Docket: 2012-2005(IT)G

BETWEEN:

JACQUES ABENAIM,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent,

and

KONICA MINOLTA BUSINESS SOLUTIONS (CANADA) LTD.,

Applicant.

[OFFICIAL ENGLISH TRANSLATION]

Oral motion under section 65 of the *Tax Court of Canada Rules (General Procedure)* heard on February 2, 2015, at Montréal, Quebec.

Before: The Honourable Justice Johanne D'Auray

Appearances:

Counsel for the appellant:	Geneviève Léveillé
Counsel for the respondent:	Benoit Mandeville
Counsel for the applicant:	Christian Létourneau

ORDER

WHEREAS at the hearing, counsel for the applicant made an oral motion under section 65 of the *Tax Court of Canada Rules (General Procedure)*;

And upon hearing the parties;

The motion is allowed with regard to the application to conduct the hearing *in camera*.

The appeal between Jacques Abenaim and Her Majesty the Queen, docket number 2012-2005(IT)G, will be heard *in camera*, at 30 McGill Street, Montréal, Quebec, at a date to be determined later.

The reasons for the order and the settlement agreements shall be treated as confidential. These documents shall be placed separately in envelopes and sealed. These envelopes shall be marked as follows:

> These envelopes shall not be opened, nor shall their contents be disclosed, except upon order of the Court.

This order shall continue in effect until the Court orders otherwise, including for the duration of any appeal of the proceeding and after final judgment.

The transcript of the hearing of the motion relating to this order shall remain confidential and shall not be disclosed except to one of the parties to this order.

In all other respects, the motion is dismissed with costs against the applicant, in favour of the appellant, to be paid within 30 days of the date of this order.

Signed at Ottawa, Canada, this 24th day of July 2015.

"Johanne D'Auray"

D'Auray J.

Translation certified true
on this 25TH day of May 2016

François Brunet, Revisor

Citation: 2015 TCC 242
Date: 20150724
Docket: 2012-2005(IT)G

BETWEEN:

JACQUES ABENAIM,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent,

and

KONICA MINOLTA BUSINESS SOLUTIONS (CANADA) LTD.,

Applicant.

[OFFICIAL ENGLISH TRANSLATION]

NOTE TO READER

Pursuant to the order made in this case, the reasons for this order contain redactions. All references to the terms of the settlement agreement have been omitted.

REASONS FOR ORDER

D'Auray J.

I. Background

[1] An oral motion was filed on February 2, 2015, in the Tax Court of Canada by Konica Minolta Business Solutions (Canada) Ltd. (the applicant) pursuant to section 65 of the *Tax Court of Canada Rules (General Procedure)*.

[2] This motion pertains to an appeal from an assessment made under the *Income Tax Act* (the Act) by Jacques Abenaim (the appellant) against the Minister of National Revenue (the Minister), concerning the taxation of a lump sum paid by

the applicant to the appellant after the appellant was dismissed, in accordance with a settlement agreement entered into by these same parties.

[3] The motion seeks to prohibit any testimony, including testimony by the appellant, regarding the terms of an agreement entered into by the applicant and the appellant. [Confidential].

II. Facts

[4] On July 6, 1994, the applicant and the appellant signed a contract of employment for an indeterminate term under which the appellant agreed to become the company's chief executive officer as of July 1, 1994.

[5] The applicant terminated the appellant's employment on June 9, 2009, by sending him a notice of termination effective July 20, 2006, in accordance with clause 5(d) of the contract of employment.

[6] On October 2, 2006, the appellant filed a civil suit against the applicant and its parent company in the Superior Court of Québec, District of Montréal, following the resiliation of his contract of employment. The motion seeks the following remedies:

- the resolution of the contract of sale of shares entered into on July 6, 1994, by which the appellant sold his shares in the company to the applicant, and the restitution of said shares;
- $2,000,000 in damages for the dividends lost as a result of selling the shares;
- the resiliation of the contract of employment dated July 6, 1994;
- all commissions and bonuses not paid since July 6, 1994;
- $2,000,000 in damages for lost income;
- the reinstatement of the appellant in his employment;
- damages of $500,000 per year, from July 20, 2006, for lost wages (or, in the alternative, a lump sum of $1,500,000 in lieu of notice);
- $150,000 in damages for extrajudicial fees; and

– $1,500,000 in damages for moral damage.

[7] [Confidential]. The parties resolved the dispute by signing a settlement agreement. Counsel representing the parties were Mr. Fournier for the appellant and Mr. Manzo for the applicant.

[8] [Confidential]

[9] The agreement also provided that its content would remain confidential. To this end, the appellant and the applicant undertook not to disclose the content of the agreement. [Confidential].

[10] [Confidential]

[11] [Confidential]

[12] [Confidential]

[13] [Confidential]

[14] [Confidential]

[15] [Confidential]

[16] [Confidential]

[17] However, the confidentiality clauses did not apply if disclosure of the terms of the agreement was required by law.

[Confidential]

[18] When he filed his tax return for the 2009 taxation year, the appellant included the full amount [Confidential] as a retiring allowance in computing his income.

[19] On June 3, 2010, the Minister issued a Notice of Assessment confirming the taxation of the amount [Confidential] as a retiring allowance.

[20] The appellant objected to the assessment dated June 3, 2010. Despite having reported the entire amount as a retiring allowance, the appellant argues that the

Minister erred in taxing the entire amount. He submits that a portion of the amount [Confidential] is non-taxable.

[21] On February 21, 2102, the Minister confirmed the assessment dated June 3, 2010.

[22] On May 22, 2012, the appellant filed an appeal in this Court.

[23] On May 2, 2014, at the hearing to determine the nature of the payment for tax purposes, counsel for the appellant stated that she intended to call Mr. Fournier as a witness. Counsel for the respondent, meanwhile, stated that he intended to call Mr. Manzo as a witness. The testimony of Mr. Fournier and Mr. Manzo addressed in part their discussions during the negotiations leading to the settlement of the dispute between the appellant and the applicant that was before the Superior Court of Québec.

[24] The appellant argues that the testimony of Mr. Fournier is necessary for the Court to determine the true nature of the payment made by the applicant to the appellant.

[25] With regard to settlement privilege and the agreements signed by the applicant and the appellant, it was agreed at the hearing that the appellant and the respondent would notify the applicant of their intention to call Mr. Fournier and Mr. Manzo as witnesses, thereby giving the applicant the opportunity to challenge any disclosure of the terms of the agreements. The hearing was therefore adjourned.

[26] Between the adjournment and the resumption of the hearing, I did not hear from the parties. However, on February 2, 2015, when the hearing resumed, counsel for the applicant, Mr. Létourneau, made an oral motion in which he asks that Mr. Manzo and Mr. Fournier be barred from testifying on the existence and terms of the settlement agreement and the negotiations leading up to it. The applicant also asks that the appellant's testimony on the terms of the agreements be declared inadmissible. The motion is primarily based on settlement privilege, to which Mr. Fournier and Mr. Manzo are subject.

III. Positions of the parties

The applicant

[27] The applicant raises four arguments in support of his motion.

[28] First, it submits that Mr. Manzo cannot testify regarding the terms of the settlement because of professional secrecy. It states that professional secrecy applies not only between a client and his or her counsel, but also when counsel enters into settlement negotiations with opposing counsel or a mediator.

[29] Second, the applicant argues that the appellant, Mr. Manzo and Mr. Fournier cannot testify regarding the terms of the agreement because they are bound by settlement privilege.

[30] The applicant also submits that the confidentiality clauses in the agreement are absolute confidentiality clauses. As such, they take precedence over the exceptions to settlement privilege in common law, more specifically, the exception that permits disclosure when one party wants to establish the existence or scope of a settlement.

[31] Furthermore, the applicant submits that the exception allowing the disclosure of the terms of a settlement agreement apply only between the parties and not to third persons. On this point, the applicant further submits that, even if the Court ruled that the exception permitting disclosure applied to third persons, in the light of the absolute confidentiality clauses in the agreement, these clauses take precedence over the exception permitting disclosure with regard to the existence or scope of a settlement agreement.

[32] According to the applicant, the language of the confidentiality clauses in the settlement agreement is strict and severe. These are not standard clauses. The breach of these clauses carries serious financial consequences for the appellant and certain members of his family [Confidential].

[33] The applicant notes that the confidential nature of a settlement conference is codified in article 151.21 of the *Code of Civil Procedure* (CCP)[1] of Quebec. The Court must therefore give effect to this principle by refusing to hear the witnesses' testimony.

---

[1] CQLR, c C-25.

[34] Finally, should the Court allow the appellant, Mr. Manzo and Mr. Fournier to testify on the terms of the settlement, the applicant asks that these witnesses be heard *in camera*, or by any other confidential process that it deems appropriate.

The appellant

[35] The appellant objects to the motion, for four reasons.

[36] First, he submits that settlement privilege must be set aside to ensure that he has a fair trial. Although the appellant is appealing from an assessment by the Minister, he submits that the motion is designed to interfere with a related principle, the right to make "full answer and defence".

[37] Second, the appellant argues that settlement privilege cannot apply because he was not physically present when Mr. Manzo and Mr. Fournier signed the agreement.

[38] Third, the appellant disputes the applicant's argument that settlement privilege can be set aside only between the parties. According to the appellant, the exception that permits disclosure has broad application and applies to the Minister.

[39] Finally, the appellant submits that the motion must be dismissed because Mr. Manzo, Mr. Fournier and he himself are free to discuss the terms of the agreement as required by law, [Confidential].

[40] Given that the Act requires that the appellant report the amount he received under the settlement agreement, he submits that it would be illogical to prevent persons who can shed light on the agreements from giving testimony so that the true nature of the amount can be determined for tax purposes.

The respondent

[41] The respondent supports the applicant's arguments. However, she raises two additional grounds.

[42] First, the respondent submits that the appellant cannot rely on the "as required by law" exception [Confidential]. According to the respondent, although reporting income is required by the Act, objecting to an assessment made on the basis of one's own information is not. This exception to the settlement agreement therefore does not apply.

[43] Second, according to the respondent, the fact that the confidentiality clause was negotiated in the agreement itself, rather than as part of a distinct prearrangement, suggests that the parties undertook not to discuss the agreement no matter what the circumstances. According to the respondent, the form chosen by the parties shows that they intended to give the confidentiality clauses precedence over the exceptions to settlement privilege.

IV. Issues

[44] (a) Is Mr. Manzo barred from testifying on the terms of the agreements because of professional secrecy?

(b) Are Mr. Manzo, Mr. Fournier and the appellant barred from testifying on the terms of the agreements because of settlement privilege?

(c) Do the confidentiality clauses in the settlement agreements defeat the exception allowing the terms of a settlement agreement to be disclosed?

(d) Do articles 151.14 *et seq*. of the CCP prevent Mr. Manzo, Mr. Fournier and the appellant from testifying on the terms of the agreement, owing to settlement privilege?

(e) If the testimonies of Mr. Manzo, Mr. Fournier and the appellant are admissible, should an application to hear the matter *in camera* or other appropriate processes for protecting the confidentiality of the settlement be granted?

V. Analysis

(a) Is Mr. Manzo barred from testifying on the terms of the agreements because of professional secrecy?

Applicable law

[45] In Quebec law, the professional secrecy of advocates has two components. First, there is a general obligation of confidentiality, which imposes a duty of discretion on lawyers and creates a correlative right to their silence on the part of their clients; then, in relation to third parties, there is an immunity from disclosure

that protects confidential information, particularly in judicial proceedings.[2]

[46] This privilege exists forever in space-time. Indeed, professional secrecy is a personal and extra-patrimonial right which persists even after the death of the person who communicated the confidential information.[3]

[47] Professional secrecy is both a substantive rule and a rule of evidence.[4] The substantive rule [TRANSLATION] "protects information exchanged between counsel and clients by keeping it confidential in relation to the general public",[5] while the rule of evidence [TRANSLATION] "concerns the right of clients not to be forced to disclose in court the communications that they have had with their counsel".[6]

[48] The issue in the present case relates to, among other things, the second rule.

[49] The courts have noted on numerous occasions that professional secrecy is very broad in scope and "must be as close to absolute as possible".[7] It must therefore be given a broad and liberal interpretation,[8] and statutory provisions that recognize exceptions to it must be interpreted restrictively.[9]

[50] That approach preserves the social importance that the case law attaches to this privilege for its role in "maintaining a properly functioning justice system and preserving the rule of law in Canada".[10] Indeed, it "serves to both protect the essential interests of clients and ensure the smooth operation of Canada's legal system".[11]

---

2 *Foster Wheeler Power Company Ltd. v Société intermunicipale de gestion et d'élimination des déchets (SIGED) inc*, 2004 SCC 18, [2004] 1 SCR 456, at para 27.

3 Jean-Claude Royer and Sophie Lavallée, *La preuve civile*, 4th ed. Cowansville: Yvon Blais, 2008, at paras 1239-40.

4 *Descôteaux et al. v Mierzwinski*, [1982] 1 SCR 860, at p 875.

5 Raymond Doray, "Les devoirs et les obligations de l'avocat," in Barreau du Québec, *Éthique, déontologie et pratique professionnelle*, vol 1, Collection de droit 2013-2014. Cowansville: Éditions Yvon Blais Inc, 2014, at p 57.

6 *Ibid* at p 58.

7 *R v McClure*, 2001 SCC 14, [2001] 1 SCR 445, at para 35.

8 Raymond Doray, "Les devoirs et les obligations de l'avocat," *supra* at note 5, at p 64.

9 *Descôteaux et autre v Mierzwinski*, *supra* at note 4, at p 875.

10 *Foster Wheeler Power Company Ltd. v Société intermunicipale de gestion et d'élimination des déchets (SIGED) inc*, *supra* at note 2, at para 33.

11 *Ibid* at para 34.

[51] That said, there is a tendency to think that all facts and events that lawyers deal with in the execution of their mandates are covered by professional secrecy. But that is not the case:[12]

> Despite the intense nature of the obligation of confidentiality and the importance of professional secrecy, not all facts and events that lawyers deal with in the execution of their mandates are covered by professional secrecy . . . .

[52] For professional secrecy to apply, the following three conditions must be met simultaneously:[13]

1. There must be a consultation with counsel;

2. There must be an intention to keep this consultation confidential; and

3. Counsel's opinion must be given in his or her capacity as counsel.

[53] That list of conditions is derived from the following comments of Justice Lamer of the Supreme Court of Canada in *Descôteaux et al. v Mierzwinski*, *supra*:[14]

> The following statement by Wigmore (8 Wigmore, *Evidence*, para. 2292 (McNaughton rev, 1961)) of the rule of evidence is a good summary, in my view, of the substantive conditions precedent to the existence of the right of the lawyer's client to confidentiality:
>
> > Where legal advice of any kind is sought from a professional legal adviser in his capacity as such, the communications relating to the purpose made in confidence by the client are at his instance permanently protected from disclosures by himself or by the legal adviser, except the protection be waived.

[54] When the above conditions are not met, counsel can be required to testify about facts involving their clients:[15]

> [N]or does the legal institution of professional secrecy exempt lawyers from testifying about facts involving their clients in all situation.

---

[12] *Ibid* at para 39.

[13] Raymond Doray, "Les devoirs et les obligations de l'avocat," *supra* at note 5, at p 62.

[14] *Descôteaux et autre v Mierzwinski*, *supra* at note 4, at pp 872-73.

[15] *Foster Wheeler Power Company Ltd. v Société intermunicipale de gestion et d'élimination des déchets (SIGED) inc*, *supra* at note 2, at para 39.

Application to the facts

[55] In my opinion, the communications with Mr. Manzo that led to the settlement are not protected by professional secrecy. He is therefore not barred from testifying because of this privilege.

[56] The applicant argues that professional secrecy applies not only to discussions between counsel and clients, but also to discussions between one's own counsel and opposing counsel, or a mediator, in mediation cases.

[57] I do not share that opinion, as the applicant is trying to expand professional secrecy to Mr. Manzo's entire mandate. That is precisely the reasoning that Justice Lebel rejected as incorrect in *Wheeler Power Company Ltd. v Société intermunicipale de gestion et d'élimination des déchets (SIGED) inc*.[16]

[58] As was mentioned above, the professional secrecy of advocates cannot apply unless (i) there was a consultation with counsel; (ii) there was an intention to keep the consultation confidential; and (iii) counsel's opinion must be given in his or her capacity as counsel.

[59] In my view, Justice Fish could not have been clearer in his choice of words in *Blank v Canada (Minister of Justice), supra*, when he characterized professional secrecy as "legal advice privilege".[17] If there is no consultation between counsel and a client in which legal advice is provided, professional secrecy cannot apply. Therefore, the discussions between Mr. Manzo and Mr. Fournier are not covered by professional secrecy.

Waiver of professional secrecy

[60] That said, even if the information exchanged by Mr. Manzo and Mr. Fournier were protected by professional secrecy, the applicant could not rely on this privilege because professional secrecy would have been waived by disclosing the information to the opposing party.

[61] When professional secrecy is waived, counsel can be called to testify to shed light on [TRANSLATION] "any action that may have been taken in a case and any

---

[16] *Foster Wheeler Power Company Ltd. v Société intermunicipale de gestion et d'élimination des déchets (SIGED) inc, supra* at note 2, at para 39.

[17] *Blank v Canada (Minister of Justice)*, 2006 SCC 39, [2006] 2 SCR 3319.

discussions that may have been held with third parties".[18] On this point, the Quebec Court of Appeal justice stated as follows in *Développement Bouchard et Lefebvre c Gagné*:[19]

> [TRANSLATION]
>
> Whereas the letters described in the application for production (i.e., the exhibits filed as P-2) are not privileged communications between the parties' counsel for the purposes of resolving a dispute, there being no dispute at that time, but were intended as a response to an offer to purchase a piece of land of which the appellant was co-owner;
> Whereas the appellant's response to this offer to purchase does not constitute information protected by professional secrecy, from the time it was disclosed to another party's counsel;
>
> [Emphasis added.]

[62] In that case, the entire dispute centred on [TRANSLATION] "whether the offer to purchase a piece of land was accepted, and whether the draft contract was valid".[20]

[63] To prove that the offer to purchase had been accepted, the plaintiffs wanted to have counsel for the defendant testify, particularly regarding the letters sent out on the defendant's behalf to explain its position on the offer to purchase. The defendant objected to the testimony on the basis of professional secrecy. The trial judge overruled the objection, and the Quebec Court of Appeal upheld her decision.

[64] According to the Court of Appeal, the letters were not protected by professional secrecy because sending them to opposing counsel constituted a waiver of that privilege.[21] Counsel was therefore [TRANSLATION] "competent to testify to recognize [the] letters that he apparently prepared and sent, for and on behalf of his client".[22]

[65] I am therefore of the opinion that, in the case at hand, professional secrecy is not a bar to having Mr. Manzo testify. The discussions between him and

---

[18] Raymond Doray, "Les devoirs et les obligations de l'avocat," *supra* at note 5, at p 65.
[19] *Développement Bouchard et Lefebvre c Gagné*, [2001] JQ No 994 (CA), at para 2, Rousseau-Houle, Chamberland and Rochette JJ.A.
[20] *Ibid* at para 4.
[21] *Développement Bouchard et Lefebvre c Gagné*, *supra* at note 20, at para 2.
[22] *Ibid* at para 3.

Mr. Fournier do not meet the conditions set out by Justice Lamer in *Descoteaux*, *supra*, regarding the applicability of professional secrecy. The applicant's objection concerns, rather, settlement privilege.

(b) Are Mr. Manzo, Mr. Fournier and the appellant barred from testifying on the terms of the agreements because of settlement privilege?

Applicable law

[66] Settlement privilege is a rule of evidence that makes communications inadmissible if they have been exchanged between parties as they try to settle a dispute:[23]

> 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 . . . .

[67] That rule of evidence applies to all communications exchanged for the purposes of settling a dispute:[24]

> . . . For instance, settlement privilege applies to all communications that lead up to a settlement, even after a mediation session has concluded.

[68] Settlement privilege applies throughout Canada, in the common law provinces and in Quebec alike.[25]

[69] The purpose of this privilege is to promote the out-of-court settlement of disputes:[26]

> Encouraging settlements has been recognized as a priority in our overcrowded justice system, and settlement privilege has been adopted for that purpose.

---

[23] *Union Carbide Inc v Bombardier Inc*, [2014] 1 SCR 800, at para 31.
[24] *Ibid* at para 51.
[25] *Ibid* at paras 36-37. In Quebec, the *Code of Civil Procedure* codifies the procedure for judge-mediated settlement conferences in articles 151.14 *et seq*.
[26] *Ibid* at para 32.

[70] Moreover, the privilege applies by operation of law, as it exists in the absence of any contractual or statutory provisions to that effect:[27]

> 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 . . . .

[71] Like professional secrecy, but unlike litigation privilege, settlement privilege does not expire. It continues to apply even after a settlement is reached.[28] Indeed, "successful negotiations are entitled to no less protection than ones that yield no settlement".[29]

[72] If a settlement is reached, the privilege protects against disclosure of the settlement's terms, the negotiations surrounding the settlement, and the settlement itself.[30]

[73] Despite all the protection it affords, settlement privilege includes exceptions.

[74] One of these exceptions is that protected communications may be disclosed "in order to prove the existence or scope of a settlement".[31]

[75] The underlying objective of this exception is the same as that of the general principle, that is, promoting out-of-court settlements:[32]

> . . . 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.

[76] Another exception to settlement privilege arises where it is proved that "a competing public interest outweighs the public interest in encouraging settlement".[33]

---

[27] *Ibid* at para 34.
[28] *Ibid* at para 34.
[29] *Sable Offshore Envery Inc v Ameron International Corp*, 2013 SCC 37, [2013] 2 SCR 623, at para 17.
[30] *Ibid* at paras 17-18.
[31] *Union Carbide Inc v Bombardier Inc*, *supra*, at para 35.
[32] *Ibid* at para 35.
[33] *Ibid* at para 34.

[77] More concretely, these countervailing interests have been found to include "allegations of misrepresentation, fraud or undue influence and preventing a plaintiff from being overcompensated".[34]

[78] Although these exceptions are the only ones that will be addressed in this judgment, it is important to note that there are other exceptions.[35]

Application to the facts

[79] According to the applicant, the settlement privilege exception relating to proving the existence or scope of a settlement can apply only when a dispute concerns the enforcement of the settlement between the parties. The applicant submits that the exception cannot apply to third parties.

[80] When considering whether settlement privilege applies to third parties, I think that it is important to distinguish between the privilege *per se* and the exceptions to it.

[81] Settlement privilege is not limited to the parties trying to resolve a dispute; it may be set up against third parties as well.

[82] The courts have recognized this principle on many occasions,[36] notably by the Supreme Court of Canada in *Sable Offshore Energy Inc. v Ameron International Corp*.[37] In that case, Justice Abella cited, with approval, the following passage by Chief Justice McEachern of the British Columbia Court of Appeal:[38]

> . . . In my judgment this privilege protects documents and communications created for such purposes both from production to other parties to the negotiations and to strangers, and extends as well to admissibility, and whether or not a settlement is reached.

[Emphasis added.]

---

[34] *Ibid* at para 34, citations omitted.

[35] See Lederman, Bryant & Fuerst, *The Law of Evidence in Canada*, at paras 14.340 *et seq*.

[36] Halsbury's Laws of Canada (online), *Evidence*, "Privilege and Related Grounds of Exclusion: Privilege for Settlement Discussions" (VIII(6)) in HEV-182, "Protection of dispute settlement" (reprinted 2014).

[37] *Sable Offshore Envery Inc v Ameron International Corp, supra* at note 32, at para 16.

[38] *Ibid*.

[83] Some authors hold a similar view:[39]

> §14.336 If it is accepted that the basis of the privilege is a public policy to encourage settlement, then it follows that the privilege should extend to subsequent proceedings not related to the dispute which the parties attempted to settle. Any possibility of subsequent adverse use could deter full and frank discussion. The principle "once privileged, always privileged" applies. This is illustrated in *I. Waxman & Sons Ltd. v. Texaco Canada Ltd.* The issue in that proceeding was whether or not production could be compelled of letters written "without prejudice" and with a view to settlement of the issue between A and C, upon the demand of B, in subsequent litigation between A and B on the same subject matter. Justice Fraser, whose decision was affirmed by the Ontario Court of Appeal, concluded that a party to a correspondence within the "without prejudice" privilege is protected from being required to disclose it on discovery or at trial in proceedings by or against a third party. [Citations omitted.]

[84] In the light of the foregoing, it seems clear that settlement privilege must be maintained in a dispute between a party to the settlement and the Minister, even if the Minister was not involved in the action that gave rise to the settlement.

[85] That being said, the applicant submits that the exception which permits disclosure to prove the existence or terms of a settlement can apply only between the parties and cannot be raised in a dispute with a third party, in this case, the Minister.

[86] I do not have to rule on this issue, as I am of the opinion that in the present case, the appellant has established that settlement privilege was ousted by the exception where "a competing public interest outweighs the public interest in encouraging settlement".[40] However, it should be noted that in *Fink*,[41] my colleague Judge Bonner appears to use the exception to settlement privilege to prove the terms of a settlement agreement *vis-à-vis* a third party, contrary to what the applicant is contending.

[87] In that case, the appellant's company was under investigation by the Ontario Securities Commission. The appellant's company and a Swiss bank reached an out-of-court settlement calling for the payment of $2.60 per share in the appellant's company to a group of the shareholders that included that appellant.

---

[39] Lederman, Bryant & Fuerst, *The Law of Evidence in Canada*, *infra* note 74, at para 14.336.
[40] *Union Carbide Inc v Bombardier Inc, supra* at note 26, para 19.
[41] *Fink v Canada*, 2002 TCJ No 712.

[88] A dispute then arose between the appellant and the Minister regarding the nature of the payment made under the out-of-court settlement. To shed light on the situation, the Minister wanted details on the negotiations leading to the settlement, but the appellant objected, raising settlement privilege as a defence.

[89] Judge Bonner rejected the appellant's argument on the basis that settlement privilege could not apply when disclosure is necessary to interpret the settlement agreement and to determine the nature of the payment for tax purposes. He stated the following at paragraph 28:

> Counsel for the appellant asserts that a party to settlement negotiations is neither required nor permitted to disclose the contents of such negotiations in proceedings by or against the third party. He relies on a number of authorities none of which deal with disclosure in the context of tax litigation in which the true substance and nature of the payment and of the injury which the payment is intended to compensate are central to the issue. The settlement privilege is one which is intended to encourage the resolution of a dispute without litigation by permitting the parties to the dispute to discuss their differences frankly and without fear that admissions made by them for the purpose of arriving at a settlement will be used against them later. It does not prevent disclosure in later litigation between persons neither of whom was a party to the litigation in which the offer of settlement was made. Furthermore, in my view, when the ambit of the privilege is properly understood, it is evident that the privilege does not attach to cases where the discussion or settlement document is relevant to establish not the liability of a party to the settlement for the conduct which gave rise to the dispute but rather to arrive at a proper interpretation of the agreement itself. The appellant's reliance on this privilege is in my view wholly unwarranted both as to the production of documents and as to discussions and events.
>
> [Emphasis added.]

[90] It should be noted that Justice Little adopted Judge Bonner's reasoning in *Tremblay Estate v Canada*.[42]

[91] In *Sable Offshore Envery Inc. v Ameron International Corp*, *supra*, the Supreme Court of Canada stated that an exception to settlement privilege applies when the person raising the exception is able to prove that, on balance, "a competing public interest outweighs the public interest in encouraging settlement".

[92] On this point, the British Columbia Court of Appeal in *Dos Santos v Sun Life Assurance of Canada*[43] stated that settlement privilege is ousted when the

---

[42] [2008] TCJ No 457.

[43] 2005 BCCA 4, para 20.

defendant can show that the documents relating to the settlement are both relevant and necessary in the circumstances. Justice Finch stated as follows:

> . . . [T]he defendant must shows that a competing public interest outweighs the public interest in encouraging settlement. An exception should only be found where the documents sought are both relevant, and necessary in the circumstances of the case to achieve either the agreement of the parties to the settlement, or another compelling or overriding interest of justice.

[93] In my opinion, the present case involves two competing public interests that outweigh the interest in encouraging out-of-court settlements.

Preserving Canada's tax base

[94] The first opposing public interest is the preservation of Canada's tax base and the taxpayer's right to not have to pay more than his or her fair share of tax. I will outline my reasoning in three steps.

[95] First, settlement privilege is in the public interest because it encourages out-of-court settlements. The practical effect of this privilege is that it "allow[s] parties to reach a mutually acceptable resolution to their dispute without prolonging the personal and public expense and time involved in litigation".[44]

[96] When two parties reach a settlement in a tax dispute, how the negotiated amount is taxed is determined on the basis of the nature of the payment that the amount is intended to replace. This approach is called the "*surrogatum* principle", which may be explained as follows:[45]

> A person who suffers harm caused by another may seek compensation for (a) loss of income, (b) expenses incurred, (c) property destroyed, or (d) personal injury, as well as punitive damages. For tax purposes, damages or compensation received, either pursuant to a court judgment or an out-of-court settlement, may be considered as on account of income, capital, or windfall to the recipient. The nature of the injury or harm for which compensation is made generally determines the tax consequences of damages.
>
> Under the *surrogatum* principle, the tax consequences of a damage or settlement payment depend on the tax treatment of the item for which the payment is intended to substitute: [citation omitted]

---

[44] *Sable Offshore Envery Inc v Ameron International Corp*, *supra* at note 32 at para 11.

[45] Peter Hogg, Joanne Magee and Jinyan Li, *Principles of Canadian Income Tax Law*. Toronto: Carswell, 2013, at pp 102-3.

[Emphasis added.]

[97] This principle has been recognized by the courts, including the Supreme Court of Canada,[46] and most recently by the Federal Court of Appeal in *Goff Construction Limited*.[47]

[98] In general terms, compensation for lost income is taxable, but compensation for moral damage is not. It is therefore essential that an amount paid under an out-of-court settlement be characterized correctly for tax purposes.

[99] Upholding settlement privilege in this context would interfere with this inquiry into the true nature of the payment and, by extension, would undermine the integrity of government revenues, especially since Canada's tax regime is based on a system of self-assessment.

[100] If, in a tax file, the Minister were unable to gain access to the documents and discussions leading to a settlement to determine the true nature of an amount received by a taxpayer, taxpayers would be able to evade their tax liabilities by characterizing the amount such that it was not taxable.

[101] In the case at hand, I am aware that the situation is different. Indeed, it is the appellant who is asking that the discussions surrounding the settlement between him and the applicant be disclosed to establish the true nature of the payment. The Minister is the one who wants to preserve privilege (at the appellant's expense) to that the amount is taxed. In my opinion, it is not relevant that it is the taxpayer who is requesting that the discussions and documents surrounding the settlement be disclosed.

[102] Although the Minister must be able to ensure the integrity of Canada's tax revenues, I am of the view that Canadian taxpayers have an interest in not being assessed more than their fair share by tax authorities. That view follows from the principle that taxpayers are entitled to order their affairs so as to reduce their tax burden.[48] This exception to settlement privilege thus applies to the Minister and to taxpayers.

---

[46] *Tsiaprallis v R*, 2005 SCC 8, [2005] 1 SCR 113. See also *Schwartz v Canada*, [1996] 1 SCR 254.

[47] 2009 FCA 60, at paras 13-15, Ryer, Desjardins and Evans JJ.A.

[48] See *Stubart Investments Ltd v The Queen*, [1984] 1 SCR 536, at p 540.

[103] In *Dos Santos v Sun Life Assurance Co of Canada*,[49] the British Columbia Court of Appeal excluded the settlement privilege to ensure that the plaintiff was not overcompensated by receiving an indemnity from his insurer, under an insurance policy, as well as compensation from the party at fault, further to an action in tort. The exception in the present case would serve essentially the same purpose, that is, to ensure that the Canadian government does not benefit from a tax overpayment at the expense of the appellant.

[104] That competing public interest should also prevail because disclosure could have beneficial effects beyond its income tax consequences. As Wagott and Morris have explained, the need to properly characterize an amount paid under a settlement is also important in determining the mandatory contributions to the public employment insurance scheme, which funds itself from these contributions:[50]

> In structuring a settlement, the tax implications related to proposed payments, from both the employer's and the former employee's perspective, will be an important consideration. Tax issues may include the appropriate tax characterization of the payments, the amount of tax to be deducted from the payments, the amount that may be contributed to a Registered Retirement Savings Plan ("RRSP"), and the amount of money, if any, that must be paid to Human Resources and Skills Development Canada as an Employment Insurance overpayment.

Right to a fair trial

[105] Second, the countervailing public interest also takes precedence over the interest in encouraging out-of-court settlements when it can be shown that, without disclosure, the appellant will be denied a fair trial. In *Dos Santos v Sun Life Assurance Co*, Justice Finch, writing on behalf of the British Columbia Court of Appeal, cited *Ruloff v Rockshore (1981) Ltd*, BCSC 751, in which Justice Chamberlist applied the exception so that the party could defend herself adequately. He stated the following at paragraph 28 of his reasons:

> . . . Chamberlist J. found an exception to settlement privilege where the plaintiff would otherwise be "muzzled in her attempts to justify her position taken in the petition or to adequately defend by evidence available to her".

---

[49] 2005 BCCA 4, Finch, Huddart and Low JJ.A.

[50] Benjamin Bathgate and Brent McPherson, eds, *The Essential Guide to Settlement in Canada*. Markham: LexisNexis Canada, 2013, at p 259.

[106] The right to a fair trial also applies to administrative disputes, such as the present case, where the burden of proof falls on the party invoking this right:[51]

> . . . Although in the context of a civil proceeding this does not engage a *Charter* right, the right to a fair trial generally can be viewed as a fundamental principle of justice: *M. (A.) v. Ryan*, [1997] 1 S.C.R. 157, at para. 84, *per* L'Heureux-Dubé J. (dissenting, but not on that point). Although this fair trial right is directly relevant to the appellant, there is also a general public interest in protecting the right to a fair trial. Indeed, as a general proposition, all disputes in the courts should be decided under a fair trial standard. The legitimacy of the judicial process alone demands as much. Similarly, courts have an interest in having all relevant evidence before them in order to ensure that justice is done.

[Emphasis added.]

[107] The right to fair trial is a fundamental principle of justice in the general public interest.[52] It cannot be said that such an interest is unique to the appellant. Moreover, a fair trial is key in seeking the truth and achieving a just result, which are in the interests of both the public and the judiciary.

[108] In the case at bar, the testimony of Mr. Manzo and Mr. Fournier is clearly essential to the appellant's case. Without this testimony, he cannot adequately defend himself against the assessment made by the Minister, and his right to a fair trial would therefore be compromised.

[109] For these reasons, I conclude that the public interest in the right to a fair trial, too, must outweigh the interest in encouraging out-of-court settlements.

(c) Do the confidentiality clauses in the settlement agreements defeat the exception allowing the terms of a settlement agreement to be disclosed?

Applicable law

[110] In *Union Carbide Inc. v Bombardier, supra,* the Supreme Court of Canada clearly decided that the parties may, by contract, expand the confidentiality afforded to communications by common law privilege. In a mediation, for example, the parties may enter into a contractual agreement under which their

---

[51] *Sierra Club of Canada v Canada (Minister of Finance), supra* at para 50.
[52] *Ibid*.

communications are given broader protection than is offered through settlement privilege:[53]

> 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.

[111] That expanded protection is not limited to "litigation strategy". As Justice Wagner explained, the justification for this may be based on concerns that go beyond the proceeding in which the parties are involved:[54]

> . . . 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).

[112] Freedom of contract can therefore lead the parties to negate certain exceptions to settlement privilege. Indeed, "[i]t is open to contracting parties to create their own rules with respect to confidentiality that entirely displace the common law settlement privilege". However, the mere fact that the parties have

---

[53] *Union Carbide Inc v Bombardier Inc*, *supra* at note 26, at para 39.

[54] *Ibid* at para 40.

agreed on a confidentiality clause does not necessarily mean that they intended to defeat the exceptions to this privilege:[55]

> . . . 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. . . . 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.

[113] When the parties wish to override these exceptions, they must do so clearly:[56]

> 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.

[114] To determine whether the parties intended to prevent the application of a recognized exception to settlement privilege, the Court must analyze the contract in the light of the law where the contract was signed and performed, in this case, Quebec. Consequently, in this case, the mediation contract will have to be analyzed in accordance with Quebec law.[57] The legal principles governing the contract are found in the *Civil Code of Québec*[58] (CCQ), at articles 1425 *et seq*.:[59]

> 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.

---

[55] *Ibid* at para 51.
[56] *Ibid* at para 54.
[57] *Ibid* at paras 49 and 57.
[58] RSQ 1991, c. 64.
[59] *Union Carbide Inc v Bombardier Inc*, *supra*, at paras 57 and 59-61.

[115] The procedure for finding the common intention can be explained as follows:[60]

> [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.

[116] In Quebec, contractual interpretation is centered on the intention of the parties.[61]

[117] As for broad or exhaustive confidentiality clauses, it has been held that any clause of this nature is still subject to scrutiny by the courts. If a competing interest takes precedence over the parties' interests, the courts may exclude that protection:[62]

> 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 Boulle 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).
>
> [Emphasis added.]

[118] In *Union Carbide Inc. v Bombardier*, the Supreme Court of Canada weighed the interests of the parties and decided to adopt the fourth part of the Wigmore test to settle the controversy. That part provides that privilege must be upheld if the

---

[60] *Ibid* at para 60.
[61] *Ibid* at para 59.
[62] *Ibid* at para 42.

injury caused to the relationship by disclosure of the communications is greater than the benefit gained for the correct resolution of the litigation:[63]

> The intervener Arbitration Place Inc. 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.
>
> . . . 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.

Application to the facts

[119] I am of the opinion that, with regard to the contract, the circumstances in which the settlement agreement was reached and the agreement's clauses, taken as a whole, do not show that the parties intended to displace the exceptions to settlement privilege. Nowhere is it stated, directly or indirectly, that the parties intended to override the exceptions to settlement privilege.

[120] In *Union Carbide*, Justice Wagner noted that settlement privilege is simply a rule of evidence. Thus, "[i]t does not prevent a party from disclosing information; it just renders the information inadmissible in litigation".[64]

---

[63] *Ibid* at paras 43-44.

[64] *Ibid* at para 37.

[121] In other words, if a confidentiality clause had not been agreed upon in this case, the appellant would have been free to discuss the agreement and its content as he saw fit. The applicant would not have been able to stop him.

[122] However, by signing the confidentiality clause, the appellant waived his right to discuss the agreement and its content. This was, in my view, the sole purpose of that clause.

[123] It is important to bear in mind that the settlement agreement between the appellant and the applicant is the product of a long and contentious relationship. Although compensation was granted to the appellant without any admission of fault, the evidence showed that the situation between the appellant and the applicant was tense.

[124] In the context of the antagonistic relationship that existed between the applicant and other employees [Confidential], it is easy to understand why these employees had an interest in knowing the terms of the settlement agreement negotiated between the appellant and the applicant. It is clear that the applicant did not want this agreement to serve as a precedent in similar cases.

[125] As stated in *The Essential Guide to Settlement in Canada*,[65] whether parties decide to include a confidentiality clause in a settlement may depend on many factors, including the interest that potential claimants could have:[66]

> Confidentiality – The parties should consider whether they want any particular aspect of the settlement to be kept confidential. For instance, the terms upon which a commercial dispute was resolved may be highly relevant to competitors or perhaps to other potential claimants who may be motivated by learning of the terms of a settlement to pursue their claims against the defendant.

[Emphasis added.]

[126] [Confidential]

[127] Moreover, [Confidential] the settlement agreement stipulates that the parties may disclose the terms of the settlement if they are required to do so by law:

> [Confidential]

---

[65] *Supra* at note 55.

[66] *Ibid* at p 186.

[128] According to the respondent, a settlement agreement that states that the content will be disclosed "as required by law" only allows the appellant to report to tax authorities the amount it received under the agreement; it does not allow him to disclose any other details in the agreement, be it though a Notice of Objection or in before this Court.

[129] In my opinion, this argument is without merit.

[130] The phrase "as required by law" is not limited to statutory law. It encompasses all the law applicable to the parties, including common law privileges and their exceptions, which are applicable in Quebec as well.

[131] Thus the words [Confidential] "as required by law" confirm that the exceptions to settlement privilege apply, if a court decides that they do.

[132] In addition, if the phrase "Disclosure Order" is used to designate the circumstances in which a party may be required to disclose the content of the agreement. In my opinion, the phrase refers to a court order. The parties have thus left it to the courts to decide whether disclosure is required by law (which includes settlement privilege and its exceptions).

[133] [Confidential]

[134] It is implicit in the agreement that, when the parties signed it, they were aware that the agreement and its terms could be made available to a public authority. Without a clear expression of intent, it cannot be concluded that the parties wanted to preserve confidentiality in this situation by displacing the exceptions to settlement privilege.

[135] The applicant also argues that the serious consequences of a breach of the confidentiality clause necessarily leads to the conclusion that the parties intended to displace the privilege exceptions.

[136] [Confidential]

[137] For her part, the respondent submits that the fact that the confidentiality clause was included in the settlement agreement, rather than in a pre-mediation conference agreement, proves that the parties intended to displace the exception to settlement privilege.

[138] In my opinion, those arguments are without merit.

[139] In *Union Carbide, supra*, Justice Wagner stated that it cannot be presumed that the parties to a transaction intended to displace the exceptions to settlement privilege unless there is a clear indication to that effect.

[140] I am therefore of the opinion that, in the light of the evidence, the parties did not intend to displace the exceptions to settlement privilege through the confidentiality clauses.

[141] Moreover, as I have already mentioned in my reasons, the Supreme Court of Canada has stated that the confidentiality provided in a broader confidentiality clause is not watertight, and that "a court may refuse to enforce it after balancing competing interests".

[142] This determination must be made in the light of the fourth branch of the Wigmore test, which provides that confidentiality must be protected if "[t]he injury caused to the relationship by disclosure of the communications [is] greater than the benefit gained for the correct disposal of the litigation".

[143] The fourth branch is based on policy grounds:[67]

> The fourth branch of the Wigmore test is based on the balancing of various *public* policy factors. *Private* interests, such as an individual's privacy, come into play only to the extent that they serve the greater purpose of promoting a particular relationship valued by the community.

[144] Moreover, the purpose of the fourth branch of the Wigmore test is to balance public policy considerations:[68]

> The balancing of the injury to the relationship against the benefit of the correct disposal of the matter involves purely public policy considerations.

[145] So even if I had decided that the confidentiality clauses in the agreements were watertight, I would have set them aside in applying the fourth branch of the Wigmore test.

---

[67] Lederman, Bryant & Fuerst, *The Law of Evidence in Canada*, 4th ed. Markham: LexisNexis, 2014, at para 14.39.

[68] *Tower v MNR*, 2003 FCA 307.

[146] In tax law, a judge must be able to determine the true nature of a payment. In cases where the only way to objectively prove the nature of a payment is through the disclosure of documents and discussions relating to the settlement agreement and those documents and discussions are relevant and necessary, I conclude that the Court may order disclosure.

[147] As stated by Justice Wagner in *Union Carbide Inc.* v *Bombardier*, *supra*, the other means are available to the parties to prevent sensitive information being made public. Either party may apply for a confidentiality order and to consider the evidence *in camera*.

(d) Do articles 151.14 *et seq*. of the CCP prevent Mr. Manzo, Mr. Fournier and the appellant from testifying?

[148] The applicant argues that article 151.21 of the CCP, which provides that "[a]nything said or written during a settlement conference is confidential". The applicant argues that, on basis of this provision alone, the witnesses at trial cannot testify on the content of the agreement.

[149] In my opinion, this argument must fail.

[150] I am of the opinion that the articles under Section IV of the CCP, entitled "Settlement Conference", serve to codify settlement privilege in the context of judicial mediation.

[151] These provisions do not abolish the exceptions to settlement privilege.

[152] On this point, Justice Thibault of the Quebec Court of Appeal made her position abundantly clear in *Bombardier c Union Carbide Inc*, where she wrote as follows at paragraph 44:[69]

> [TRANSLATION]
>
> [44] The respondent cited three cases decided by the Court which, in its opinion, support the idea that the confidentiality of discussions and communications in an out-of-court mediation is absolute where the mediation agreement contains a confidentiality clause. In those three cases, the Court recognized the confidential nature of the communications and exchanges in a judicial conciliation, a judicial mediation or a settlement conference. It did not, however, express an opinion

[69] *Bombardier Inc c Union Carbide Canada Inc*, 2012 QCCA 1300.

> contrary to those of the above-referenced authors, according to whom such evidence is admissible with regard to the parties to prove the existence or scope of a transaction between them.

[Emphasis added.]

[153] Moreover, in *Union Carbide Inc. v Bombardier*, *supra*, Justice Wagner confirmed this comment by the Quebec Court of Appeal, stating as follows at paragraph 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.

[Emphasis added.]

[154] In *Weinberg c Ernst & Young LLP*,[70] a decision in which articles 151.14 *et seq*. of the CCP applied, Justice Forget of the Quebec Court of Appeal expressed his agreement with the words of the British Columbia Court of Appeal in *Dos Santos*. In a unanimous judgment, Justice Forget stated that a confidentiality clause in an agreement does not prevent a judge from allowing a third party to have access to documents if this is necessary or relevant to allow a litigant to fully assert his or her rights in a dispute. In *Dos Santos*, the Court of Appeal had referred to the words "relevant" and "necessary". Justice Forget stated as follows:

[TRANSLATION]

> In any event, the controversy is somewhat moot in this case because the parties chose to protect the confidentiality of the agreement through a contractual clause, as it was open to them to do. It must therefore be assumed that the settlement agreement between Cinar and the appellants is confidential, at least on the basis of a valid contract between the signatories.
>
> Although it is recognized that the settlement agreement is confidential, this does not prevent a judge from granting a third party access to it—or even admitting it in evidence, where appropriate—if this is necessary or relevant to allow that party to fully assert his or her rights in a dispute.
>
> . . .
>
> If I had to set out a test for verifying whether a confidential document has a semblance of relevance, I would favour the genuine connection test.

---

[70] *Weinberg v Ernst & Young LLP*, 2010 QCCA 1727, at paras 48-49 and 61.

[Emphasis added.]

[155] In the present case, the settlement agreement was signed at a settlement conference [Confidential]. The confidentiality of this agreement and the negotiations that led to its conclusion is therefore guaranteed by article 151.21 of the CCP.

[156] To determine the true nature of the payment received by the appellant, I am of the opinion that, in this case, it is relevant and necessary in the circumstances to allow the disclosure of the documents, if any, and the communications between Mr. Manzo and Mr. Fournier during the negotiation of the settlement.

[157] This will allow the appellant to fully assert his rights. Moreover, the burden of proof being on the appellant, to deprive the appellant of the opportunity to question the key figures in the negotiations would amount to denying him the right to appeal to this Court.

[158] Furthermore, as articles 151.14 *et seq*. of the CCP apply only to judicial mediation, if I accepted the applicant's argument, only the parties that participated in an out-of-court mediation could avail themselves of the exceptions to settlement privilege, which makes no sense.

[159] For these reasons, I am of the opinion that article 151.21 of the CCP cannot prevent the testimony in question.

(e) If the testimonies of Mr. Manzo, Mr. Fournier and the appellant are admissible, should an application to hear the matter *in camera* or other appropriate processes for protecting the confidentiality of the settlement be granted?

Applicable law

[160] Section 16.1 of the *Tax Court of Canada Act* provides that the Court may, on application, hold a hearing *in camera* if the circumstances justify it:

> 16.1 A hearing before the Court may, on the application of any party to a proceeding, other than Her Majesty in right of Canada or a Minister of the Crown, be held *in camera* if it is established to the satisfaction of the Court that the circumstances of the case justify *in camera* proceedings.

[161] In *Union Carbide*, the Supreme Court of Canada noted that a party that wants to keep confidential, or sensitive, evidence from the public may apply to have it considered *in camera*. Any application of this nature must be assessed in accordance with the conditions laid down by the Supreme Court of Canada in *Sierra Club of Canada v Canada (Minister of Finance)*:[71]

> . . . 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] 2 S.C.R. 522.

[162] Specifically, an applicant must show that[72]

1. a confidentiality order is necessary in order 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
2. the advantages of the confidentiality order, including the effects on the right of civil litigants to a fair trial, outweigh its disadvantages, including the effects on the right to free speech, which in this context includes the public interest in open and accessible court proceedings.

[163] The first condition consists in turn of three elements:[73]

(i) the risk in question must be real and substantial, in that the risk is well grounded in the evidence, and poses a serious threat to the interest in question;

(ii) to qualify as an "important interest", the interest in question cannot merely be specific to the party requesting the order; the interest must be one which can be expressed in terms of a public interest in confidentiality; and

(iii) the Court must consider not only whether reasonable alternatives to a confidentiality order are available, but also restrict the order as much as is reasonably possible while preserving the interest in question.

---

[71] 2002 SCC 41, [2002] 2 SCR 522; see *Union Carbide Inc v Bombardier Inc*, *supra*, at para 66.
[72] *Union Carbide Inc v Bombardier Inc*, *supra*, at para 66.
[73] *Sierra Club of Canada v Canada (Minister of Finance)*, *supra*, at paras 54-57.

[164] I will now address each of the above elements.

Application to the facts

[165] In my opinion, the application for an *in camera* hearing should be allowed. The facts in the case at hand show that each of the conditions set out in *Sierra Club* has been met.

First condition in *Sierra Club*

[166] The first condition has been met because the three subordinate criteria have been met.

[167] First, there is a real and substantial risk to an important interest if an order for an *in camera* hearing is not made. Indeed, there is not just one interest at risk of being compromised, but two.

[168] For one, there is the interest in keeping settlement negotiations confidential. As we have seen, this interest is important because it serves to make the administration of justice more efficient by encouraging out-of-court settlements.

[169] In addition, where the parties want to use a contractual agreement to keep a document confidential, there is an interest in giving effect to that contract and preserving contractual relations:[74]

> The immediate purpose for AECL's confidentiality request relates to its commercial interests. The information in question is the property of the Chinese authorities. If the appellant were to disclose the Confidential Documents, it would be in breach of its contractual obligations and suffer a risk of harm to its competitive position. This is clear from the findings of fact of the motions judge that AECL was bound by its commercial interests and its customer's property rights not to disclose the information (para. 27), and that such disclosure could harm the appellant's commercial interests (para. 23).
>
> . . .
>
> Thus, the interests which would be promoted by a confidentiality order are the preservation of commercial and contractual relations, as well as the right of civil litigants to a fair trial.

[Emphasis added.]

---

[74] *Ibid* at paras 49 and 51.

[170] If an *in camera* order is not made, the privileged communications will be disclosed.[75] The risk of violating each of the above interests is therefore real and substantial.

[171] Second, the interest in keeping settlement negotiations confidential is not an interest that relates solely to the applicant; it is one of general concern:[76]

> Settlements allow parties to reach a mutually acceptable resolution to their dispute without prolonging the personal and public expense and time involved in litigation. The benefits of settlement were summarized by Callaghan A.C.J.H.C. in *Sparling v. Southam Inc.* (1988), 66 O.R. (2d) 225 (H.C.J.):
>
> > . . . the courts consistently favour the settlement of lawsuits in general. To put it another way, there is an overriding public interest in favour of settlement. This policy promotes the interests of litigants generally by saving them the expense of trial of disputed issues, and it reduces the strain upon an already overburdened provincial court system. [p. 230]
>
> [Emphasis added.]

[172] Third, apart from an *in camera* order, the Court has no other reasonable means of ensuring that important interests are not seriously affected.

Second condition in *Sierra Club*

[173] The second condition is also met.

[174] In my opinion, maintaining the confidentiality of settlement negotiations and contractual relationships must outweigh the public's freedom of expression.

[175] The right to freedom of expression to which the Supreme Court of Canada refers in this second condition relates to the public's right to express ideas and opinions about the operation of the courts.

[176] However, while I must consider the public interest, I must also take into account the context of the dispute in this case and the importance of out-of-court settlements in the Canadian judicial system.

---

[75] The competing public interests (the preservation of Canada's tax base and the right of taxpayers not to pay more than their fair share, the right to fair trial, etc.) were found to outweigh the public interest in maintaining the confidentiality of settlement negotiations.

[76] *Sable Offshore Envery Inc v Ameron International Corp, supra* at note 32, at para 11.

[177] The parties signed a settlement agreement containing confidentiality clauses to prevent disclosure of the agreements. It would be inconsistent to give the public access to the content of an exchange of communications that is, on its face, (i) extrajudicial in nature; and (ii) confidential. Moreover, if I did not grant an *in camera* hearing in this case, this could stop the settlement in its tracks, whether or not judicial mediations take place. This would mean that the parties, who thought they were protected by confidentiality clauses, would see their information disclosed in the public sphere. I understand that the balance between the public's right to be informed and the parties' expectation that their information will remain confidential is a delicate one, but in the present case, I am of the opinion that the parties' expectation that the information will remain confidential takes precedence.

[178] I adopt the reasoning of Justice Langlois of the Quebec Superior Court in *Joli-Coeur, Lacasse, Geoffrion, Jetté, St-Pierre c Fiset*.[77]

[179] In that case, the respondent, Fiset, sued the lawyers he had worked with in several related class actions for his share of the professional fees related to those actions.

[180] The class actions were resolved through an out-of-court settlement with a confidentiality clause that read as follows:[78]

> [Translation]
> The parties and their counsel confirm that the terms and conditions of this settlement shall in any event remain confidential and private. The parties and their counsel also confirm that the amount of the settlement, the nature of the settlement negotiations, and the value and any categorization of the settlement must remain confidential and private in any event, except where a court and/or judge orders otherwise. . . . Any application relating to the termination of the judicial proceedings shall receive in response a declaration to the effect that the case has been settled, without any additional comment. . . .

[181] The amount of the professional fees earned by the lawyers in *Joli-Cœur et al.*, *supra*, was supposed to depend on the date the litigation was terminated. It was therefore important for the respondent to file the settlement agreements and the communications between counsel in evidence. The respondent made a preliminary application to Justice Langlois to have the evidence heard *in camera* because of the confidential and privileged nature of the information that had to be discussed.

---

[77] 2003 CanLII 34261 (QCCS).
[78] *Ibid* at para 21.

[182] Justice Langlois ordered an *in camera* hearing. In his opinion, the interest in maintaining the integrity of the confidentiality clause, as well as settlement privilege, should take precedence over the open court rule. She explained as follows:[79]

> [TRANSLATION]
> The individual claims never having resulted in judicial proceedings, it cannot be inferred that the claimants have waived the confidentiality of the personal information concerning them, particularly since this information was disclosed in a context that was itself privileged in nature.
>
> Therefore, allowing settlement information to be disclosed in violation of the confidentiality clause and settlement privilege, without protecting it from the publicity that normally results from the judicial process, would bring the administration of justice into disrepute, particularly since the individual claimants chose to settle their dispute privately.
> There is a public interest in confidentiality here.
>
> The dispute between the parties involves purely private interests and is thus not public in nature, and it has not been shown that Joli-Cœur would suffer any harm as a result of the *in camera* order.
>
> In the circumstances, there does not appear to be any reasonable alternative to an *in camera* hearing.

[183] Neither the appellant nor the respondent objected to having this appeal heard *in camera* or to having a confidentiality order made with regard to the settlement agreement.

VI. Disposition

[184] The motion is allowed with regard to the application to conduct the hearing *in camera*.

[185] The appeal between Jacques Abenaim and Her Majesty the Queen, docket number 2012-2005(IT)G, will be heard *in camera*, at 30 McGill Street, Montréal, Quebec, at a date to be determined later.

[186] The reasons for the order and the settlement agreements shall be treated as confidential. These documents shall be placed separately in envelopes and sealed. These envelopes shall be marked as follows:

---

[79] *Ibid* at paras 24-28.

> These envelopes shall not be opened, nor shall their contents be disclosed, except upon order of the Court.

[187] This order shall continue in effect until the Court orders otherwise, including for the duration of any appeal of the proceeding and after final judgment.

[188] The transcript of the hearing of the motion relating to this order shall remain confidential and shall not be disclosed except to one of the parties to this order.

[189] In all other respects, the motion is dismissed with costs against the applicant, in favour of the appellant, to be paid within 30 days of the date of this order.

Signed at Ottawa, Canada, this 24th day of July 2015.

"Johanne D'Auray"

D'Auray J.

Translation certified true
on this 25TH day of May 2016

François Brunet, Revisor

CITATION:	2015 TCC 242
COURT FILE NO.:	2012-2005(IT)G
STYLE OF CAUSE:	JACQUES ABENAIM v HER MAJESTY THE QUEEN and KONICA MINOLTA BUSINESS SOLUTIONS (CANADA) LTD.
PLACE OF HEARING:	Montréal, Quebec
DATE OF HEARING:	February 2, 2015
AMENDED REASONS FOR ORDER BY:	The Honourable Justice Johanne D'Auray
DATE OF ORDER:	July 24, 2015

APPEARANCES:

Counsel for the appellant:	Geneviève Léveillé
Counsel for the respondent:	Benoit Mandeville
Counsel for the applicant	Christian Létourneau

COUNSEL OF RECORD:

For the appellant:

Name:	Geneviève Léveillé
Firm:	Wilson & Partners LLP

For the respondent: William F. Pentney
Deputy Attorney General of Canada
Ottawa, Canada

For the applicant:

Name:	Christian Létourneau
Firm:	Dentons Canada LLP