting the confidentiality of the process mediation would have little value as an alternative process for resolving disputes. The courts strive to protect the mediation process, but case law has evolved to permit exceptions to settlement privilege in mediation in order to prove the scope of an agreement. It is important to consider the confidentiality of going into a mediation as it is conceivable that mediation briefs, submissions, or communications within the process may come to light after minutes of settlement are signed. To protect your client, it is important to consider the scope of the mediation contract and the confidentiality terms.

In the recent family law trial of *Reiss v. Garten*, the parties settled a complex property dispute in mediation.[2] As part of the settlement, certain corporations and underlying corporate assets were to be valued and then divided. After the valuation process concluded, the parties disagreed about whether or not the professional retained to value certain corporate entities should have applied a net present value discount of the contingent taxes to the shareholder personally, as required in equalization calculations under the *Family Law Act* by the Court of Appeal in *Sengmueller v. Sengmueller*.[3] The minutes of settlement did not prescribe the discount and the valuator was not expressly instructed in the minutes to undertake that particular calculation. In this case, the value of the contingent taxes would have swung the notional equalization payment by a very significant number in the wife's favour. The wife was of the view that a term should be implied into the minutes of settlement requiring the valuator to undertake the *Sengmueller* discount. Her position was that she bargained for the discount. The husband's position was that he did not.

A trial of the issue about whether a term could be implied into the minutes of settlement was conducted. In the trial, both parties sought to adduce evidence of the parties' presumed intentions leading to the agreement. In doing so and in light of the decision of the Supreme Court of Canada in *Creston Moly Corp. v. Sattva Capital Corp.*,[4] both parties sought to tender evidence of the surrounding circumstances leading up to the signing of the minutes of

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[2] *Reiss v. Garten*, 2018 CarswellOnt 15657 (S.C.J.).
[3] *Sengmueller v. Sengmueller*, 1994 O.J. No. 278 (C.A.).
[4] *Creston Moly Corp v. Sattva Capital Corp.*, 2014 CarswellBC 2267 (S.C.C.).

settlement. They did so by trying to adduce into evidence the parties' mediation briefs, despite the settlement privilege and confidentiality that attached to that material. To attempt to have this privileged and confidential material admitted in evidence seems in keeping with the requirements of *Sattva*. In *Sattva*, the Supreme Court of Canada held that a contract interpretation exercise requires an analysis of the parties' intent and scope of their understanding. When determining the parties' presumed intentions, the trier of fact must consider the factual matrix at the time the parties entered the contract.[5]

In *Reiss v. Garten*, the trial judge requested submissions from counsel on the appropriateness of this evidence. The trial judge correctly viewed his role in part as the protector of the mediation process. Both parties made submissions on the issue addressing the application of the Supreme Court of Canada case of *Bombardier Inc. v. Union Carbide Canada Inc.*[6] In *Bombardier*, the court grappled with the problem of whether an absolute confidentiality clause in a mediation contract displaces the exception to common law settlement privilege that arises when a party seeks to prove or interpret a contract. If the absolute confidentiality clause in the mediation contract were to prevail, then it would be impossible for a party seeking to prove the existence of an agreement to make its case. *Bombardier* stands for the proposition that there is an exception to settlement privilege such that "protected communications may be disclosed in order to prove the existence or scope of a settlement". The court explained that 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 scope of the settlement."[7] Even though the court agreed that parties' agreements to contract out of common law rules like settlement privilege should be respected, on the facts of that case, it found that the parties did not intend to override the exception to settlement privilege when they entered their contract to mediate.[8]

The court in *Bombardier* held that a mediation contract may provide for a confidentiality clause that is broader than that provided for by common law settlement privilege, but that clause does not automatically preclude the parties from tendering evidence of communications made in the mediation to prove the terms of the settlement. The court held that it is open to parties to contract for confidentiality in the mediation process and limit their ability to prove the terms of a settlement, that is, limit the exception to settlement privilege. However, "it must be clear, on applying principles of contract interpretation […] that that is what the parties intended."[9] As a practice point, it is therefore incumbent on the lawyer to consider this issue with his or her client when entering mediation.

In *Reiss v. Garten*, the trial judge decided that the mediation briefs should not be used as evidence in their entirety. His view was that the briefs were delivered in advance of the mediation as an opening position and could not be relied upon as conclusive of the parties' closing position. The trial judge did however permit cross-examination on certain paragraphs

[5] *Sattva, supra* at para. 47-50.
[6] *Bombardier Inc. v. Union Carbide Canada Inc.*, 2014 CarswellQue 3600 (S.C.C.).
[7] *Bombardier, supra* at para. 35.
[8] *Bombardier, supra* at para. 29.
[9] *Bombardier, supra* at para. 67.

of the mediation briefs to adduce evidence of the parties' opening positions in the brief and whether or not the parties changed their positions during the course of the mediation.

Many mediators' contracts have confidentiality clauses that are broader in scope than the confidentiality provided by the common law settlement privilege. The purpose of the clause is to protect the process. It follows that the documents produced by the parties for the mediation and the positions taken by them in the mediation are privileged, as are the mediator's notes and records. While the latter remain sacrosanct (the trial judge in *Reiss v. Garten* did not permit access to the mediator's notes and records concerning the minutes of settlement), the former are vulnerable to disclosure even in the face of a broad confidentiality clause in the mediation agreement.

Reiss v. Garten raises a number of considerations, particularly for family law lawyers and mediators because many family law disputes are resolved in that process, family law mediation briefs are customarily extensive and detailed, and family law litigants are often vulnerable participants in mediation. As a practice consideration, it is important to consider the terms of confidentiality provisions in a mediation contract and how careful you should be about exposing material that may surface in a court at a later date

If your client's goal is to use mediation more as a tool or a strategy to suss out your opponent's case in the context of litigation, then the settlement privilege is less of an issue. If your client's goal in mediation is more legitimate, that is to participate in an interest-based exploration with a view to achieving settlement, then you will want to turn your mind to the scope of confidentiality in the mediation agreement in case there is a future challenge to any possible settlement. You will also want to consider how you frame your client's negotiation and settlement position in your client's written materials and communications within the process as your client may have to prove his or her intentions at the time of the contract down the road should a dispute arise over the minutes.

A good method for capturing the parties' intentions at the time of the contract is to carefully draft recitals or background facts in the minutes of settlement. This is especially so if one of the parties is vulnerable. Well-drafted background facts will ensure that the minutes of settlement capture the parties' contemporaneous factual matrix for the future reader and protect your client.