Confidentiality of Settlement Discussions and the Homologation of Transactions

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I. Introduction

Alternate dispute resolution processes resulting in settlements have been taking place for decades. Following the conclusion of negotiations, a party may try to submit evidence regarding their agreement in subsequent proceedings or seek to have their agreement homologated. Since confidentiality is inherent in mediations and settlement conferences, the issue arises as to whether parties can present evidence concerning their confidential oral or written communications in other proceedings.

Recently, the Supreme Court of Canada in the cases of *Union Carbide Canada Inc. v. Bombardier*[2] and *Association de médiation familiale du Québec v. Bouvier*[3] dealt with this issue. These judgments have had an important impact on determining whether communications during settlement discussions in Quebec remain confidential or whether confidentiality can be lifted in certain circumstances.

The present article will discuss the principle of confidentiality in settlement discussions, its legal framework, its application in written proceedings and hearings, and the possible clauses that can be drafted. Finally, we will deal with the notion of transactions and the issues involved when a party wishes to homologate or annul the homologation of a transaction.

II Confidentiality

1. The Notion of Confidentiality and its Purpose

In Quebec, article 1(3) of the *Code of civil procedure* (“CCP”) stipulates that parties must consider private prevention and resolution processes before referring their dispute to the courts. Conflict resolution is not only foreseen by the legislature, but the courts also have a judicial policy of promoting the efficient resolution of disputes[4]. Parties are encouraged to settle their conflict because of court backlogs, the complexity of cases, the high costs involved in litigation, and the long delays involved in lawsuits. As well, there is a high level of satisfaction on the part of parties who participate in mediations and in settlement conferences.

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[2] 2014 SCC 35.

[3] 2021 SCC 54.

[4] Kosko c. Bijimine, 2006 QCCA 671; L.L.c. J.L., 2021 QCCS 5076.

An agreement concluded by the parties allows them to resolve their conflict quickly, without the expense and stress of a trial. In addition, parties often choose to participate in a private mediation process or in a settlement conference because of the possibility of fashioning their own solution to the conflict and because of the confidentiality involved. The confidential nature of the process allows them to keep personal information, financial matters, or other concerns, such as trade secrets, private and inaccessible to third parties.

The confidentiality of settlement discussions is established by our legislation. With respect to private mediations, article 4 CCP states that parties who choose a private dispute prevention and resolution process undertake to preserve the confidentiality of anything said, written or done during the process.

The same applies when parties select a settlement conference ("CRA"), presided by a Judge, to resolve their conflict. The privacy of a settlement conference is protected by article 163(3) CCP which states:

> "Everything said, written or done during the conference is confidential."

The obligation to maintain the confidentiality of the settlement process applies not only to the parties but also to the person assisting them as well as anyone who has participated in the process[5].

Prior to attending a mediation session or a settlement conference or before the discussions even begin, parties often sign a protocol containing confidentiality clauses. Such clauses may be limited to stating that the process is confidential, or they may be extensive and govern what can or cannot be divulged that is related to their dispute.

Confidentiality is an integral and an essential part of the settlement process. It allows the parties to be frank and honest with each other. It facilitates their discussions and the possibility of a settlement, in an uninhibited manner, without the fear that any information exchanged, or any admissions, offers, or compromises the parties make, will be used against them in court if they do not reach a settlement. Parties will be more likely to settle if they are confident that their discussions and negotiations will not be divulged.

The Court of Appeal in the case of *Kosko*[6] explained in the following passage why the protection of confidentiality in settlement talks is important:

> *[49] The protection of the confidentiality of these "settlement discussions" is the most concrete manifestation in the law of evidence of the importance that the*

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[5]3476677 Canada inc. c. Pomerleau inc., 2018 QCCS 3027 at para 21.

[6]Kosko, *supra* note 4 at paras 49-50.

> *courts assign to the settlement of disputes by the parties themselves. This protection takes the form of a rule of evidence or a common law privilege, according to which settlement talks are inadmissible in evidence.*
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> *[50] 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*[7]*.*

The courts, by protecting the confidentiality of settlement discussions, have shown the importance they place on the settlement of conflicts by the parties themselves. It has been recognized by the courts and scholars that, without the protection provided by confidentiality, settlement discussions would either not be effective or not take place at all. Parties may be reluctant to attempt to negotiate with each other given the risk that, if they fail to reach an agreement, they will be negatively affected by the disclosure of the communications that took place during their settlement negotiations. Moreover, it is in the public interest and of public order that the parties to a dispute be able to participate in such discussions[8].

2. Settlement Privilege

Settlement privilege is a common law rule of evidence that protects the confidentiality of the information which is divulged by the parties for the purpose of settling their dispute.

The Supreme Court, in the case of *Union Carbide*[9], recognized the importance of protecting confidentiality by reiterating with approval the above cited judgment of the Quebec Court of Appeal in the case of *Kosko*[10] on this subject. The Court indicated that "Settlement privilege", which is sometimes known as the "without prejudice rule", protects communications that parties exchange in their attempt to settle a dispute[11].

Settlement privilege applies in mediations and settlement discussions even when the parties have not invoked the privilege. It protects what was said and exchanged not only before and during a settlement conference and a mediation but, unlike a confidentiality clause in a contract, it also applies even after a settlement has been reached[12].

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[7]This citation from the Court of Appeal judgment of Kosko is reproduced in Union Carbide, *supra* note 2 at para 33.

[8]Kosko, *supra* note 4 at paras 49-54; L.L,.*supra* note 4, at para 22.

[9]Union Carbide, *supra* note 2.

[10]*Ibid*, at para 33.

[11]*Ibid*, at para 31.

[12]Union Carbide, *supra* note 2 at para 34; Association de médiation familiale du Québec, *supra* note 3 at para 95; Caux et Fils inc. c. 9215-4012 Québec inc., 2016 QCCS 4553 at para 40.

In addition to the provisions of the *Code of civil procedure*, settlement privilege, stemming from the common law, constitutes another basis to protect the dispute resolution process and the communications between parties trying to settle their conflict. As the Supreme Court pointed out in the case of *Globe and Mail v. Canada (Attorney General)*[13], the rules set out in the *Civil Code of Quebec* are rooted in both the French law and the common law, which means that French law and common law can be used to interpret those rules. Quebec is therefore considered a mixed jurisdiction; if the ultimate source of a legal rule is the common law, then it would only be logical to look to the common law, in interpreting and articulating the same rule in the civil law[14].

Settlement privilege, which is now recognized to be applicable in Quebec[15], is known as the "duty of confidentiality[16]. It has been codified in Quebec law in section 4 CCP, as already indicated above. It is immaterial whether parties reach an agreement for the privilege to take effect.

In this regard, the Supreme Court stated in the judgment of *Sable Offshore Energy Inc. v. Ameron International Corp*[17] :

> *[17] (…) the protection is for settlement negotiations, whether or not a settlement is reached. That means that successful negotiations are entitled to no less protection than ones that yield no settlement (…).*

3. The Application of Confidentiality in Quebec Judgments

Parties are required to respect their obligation of confidentiality when they choose to prevent a dispute or settle a dispute that has already arisen, by means of a dispute resolution process. Our courts have protected the confidentiality of what was said, written, or done in mediations and in CRA's in several cases[18]. This protection includes the documents that are prepared for the purpose of negotiations.

Consequently, the courts have accepted objections to evidence which would reveal what transpired, such that evidence of this nature is not permitted because of its confidential nature.

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[13]Globe and Mail v. Canada (Attorney General), 2010 SCC 41.

[14]*Ibid,* at para 45.

[15]Procureure générale du Québec c. Groupe Hexagone, 2018 QCCA 2129 at para 45; Construction Novatek inc. c. Hoang Binh inc., 2019 QCCS 2997 at para 11.

[16]Association de médiation familiale du Québec, *supra* note 3 at para 95.

[17]Sable Offshore Energy Inc. v. Ameron International Corp., 2013 SCC 37, at para 17.

[18]Milunovic c. Bélanger, 2015 QCCA 282;Thibault c. Ouellette, 2014 QCCA 1258; K.I. c. J.H., 2019 QCCA 759.

The case of *Caux and Sons Inc.*[19] constitutes an example where the Court refused to hear evidence in an action for the termination of a franchise agreement. The plaintiff wished to question the defendant on the verbal exchanges that occurred during a settlement conference. The Court stated that, in their agreements written for the purpose of a settlement conference, the parties had unequivocally indicated that the documents and information exchanged in this context could not be opposed in the event the settlement conference failed. Accordingly, the Court concluded that everything that followed the signing of these agreements must be protected and remain confidential in order to preserve the integrity and usefulness of this alternative dispute resolution method. Other judgments have adopted the same position.

In addition to the provisions of the *Code of civil procedure*, as indicated above, settlement privilege is an additional means to protect the dispute resolution process and the communications between parties attempting to settle their conflict.

In the case of *Alliance québécoise des techniciens de l'image et du son (AQTIS) c. Alliance internationale des employés de scène, théâtre, techniciens de l'image, artistes et métiers connexes des États-Unis, ses territoires et du Canada, section locale 514 (AIEST 514)*[20], the plaintiff's objective was to attack the credibility of the defendant's representative by putting into evidence the animosity that existed between the parties at the mediation. In addition, the plaintiff wanted to question the defendant's representative about the transaction concluded between the parties. The Court applied the common law settlement privilege and referred to the fact that the public interest favours the settlement of disputes. The Court considered that there were no grounds to justify an exception to the principle of settlement privilege and that the allegations the plaintiff wanted to prove could be established without divulging the discussions that took place during the mediation process.

Parties have tried, in their written proceedings, to introduce discussions regarding the behaviour that took place in settlement conferences or mediations. Our jurisprudence has noted that the courts are cautious before radiating allegations, so that parties can be heard and participate in a contradictory debate, and for all pertinent information to be put into evidence to establish the truth[21]. However, our courts have not hesitated to radiate paragraphs of a proceeding which reveal the communications between the parties or the content of offers made in a dispute resolution process.

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[19] Caux and Sons Inc., *supra* note 12.

[20] Alliance québécoise des techniciens de l'image et du son (AQTIS) c. Alliance internationale des employés de scène, théâtre, techniciens de l'image, artistes et métiers connexes des États-Unis, ses territoires et du Canada, section locale 514 (AIEST 514), 2016 QCCS 1575.

[21] 3821099 Canada inc. c. Mode Kookai inc., 2021 QCCQ 11280 at para 13.

For example, in the case of *Dr Élise Shoghikian inc. c. Syndic*at des copropriétaires du *Clos St-Bernard*[22], the Court of Appeal concluded that the paragraphs of the Motion to Institute Proceedings would allow the plaintiff to present evidence of the defendant's reproached behaviour, without the necessity of knowing the details of the negotiations that preceded the settlement conference or the offers presented during the settlement conference itself. According to the Court, those negotiations were protected by the *Code of civil procedure* as well as by the confidentiality agreement which was signed by all the participants.

While the nature of what transpires in a mediation or settlement conference is confidential, it should be noted that the existence of a mediation, or settlement negotiations between the parties, is not confidential. It is an element of evidence that can be presented to show that the parties considered the different means of dispute resolution before referring their conflict to the courts, as required by article 1 CCP[23]. As well, the refusal to participate in a settlement conference is not a fact that is protected by litigation privilege. The courts associate litigation privilege with the secrecy surrounding negotiations to protect this mechanism of settlement, but not the fact of participating in the negotiations[24].

4. The Exception to Settlement Privilege

Settlement privilege, while applicable to protect confidential information and discussions that take place during dispute resolution sessions, is not absolute. There are exceptions to settlement privilege such that confidentiality can be lifted where misrepresentation, fraud, undue influence, and the prevention of overcompensation of the plaintiff is alleged[25].

Information that is protected can also be disclosed to prove the existence or scope of a settlement agreement. The Supreme Court in *Union Carbide*[26] explained the exception to settlement privilege as follows:

> *[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:*
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> *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*

[22]Dr Élise Shoghikian inc. c. Syndicat des copropriétaires du Clos St-Bernard, 2015 QCCA 1445.
[23]3821099 Canada inc. *supra* note 21 at para 9.
[24]Desautels c. Mitchell, 2022 QCCS 2674.
[25]Union Carbide, *supra*, note 2 at para 34.
[26]*Ibid,* at para 35.

> *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.*

According to the Court, the settlement exception serves the same public interest as the privilege itself, which is the promotion of settlements.

The Supreme Court in the *Sable Offshore Energy Inc.* case explained the considerations that apply when the Court considers a situation to qualify as an exception to settlement privilege and lifts the privilege of confidentiality surrounding a settlement conference:

> *[19] There are, inevitably, exceptions to the privilege. To come within those exceptions, a defendant must show that, on balance, "a competing public interest outweighs the public interest in encouraging settlement" (…)*[27]*.*

The exception applies even when the parties do not enter into an agreement until after the mediation has concluded. However, it applies only to what is necessary to divulge in order to prove the existence or scope of the settlement[28].

Not only is settlement privilege applicable in Quebec, but the exception to settlement privilege is also applicable in Quebec. As indicated above, while confidentiality is an integral aspect of mediations and settlement conferences, communications can be disclosed when a party wishes to prove the existence or scope of an agreement that resulted from these settlement discussions. As well, parties are allowed to prove facts that occurred, and exchanges made, after a settlement has been reached to establish the purpose of an agreement[29] or to set out facts relevant to determine a party's bad faith in the dispute resolution process[30].

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[27]Sable Offshore Energy Inc., *supra* note 17 at para 19.

[28]Union Carbide, *supra* note 2 at para 66.

[29]9156-3817 Québec inc. c. Presse-Café inc., 2012 QCCS 3549 at para 24.

[30]Construction Novatek inc., *supra* note 15 at para 12.

Accordingly, the Courts have lifted the confidentiality of discussions that take place with the intent of settling a dispute in cases that come within the exceptions indicated above. Since parties often wish to homologate their agreements, the lifting of confidentiality has been invoked in motions to homologate a transaction, particularly when parties disagree as to whether they had in fact reached an agreement and when they dispute its terms.

As well, while the confidentiality of a settlement conference is not lifted lightly, it has been lifted where a party disputes the validity of a transaction and claims that it is void[31]. If a party could not invoke the discussions that took place during a dispute resolution process to show fraud or misrepresentation, parties could act in bad faith without suffering any consequence[32].

The exception to the general rule of settlement privilege also applies to family mediations. The Supreme Court in *Association de médiation familiale du Québec*[33] stipulated that confidentiality is a "means to an end". Consequently, when spouses resolve their dispute, they must have the proper tools to prove and to implement their agreement. The Court considered that the exclusion of the settlement exception in favour of absolute confidentiality once a dispute has been resolved could prevent a spouse from claiming their rights against the other spouse who is acting in bad faith[34].

While settlement privilege and confidentiality have a common purpose, namely, to promote settlements by encouraging parties to try to settle their conflict without the concern that any disclosure they make will be subsequently used against them, they are not identical. Settlement privilege, as explained above, is a rule of evidence. A confidentiality clause, on the other hand, is an agreement.

The scope of settlement privilege is not limited to the mediation session. The settlement privilege applies even after a settlement is reached. However, the parties to a mediation are free to change the scope of the settlement privilege and can create their own rules governing the confidentiality of their settlement discussions. They can, for example, stipulate that to be valid, an agreement that is reached in a mediation must be immediately put into writing. However, unless the parties have contracted out of the settlement privilege, the Court can analyze their communications to determine whether or not an agreement has been reached.

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[31]Viconte inc. c. Transcontinental inc., 2020 QCCQ 1475 at paras 12 and 54.

[32]David GROSSMAN, "*The Limited Secrecy of Settlement Conferences (or, The Truth is Out There)", CanLII Connects*, May 18, 2020.

[33]Association de médiation familiale du Québec, *supra* note 3 at para 104.

[34]*Ibid*, at para 105.

5. The Impact of the Supreme Court Judgments

It is clear from the recent judgments of the Supreme Court and the judgments that follow them, that typical confidentiality clauses signed by parties for the purpose of settlement discussions are not airtight. As already indicated, various situations provide an opening for the disclosure of the discussions and documents exchanged in the context of settlements. Our courts have readily admitted evidence that allow such information to be disclosed if they consider that the facts of the case correspond to an exception to settlement privilege and warrant the lifting of confidentiality.

However, jurists have raised concerns about the fact that laypersons who engage in mediation sessions cannot reasonably be expected to be aware of the exception to settlement privilege and its application to settlements[35]. Parties who sign confidentiality protocols to settle a dispute generally consider that such protocols will apply, and that everything said, written, or done with respect to a settlement will remain private.

Therefore, it would be beneficial to parties for the mediation protocol to clearly spell out the limits to the confidentiality undertakings it contains. As well, they should be made aware of the application of the exceptions to settlement privilege. In this way, parties will not be taken by surprise if the courts lift the protection of confidentiality and allow their discussions and negotiations to be disclosed. Consequently, lawyers should consider how confidentiality clauses should be drafted to reflect the wishes of their clients, who may or may not want absolute confidentiality to govern their settlement talks.

6. Confidentiality Clauses

The parties to settlement discussions can foresee greater confidentiality protection by contracting out of the common law exception to settlement privilege. In this way, they can prevent the other party from presenting evidence regarding the communications that took place before, during, or after their settlement discussions. However, in order that such clauses be accepted by the courts, they must be written very clearly in the parties' agreement.

Inversely, parties can foresee that information that is necessary to demonstrate the existence or scope of an agreement reached in a mediation or settlement conference be admissible as evidence.

The following is an example of a mediation protocol which would specifically provide for the disclosure of what transpired during a mediation or a settlement conference, if necessary, to prove that the parties concluded an agreement or to prove its scope:

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[35]B. RUMBLE, (2022, March), "Settlement Privilege & Family Mediation in Quebec", *TheCourt.ca.* http://www.thecourt.ca/association-de-mediation-familiale-du-quebec-v-bouvier-scc-finds-the-exception-to-settlement-privilege-applies-in-the-family-mediation-context/.

Confidentiality[36]

We acknowledge that the context of our meetings, including discussions, writings, documents, and/or actions, are confidential. We undertake not to use as evidence, whether orally or in writing, in any arbitration, administrative or legal proceeding, which is related or not to the dispute, anything that transpired in the mediation session (or settlement conference), without the consent of the parties.

We understand that we cannot be compelled to disclose, in any arbitration, administrative or legal proceeding, which is related or not to the dispute, anything that transpired during the mediation (or settlement conference), including negotiations, offers, compromises, admissions, as well as what was said to us, discussed with us, shown to us, or revealed to us in any manner, during the mediation or settlement conference.

We understand that we may be called upon to testify to establish the existence of an agreement reached in the mediation or settlement conference or its scope and that any useful information in this regard may be admissible as evidence.

We acknowledge that the mediator (or judge) presiding over the mediation (or settlement conference) will not be called upon to testify in any legal or other proceeding as to what transpired during the mediation session or settlement conference, and we undertake not to call upon him to do so.

(English translation, the underlining is ours)

The following is another example of a confidentiality clause that allows for the divulgation of evidence, but only in certain circumstances. It prohibits the use of evidence arising out of the mediation process, except in the case of homologation or judicial review.

Confidentiality of the mediation[37]

a) Everything that is said or written during the mediation process is formulated under the guise of confidentiality, without prejudice, and is not admissible as evidence in any proceedings, whether judicial or otherwise;

b) The Mediator, the parties, their attorneys, their representatives and all accompanying persons must maintain the confidentiality of the entire mediation process; however, nothing in this Agreement shall in any way impair the right of the party who disclosed a document, to use it in any proceeding, whether

[36]This clause is based on that contained in the case of Viconte inc., *supra* note 31.

[37]Bloom Films 1998 inc. c. Christal Films productions inc., 2011 QCCA 1171.

> *judicial or otherwise, when that party would otherwise have had the right to do it otherwise;*
>
> *c) <u>This confidentiality clause does not apply in the event of a request for homologation or judicial review;</u>*
>
> *d) In any event, the Mediator will not be subpoenaed to testify in any proceedings, whether judicial or otherwise.*
>
> (English translation, the underlining is ours)

To have the effect of preventing the application of the exception to settlement privilege and preclude evidence of any aspect of a mediation or settlement conference from being disclosed, the terms of an agreement must not be ambiguous in any way.

We suggest that in any text dealing with the confidentiality of a mediation or settlement conference, in addition to the standard clauses, the text contains a paragraph that specifically stipulates that the exception to the settlement privilege is displaced. The following is an example of such a text:

> The parties confirm they are participating in settlement discussions with the intent of settling their dispute in an amicable manner.
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> The parties hereto wish to keep strictly confidential all communications and documents exchanged in the mediation process or settlement conference.
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> The discussions held before, during, or after the mediation or settlement conference, as well as all documents used or exchanged by a party, which are not part of the court record and which cannot otherwise be legally introduced into evidence are confidential and will not be disclosed under any circumstances. Accordingly the parties undertake not to allege, refer to or seek to put into evidence in any proceeding, whether legal or otherwise, anything that transpires in or is related to the mediation or settlement conference, including any oral or written communications or any behaviour that takes place.
>
> The parties expressly contract out of the exception to settlement privilege. No disclosure whatsoever can be made in any proceeding, whether legal or otherwise, of anything that was said, written, or done in the context of their attempts to settle their dispute, to establish the existence of an agreement, its scope, its purpose, its validity, a misrepresentation, fraud, undue influence, or the bad faith of a party, or for any other purpose whatsoever.
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> The mediator, attorneys, the parties, and any other participant in the mediation process or settlement conference undertake to maintain the confidentiality of all aspects of the settlement discussions. They cannot be compelled to disclose the content of the discussions held, the documents exchanged, or the offers,

admissions, or concessions made before, during, or after the mediation process or settlement conference. The parties agree that all participants are bound by the present contracting out of the exception to settlement privilege.

The parties undertake to refrain from taking any screenshots, from recording in any manner, broadcasting or transmitting the mediation process or settlement conference. They will not contact anyone else through any technological means, with the exception of their attorney, if their attorney is not present at the mediation or settlement conference.

The parties recognize that they may withdraw from the mediation or settlement conference at any time but that they will be unable to compel the other party to disclose what was said, written, or done during the mediation or settlement conference.

In summary, the protection accorded to settlements depends on the express wishes of the parties in their signed mediation or settlement protocol. In the absence of clear language regarding the express wishes of the parties, the principle of settlement privilege and its exception will apply.

Once the negotiations have ended, a party may seek to have the Court homologate the agreement, alleging that a transaction was concluded. The other party may contest. The next section will deal with the nature of transactions and the various considerations that arise in the homologation process.

III Homologation Of Transactions

1. Applications for Homologation of a Transaction

A transaction is a written or verbal contract which parties have concluded after they have made mutual concessions or reservations. Its purpose is to prevent future litigation, put an end to a lawsuit, or resolve difficulties arising from the execution of a judgment[38].

Not everything can be the object of a transaction. There are exceptions, such as the status or capacity of a person and matters of public order[39].

[38]Article 2631 C.c.Q.
[39]Article 2632 C.c.Q.

Transactions must be homologated, that is approved by the Court, before they can be executed[40]. Transactions, once homologated, have the same force and effect as a judgment.

The process, which begins with an application to homologate a transaction[41], may be met with a contestation of the application, based on various grounds. In situations where confidentiality is alleged, the courts will first deal with that issue. If the contestation based on confidentiality is rejected, the courts will then be called upon to determine if a transaction was concluded[42].

2. The Conditions for a Transaction

In *Sacchetti c. Nuccio*[43], Justice Martin Sheehan undertook an extensive review of the law concerning the establishment and homologation of a transaction. The following emerged from that judgment: (1) a transaction does not require a specific form, it can be verbal; (2) the party attempting to prove the transaction has the burden to prove it on the balance of probabilities; (3) presumptions may be used to prove a transaction but they must be serious, precise, and concordant; (4) the parties must have the capacity to agree; (5) there must be an exchange of consents and a valid cause and object[44].

The Federal Court also weighed in on the essential elements of a transaction in the case of SSE Holdings, LLC v. Le Chic Shack Inc.[45], ("*Shake Shack").* According to the Court:

> *[81] In light of the CCQ provisions and the case law concerning the formation of contracts, the applicable requirements for concluding to the existence of a settlement agreement can be summarized as follows: 1) for there to be a binding settlement contract, there must be a matching offer and acceptance on all terms essential to the agreement; 2) the acceptance must be unequivocal; 3) as for any other agreements, there must be considerations flowing both ways; 4) the terms must be sufficiently certain; 5) there can be an offer and acceptance so as to create a binding contract even where there is no written agreement or where the parties contemplate the execution, at a later date, of a formal document evidencing the terms of the agreement; 6) on-going negotiations as to a more formal document do not necessarily mean that an offer*

[40]Article 2633 C.c.Q.
[41]Article 527 C.C.P.
[42]Article 528 C.C.P.
[43]Sacchetti c. Nuccio, 2019 QCCS 1931.
[44]*Ibid,* at para 108.
[45]SSE Holdings, LLC v. Le Chic Shack Inc., 2020 FC 983.

> *or acceptance has been repudiated; 7) the Court must assess the evidence objectively, whether it is on the existence of the agreement, the certainty of its terms or their essential character.*[46]

What emerges from the jurisprudence is that in order to establish the existence of a transaction[47]:

1. The object of the agreement must be to put an end to or avoid litigation;
2. The parties must make mutual concessions or reservations;
3. The parties must agree on all of the essential elements of the transaction.

The existence of a transaction is a question of fact. The party alleging the transaction has the burden of proving its existence[48]. All three of the above criteria must be present. In the absence of any one of the criteria, the application will not be granted[49].

3. Evidence Examined to Determine the Existence of a Transaction

When deciding whether the parties have concluded a transaction, the courts consider the evidence presented to ensure that the conditions for the existence of a transaction have been met.

Union Carbide[50] provided the Supreme Court of Canada with the opportunity to discuss the nature of the proof a party could use to establish a transaction. The Court considered the mediation agreement signed by the parties before the mediation began and the communications exchanged to determine the parties' intentions. Based on the evidence, the Court found in favour of the conclusion of a transaction.

The Federal Court of Canada in *Domaines Pinnacle Inc. v. Beam Suntory Inc.*[51]*, (Beam)* considered similar evidence in reaching its conclusion that a transaction existed. The parties sued each other over alleged trademark infringements. At issue was whether the unconditional acceptance of a final offer to settle put an end to the dispute in Federal Court and constituted a transaction binding the offeror, who refused to comply with the offer.

Beam had proposed settling the case by each party filing a discontinuance of their action (claim and counterclaim) without costs. The offer was accepted by Pinnacle who

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[46] *Ibid,* at para 81.
[47] Sacchetti, *supra* note 43.
[48] *Ibid,* at para 108.2.
[49] *Rathwell c. Rathwell,* 2023 QCCS 258 at para 26.
[50] Union Carbide, *supra* note 2.
[51] Domaines Pinnacle Inc. v. Beam Suntory Inc., 2015 FC 680, upheld by the Federal Court of Appeal in 2016 FCA 212.

filed its Notice of Discontinuance with the Federal Court. However, Beam refused to sign the agreement and produce its Notice of Discontinuance when it discovered that Pinnacle's interpretation of the agreement between the parties did not prevent Pinnacle from continuing its action before the Superior Court of Quebec. Beam invoked a defect of consent and asked the Court to declare that there was no agreement between the parties.

At the hearing on the motion to homologate, Pinnacle established that it had unconditionally accepted Beam's written offer to settle which Beam had never withdrawn or revoked. Moreover, Beam's offer was not conditional on settlement of the Superior Court action.

The Federal Court held that there was in fact a transaction. In arriving at its conclusion, the trial Judge considered all of the affidavits and documents submitted by the parties, including the cross examinations of the parties.

In the case of *Audrey Chédor and The Minister of Immigration, Refugees and Citizenship Canada*[52]*,* the Federal Court considered the provisions of the *Civil Code of Quebec* in determining whether the agreement complied with the Code. There was no dispute over the existence of the settlement agreement. At issue was:

> *[55] Article 2633 of the CCQ provides that a transaction has, between the parties, the authority of res judicata, but that it is not subject to forced execution until it is "homologated"(...). In the Province of Quebec, transactions are usually homologated by the courts, which poses the question whether the approval of the Settlement by the CHRC – which is not a court, nor an administrative tribunal (like the Canadian Human Rights Tribunal) – constitutes "homologation" within the meaning of article 2633 of the CCQ*.[53]

The Court concluded that it had the power to homologate the settlement agreement[54]. Having found that the provisions of the *Civil Code of Québec* were respected, the Court homologated the settlement agreement and declared that for the purpose of enforcement, the settlement agreement was made an Order of the Federal Court.

In *Shake Shack* [55], the Court also considered the applicable provisions of the *Civil Code of Québec* to determine whether the parties reached an agreement. Shake Shack had sued Le Chic Shack for alleged trademark infringement. The parties agreed to attend a Court-assisted Mediation Session. Following the Mediation Session, Shake Shack was

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[52]Audrey Chédor and The Minister of Immigration, Refugees and Citizenship Canada, 2016 FC 1205.
[53] *Ibid,* at para 55.
[54]*Ibid* at paras 58 and 62.
[55]Shake Shack, *supra* note 45.

of the opinion an agreement had been reached but Le Chic Shack disagreed. The evidence was to the effect that the parties had been unable to agree on the size of the exclusivity zone where Le Chic Shack could continue to use its trademark. Nonetheless, Shake Shack sued to enforce the alleged agreement.

The Federal Court has specific rules in place governing its Court-assisted Mediation Sessions, namely section 389 of the Rules which states that when parties settle all or part of a proceeding, their agreement must be signed by the parties or their counsel[56]. However, at no point during the Court-assisted Mediation Session did the parties put their proposed agreement in writing. The Court did not consider this fact sufficient in and of itself to dismiss the proposed settlement agreement. Instead, it recognized its authority to consider the civil law of Quebec in order to determine whether a transaction had been concluded[57].

The evidence surrounding the conclusion of an agreement is often examined to determine whether the parties agreed on all of the essential elements of the transaction.

In the case of *Shake Shack,* the Court found that the territorial restriction in this trademark case was an essential element of the transaction. The failure of the parties to agree on the territory precluded the Court from finding that a transaction took place.

The notion of essential elements was also dealt with in *Rathwell*[58] where one party argued a transaction had been concluded following the alleged acceptance of a promise to purchase. The contesting party stated there was no transaction and that the promising purchaser had failed to respect his own undertakings.

The Court, reiterating the principles which must guide it when called upon to homologate a transaction[59], stated:

> *[12] Given the contractual nature of a transaction, the parties must have agreed on all essential elements for a transaction be found to exist[5] and the Court may consider the provisions of the Civil Code regarding the interpretation of contracts. The content of contemporaneous documents and discussions, the context under which these discussions took place as well as the conduct of the parties or their attorneys can all be considered to shed light on the parties' intention.[6]*

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[56] *Ibid*, at para 31.
[57] *Ibid,* at para 63.
[58] Rathwell, *supra* note 49.
[59] *Ibid, at para* 12.

The evidence showed that the parties had failed to agree on a closing date[60]. Having found that the closing date was an essential condition; the Court was of the opinion that no transaction had been concluded[61].

In *Groupe Hexagone c. Miron*[62], one of the parties argued there was no transaction because the parties had failed to agree on the fiscal treatment of a payment. According to the Court, the fiscal treatment was not an essential element of the transaction and did not prevent its homologation.

In another case, the court's decision was based on whether the parties had made mutual concessions or reservations. In *La Rochelle c. Gesco Columbus inc*.[63], the court confirmed that the absence of reciprocal concessions or reservations was fatal[64]. It also reiterated that the agreement cannot be contrary to public order[65].

4. Secondary Elements

As indicated above, while determining whether the parties have agreed on the essential elements of a transaction, the courts will sometimes identify secondary elements as well.

Franchises Eggsquis inc. c. 9174-7600 Québec inc.[66] is a case on point. The parties continued to negotiate a contract for the sale of an enterprise after the conclusion of an agreement. The Court distinguished the conclusion of a transaction from its application, which can entail the drafting of other agreements or juridical acts. The Court held that the negotiation over the form of the sale agreement was not sufficient to negate the existence of a transaction.

As held by the Court][67]:

> *[30] En effet, il importe de distinguer la conclusion d'une transaction de sa mise en application, laquelle peut impliquer la rédaction d'autres ententes ou actes juridiques afin de donner effet à la transaction[5].*
>
> > *[71] Quant à la présence d'un consensus entre les parties, le juge Dumais précise ce qui suit en faisant une*

[60] *Ibid,* at para 25.
[61] *Ibid*, at para 26.
[62] Groupe Hexagone c. Miron, 2022 QCCS 4475.
[63] La Rochelle c. Gesco Columbus inc., 2021 QCCS 3219.
[64] *Ibid,* at para 34.
[65] *Ibid,* at para 2.
[66] Franchises Eggsquis inc. c. 9174-7600 Québec inc., 2021 QCCS 4140.
[67] *Ibid* at para 30.

> *distinction entre l'entente elle-même et sa mise en application :*
>
> *[34] À ce niveau, le Tribunal rappelle qu'il faut distinguer l'entente elle-même de sa mise en application, laquelle implique souvent la rédaction d'un document final signé par les parties.*
>
> *[35] Dans la décision Morin c. Villeneuve, M. le juge Fraiberg écrivait à ce sujet:*
>
> > *On ne doit pas confondre, d'ailleurs, le contrat et sa réalisation. La mise en application d'une transaction nécessite souvent l'exécution d'autres ententes ou actes juridiques. Cela n'empêche pas que le contrat lie toujours les parties, de sorte que l'une ou l'autre puisse exiger l'exécution en nature des obligations prévues. Voilà en effet l'objectif de l'homologation: rendre exécutoires ses obligations advenant le refus de l'une ou l'autre des parties de donner suite à la transaction valablement conclue.*
> >
> > *[Emphase en gras omis. Notre soulignement]*

Once a Court concludes in favour of the existence of a transaction, the next step is homologation.

5. The Power of the Court When Called Upon to Homologate a Transaction

The jurisprudence is consistent in holding that the Judge's role is limited to determining whether a transaction exists. The Court cannot pronounce itself on the merits of the agreement unless specifically empowered to do so. The Court exceeds its jurisdiction if it attempts to assess whether the concessions made were appropriate.

As held in *Rathwell*[68]:

> *[13] When called upon to decide on an application to homologate a transaction, the Court's role is limited in that it only examines its legality to determine whether a transaction does in fact exist. In this determination, there is no room for an evaluation of the merits of the parties' respective claims or the appropriateness of their mutual concessions.[7]*

The case of *Audrey Chédor*[69] is another example of the limited authority of the Court. When faced with an application to homologate, the Court confirmed that its role was limited to examining the settlement to ensure its compliance with the civil law rules concerning transactions.

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[68]Rathwell, *supra* note 49 at para 13.

[69]Chédor, *supra* note 52.

Unlike civil transactions, in family matters the power of the Court is more extensive. Because it is dealing with matters of public order, such as custody of children and child support, the agreement cannot be enforced until the Court has reviewed it to determine its appropriateness[70].

In *Association de médiation familale du Québec*[71], the Court considered that the parties in family matters could prove the existence and terms of a transaction in the same way as parties in civil or commercial matters. Acceptable evidence included emails, cheques written and cashed, and testimony[72].

The powers of the Court were also considered in *Duquette Construction (1994) ltée c. Klub Athletik 40 inc.*[73], where plaintiff sued to homologate a transaction. Defendant opposed on the grounds the plaintiff had been paid in full. The Court confirmed that its powers were limited to determining whether or not a transaction had occurred. Defendant's argument that plaintiff had been paid in full related to the execution of the transaction and not to its validity. Defendant could only raise those arguments at the execution stage once the homologation was granted[74]. The Court homologated the transaction.

Once homologated, a transaction has the same force as a judgment[75], which allows a party to execute it if the transaction is not respected. It is not possible to partially execute a transaction; it must be considered as a whole and is indivisible[76].

In *Sacchetti c. Nuccio*[77], the Court of Appeal discussed the standard of intervention applied by an appeal court when reviewing a lower court's homologation judgment. According to the Court:

> *[54] (...)*
>
> > *[5] When asked to homologate a transaction, a trial judge must, while keeping in mind the applicable conditions and principles, undertake an evidence-based factual analysis to determine whether there was a meeting of the minds on the essential terms and conditions giving rise to the transaction. As such, the Court of Appeal should only intervene in the case of a "palpable and overriding error", as previously underlined by this Court in the*

[70] Association de médiation familiale du Québec, *supra* note 3.
[71] *Ibid*.
[72] *Ibid,* at para 119.
[73] Duquette Construction (1994) ltée c. Klub Athletik 40 inc., 2019 QCCS 2015.
[74] *Ibid,* at para 41.
[75] Article 528 C.C.P.
[76] Article 2631 C.c.Q.
[77] Sacchetti c. Nuccio, 2021 QCCA 1230 at para 54.

> *context of a contested transaction in Supreme Precision Castings (1963) Ltd c. Parker Industries Ltd:*
>
> > *La détermination de savoir s'il y a eu ou non transaction est essentiellement une question de fait, question sur laquelle une Cour d'appel n'interviendra pas à moins d'erreur manifeste du juge du procès.[59]*
> >
> > [Renvois omis]
>
> (English translation)

6. Grounds for Annulling a Transaction

The *Civil Code* provides that a transaction can be annulled for the same causes as contracts in general such as error, fear or lesion. Error of law is not a ground to annul a transaction[78]. As well, the discovery of documents, after the fact, does not justify the annulment of the transaction, unless they were intentionally withheld[79].

Recent judgments have dealt with grounds for annulment. For example, *Groupe Drumco Construction inc. c. 7321228 Canada inc.*[80] was an appeal from a judgment homologating a transaction. The Court of Appeal confirmed that once a transaction is homologated, it cannot be annulled on the grounds that one of the parties is not respecting its obligations. The appropriate recourse under those circumstances is a separate action for breach of contract[81].

In *Docteure Renée Gendron parodontiste inc. c. Pelletier*[82], at issue was whether force majeure could nullify a transaction. A dispute arose regarding the purchase of a party's interest in a dental clinic. The parties attended a CRA where they signed a transaction and release. Following the CRA, defendant refused to respect the transaction and pay the amount agreed upon, alleging the pandemic and plaintiff's fraud. The Court held that the personal impossibility of a party to pay a sum of money was not considered force majeure and was not grounds to nullify the transaction and stated:

> [31] *Précisément sur la question de savoir si la force majeure peut être opposée à l'obligation de payer une somme d'argent, le Tribunal est accord avec les principes qui se dégagent du jugement Fardad c. Altitude Montréal inc.[10]. La juge Catherine Mandeville s'y exprime ainsi :*
>
> > *[11] Cette position est insoutenable en droit et manifestement non*

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[78] Article 2634 C.c.Q.

[79] Article 2637 C.c.Q.

[80] Groupe Drumco Construction inc. c. 7321228 Canada inc., 2017 QCCA 145.

[81] *Ibid,* at para 7*3. See also Béland c. Proulx, 2023 QCCQ 25 and CS Design Inc. c. Lateral Office Inc. 2022 QCCS 233.*

[82] *Docteure Renée Gendron parodontiste inc. c. Pelletier,* 2021 QCCS 5001 at para 31.

> *fondée. Dans un premier temps, la doctrine enseigne que la notion de force majeure n'est pas opposable à un défaut de payer une somme d'argent. C'est ainsi que dans l'ouvrage de doctrine bien connu, Les obligations, on indique :*
>
> > *39. Lorsqu'il s'agit de l'obligation de payer une somme d'argent, c'est une obligation de garantie et la force majeure n'est pas un moyen de défense permettant de se soustraire à cette obligation.*
> >
> > *[12] L'argent étant un bien fongible, la présente situation se distingue de celles où, en raison de force majeure, le bien n'est plus disponible ou détruit et ne peut donc pas être remis.*
> >
> > *[…]*
> >
> > *[20] Monsieur Fardad allègue son incapacité à effectuer les versements attendus en fonction du contrat. Mais son incapacité personnelle n'est pas synonyme d'impossibilité pour tous. Par ailleurs, ses déclarations lors de son interrogatoire permettent de relativiser cette incapacité et de conclure qu'il s'agit plutôt d'une difficulté.*

In *Cai c. 9104-2523 Québec inc.*[83], the plaintiff alleged that the plaintiff had failed to read the transaction agreement. The Court considered this failure to be an inexcusable error and not justification for preventing the homologation[84].

IV Conclusion

Mediations and settlement conferences are confidential; there are however exceptions to this principle. Accordingly, litigants who participate in settlement negotiations should do so with the understanding that what they say, write, and do can be used against them, unless they specifically contract for greater confidentiality protection than what is available at common law.

Once the parties end their settlement discussions, a party may then seek to homologate their alleged agreement so that it can be executed. The other party may contest the application. The courts will then be called upon to determine whether the required conditions for an agreement have been met.

It is clear that the 2016 amendments to the *Code of civil procedure* represent a shift in favor of dispute prevention and resolution processes, such that the courts will not hesitate to homologate an agreement, where sufficient facts exist to support this conclusion.

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[83] Cai *c. 9104-2523 Québec inc.,* 2018 QCCQ 5020.

[84] *Ibid* at para 40.