



**SUPREME COURT OF CANADA**

**CITATION:** Association de  
médiation familiale du Québec v.  
Bouvier, 2021 SCC 54

**APPEAL HEARD:** March 18,  
2021

**JUDGMENT RENDERED:**  
December 17, 2021

**DOCKET:** 39155

**BETWEEN:**

**Association de médiation familiale du Québec**  
Appellant

and

**Michel Bouvier and Isabelle Bisailon**  
Respondents

**OFFICIAL ENGLISH TRANSLATION:** Reasons of Kasirer J.

**CORAM:** Wagner C.J. and Abella, Moldaver, Karakatsanis, Côté, Brown, Rowe,  
Martin and Kasirer JJ.

**REASONS FOR  
JUDGMENT:** Kasirer J. (Wagner C.J. and Moldaver, Côté, Brown and  
Rowe JJ. concurring)  
(paras. 1 to 131)

**CONCURRING  
REASONS:** Karakatsanis J. (Abella and Martin JJ. concurring)  
(paras. 132 to 181)

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**Association de médiation familiale du Québec**

*Appellant*

v.

**Michel Bouvier and Isabelle Bisailon**

*Respondents*

**Indexed as: Association de médiation familiale du Québec v. Bouvier**

**2021 SCC 54**

File No.: 39155.

2021: March 18; 2021: December 17.

Present: Wagner C.J. and Abella, Moldaver, Karakatsanis, Côté, Brown, Rowe, Martin and Kasirer JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR QUEBEC

*Family law — Mediation — Confidentiality — Summary of mediated agreements — Proof of settlement — Exception to settlement privilege — Former spouses undertaking family mediation process — Mediator preparing summary of agreements arising from mediation — Summary of mediated agreements relied on in subsequent judicial proceedings to prove existence of settlement — Admissibility of summary of mediated agreements and other mediation communications challenged on*

*ground that they were protected by confidentiality of mediation process — Legal status of summary of mediated agreements — Whether exception to settlement privilege that allows existence or scope of settlement to be proved applies in family mediation context.*

I and M were *de facto* spouses for more than three years and had two children. After ending their union, they undertook a mediation process to resolve their disputes with respect to custody and support arrangements for the children, their respective rights in the immovable that served as their residence, and the determination of compensation for I to remedy the impact of childcare responsibilities on her career. Once the process had ended, the mediator recorded his conclusions about what had been agreed upon in mediation in a document called “summary of mediated agreements”. Sometime later, I filed a court action seeking greater financial compensation than was provided for in the summary of mediated agreements. In defence, M argued that the parties had entered into a contract during mediation, the terms of which were set out in the summary. I denied the existence of that contract and objected to the summary being admitted in evidence on the ground that it was protected by the confidentiality of the mediation process.

The trial judge dismissed I’s objection, relying in part on the exception to settlement privilege recognized in *Union Carbide Canada Inc. v. Bombardier Inc.*, 2014 SCC 35, [2014] 1 S.C.R. 800, a commercial mediation case. This exception allows protected communications to be disclosed in order to prove the existence and

terms of a settlement. On the basis of the summary and the parties' post-mediation conduct, the judge found that there was a contract between the parties. I appealed the trial judge's decision. The Court of Appeal unanimously dismissed the appeal, though the judges did not agree about the application of the principles enunciated in *Union Carbide* in the family mediation context. I decided not to appeal the Court of Appeal's decision, but a third party to the original litigation, the Association de médiation familiale du Québec, obtained leave to be substituted as appellant and to appeal the judgment to the Court.

*Held:* The appeal should be dismissed.

*Per* Wagner C.J. and Moldaver, Côté, Brown, Rowe and **Kasirer JJ.:** The settlement exception generally applies. Having regard to the very nature of family mediation, to its inherent procedural safeguards and to the terms of the standard family mediation contract used in Quebec, it is neither necessary nor desirable, for the protection of vulnerable parties, to establish a rule of absolute confidentiality or to depart from the rule developed in *Union Carbide* relating to the settlement exception. In this case, the parties did not displace this exception in their mediation contract. Where there is no settlement, preserving the absolute confidentiality of communications is an essential aspect of mediation and is necessary to encourage frank discussions. But confidentiality is above all a means to an end: where spouses resolve their dispute, this concern must yield, as far as necessary, to that of giving them the proper tools to implement their agreement. A rule of absolute confidentiality might

deflect family mediation from its participatory and consensual foundations and undermine the parties' adherence to this process for resolving their dispute, or even to the settlement itself. On the whole, to reject the exception recognized in *Union Carbide* in the family context would interfere with the primary objective of family mediation, which is to reach an agreement resolving an existing or anticipated dispute.

The coming into force of the new *Code of Civil Procedure* in 2016 has resulted in dispute prevention and resolution processes, including family mediation, being recognized as justice processes with the same importance as the traditional court process. This significant shift in Quebec's legal culture was expressly undertaken by the legislature as an access to justice measure designed to make the system more accessible, faster, less cumbersome and less expensive. Mediation in the broad sense is a process of reaching a decision as a result of dialogue and negotiation assisted or facilitated by a neutral and impartial third party who has no decision-making power and who is freely chosen by the parties to resolve an existing or anticipated dispute in an amicable and mutually acceptable manner and, ideally, to restore or improve the relationship. Family mediation, like the other types of mediation, is also characterized by the self-determination aspect of the process, which is to say that the parties together choose the justice process that will allow them to resolve their dispute in a spirit of cooperation, despite the conflict that remains between them.

The special law of family mediation differs from general mediation law in that it does not allow the parties to be accompanied by legal advisers during the

sessions, but this is not incompatible with the idea of participatory justice and of an agreement culture. The legislature's purpose in preventing legal advisers from being present during family mediation sessions is to ensure that the parties really have the floor. Mediation is particularly well-suited to family conflicts in this regard, because it helps to restore better communication between spouses and to preserve their relationship in the future in cases where there are children.

It is true that family mediation takes place in a unique context, one that is often charged and emotional, which distinguishes it from civil or commercial mediation. The problem of vulnerability in family mediation is a real one, but procedural safeguards that are inherent in the process serve to counter this vulnerability. Although parties to family mediation do not have the option of being assisted by a lawyer or notary during the sessions, the possibility of consulting a legal adviser at various times during the process exists and is even encouraged. The process is also guided by impartial third parties, who are certified and specially trained to address the psychological and legal needs of spouses and parents. Mediators are subject to strict professional obligations and have, among other things, the power to put an end to the mediation process in order to avoid irreparable prejudice. Moreover, there is no requirement that the parties enter into a contract when the mediation ends. In fact, the standard family mediation contract in Quebec specifically provides that family mediation sessions lead to a proposed agreement that is not binding.

The unsigned summary of mediated agreements, as provided by the mediator at the end of the sessions, is therefore not a contract. Following mediation, the parties will be free to enter into a contract whose terms differ in whole or in part from those recorded by the mediator in the summary. In principle, a summary of mediated agreements, as a simple writing prepared by a third party, is not admissible in court proceedings to prove a juridical act, but a court may not raise this rule of its own motion. In addition, even where a binding agreement is entered into following mediation, it will not be enforceable unless a court has reviewed it to determine its appropriateness, to the extent that it deals with matters of public order like custody of children and child support. This suggests that a binding agreement between spouses arising from family mediation, to the extent that it deals with matters of public order, cannot be a transaction within the meaning of art. 2631 *C.C.Q.*, because no transaction may be made with respect to such matters. It follows that, very often, the parts of an agreement between spouses that do not concern matters of public order cannot be considered separately, because a transaction is indivisible as to its subject. All of these procedural safeguards serve to ensure that vulnerable parties will not unknowingly end up bound by an ill-considered agreement.

Settlement privilege is a rule of evidence that protects the confidentiality of communications and information exchanged for the purpose of settling a dispute. It is recognized as fundamental to the making of an agreement between parties because it promotes honest and frank discussions, which can make it easier to reach a settlement in all types of mediation. The privilege applies without having to be invoked by the



parties. Unlike a confidentiality clause in a contract, the privilege applies to all communications that lead up to a settlement, even after a mediation session has concluded. This common law rule is codified in art. 4 of the *Code of Civil Procedure*.

Settlement privilege is not absolute, however. There are some exceptions developed by the courts or established by law that allow confidentiality to be lifted. The settlement exception allows protected communications to be disclosed in order to prove the existence or scope of a settlement arising from mediation. It applies even where an agreement is not entered into until after mediation. In keeping with its purpose, the exception applies only to what is necessary to prove the existence or scope of the settlement. The exception serves the same public interest as the privilege itself, that is, the promotion of settlements. 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.

The parties can displace the exception or change its scope by contract, provided that they do so clearly, and as long as they do not deprive a court of its supervisory jurisdiction over matters of public order. To determine whether a contract displaces the exception, it is necessary to ascertain the common intention of the parties, which requires analyzing the nature of the contract, the circumstances in which it was formed, and usage.

The trial judge was right not to allow the objection raised by I, and there was no reason to intervene on appeal. Before participating in family mediation, I and M signed a mediation contract modelled on the standard family mediation contract used in Quebec. Their contract contained a general confidentiality clause and an unambiguous statement that the objective of the process was to come to an agreement. None of the contract's clauses clearly displaced settlement privilege or its exceptions, and the interpretation of the contract cannot lead to the contrary conclusion. Although the parties never signed the summary of mediated agreements, their subsequent conduct indicates that they had an agreement of wills that was clear enough for the formation of a true agreement reflecting the terms recorded in the summary of mediated agreements.

Exceptionally, the circumstances of this case justify an award of costs on a solicitor-client basis; that being said, the specific circumstances and the Association's status as a non-profit organization call for caution. The Court has the discretion to depart from the usual practice and to order solicitor-client costs in exceptional circumstances, such as where an appeal raises issues of general interest that go beyond the particular case of the successful party. Unlike in the Court of Appeal, where it intervened as a friend of the court, the Association is asking the Court to uphold the objection raised by I and has taken a position on the merits of the lower courts' decisions, which were based on significant findings of fact. M has had to mount a defence against a third party to the original litigation that, despite I's absence from the proceeding, is asking that the appeal be allowed. M did not have to personally bear the

cost of such a test case, which went far beyond the facts of his original dispute. Because awarding solicitor-client costs against the Association could have a deterrent effect on other organizations of this kind, and in light of the specific circumstances of this case, it is necessary to proceed with caution; therefore, as a compromise, costs should be limited to \$15,000, plus disbursements.

*Per* Abella, **Karakatsanis** and Martin JJ.: There is agreement with the majority that the appeal should be dismissed. However, there is divergence of opinion regarding the conclusion that the *Union Carbide* exception to settlement privilege applies to communications that occur during family mediation sessions in Quebec. Discussions that occur within family mediation sessions remain confidential and cannot be disclosed or adduced as evidence unless the parties specifically agree otherwise. Rules relating to the confidentiality of settlement negotiations applied in civil and commercial cases cannot simply be transposed to the family law context: doing so undermines both the unique legal approach to family law settlements developed by the courts and the broader objectives of the family mediation regime. Accordingly, the summary of mediated agreements, being the mediator's understanding of the potential basis for agreement between the parties, was inadmissible because it was protected by settlement privilege and the confidentiality terms of the contract.

Family law settlements are unique. The Court's jurisprudence reflects an evolving understanding of the distinct challenges relating to the settlement of disputes in the family law context. A family breakdown is no ordinary legal issue. Familial

relationships are not mere business relationships nor casual encounters. Their dissolution may be a catastrophic event in the lives of participants. The breakdown of a spousal relationship is often wrought with emotional turmoil, power imbalance and vulnerability. In these respects, family law cases, and in particular cases involving settlements, stand on an entirely different footing from commercial cases. In decisions spanning at least four decades, the Court has highlighted the central reality of vulnerability in family negotiations and has consistently recognized the need for a discrete approach to address the challenges of resolving family disputes. It has resisted importing principles that apply to commercial settlements into the family context and has adjusted the general private law to this unique context. The two realms have developed separately for good reason.

The objectives of family mediation are much broader than simply promoting the settlement of a specific legal dispute. In particular, two overarching public interest objectives are key, and both depend on complete confidentiality in the mediation sessions. First, family mediation sets the groundwork for restructuring relationships that can navigate the traumatic consequences of familial breakdowns on a long-term basis, especially when children are involved. The aim of reshaping relationships carries much greater significance in the family context given the intimacy of family bonds. Typically, family disputes cover a broad range of issues, from the primary legal issues of support, custody and access, and division of property, to the intricate untangling of interdependent family affairs — issues that often require cooperation on a sustained basis. When children are involved, the best interests of the

child deserve the ongoing ability of parents to communicate and resolve disputes. The objective of restructuring relationships is achieved through family mediation's unique focus on promoting earnest discussions, dialogue and active listening. In Quebec, this priority is reflected in the interdisciplinary nature of the regime: it deals with every aspect of a relationship breakdown, whether the issues are emotional, relational, financial or legal in nature.

Second, family mediation strives to protect vulnerable parties and compensate for power imbalances to achieve equitable outcomes. The process is designed for parties who, in the tumult of separation, inevitably bring to the table a host of emotions and concerns that do not obviously accord with the making of rational economic decisions. This objective plays a broader role in family mediation and negotiation than it does in commercial settings because the intimate nature of the relationship between the parties makes it difficult to overcome potential power imbalances and modes of influence. After all, family mediation in Quebec aims to reach a fair settlement, not just any form of settlement.

Confidentiality furthers mediation's participatory and consensual foundations, as well as the objective of reaching settlements in the family context. The effectiveness of family mediation in promoting settlements is predicated on the creation of a confidential space where the parties can fully explore common ground on a diverse range of interrelated issues and engage without fear of legal repercussions. Confidentiality is essential for full and frank discussions, which are necessary to

establishing functional familial dynamics going forward. It is also critical for protecting vulnerable parties and compensating for power imbalances, in that confidentiality prevents the more powerful party from using the words of the more vulnerable party to substantiate an unfair agreement. This risk is pronounced in Quebec given the regime's prohibition on lawyers being present during the sessions. Family law mediators may not always be able to intervene to protect vulnerable parties because abusive dynamics are not always evident.

There are two overriding problems with the application of the settlement exception discussed in *Union Carbide* to confidential communications during family mediation sessions. First, the justification for the exception to settlement privilege — to encourage settlement of legal disputes — does not account for the unique context of family settlement, nor the broader objectives of family mediation. Exceptions are applied with regard to their purpose and not mechanically. Encouraging the settlement of legal disputes is not the only public interest at stake in the family law context.

Second, the exception's underlying reasoning is fundamentally incompatible with the nature of family mediation in Quebec. In *Union Carbide*, the objective of promoting settlement was served by the possible disclosure of communications constituting the offer and acceptance of a binding contract. In the present context, however, no offer and acceptance can occur during mediation sessions. The Quebec mediation regime, which prohibits the presence of lawyers, forecloses parties from reaching a binding settlement in mediation sessions — they are a forum

for exploratory negotiations that may, but need not, lead to a settlement outside of mediation. It follows that the terms of an agreement can only be reached outside the mediation process.

Even if *Union Carbide* were to apply to the family law context, it remains open to the parties to contract for greater confidentiality than is available at common law. The question is whether an absolute confidentiality clause in a mediation agreement displaces the common law exception. In this case, the text and nature of the contract, as well as the circumstances in which it was formed, lead to the conclusion that the parties intended complete confidentiality during mediation sessions, therefore displacing the exception to settlement privilege.

Therefore, the summary of mediated agreements was not admissible, as it contains protected confidential information. The trial judge erred in proceeding on the basis that a contract could be formed during the mediation sessions. He also erred in admitting confidential information from the mediation sessions and the summary of mediated agreements into evidence. I's objection to the admissibility of the summary of agreements should be sustained. However, given the limited record before the Court, it is difficult to assess whether the evidence would otherwise have been sufficient to justify the trial judge's conclusion regarding the existence of a contract; therefore, the disposition appealed from should not be overturned.

The majority's award of solicitor-client costs against the Association in this case is unprecedented and unwarranted. The Court has never ordered costs on a solicitor-client basis against a non-profit organization that raised an issue of public importance. An award on this scale is an extraordinary measure that effectively penalizes a non-profit organization for bringing forth an issue of obvious importance to an area of law that touches the lives of so many Canadians. It can only deter such parties from doing so in the future.

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By Kasirer J.

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*Octane Stratégie inc.*, 2019 SCC 57; *Mackin v. New Brunswick (Minister of Finance)*, 2002 SCC 13, [2002] 1 S.C.R. 405; *Young v. Young*, [1993] 4 S.C.R. 3; *Finney v. Barreau du Québec*, 2004 SCC 36, [2004] 2 S.C.R. 17; *Friends of the Oldman River Society v. Canada (Minister of Transport)*, [1992] 1 S.C.R. 3.

By Karakatsanis J.

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*Code of Civil Procedure*, CQLR, c. C-25, arts. 151.16, 814.7, 815.3, 827.2 to 827.4.

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*Code of ethics of notaries*, CQLR, c. N-3, r. 2, s. 3.

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APPEAL from a judgment of the Quebec Court of Appeal (Doyon, Hogue and Roy JJ.A.), 2020 QCCA 115 (*sub nom. Bisailon v. Bouvier*), [2020] J.Q. n° 282 (QL), 2020 CarswellQue 293 (WL Can.), affirming a decision of Moore J., 2017 QCCS 3788, [2017] J.Q. n° 11071 (QL), 2017 CarswellQue 7306 (WL Can.). Appeal dismissed.

*Sylvie Schirm and Marie-Elaine Tremblay*, for the appellant.

*Joanne Biron and Emily Kissel*, for the respondent Michel Bouvier.

No one appeared for the respondent Isabelle Bisailon.

English version of the judgment of Wagner C.J. and Moldaver, Côté, Brown, Rowe and Kasirer JJ. delivered by

KASIRER J. —

I. Overview

[1] Since the introduction of the first mediation service for families at the Quebec Superior Court in 1981, Quebec law has embraced this private dispute prevention and resolution process, which differs in many respects from civil justice administered by the courts. According to the data of the Ministère de la Justice for 2013-14 — at the time of the dispute between the spouses in this case — about 15,000 couples received free family mediation sessions, and 80 percent of them reached an agreement resolving their various conflicts (Committee of Accrediting Organizations in Family Mediation (“COAMF”), *Standards of Practice in Family Mediation* (2016) (“2016 Guide”), at p. 3). In Quebec, family mediation by certified mediators is made available to married, civil union and *de facto* spouses with or without children. Significantly subsidized, mediation unquestionably has the favour of the government: the law even provides that spouses must attend a family mediation information session before a court may hear their judicial application.

[2] Although this record is impressive and represents a considerable step forward for access to justice, some debate persists about certain aspects that are rooted in the very nature of this procedure and, as this appeal shows, about the role of confidentiality in family mediation, as opposed to civil or commercial mediation. At a time when the Quebec legislature has made private dispute prevention and resolution processes central to its reform of civil justice in the new *Code of Civil Procedure*, CQLR, c. C-25.01 (“N.C.C.P.”), this appeal affords the Court an opportunity to clarify the scope of family mediation as a mechanism of what is known as participatory and consensual justice. The issue reflects a shift that has taken place in other parts of

Canada, where it is recognized in a variety of contexts that “alternative models of adjudication are no less legitimate than the conventional trial” for ensuring timely and affordable access to civil justice (*Hryniak v. Mauldin*, 2014 SCC 7, [2014] 1 S.C.R. 87, at para. 27; see also para. 2).

[3] After ending their *de facto* union, Isabelle Bisailon and Michel Bouvier undertook a mediation process to resolve their disputes with respect to custody and support arrangements for their children, their respective rights in the immovable that served as their residence, and the determination of compensation for Ms. Bisailon to remedy the impact of childcare responsibilities on her career. Once their meetings had ended, the certified mediator recorded his conclusions about what had been agreed upon in mediation in a document called a “summary of mediated agreements”, which is the term used in the standard family mediation contract in Quebec. Sometime later, Ms. Bisailon filed a court action seeking greater financial compensation than was provided for in the summary of mediated agreements, including in relation to the partition of the immovable. In defence, Mr. Bouvier argued that the parties had entered into a contract during mediation, the terms of which were set out in the summary. Ms. Bisailon denied the existence of that contract and objected to the summary being admitted in evidence on the ground that it was protected by the confidentiality of the mediation process.

[4] The trial judge dismissed Ms. Bisailon’s objection, relying in part on *Union Carbide Canada Inc. v. Bombardier Inc.*, 2014 SCC 35, [2014] 1 S.C.R. 800, a



commercial mediation case, and found that there was a contract between the parties dealing, among other things, with rights in the residence. The Court of Appeal unanimously dismissed Ms. Bisailon's appeal, though the judges did not agree about the application of the principles enunciated in *Union Carbide* in the family mediation context. Ms. Bisailon decided not to appeal the Court of Appeal's decision.

[5] The Association de médiation familiale du Québec obtained leave from this Court to be substituted as appellant in order to raise Ms. Bisailon's objection and have the Court of Appeal's judgment set aside. The Association argues that discussions during family mediation and the summary of mediated agreements prepared by a mediator are protected by a rule of absolute confidentiality that is necessary for such a process to function fairly and effectively. Without such confidentiality, mediation would entail risks for vulnerable spouses.

[6] I disagree with the Association on this point. It is certainly true that confidentiality is necessary in any mediation to allow for frank discussions between the parties in order to encourage settlements. It is also true that, unlike in the case of civil or commercial mediation, negotiations following the breakdown of a relationship often take place during a period of personal upheaval that may heighten the vulnerability of either spouse. However, the protection of vulnerable individuals is assured not by absolute confidentiality, but by a set of special norms — some of which are legislated, while others reflect usages in practice or are found in the standard mediation contract — that provide spouses, parents and children with [TRANSLATION] “procedural

safeguards” while at the same time protecting public order (I take the term “procedural safeguard” from J.-F. Roberge, *La justice participative: Fondements et cadre juridique* (2017), at p. 106).

[7] These safeguards are implemented primarily by two actors who are, by comparison, absent from civil and commercial mediation: the government-*certified family mediator* chosen by the parties under the standard mediation contract, and the *judge* who is asked to confirm any agreement arising from family mediation. These two actors play a key role in the protection of more vulnerable parties, one that is unique to this form of mediation in that it serves to alleviate the risks associated with the absence of legal advisers during family mediation sessions.

[8] Given the significance of the procedural safeguards inherent in family mediation, it is, in my respectful view, an error to insist on the absolute nature of confidentiality. A rule of absolute confidentiality might not only deflect family mediation from its participatory and consensual foundations, but also undermine the parties’ adherence to this process for resolving their dispute, or even to the settlement itself. To reject the settlement exception recognized by this Court in *Union Carbide* in favour of absolute confidentiality would interfere with the primary objective of family mediation, which is to reach an agreement resolving an existing or anticipated dispute. Moreover, the interpretation of the standard mediation contract widely used in Quebec, and of the contract signed by the spouses in this case, supports the conclusion that parties to such a process do not exclude from the outset the settlement exception from

*Union Carbide*. Therefore, where spouses enter into a settlement at the end of a mediation process governed by the standard contract, the settlement exception can apply and allow them to file in evidence the communications that are necessary to establish the existence or terms of their agreement.

[9] Even though the settlement exception applies in family mediation governed by the standard contract scheme, proof that the parties actually entered into an agreement must still be made in accordance with the rules of the law of evidence. It is useful to put an end to a debate that has long troubled family mediation in Quebec: the summary of mediated agreements provided to the parties by the mediator at the end of the family mediation process is not a contract that can serve to prove such an agreement, but simply a working tool for the spouses. Prepared by the mediator on the basis of the spouses' discussions during mediation, the summary cannot satisfy the requirement that there be an agreement of wills for the formation of a valid contract, because, at the time it is given to the parties, it does not reflect firm offers to contract or firm acceptances by the spouses. That being said, nothing prevents the parties from entering into a contract whose terms are identical to those recorded by the mediator in the summary of mediated agreements. They can do so by signing the summary or by consenting expressly or tacitly after it has been given to them. Because the parties are encouraged to obtain independent legal advice after receiving that document, they may also decide to bind themselves contractually on different terms, or not to bind themselves at all. In any event, the unsigned summary of mediated agreements given to the spouses is not a contract, because it is not a juridical act that results from an

agreement of wills between the spouses and that is intended to produce legal effects. In this regard, and subject to the rule of evidence in art. 2859 of the *Civil Code of Québec* (“*C.C.Q.*”), which limits a court’s power to raise grounds of inadmissibility of its own motion, an unsigned summary is a simple writing and is generally not admissible to prove the existence of an agreement arising from mediation.

[10] In this case, the trial judge was correct in finding that the parties, through their communications following the mediation sessions, had expressed their intention to be bound contractually. Even without the summary of mediated agreements, their testimony regarding their communications during mediation and the evidence concerning their communications thereafter were admissible and could serve to prove the existence and terms of a settlement, in accordance with the principles set out in *Union Carbide* and in the absence of any objection based on the applicable rules of evidence. The parties exchanged consents after being given the summary and entered into a binding agreement, which, in the circumstances of this case, reflected the terms recorded in the summary. I would therefore dismiss the appeal.

## II. Background

[11] Ms. Bisailon and Mr. Bouvier were *de facto* spouses from April 2009 to July 2012. They had two children, born in 2009 and 2011. In 2010, they purchased a residence for the family. The notarial deed provided that the spouses were equal undivided co-owners of that immovable. Mr. Bouvier agreed to pay the costs for as

long as Ms. Bisailon was not working and was caring for the children. Later, they were to divide those costs equally. The spouses disagree about their respective contributions to the purchase price of the residence and to the cost of its renovation.

[12] In July 2012, they ended their relationship. Between August and December 2012, Ms. Bisailon and Mr. Bouvier participated in a family mediation process dealing with child custody and support, the fate of the family's residence and possible compensation for Ms. Bisailon because of the time she had spent caring for the children rather than pursuing her career. The parties signed the mediation contract proposed by the mediator, modelled largely on the standard contract prepared by the COAMF.

[13] Clause 1 of their mediation contract provided that the goal of the process was to come to an agreement:

[TRANSLATION]

1. We the undersigned understand that the objective of mediation is to allow spouses who have separated, divorced or have made the decision not to live together anymore to come to an agreement regarding the exercise of parental authority, access and the residence of the children, the financial responsibilities, the division of the family assets and the settlement of the matrimonial regime, if any.

(A.R., at p. 94)

[14] Clause 2 recognized this objective by setting out the matters in dispute. In cl. 3, the spouses stated that the mediator's role was to help them [TRANSLATION]

“negotiate an agreement”. Clause 4 provided that the discussion between the spouses was to take place in an [TRANSLATION] “atmosphere of cooperation” and that each of them would “work towards finding solutions in their mutual interest and more particularly in the best interests of the children”. Clause 8 dealt with the confidential nature of the mediation:

[TRANSLATION]

8. We acknowledge that the content of our meetings, of the interviews and of our file is confidential. We commit ourselves to not use as a proof in front of a court any document contained in the file, including the Summary of Mediated Agreements, without the consent of both parties. The mediator cannot communicate this information to anyone except when the law expressly orders it.

(A.R., at p. 95)

[15] Following the five mediation sessions between Mr. Bouvier and Ms. Bisailon, the mediator drew up a summary of mediated agreements, as provided for by the mediation contract and the instructions in the *Guide*. The purpose of that summary was to set out the consensus resulting from mediation. Adopting the wording of the standard contract, cl. 10 of their mediation contract stated the following about the summary:

[TRANSLATION]

10. We are informed that the Summary of Mediated Agreements prepared at the end of the mediation process will not constitute a legal document nor an enforceable agreement. It will serve to help the legal advisers who will be retained to prepare the appropriate legal documents. We are also informed that the signature of the Summary of Mediated

Agreements produces legal effects, even if it is not enforceable, and that it is preferable to obtain independent legal advice [before] signing it.

(A.R., at p. 95)

[16] The summary of mediated agreements included a reminder of the confidentiality of the mediation documents, [TRANSLATION] “including this Summary of Mediated Agreements”, and of the undertaking not to use the summary as proof in court without the consent of both parties.

[17] The parties did not sign the summary of mediated agreements and never had any agreement relating to their union homologated by a court.

[18] In 2013, Mr. Bouvier wrote Ms. Bisailon three cheques, two of which specifically referred to [TRANSLATION] “mediation”. Ms. Bisailon cashed those cheques. In an exchange of emails concerning the children, the parties alluded to the terms of an arrangement they had made during mediation. In the last two emails that Ms. Bisailon sent Mr. Bouvier, she denied the existence of any agreement between them.

[19] In October 2014, Ms. Bisailon filed a court action seeking equal partition of their former residence through a sale under judicial authority. Mr. Bouvier filed a defence and a cross demand in which he argued that the summary of mediated agreements, which determined the fate of the residence, was a transaction contract,

within the meaning of the *Civil Code of Québec*, that he was seeking to have homologated. In his view, the application for equal partition did not reflect the agreement entered into at the end of the mediation process, as recorded in the summary of mediated agreements.

[20] In answer, Ms. Bisailon raised a ground of inadmissibility, arguing that the summary of mediated agreements could not be admitted in evidence because it was confidential under the parties' mediation contract. She alleged that there had never been a binding agreement between the parties.

### III. Judicial History

#### A. *Quebec Superior Court, 2017 QCCS 3788 (Moore J.)*

[21] In a judgment rendered during the course of a proceeding, the Superior Court dismissed Ms. Bisailon's exception to dismiss (2015 QCCS 5019). Nantel J. found that the confidentiality rule applicable to mediation did not make the summary of mediated agreements inadmissible in evidence. In her view, Ms. Bisailon had acted as if there were a binding agreement between the parties and had not objected to its partial performance. It followed that she had waived confidentiality and therefore that the summary of mediated agreements was admissible in evidence.



[22] Ruling on the merits of the case, Moore J., as he then was, dismissed Ms. Bisailon's application for partition of the residence. He also dismissed Mr. Bouvier's cross demand for homologation of a transaction. However, he found that there was an agreement concerning the partition of the residence dated the day on which the mediator had given the parties the summary.

[23] Considering, on the merits, the issue of whether the summary of mediated agreements was admissible in evidence, the trial judge acknowledged that such a document is, in principle, subject to the rule of confidentiality. However, like Nantel J., Moore J. explained that the parties could waive confidentiality implicitly. Taking note of Ms. Bisailon's cashing of the three cheques and of the parties' exchange of emails, the trial judge found that the parties had waived confidentiality [TRANSLATION] "by performing and referring to the agreement entered into" (para. 39 (CanLII)).

[24] Furthermore, as an exception to settlement privilege, *Union Carbide* allows the admission of evidence that is necessary to prove the existence and terms of a settlement. The judge therefore dismissed Ms. Bisailon's objection and admitted in evidence the summary of mediated agreements and any other evidence that could establish the existence of the parties' agreement.

[25] However, the trial judge declined to homologate the agreement as a transaction, noting that, in the context of child custody and support, an agreement dealing with matters of public order cannot be a transaction under the *Civil Code of*

*Québec*. Accordingly, even though Mr. Bouvier’s cross demand concerned only the partition of an immovable, the judge preferred to take note of the existence of an overall agreement and to order its performance as far as such partition was concerned.

B. *Quebec Court of Appeal, 2020 QCCA 115 (Doyon, Hogue and Roy J.J.A.)*

[26] Ms. Bisailon appealed the judgment of the Superior Court. She challenged mainly the trial judge’s finding that she had waived the confidentiality of the mediation process and his decision to admit the summary of mediated agreements in evidence.

[27] Vauclair J.A., sitting alone, authorized the Association to intervene in the appeal as a friend of the court, since he was of the view that the case raised, among other things, [TRANSLATION] “an important issue of public interest” relating to the confidentiality of the family mediation process (2017 QCCA 1793, at para. 2 (CanLII)). He gave the Association permission to [TRANSLATION] “file a memorandum to provide the Court with guidance on the nature and legal scope of the discussions and of the summary of mediated agreements” (para. 4).

[28] The Court of Appeal unanimously dismissed the appeal on the merits. Hogue J.A. wrote reasons with which Roy J.A. agreed; Doyon J.A. wrote concurring reasons.

[29] After providing an overview of the legal framework of family mediation, Hogue J.A. noted that the process is confidential because of settlement privilege, which protects communications between parties attempting to resolve a dispute. Citing *Union Carbide*, she explained that the settlement exception allows communications to be disclosed despite confidentiality if their disclosure is necessary to prove the existence or scope of an agreement.

[30] In Hogue J.A.'s view, the parties had confirmed that the privilege applied through their mediation contract but had not displaced the settlement exception, although they had been free to do so. She also rejected the argument that the exception cannot apply in the family mediation context. Because the purpose of family mediation is the same as that of civil mediation — to prevent or resolve a dispute by entering into a freely negotiated agreement — the principles established in *Union Carbide* are equally valid in this context. The trial judge had therefore been correct to dismiss Ms. Bisailon's objections based on confidentiality.

[31] However, Hogue J.A. found that Ms. Bisailon could have raised another ground of inadmissibility to object to the filing of the summary of mediated agreements. Given that an unsigned summary is a simple writing and not a contract, it may not be admitted in evidence to prove a juridical act. Ms. Bisailon had not raised this ground, and it was not for the trial judge to raise it of his own motion (art. 2859 *C.C.Q.*). In any event, on the facts of this case, the objection would not have changed the result, because the testimonial evidence and the post-mediation conduct of the

parties could nonetheless have established the existence of a binding agreement, even without the summary of mediated agreements.

[32] In his concurring reasons, Doyon J.A. wrote that the settlement exception recognized in *Union Carbide* does not apply in family matters unless it is shown that this was what the parties wished. In family mediation, unlike in civil or commercial mediation, parties cannot be represented by legal advisers during the mediation sessions. It would therefore be unrealistic for a party who is a layperson, and who is also in the process of separating or divorcing, to understand the subtleties of the settlement exception.

[33] On the facts of this case, however, Doyon J.A. found that the post-mediation exchanges of emails and cheques amounted either to recognition of the existence of an agreement or to an implied waiver of confidentiality. Like Hogue J.A. and the trial judge, he was of the view that the testimonial and written evidence showed that there was an agreement between the parties.

#### IV. Issue and Grounds of Appeal

[34] The issue in this appeal is whether the exception to settlement privilege that allows the existence or scope of a settlement to be proved, an exception recognized by this Court in *Union Carbide*, applies in the family mediation context. Specifically, the Court must decide whether the family mediation process established by the

legislature and governed, as in this case, by the COAMF's standard contract scheme excludes the exception recognized in that case.

[35] According to the Association, there is absolute confidentiality in family mediation, which means that the exception must be excluded once a mediation contract is signed, except where the parties indicate that it applies. The Association asks the Court to reach this conclusion because of the special nature of family mediation and the protection it must afford to vulnerable individuals. The Association also submits that the summary of mediated agreements prepared by a mediator and the parties' testimony may not be admitted in evidence to prove the existence or terms of a settlement arising from family mediation. It further argues that the summary of mediated agreements is not a contract, but simply a working tool.

[36] I note that the parties generally refer to the new *Code of Civil Procedure* in their factums, but also, on occasion, to the former *Code of Civil Procedure*, CQLR, c. C-25 ("F.C.C.P."). When account is taken of the usages and practices specific to the standard contract scheme in question, one observes that the norms relevant under the new *Code* are similar in many respects to the sources of the former law (the 2016 *Guide* states that "[t]he new *Code of Civil Procedure* largely includes the contents of the guide to standards developed by the COAMF more than 15 years ago" (notice page)). This is the case for the principle that private dispute prevention and resolution processes are confidential, which used to be in art. 815.3 F.C.C.P. and is now set out as a general principle in art. 4 N.C.C.P., supplemented by arts. 606 and 607 and by art. 617 for

family mediation specifically. However, the outcome of this case, though closely tied to the law of civil procedure, depends on whether a judge-made rule of evidence developed in *Union Carbide* applies in family mediation, a question that arises under both the new *Code of Civil Procedure* and the former law.

## V. Analysis

[37] To understand whether the spouses did in fact exclude the exception to privilege that would allow them to prove the existence or terms of an agreement, it is useful to begin by considering the place of mediation in the civil justice system and by looking at the specific nature of family mediation (A). Next, it should be reiterated that parties to family mediation enjoy additional procedural safeguards that can protect spouses (B). Having regard to the very nature of family mediation, to these procedural safeguards and to the terms of the standard contract, it is neither necessary nor desirable, for the protection of vulnerable parties, to establish a rule of absolute confidentiality or to depart from the rule developed in *Union Carbide* relating to the settlement exception. Systematically displacing the exception in the family mediation context would interfere with the main objective of the process, which is to reach a settlement. Moreover, the COAMF's standard contract, as adapted by the parties in this case, cannot be interpreted as excluding the exception (C). On the facts of this case, the parties could prove the existence or terms of an agreement by relying — to the extent necessary and subject to the rules of the general law of evidence — on what was said, written or done during mediation (D).

A. *Family Mediation Is a Private Dispute Prevention and Resolution Process That Is an Integral Part of the Civil Justice System*

(1) Sources of Family Mediation Law

[38] Both parties assert that the very nature of family mediation supports their respective positions. This apparent contradiction can be explained in part by the fact that the sources of family mediation law are sometimes difficult to identify and are, at first glance, somewhat disparate. Among these sources are legislation and regulations, the will of the parties as expressed in their mediation contract, and practices and usages in the field, including the norms set out in the standard contract and in the *Guide* for certified mediators.

[39] First of all, the *general law of civil mediation* — a set of norms of general application for any mediation — should be distinguished from the *special law of family mediation*, which applies to the category of mediation dealing with the resolution of a dispute between spouses or parents. Largely governed by rules of public order laid down in the *Civil Code of Québec*, the *Code of Civil Procedure* and the *Regulation respecting family mediation*, CQLR, c. C-25.01, r. 0.7 (“*Regulation*”), the special law of family mediation is, in many respects, designed to recognize the fact that spouses negotiate a potential agreement “on the fault line of one of the most emotionally charged junctures of their relationship” (*Rick v. Brandsema*, 2009 SCC 10, [2009] 1 S.C.R. 295, at para. 40).

[40] Second, family mediation is heavily influenced by contractual practice and the usages established in the field over the past 30 years or so in Quebec. Family mediation usages are set out partly in the *Guide* prepared by the COAMF.<sup>1</sup> The *Guide* states that the standards of practice were developed “[i]n order to insure high practice standards as well as harmonization in the quality of family mediation practices” (2016 *Guide*, at p. 5; 2012 *Guide*, at p. 5) and that, while they do not have the force of law, they nonetheless guide the practice of the family mediation profession as a “type of auto-regulation specific to this field” (2016 *Guide*, at p. 5; 2012 *Guide*, at p. 5). A certified family mediator “must inform his clients of the existence of the[se] Standards” (2016 *Guide*, at p. 6; 2012 *Guide*, at p. 5).

[41] Additional norms are set out in the standard family mediation contract appended to the *Guide*, which is offered to certified mediators as a model. This standard contract is often adopted by spouses, as it was in this case, and governs several aspects of family mediation for which the law does not otherwise provide, such as the duty of mediators to prepare a “Summary of Mediated Agreements” as a tool “to encourage reflection and to orient future legal actions” (2016 *Guide*, at p. 34; 2012 *Guide*, at p. 32). The standard contract also includes additional protections meant to address certain vulnerabilities of the parties that are unique to family mediation.

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<sup>1</sup> Two versions of the *Guide* will be cited throughout these reasons, the 2012 *Guide* and the 2016 *Guide*. The 2016 *Guide* is a revision of the 2012 *Guide*.



(2) Family Mediation: A Form of Participatory and Consensual Civil Justice Whose Primary Objective Is To Conclude an Agreement Resolving a Dispute

[42] The Association submits that the specific context of family mediation, including the vulnerability of the parties, distinguishes it from commercial and civil mediation. The Association thus reasons that the confidentiality scheme set out in *Union Carbide* is ill-suited to the family context, which requires what it describes as airtight or absolute confidentiality.

[43] Mediation in the broad sense is a [TRANSLATION] “process of reaching a decision as a result of dialogue and negotiation assisted or facilitated by a neutral and impartial third party who has no decision-making power and who is freely chosen by the parties to resolve a problematic situation in an amicable and mutually acceptable manner and, ideally, to restore or improve the relationship” (J.-F. Roberge, *La justice participative: Changer le milieu juridique par une culture intégrative de règlement des différends* (2011), at p. 66; see also P.-C. Lafond and M. Thériault, “La médiation”, in P.-C. Lafond, ed., *Régler autrement les différends* (2nd ed. 2018), 103, at No. 3-1). Mediation is a confidential process that favours free and open discussions between the parties. It is true that family mediation takes place in a unique context, one that is often charged and emotional, which mediation law must take into account. That being said, I do not consider family mediation to be intrinsically different from civil or commercial mediation in terms of its primary objective, that is, to prevent an anticipated dispute or resolve an existing one.

[44] Entering into an agreement that resolves the parties' dispute is the objective that defines family mediation, like civil or commercial mediation, as a form of civil justice (see arts. 605 and 613 N.C.C.P.; see also art. 151.16 F.C.C.P.). According to the 2012 *Guide*, [TRANSLATION] "[t]he objective of family mediation is to enable the spouses/parents to reach a fair agreement to which both parties have given their free and enlightened consent" (p. 6). This purpose is confirmed by the standard family mediation contract at issue in this appeal, which provides that the objective of mediation is enable spouses "to come to an agreement" on the various aspects of the conflict, as they have, themselves, defined it (cls. 1 and 2; 2016 *Guide*, at p. 28; 2012 *Guide*, at p. 26). The focus is on the "consensus of the spouses/parents on the subjects discussed during mediation" (2016 *Guide*, at p. 22; 2012 *Guide*, at p. 20). Family mediators therefore do not dictate the outcome of mediation. They facilitate the parties' negotiations to support "the preparation of an agreement that will meet both the spouses'/parents' needs and the needs of the children" (2016 *Guide*, at p. 7; 2012 *Guide*, at p. 6; see also standard contract, cl. 3; 2016 *Guide*, at p. 28; 2012 *Guide*, at p. 26). Because of its participatory and consensual nature, mediation is thus recognized as being particularly well-suited to the resolution of family disputes (see, e.g., Comité consultatif sur le droit de la famille, *Pour un droit de la famille adapté aux nouvelles réalités conjugales et familiales* (2015), at p. 81; Action Committee on Access to Justice in Civil and Family Matters, *Access to Civil & Family Justice: A Roadmap for Change* (2013), at pp. 11 and 19). Mediation, whether family, civil or commercial, can also be aimed at preventing a dispute (P. Noreau, *Droit préventif: le droit au-delà de la loi* (exp. ed. 2016), at pp. 111-12; L. Marquis, *Droit de la prévention et du règlement*

*des différends (PRD): Principes et fondements — Une analyse dans la perspective du nouveau Code de procédure civile du Québec* (2015), at p. 42). This component is part of the very definition of a dispute prevention and resolution process. In any event, the objective of mediation will always be to address a dispute, be it existing or potential. Without a dispute, mediation loses its purpose.

[45] In some circumstances, particularly where parties dealing with a dispute have to maintain a relationship over the longer term, they may use mediation to improve the dialogue between them and to prevent conflicts beyond their specific dispute. For example, family mediation can be aimed at [TRANSLATION] “maintaining an ongoing relationship over a long period in cases where the parties do in fact have to continue dealing with each other, either as former spouses or as parents” (Noreau, at p. 112-13). This dispute prevention and resolution process is a particularly good fit for family law because some of the aspects negotiated, such as childcare responsibilities, tie in with the logic of continuity rather than a complete break (M.-C. Belleau and G. Talbot-Lachance, “La valeur juridique des ententes issues de la médiation familiale: présentation des mésententes doctrinales et jurisprudentielles” (2008), 49 *C. de D.* 607, at pp. 612 and 614-15).

[46] However, the relational dimension of family mediation and this so-called transformative purpose are not unique to this type of mediation (see M. Shea and S. Clairmont, “Le droit collaboratif: la diversification de la pratique”, in *Service de la formation continue du Barreau du Québec*, vol. 259, *Développements récents en justice*

*participative: la diversification de la pratique de l'avocat* (2006), 105, at p. 130). Civil mediation proceeds from this same logic, for example in the case of neighbourhood disturbances or conflicts between co-owners. It allows parties, as they resolve their dispute, to [TRANSLATION] “reshape their relationship” in order to “preserve a relationship in the future”, because “the neighbours will remain neighbours and will have to continue living side by side” (P.-C. Lafond, “Les troubles de voisinage, la médiation et le notaire”, [2018] 1 *C.P. du N.* 81, at pp. 95-96). Similarly, since co-owners will have to see each other regularly following the resolution of their dispute, [TRANSLATION] “it is also essential that the ‘personal’ relationship between the individuals involved in the dispute be preserved and maintained over time” (S. Chianetta, “Médiation et arbitrage en copropriété”, in *Service de la qualité de la profession du Barreau du Québec*, vol. 447, *Développements récents en droit de la copropriété divise* (2018), 275, at p. 325). In employment law as well, civil mediation serves to defuse interpersonal conflicts between coworkers with a view to [TRANSLATION] “improving the relationship” and giving them a “safe discussion space” to “restore their relationship” (M. Flynn, “Les facettes méconnues de la médiation en 2016”, in *Service de la formation continue du Barreau du Québec*, vol. 422, *Développements récents en matière de cessation d'emploi et d'indemnités de départ* (2016), 75, at p. 85).

[47] This relational logic can also characterize commercial mediation. For example, it may be an aspect of dispute resolution between franchisors and franchisees where legal persons seek, beyond a specific dispute, to [TRANSLATION] “maintain and

even strengthen the quality of the relationship and communications” between them (J. H. Gagnon, “Les meilleurs outils et pratiques de règlement des différends en franchisage depuis l’entrée en vigueur du nouveau *Code de procédure civile*”, in Service de la formation continue du Barreau du Québec, vol. 420, *Développements récents en droit de la franchise* (2016), 1, at p. 31). Article 605 N.C.C.P. in fact provides that, in any type of mediation, the mediator must not only help the parties reach an agreement but must also encourage them to engage in dialogue and to communicate their respective needs.

[48] To be sure, the issues of public order that arise in family cases must not be conflated with civil and commercial conflicts, but it must be acknowledged that the relational dimension of dispute resolution is not exclusive to family mediation. In any form of mediation, the dialogue established to reach a settlement is a mechanism for addressing a relationship conflict. It is therefore essential to give parties the tools they need to give effect to their compromise and, whether or not a settlement is reached, to maintain their relationship going forward.

[49] In addition, family mediation, like the other types of mediation, is characterized by the “self-determination” aspect of the process, which is to say that the parties together choose the justice process that will allow them to resolve their dispute in a spirit of cooperation, despite the conflict that remains between them (M.-C. Belleau, “La médiation familiale au Québec: une approche volontaire, globale, interdisciplinaire et accessible”, in Lafond, *Régler autrement les différends*, 299, at

No. 8-12; see also art. 2 N.C.C.P.; J.-G. Belley, “Une justice de la seconde modernité: proposition de principes généraux pour le prochain *Code de procédure civile*” (2001), 46 *McGill L.J.* 317, at pp. 360-63). Indeed, mediation is based on an [TRANSLATION] “agreement culture” (Roberge (2017), at p. 8; see also Marquis, at p. 90). This culture finds expression at two stages: first, when the parties establish a dispute resolution process on a consensual basis, through the *mediation contract* itself and, second, if they work out an agreement to end the dispute, through the *settlement contract*. The purpose of the first contract is to create the framework in which the parties can enter into the second. The interpretation of the first contract makes it possible to determine how the parties can prove the existence and scope of the second contract, if any, setting out the resolution of their conflict.

[50] It is true, as the Association notes, that the special law of family mediation differs from general mediation law in that it does not allow the parties to be accompanied by legal advisers during the mediation sessions (art. 617 para. 1 N.C.C.P.; see also art. 814.7 F.C.C.P.). However, the absence of lawyers during the sessions is not incompatible with this idea of participatory justice and this agreement culture.

[51] The legislature’s purpose in preventing legal advisers from being present during family mediation sessions is in fact to ensure [TRANSLATION] “that the parties really have the floor” (Ministère de la Justice, *Commentaires de la ministre de la Justice: Code de procédure civile, chapitre C-25.01* (2015), art. 617). Belleau writes

that family mediation is based on an “empowerment” model that enables spouses to take charge of the resolution process that concerns them; it is above all they who speak, rather than a third-party decision maker or lawyers acting on their behalf (No. 8-8). This is intended to facilitate their future cooperation and to give them greater accountability for any undertaking they make (see Noreau, at pp. 112-13). Authors note that mediation is particularly well-suited to family conflicts [TRANSLATION] “because it helps to restore better communication between spouses and to preserve their relationship in the future in cases where there are children” (Lafond and Thériault, at No. 3-39). Moreover, studies show that spouses are more likely to adhere to a settlement they have actively shaped (G. A. Legault, “La médiation et l’éthique appliquée en réponse aux limites du droit” (2002-2003), 33 *R.D.U.S.* 153).

[52] Finally, the coming into force of the new *Code of Civil Procedure* in 2016 has resulted in dispute prevention and resolution processes, including family mediation, being recognized [TRANSLATION] “as justice processes with the same importance” as the traditional court process (L. Chamberland, ed., *Le grand collectif: Code de procédure civile — Commentaires et annotations* (5th ed. 2020), at p. 8; *Commentaires de la ministre de la Justice*, art. 1). This significant shift in Quebec’s legal culture was expressly undertaken by the legislature as an [TRANSLATION] “access to justice” measure designed to make the system “much more accessible, faster, less cumbersome, less expensive” (*Le grand collectif*, at pp. 8-9, quoting former Minister Bertrand St-Arnaud; see also Roberge (2017), at p. 36; Civil Procedure Review Committee, *Une nouvelle culture judiciaire* (2001), at p. 34). Of course, the question of the relative

quality of the justice ensured by private dispute prevention and resolution processes in comparison with that rendered by the traditional courts is beyond the scope of this appeal. Nevertheless, it is clear that mediation facilitates access to settlements in family matters and that it is a dispute resolution process that is not only permitted but encouraged. Indeed, the Quebec government, through the family mediation service it offers, promotes affordable access to dispute resolution by making the information session and five family mediation sessions free where the interests of children are at stake. In addition to these fully subsidized sessions, the fees of certified mediators are fixed by regulation (see *Regulation*, ss. 10 and 10.1; see also, for spouses who have no common dependent children, *Regulation respecting a Family Mediation pilot project for couples who have no common dependent children*, CQLR, c. C-25.01, r. 6.1).

B. *Protection of the Interests of Spouses, Parents and Children in Family Mediation*

[53] The Association submits that dispute resolution in the family context presents a serious risk of abuse for a vulnerable party, a risk of a different nature than in civil or commercial mediation. In *Miglin v. Miglin*, 2003 SCC 24, [2003] 1 S.C.R. 303, a case concerning the validity of contracts negotiated by spouses further to a divorce, Bastarache and Arbour JJ. noted that negotiations entered into upon the breakdown of a marriage may make the parties particularly vulnerable. “Unlike emotionally neutral economic actors negotiating in the commercial context,” they wrote, “divorcing couples inevitably bring to the table a host of emotions and concerns that do not obviously accord with the making of rational economic decisions”



(para. 74). They also cautioned against “the power imbalance” that may vitiate the bargaining process and pointed out that the absence of legal counsel in this context may amplify the parties’ vulnerability (para. 83).

[54] These concerns are legitimate. Even though *Miglin* involved a divorce and the parties in that case did not go through mediation, the problem of vulnerability raised by the case is a real one, and family mediation is not immune from this problem.

[55] However, procedural safeguards that are inherent in family mediation, as a mechanism of participatory justice, serve to counter this vulnerability. These safeguards arise from legislated norms, some of which are of public order, from family mediation practice, as shown by the *Guide*, and from the contractual will of the parties, as expressed in the standard contract. By voluntarily entering into a mediation contract that confers protections not otherwise provided for by law, the parties are therefore themselves responsible for establishing a number of procedural safeguards. As we will see, these safeguards are implemented by two main actors: certified mediators and, in some circumstances, judges.

(1) Independent Legal Advice

[56] Relying on the concurring reasons of Doyon J.A., the Association argues that the vulnerability of the parties in family mediation is compounded by the absence of independent legal advisers during the sessions. In its opinion, this concern is unique

to family mediation because of the harmful consequences of the power imbalance observed in connection with agreements entered into by spouses when their relationship ends.

[57] In *Miglin*, the Court noted that in determining the validity of a separation agreement negotiated by spouses, it is essential to consider whether either party was vulnerable. Such vulnerability can be “effectively compensated by the presence of counsel” during the negotiations (para. 83).

[58] It is true that parties to family mediation do not have the option of being assisted by a lawyer or notary during the sessions, unlike in a negotiation process such as the one in *Miglin*. However, this does not mean that the vulnerability of such parties cannot be effectively “compensated” for, as they will have many opportunities to obtain legal advice. In particular, nothing prevents the parties from consulting a legal adviser prior to or in the course of mediation (Belleau and Talbot-Lachance, at p. 618). Because the prohibition in art. 617 N.C.C.P. against using the services of legal advisers applies only during mediation sessions, spouses are thus able to obtain legal advice before signing their mediation contract, including to assist them in understanding the confidentiality rules. The standard mediation contract also provides in its addendum that each spouse reserves the right to consult a legal adviser “during the mediation process” (2016 *Guide*, at pp. 32-33; 2012 *Guide*, at pp. 30-31), and the mediation contract signed by the parties in this case states that an independent legal consultation is recommended before the parties sign the summary of mediated agreements or have

it confirmed. As well, as Hogue J.A. noted, [TRANSLATION] “mediators generally recommend that parties consult a legal adviser before binding themselves firmly. This was the case here” (C.A. reasons, at para. 72 (CanLII)). Spouses may also suspend a session in order to consult a lawyer or any other person, and mediators have a duty to [TRANSLATION] “suggest that advice be sought from a legal professional” if they perceive an “imbalance” between the spouses or if one spouse “is about to negotiate an unfair agreement” (2012 *Guide*, at p. 11; see also 2016 *Guide*, at p. 12; art. 618 N.C.C.P.; art. 814.7 F.C.C.P.). The absence of legal advisers during the sessions is therefore by no means fatal to considerations of fairness in family mediation.

[59] In addition to the possibility of consulting a legal adviser at various times during the process, procedural safeguards inherent in family mediation also help “compensate” for the exclusion of lawyers and notaries from the sessions. Moreover, as we will see, the standard family mediation contract establishes a scheme that makes it impossible to enter into a binding agreement during the mediation sessions, when no legal adviser is present. Let us now turn to a review of these safeguards.

## (2) A Certified and Impartial Family Mediator

[60] Foremost among these procedural safeguards for the parties is the presence of a mediator, who must be impartial and act fairly (2016 *Guide*, at p. 8; 2012 *Guide*, at p. 8; see arts. 605 and 610 N.C.C.P.). In the family context, a mediator must also be certified in accordance with the standards established by the government. The

conditions for certification, which are determined by regulation (art. 619 N.C.C.P.; see also arts. 827.2 to 827.4 F.C.C.P.; *Regulation*), require in particular that a mediator be a member of one of the designated professional orders and receive training in the legal and psychological aspects of the breakdown of a relationship (*Regulation*, ss. 1 and 2). Section 2 of the *Regulation* provides that the training must pertain in part to “obstacles to negotiation and the balance of forces between the parties” and to “domestic violence”. The *Guide* specifies that this training imposes a duty on family mediators to “maintain balance and equality during the negotiations and . . . not [to] tolerate any intimidation or manipulation from . . . the spouses/parents during . . . mediation” (2016 *Guide*, at p. 15; 2012 *Guide*, at p. 13). Mediators must take this training and learn the responsibilities attached to their role as family mediators during the sessions, regardless of their original profession. All certified family mediators, whatever their professional background, will therefore be required to help spouses achieve their primary objective of resolving their dispute (art. 609 N.C.C.P.; 2016 *Guide*, at p. 8). Indeed, the multidisciplinary nature of family mediation assists in achieving this objective by facilitating the [TRANSLATION] “negotiation of agreements that cover all arrangements upon the breakdown of a spousal relationship” (Belleau, at No. 8-4).

[61] Echoing the *Regulation*, the *Guide* imposes, among other things, a duty on certified family mediators to take any signs of domestic violence into account (2016 *Guide*, at pp. 20-21; 2012 *Guide*, at pp. 18-19). Mediators have an obligation to make sure “at all times during the family mediation process of the ability to negotiate on an equal basis and of a free and enlightened consent of each of the spouses/parents” (2016

*Guide*, at p. 21; 2012 *Guide*, at p. 19). The *Guide* further states that family mediators have a duty to suspend or put an end to the process when mediation is being misused by one of the parties, for example when one spouse is using the children to perpetuate the conflict, scorning the other spouse, hiding assets or using the process to exhaust the other spouse (2016 *Guide*, at p. 17; 2012 *Guide*, at p. 15).

[62] The legislature also gives mediators the powers needed to protect the integrity of the process and the participants' rights. For example, mediators may suspend the process "in the interests of the parties or of one of the parties" (art. 610 para. 2 N.C.C.P.) and take action [TRANSLATION] "where there is a significant imbalance, intimidation or manipulation" (*Le grand collectif*, at p. 3081). These powers are in addition to the general power of mediators to put an end to the mediation process if the circumstances warrant, particularly where serious prejudice is likely to be caused to one of the parties (art. 614 para. 2 N.C.C.P.). Moreover, art. 613 N.C.C.P., which applies to mediation generally, requires mediators to make sure at the end of the mediation process that the parties understand the settlement agreement (see art. 613 para. 2 N.C.C.P.; 2016 *Guide*, at p. 15). These rules, which apply in family mediation, oblige mediators to ensure that spouses or parents understand the nature and scope of the consensus they have reached by the end of the sessions, as recorded in the summary of mediated agreements. Roberge sees this as [TRANSLATION] "an important procedural safeguard" that will help the parties give their free and enlightened consent if they decide, following mediation and possibly with the assistance of a legal professional, to

bind themselves contractually on terms reflecting the summary of mediated agreements (*Le grand collectif*, at p. 3086).

[63] Finally, mediators are required to preserve the confidentiality of the sessions and must explain to spouses that neither mediators nor participants can be compelled, in judicial proceedings, to disclose anything they hear in the course of the mediation process. However, mediators must also explain to spouses that this principle of confidentiality is not absolute: the *Guide* states that mediators must, for example, reveal certain information obtained during mediation when the law requires them to do so (2016 *Guide*, at p. 11; 2012 *Guide*, at p. 10). The family mediation context therefore calls for active supervision by mediators, who, despite their impartiality, must intervene to protect spouses.

[64] As the scope of mediators' duties and powers is well established, it is important to address directly the Association's concern about the vulnerability of spouses and the risks arising from the absence of a legal adviser to support them at certain times.

[65] With respect, the Association's position seems to trivialize the work of its own members: because of their duty to intervene and their training, certified family mediators can "compensat[e]" for the vulnerability of spouses, to invoke the idea referred to in a different context by Bastarache and Arbour JJ. in *Miglin* (para. 83). In *Miglin*, it was the presence of independent legal counsel that had this compensating

effect. In the different context of family mediation, this vulnerability is offset in part by certified mediators. I would add that, in keeping with the new culture of participatory justice, legal professionals who practise mediation [TRANSLATION] “must free themselves from the logic of the adversarial system operating against a backdrop of opposition and conflict” and adopt the participatory and consensual logic of family mediation (Belleau, at No. 8-16). The role and participation of legal professionals are therefore different in the mediation context, particularly in light of their ethical obligation to promote settlements (see *Code of ethics of notaries*, CQLR, c. N-3, r. 2, s. 3; *Code of Professional Conduct of Lawyers*, CQLR, c. B-1, r. 3.1, s. 42; M.-C. Rigaud, “La déontologie et l’éthique dans le contexte des MARC”, in Lafond, *Régler autrement les différends*, 465, at Nos. 12-4 and 12-5; J. Macfarlane, *The New Lawyer: How Clients Are Transforming the Practice of Law* (2nd ed. 2017), at pp. 123-24).

(3) Formation of a Binding Agreement Under the Standard Contract Scheme

[66] The legal principles surrounding the formation of a binding agreement in family mediation confer additional protection on the parties. The conclusions that follow apply where parties enter into a mediation process under the COAMF’s standard mediation contract scheme, or under a contract scheme that is substantially based on the standard one and that incorporates the “summary of mediated agreements” model, as is the case here.

(a) *End of the Mediation Process Governed by the Standard Contract Scheme*

[67] First, it is important to clarify the parties' situation at the end of a family mediation process governed by the standard contract. One possibility is that the parties will find common ground, on all or some points, with respect to the resolution of their disputes. Under general mediation law, the parties may enter into a settlement agreement in the course of mediation (see art. 613 N.C.C.P.). Under the special law of family mediation, where the standard contract scheme applies, the concept of "settlement agreement" referred to in art. 613 N.C.C.P. must be interpreted in a specific manner: while the parties may "agree" in the ordinary sense of the word, they do not enter into a binding agreement — a contract — *during* the family mediation process. At best, when they agree on one or more points, they will end the process with a [TRANSLATION] "proposed agreement" recorded in the summary of mediated agreements provided by the mediator at the close of mediation (*Le grand collectif*, at p. 3085). As we will see, this unsigned summary of mediated agreements is not binding and [TRANSLATION] "must be distinguished from the agreement" that the parties may enter into later "and that may be confirmed by a court" (D. Lambert and L. Bérubé, *La médiation familiale: Étape par étape* (3rd ed. 2016), at p. 303). Of course, it is possible that mediation will end without any agreement or proposed agreement (art. 614 N.C.C.P.).

[68] In principle, therefore, the end of the mediation process does not coincide with the end of the dispute. It is possible that parties who have a proposed agreement



will decide to change the terms discussed and recorded in the summary after they have consulted a legal adviser. It is also possible that parties whose mediation process has ended without a proposed agreement will ultimately be able to reach a settlement. In every case, the parties will have an opportunity to think about the terms of settlement for their dispute after the mediation sessions have ended, once the mediator has given them the summary of mediated agreements.

(b) *Impossibility of Entering Into a Contract During the Mediation Sessions*

[69] Second, the rules on contract formation in the civil law, when applied in the family mediation context, show that parties cannot enter into a binding agreement during the mediation sessions.

[70] To be binding on spouses, an agreement arising from mediation must comply with the conditions of contract formation (M. Tétrault, *Droit de la famille: La procédure, la preuve et la déontologie* (4th ed. 2010), vol. 4, at pp. 338-39). The general rule in Quebec civil law is that a contract is an agreement of wills formed “by the sole exchange of consents between persons having capacity to contract” (art. 1385 C.C.Q.); this exchange is accomplished by the express or tacit manifestation of the will of one spouse to accept an offer made by the other (art. 1386 C.C.Q.) and, unless another exception applies, does not require any formalities (see J.-L. Baudouin and P.-G. Jobin, *Les obligations* (7th ed. 2013), by P.-G. Jobin and N. Vézina, at No. 168; D. Lluelles and B. Moore, *Droit des obligations* (3rd ed. 2018), at No. 247).

[71] It is therefore important to distinguish offers that can, once accepted, give rise to a meeting of the minds from communications made during mediation that are designed to explore the possibility of reaching an agreement and are not firm offers. A communication amounts to an offer to contract only if it signifies the willingness of the party making it to be bound (art. 1388 *C.C.Q.*). Parties may begin discussing a potential contract during the mediation sessions without either of them making an offer that is [TRANSLATION] “firm” enough to constitute an offer to contract for the purposes of the *Civil Code of Québec* (Jobin and Vézina, at No. 176; Lluelles and Moore, at No. 281; *Howick Apparel Ltd. v. Champoux*, 2007 QCCA 674, at paras. 13 and 17 (CanLII)).

[72] In fact, in the context of a family mediation process governed by the standard contract, or by a contract that replicates its content, as in this case, the parties do not make each other firm offers to contract *during* the sessions. The spouses know during the sessions that they are working on a *proposed agreement* only or, as stated in the *Guide*, on the development of a “consensus” that may subsequently be strengthened (2016 *Guide*, at p. 22; 2012 *Guide*, at p. 20). They know that, at the end of the mediation sessions, the consensus will be recorded in a summary of mediated agreements, which “will not constitute a legal document nor an enforceable agreement”, and that they will have an opportunity to obtain “independent legal advice” on its appropriateness at a later date (cl. 10). They therefore negotiate knowing that the proposals they make do not bind them firmly and that they will have an opportunity to think about them and to consult a legal adviser before entering into a binding agreement.

[73] Accordingly, insofar as their mediation contract provides that the consensus recorded in the summary of mediated agreements may be reviewed by a legal adviser before it becomes binding, the spouses can assume that their communications with each other during the sessions do not amount to binding offers within the meaning of art. 1388 *C.C.Q.* Of course, the parties remain in control of their process, so there is nothing to stop them from ending the mediation process early and resolving their dispute in another way (see art. 614 *N.C.C.P.*).

[74] As under the general law of obligations, a contract arising from a mediation process will not be valid unless the parties' consent is "free and enlightened", which means that it "may [not] be vitiated by error, fear or lesion" (art. 1399 *C.C.Q.*; see also Jobin and Vézina, at No. 203; Tétrault, at p. 347; *Le grand collectif*, at p. 3086). Of course, where divorce is one of the matters in issue, the legal principles arising from the *Divorce Act*, R.S.C. 1985, c. 3 (2nd Supp.), and from *Miglin* will also apply (Tétrault, at pp. 343-44; see *Droit de la famille — 211056*, 2021 QCCS 2431, at para. 103 (CanLII); *Droit de la famille — 133025*, 2013 QCCA 1869, at paras. 44-46 (CanLII)).

[75] In summary, if the parties wish to bind themselves contractually, they may do so in accordance with the rules of contract formation after being given the summary of mediated agreements. Before they are given the summary, the solutions identified by them during the sessions — the potential "consensus" to which the *Guide* refers — at best represent a proposed agreement that must be confirmed by them in order to have

contractual effect. The parties will therefore not be bound by offers made during the sessions until they have had an opportunity to think about them and, if need be, to consult a legal adviser. These rules established by the standard contract serve as an important procedural safeguard against any rash undertaking by the parties.

(c) *The Summary of Mediated Agreements Is Not a Contract*

[76] Third, it is important to clarify the legal status of the summary of mediated agreements, which has been a subject of debate in family mediation law.

[77] Unlike the mediator's administrative report (art. 617 para. 3 N.C.C.P.), the summary of mediated agreements is a document required not by enactment, but by parties who, as in this case, sign the COAMF's standard family mediation contract. Its name is misleading: legally speaking, it is not a summary of "agreements". The *Guide* states that the summary given to the parties is a working tool and one that they can use for reflection (2016 *Guide*, at p. 23; 2012 *Guide*, at p. 20). If they wish, for example, the summary can be used as a [TRANSLATION] "reference" document for the subsequent drafting of a contract between them (Lambert and Bérubé, at p. 316; see also Belleau, at No. 8-50). As the wording of the standard contract shows, the consensus recorded in the summary by the mediator does not yet reflect a true agreement of wills. Clause 12 of the standard contract, which is reproduced verbatim in the mediation contract signed by the parties in this case, suggests that no binding agreement will be entered into until the parties have had an opportunity to consult a legal adviser about the appropriateness

of their agreement once the mediation process has ended. The standard contract thus steers the mediation process simply toward a *proposed* agreement, embodied in the summary of mediated agreements.

[78] It is true that the summary of mediated agreements in this case states that [TRANSLATION] “[a]s a result of the mediation sessions, Ms. Bisailon and Mr. Bouvier have arrived at an agreement that represents the overall result of a process of thinking about their common and respective needs as well as those of their children” (A.R., at p. 99). However, we know that this is a statement made not by the spouses, but by a third party, the family mediator, and that he says in the same document that [TRANSLATION] “the parties have been informed that this proposed settlement agreement does not constitute a contract or judgment and therefore cannot have legal effect” (A.R., at p. 101). This wording is essentially the same as that proposed by the COAMF and its standard contract. The proposed wording encourages the parties to have any future agreement confirmed by a court, and it too notes that an “independent legal consultation is recommended” before proceeding (2016 *Guide*, at p. 34; 2012 *Guide*, at p. 32).

[79] The unsigned summary of mediated agreements, as provided by the mediator at the end of the sessions, is therefore not a contract. Following mediation, the parties will be free to enter into a contract whose terms differ in whole or in part from those recorded by the mediator in the summary. The Court of Appeal was thus correct to find that this document is a working tool that is not binding on the parties

(C.A. reasons, at paras. 97-101; see also Sup. Ct. reasons, at para. 56; R. Tremblay, “Réflexions sur le dialogue entre la médiation familiale et le droit de la famille”, in J. Torres-Ceyte, G.-A. Berthold and C.-A. M. Péladeau, eds., *Le dialogue en droit civil* (2018), 201, at pp. 218-19 and 227-28).

[80] It nonetheless remains possible for parties to bind themselves contractually in accordance with the terms recorded in the summary of mediated agreements in two specific situations.

[81] First, the parties may sign the summary of mediated agreements, in which case it is clear that they will be bound contractually in accordance with its terms because they have expressed a firm intention to bind themselves (Tétrault, at p. 409). That being said, the parties’ mediation contract in this case and the *Guide* urge them not to sign the summary without consulting an independent legal adviser. In addition, the summary itself contains a cautionary note about the possible consequences of signing it:

[TRANSLATION] We also inform you that the signature of the Summary of Mediated Agreements would produce legal effects, even if it is not enforceable, and that it is therefore preferable to obtain independent legal advice before signing it.

(A.R., at p. 97)

[82] Second, the parties may decide, following mediation and after being given the summary, to enter into an oral or written contract by expressing their intention to

bind themselves in accordance with the terms of the summary. Just as it is possible that the parties, after the sessions have ended, will enter into a contract that rejects all or some of the agreed points set out in the summary, as Hogue J.A. correctly noted (C.A. reasons, at para. 101; see also *Droit de la famille — 171578*, 2017 QCCS 3018; *Droit de la famille — 111393*, 2011 QCCS 2411, at para. 16 (CanLII)), it is also possible that they will subsequently decide that the summary of mediated agreements is a true and accurate representation of their respective intentions, once they have had an opportunity to think about it (Lambert and Bérubé, at p. 315). Indeed, the parties can express either explicitly or implicitly, including through their conduct, their intention to be bound by terms reflecting those of the summary. The summary also contains a cautionary note to this effect:

[TRANSLATION] Similarly, we wish to inform you that the implementation of all or part of the agreements may also produce legal effects in the sense that it may constitute an acknowledgement of the agreement before it goes before a court.

(A.R., at p. 97)

[83] It is important to note that, in such circumstances, the summary of mediated agreements will not be “transformed” into a contract, even if the parties express a firm intention to bind themselves in accordance with its terms after the sessions have ended. The juridical act will not be formed until there is an exchange of wills subsequent to the mediation sessions, when the parties agree on terms. Even where the parties’ conduct in this exchange shows that they intended the terms of their contract to be exactly the same as those of the summary, the unsigned summary will not be the

juridical act itself and will remain a simple writing. This distinction is important, as it affects the admissibility of the summary of mediated agreements in evidence, which will be discussed below.

[84] In sum, contract law and the standard contract used in this case confer additional protections on the parties to family mediation, who will not be bound automatically by proposed agreements without having formally consented to them after being given the summary of mediated agreements. Where the parties decide to turn to the courts or where one of them challenges the validity of an agreement, it will then be up to a judge to determine whether there is indeed an agreement of wills between the parties and whether it is valid.

#### (4) Enforcement of an Agreement

[85] In family mediation, even when the parties enter into a binding agreement following the sessions and there is a meeting of the minds, the agreement they enter into will not be enforceable unless the courts have had an opportunity to review its appropriateness, as the trial judge noted (Sup. Ct. reasons, at paras. 51-52; see also G. Latulippe, *La médiation judiciaire: un nouvel exercice de justice* (2012), at pp. 79 and 81). This additional “procedural safeguard” can be explained by the fact that any matter of public order is subject to judicial scrutiny when the parties ask a court to confirm their settlement. The content of any settlement that relates, as in this case, to custody of children (arts. 522, 604, 606 and 612 *C.C.Q.*) or child support (arts. 586,



587.1 and 587.3 *C.C.Q.*; see also Belleau and Talbot-Lachance, at p. 632) is therefore reviewable by a court to determine its appropriateness. This principle applies where the parties were *de facto* spouses (*V.F. v. T.D.*, 2005 QCCA 907, at para. 13 (CanLII)), but also in the context of marriage and civil union. I note as well that, even after being confirmed, such settlements may be reviewed by a court if this is “warranted by circumstances” (see, e.g., arts. 594 and 612 *C.C.Q.*). It is true that not all couples actually decide to have their agreement confirmed by a court, but it remains important to point out that, if they do, courts can intervene in the name of public order and thereby protect the most vulnerable spouses (Belleau, at No. 8-6).

[86] This also suggests that a binding agreement between spouses arising from family mediation, to the extent that it deals with matters of public order, cannot be a transaction within the meaning of art. 2631 *C.C.Q.*, because no transaction may be made with respect to such matters (art. 2632 *C.C.Q.*; art. 613 *N.C.C.P.*; *Le grand collectif*, at pp. 3085-86; *Droit de la famille — 083185*, 2008 QCCA 2405, [2009] R.D.F. 8, at paras. 25-29). This is a major difference between family mediation and commercial mediation. Very often, the parts of an agreement between spouses that do not concern matters of public order cannot be considered separately, because a transaction is “indivisible as to its subject” (art. 2631 *C.C.Q.*; see also M. Lachance, *Le contrat de transaction* (3rd ed. 2018), at paras. 32-34). Accordingly, a court can generally review the appropriateness of an agreement and not just its legality — an additional procedural safeguard for vulnerable parties — as would be the case, for example, with the homologation of a transaction arising from commercial mediation.

In the context of civil or commercial mediation, an agreement that meets the conditions for a transaction contract set out in art. 2631 *C.C.Q.* — unlike one arising from family mediation — will have the authority of *res judicata* between the parties (see art. 2633 *C.C.Q.*; *Le grand collectif*, at p. 24).

[87] Therefore, the trial judge properly declined to homologate the “transaction” relied on by Mr. Bouvier as a defence to Ms. Bisailon’s action (Sup. Ct. reasons, at para. 74). Because their contract concerned public order — as certain matters related to the children — the judge was not bound by its terms.

[88] To conclude on this point, family mediation is a mechanism of civil justice that involves inherent protections to guard against the possibility that vulnerable parties will unknowingly end up bound by an ill-considered agreement. The process is guided by impartial third parties, who are certified and specially trained to address the psychological and legal needs of spouses and parents. Mediators are subject to strict professional obligations and have, among other things, the power to put an end to the mediation process in order to avoid irreparable prejudice. Moreover, there is no requirement that the parties enter into a contract when the mediation ends. In fact, the standard contract specifically provides that family mediation sessions lead to a proposed agreement that is not binding. In addition, even where a binding agreement is entered into following mediation, it will not be enforceable unless a court has reviewed it to determine its appropriateness, to the extent that it deals with matters of public order.

C. *Proof of an Agreement*

(1) Limits Imposed by the Law of Evidence

[89] In principle, a summary of mediated agreements is not admissible in court proceedings to prove a juridical act. As Hogue J.A. noted, the rules of the law of evidence significantly limit the manner in which juridical acts can be proved, including the contract that the respondent Mr. Bouvier alleges arose from mediation.

[90] An unsigned summary of mediated agreements is a simple writing. It is prepared by a third party to reflect the proposed agreement reached by the parties and, as discussed above, it is not a contract. Even when it can be considered an accurate tangible representation of the parties' consensus, this does not make it a juridical act (L. Ducharme, *Précis de la preuve* (6th ed. 2005), at Nos. 430-32; C. Piché, *La preuve civile* (6th ed. 2020), at No. 403).

[91] As a result, an unsigned summary of mediated agreements, as a simple writing that emanates from a third party, does not fall within the category of documents that can be used to prove a juridical act (Tétrault, at pp. 357 and 364). The rule in art. 2862 *C.C.Q.* against proving a juridical act by testimony applies to simple writings filed as testimony. However, a summary will be admissible on an exceptional basis where there is a commencement of proof (arts. 2862 para. 2 and 2865 *C.C.Q.*). In any

case, I agree with Hogue J.A. that, as a general rule, a party can object to the admission in evidence of an unsigned summary of mediated agreements to prove a juridical act.

[92] Parties may also object to the use of testimony to prove the existence of a binding agreement. Again, I agree with Hogue J.A. that the rules that prohibit testimonial evidence to establish a juridical act also apply, as does the exception where there is a commencement of proof (art. 2862 *C.C.Q.*). In this regard, it is important to specify that an unsigned summary of mediated agreements cannot be such a commencement of proof. It does not suggest the existence of a juridical act and certainly does not make it plausible, not to mention the fact that it emanates from a third party and not from the adverse party.

[93] I also agree with Hogue J.A.'s view that a court may not raise this rule of its own motion (art. 2859 *C.C.Q.*) and with her explanation of the impact of this rule in the present case. Because Ms. Bisailon did not raise this ground of inadmissibility, the trial judge could not do so in her place. In other circumstances, the inadmissibility in principle of a summary of mediated agreements to prove a juridical act is an important tool in the hands of a party who denies the existence of a contract entered into orally following mediation. Of course, such an objection will be relevant only if an exception allows settlement privilege to be lifted. Otherwise, the summary of mediated agreements, like any communication arising from mediation, will already be inadmissible on the basis that it is confidential.

(2) Confidentiality of Family Mediation

(a) *Settlement Privilege and Its Exceptions*

[94] I will now consider the evidentiary rule that divided the Court of Appeal: the rule of settlement privilege.

[95] Settlement privilege is a rule of evidence that protects the confidentiality of communications and information exchanged for the purpose of settling a dispute (*Union Carbide*, at paras. 1 and 31; *Globe and Mail v. Canada (Attorney General)*, 2010 SCC 41, [2010] 2 S.C.R. 592, at para. 80; Lafond and Thériault, at No. 3-9). It is recognized as fundamental to the making of an agreement between parties (*Sable Offshore Energy Inc. v. Ameron International Corp.*, 2013 SCC 37, [2013] 2 S.C.R. 623; *Union Carbide*, at para. 1) because it promotes honest and frank discussions, which can make it easier to reach a settlement in all types of mediation (*Union Carbide*, at para. 31). The privilege applies in the general law of mediation without having to be invoked by the parties, because it [TRANSLATION] “presupposes that all discussions in the course of mediation between the parties are protected at all times” (Piché, at Nos. 1284-86; see also *Union Carbide*, at para. 34). Unlike a confidentiality clause in a contract, “settlement privilege applies to all communications that lead up to a settlement, even after a mediation session has concluded” (*Union Carbide*, at para. 51). This common law rule, often called the “duty of confidentiality” in Quebec law, has been codified in art. 4 N.C.C.P. since the reform of the *Code of Civil Procedure*

(D. Ferland and B. Emery, *Précis de procédure civile du Québec* (6th ed. 2020), vol. 1, at No. 1-41). The new *Code of Civil Procedure* also sets out the principle that mediators and mediation participants are non-compellable (art. 606).

[96] Settlement privilege is not absolute, however. For one thing, the parties can change its scope by contract (*Union Carbide*, at paras. 39, 54 and 58), as long as they do not deprive a court of its supervisory jurisdiction over matters of public order. There are also some exceptions developed by the courts or established by law that allow confidentiality to be lifted on an exceptional basis, for example where there is fraud or professional misconduct by a mediator (*Sable Offshore*, at para. 19; *Union Carbide*, at paras. 34 and 49; art. 606 N.C.C.P.; 2016 *Guide*, at p. 11).

[97] In *Union Carbide*, this Court reiterated the importance of another exception developed by the courts, the settlement exception, which is central to this appeal. This exception allows protected communications to be disclosed in order to prove the existence or scope of a settlement arising from mediation (*Union Carbide*, at paras. 35-36; Roberge (2017), at p. 104). It applies even where an agreement is not entered into until after mediation (*Union Carbide*, at para. 34). In keeping with its purpose, the exception applies only to what is necessary to prove the existence or scope of the settlement (*ibid.*, at para. 35).

[98] In *Union Carbide*, Wagner J., as he then was, explained that the settlement exception serves the same public interest as the privilege itself, that is, the promotion

of settlements: “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” (para. 35). It is in this sense, as Wagner J. observed, that disclosure to prove the terms of an agreement promotes settlements generally. It follows that the exception in no way weakens the principle of privilege in mediation. As noted by Paul M. Perell (now a justice of the Ontario Superior Court), “where the without prejudice settlement offer has been accepted, there is no longer any public policy reason to exclude the evidence, the goal of the policy having been achieved” (“The Problems of Without Prejudice” (1992), 71 *Can. Bar Rev.* 223, at p. 234). Within the limits of public order, this logic applies, in my view, both in family mediation and in civil and commercial mediation when parties opt for confidentiality to serve their primary objective of reaching a settlement. As the trial judge wrote: [TRANSLATION] “Prohibiting the submission of such evidence based on the principle of confidentiality would make it impossible to homologate such an agreement once its existence is contested, which would make little sense” (para. 41).

[99] Nevertheless, parties are free to contract out of the settlement exception. Because a failure to apply the exception “could frustrate the broader purpose of promoting settlements”, parties must express this intention clearly in their mediation contract (*Union Carbide*, at para. 50; see also para. 54).

(b) *Application of These Principles in the Family Mediation Context*

[100] The application of the settlement exception in family mediation is at the heart of the disagreement between the parties in this case. The respondent Mr. Bouvier concedes that the confidentiality of family mediation is necessary, indeed essential, when mediation fails and the spouses are unable to reach an agreement. Even when they reach an agreement and carry it out without difficulty, the discussions that took place during mediation must remain confidential because their disclosure is not necessary. However, he believes that the exception should allow him to prove a contract entered into by him and Ms. Bisailon insofar as she denies its existence.

[101] The Association submits that because of the unique context of family mediation, it must be presumed that the parties, who are potentially vulnerable, who are not legal experts and who participate in the sessions without legal advisers, intended the family mediation process to be absolutely confidential. It argues that this presumption may be rebutted where there is evidence showing that the parties waived confidentiality.

[102] I am of the view that, as a general rule, the settlement exception applies in family mediation and that the parties in this case did not displace it by adopting a contract modelled on the COAMF's standard contract.

[103] First of all, the Association's general proposition that the settlement exception does not apply in family mediation must be rejected. While I agree that parties to family mediation have unique vulnerabilities, which merit legal protection,



in my respectful opinion, the Association's proposition does not assist in achieving this objective.

[104] As we have seen, many procedural safeguards specific to family mediation already protect spouses and parents from unknowingly entering into an ill-considered agreement. In this context, it can be assumed that the various protections put in place by law, the *Guide* and the standard mediation contract adopted by parties make it possible for spouses to reach a mutually satisfactory agreement. It is true that, where there is no settlement, preserving the absolute confidentiality of communications is an essential aspect of mediation and is necessary to encourage frank discussions. But confidentiality is above all a means to an end: where spouses resolve their dispute, this concern must yield, as far as necessary, to that of giving them the proper tools to implement their agreement.

[105] Excluding the settlement exception in favour of absolute confidentiality once a dispute has been resolved could prevent a spouse from asserting their rights against a spouse acting in bad faith. It must be remembered that parties have a duty to participate in the mediation process in good faith (art. 6 *C.C.Q.*; art. 2 *N.C.C.P.*), and absolute confidentiality could impede a spouse's ability to raise the bad faith of the other spouse where the latter, capitalizing on this airtight confidentiality, is dishonest about their own position taken during mediation (see E. B. Zweibel and J. C. Kleefeld, "Mediation", in J. C. Kleefeld et al., eds., *Dispute Resolution: Readings and Case Studies* (4th ed. 2016), 291, at p. 463). Above all, it must be kept in mind that the

settlement exception may be essential for a vulnerable spouse who has been able to negotiate a fair agreement and would like to prove it, and that absolute confidentiality could undermine the protection of that spouse if the other took advantage of the power imbalance and denied the agreement. Finally, there is nothing to suggest that the legislature sought to impose “absolute confidentiality” when enacting the confidentiality rules applicable under the special law of family mediation.

[106] Second, the application of the exception to confidentiality that allows agreements to be proved is just as relevant in the family mediation context. As Hogue J.A. wrote, the exception must apply in family matters because [TRANSLATION] “[t]he aim of such mediation is in fact the same as that of any other mediation, whatever its form: to prevent a potential dispute or resolve an existing one by entering into a freely negotiated agreement” (C.A. reasons, at para. 84). Although the context of family mediation is distinct from that of civil or commercial mediation, this does not change the fact that these types of mediation are not intrinsically different in this regard: they have the same primary objective and the same consensual and participatory foundations. It is not a matter of denying the specific nature of family mediation, but of recognizing that because of the many procedural safeguards governing the process, absolute confidentiality is not necessary and would, on the contrary, be detrimental to the parties. Where the parties enter into a binding agreement, it would therefore be contrary to the objective being pursued to prohibit them from using the communications needed to prove it.

[107] Third, it is important to clarify that the standard family mediation contract used in Quebec does not displace the settlement exception. Even though the exception generally applies in family matters, freedom of contract does allow the parties to displace it, provided that they do so clearly. It must therefore be determined, through contractual interpretation in accordance with Quebec's general law of obligations, whether the standard contract clearly displaces the exception. Accordingly, rather than adhering to the literal meaning of the words in a disputed clause, a court must focus on the common intention of the parties, which is central in interpreting a mediation contract (*Union Carbide*, at para. 59; art. 1425 *C.C.Q.*). This requires analyzing the nature of the contract, the circumstances in which it was formed, and usage (art. 1426 *C.C.Q.*).

[108] Clause 8 of the contract entered into by the parties (reproduced above) — modelled on cl. 9 of the COAMF's standard contract (2016 *Guide*, at p. 29; 2012 *Guide*, at p. 27) — deals with the confidentiality of the mediation process. A reading of the clause leads to a first observation: the parties did not intend their communications to be absolutely confidential without exception. Indeed, the clause specifically provides for the possibility of disclosing certain documents if both parties consent. The Association's proposition that there is absolute confidentiality fails already at this stage. It is also noteworthy that cl. 9 of the standard contract (the equivalent of the confidentiality clause in this case) refers to arts. 4, 5 and 606 *N.C.C.P.* (2016 *Guide*, at p. 29, fn. 6). In her commentary on art. 4 *N.C.C.P.*, the then Minister of Justice clarified the circumstances in which the confidentiality of mediation must be lifted:

[TRANSLATION] “This may be the case for an agreement if its implementation and application require that it be disclosed” (see also *Le grand collectif*, at pp. 24-25, discussing *Union Carbide* and its application in the family context). By referring to these articles of the new *Code of Civil Procedure* in its standard contract reproduced in the *Guide*, the COAMF is therefore suggesting that the settlement exception applies in family mediation.

[109] In addition, a proper interpretation of the confidentiality clause requires that it be considered in light of the contract as a whole, including cls. 1, 2, 3 and 4 (art. 1427 *C.C.Q.*). Clause 1 of the contract provides that the objective of the mediation is “to come to an agreement” (A.R., at p. 94). Clause 2, individualized by Ms. Bisailon and Mr. Bouvier, specifies the subject matter of the dispute to be resolved. These clauses make it clear that the spouses’ primary intention was to resolve their dispute. This is crucial to the interpretation of the confidentiality clause, which cannot be regarded as preventing the parties from achieving this objective. Clauses 3 and 4 are also to the same effect, as they define the roles of the mediator and the spouses by reference to the objective of arriving at a mutually satisfactory agreement.

[110] The nature of the contract and the circumstances in which it was formed lead to the same conclusion. By its very nature, a mediation contract is meant to provide a framework for the family mediation process. The dominant intention of parties who enter into such a process is to resolve their disputes, existing or potential, through an agreement (Belleau, at No. 8-45; cl. 1). In this case, Ms. Bisailon and Mr. Bouvier

chose mediation because they had a genuine dispute and wanted to settle all aspects of their separation, including custody of their children, the partition of their immovable and compensation for Ms. Bisailon. It is true that mediation might incidentally have a beneficial effect on their long-term relationship, but it is clear that their primary objective here was to resolve their disputes. The parties therefore had a legitimate expectation that they would have the tools needed to implement this agreement and thus that they could, if necessary, lift confidentiality to prove its existence and its terms.

[111] Lastly, the parties' conduct after a contract is formed must also be taken into account to guide the interpretation of the contract where it is ambiguous: [TRANSLATION] "This is why an act of partial performance of a contract, provided that it is free and not the result of an error, may prevent the party who performed the act from suggesting later, in court, an interpretation at odds with the act" (Jobin and Vézina, at No. 418; art. 1426 *C.C.Q.*). Therefore, the interpretation of a mediation contract also depends on the parties' conduct, particularly where it shows that their objective was indeed to enter into and implement an agreement and that they did not keep the content or outcome of their discussions confidential. This was in fact the case here, since the evidence shows that Ms. Bisailon and Mr. Bouvier specifically referred to the mediation after the process had ended, thereby expressing their intention to implement the agreement arising from it.

[112] In this context, to regard cl. 8 as imposing absolute confidentiality would be inconsistent with the parties' intention as expressed in the contract they signed and

as inferred from the circumstances. This clause simply confirms the general rule of confidentiality, without excluding the exception to settlement privilege. In my view, the following explanation given by Wagner J. in *Union Carbide* is just as applicable to family mediation: “Absent an express provision to the contrary, I find it unreasonable to assume that parties who have agreed to mediation for the purpose of reaching a settlement would renounce their right to prove the terms of the settlement. Such a result would be illogical” (para. 65). Indeed, interpreting a confidentiality clause as displacing the settlement exception may undermine the objective of reaching a settlement (*Union Carbide*, at para. 50).

[113] To interpret the standard contract or the contract signed by the parties as creating airtight and absolute confidentiality would therefore be to disregard the primary intention of parties who enter into a mediation process while making it impossible to enforce a valid agreement that can be understood properly only in the context of the communications made during mediation. To conclude on this point, I agree with Hogue J.A., who wrote that it would be beneficial if, as a precaution, the standard mediation contract clearly referred to the limits of settlement privilege and to the application of its exceptions, although such a statement was not, as she explained, necessary to decide this case.

[114] In short, the settlement exception adopted by this Court in *Union Carbide* must apply equally in family mediation governed by the standard contract. However, it must be kept in mind that the parameters for its application will be different in the

context of family mediation based on the COAMF's standard contract than under other contractual schemes governing civil or commercial mediation. A notable influence on how *Union Carbide* is applied is the fact that the standard contract scheme makes it impossible to form a binding agreement during family mediation sessions, because the proposals made by the spouses are not firm offers. The scheme provides that the process ends with the parties being given a summary of mediated agreements, not with a binding agreement, and that the parties will have an opportunity to consult an independent legal adviser before they are bound contractually by an agreement arising from mediation. These aspects specific to the standard contract scheme are crucial, because their effect is to defer the moment when the parties can enter into a binding agreement and, therefore, the moment when the exception could apply and cause confidentiality to be lifted.

[115] It follows that, under the standard family mediation contract scheme, all communications made by spouses for the purpose of resolving their dispute will remain completely confidential unless one of the recognized exceptions applies. The settlement exception will apply only if (1) the spouses reach a settlement after the process ends and after they are given the summary of mediated agreements, once they have had an opportunity to consult an independent legal adviser, and (2) one of them denies the existence or terms of the agreement or objects to its implementation. In addition, even where these two conditions are met, the settlement exception will allow disclosure only of the communications that are necessary to establish the existence or terms of the agreement, not of all communications (*Union Carbide*, at para. 35). There

should therefore be no fear that private communications concerning the parties' relationship will be revealed: if such communications are not necessary to prove the settlement, they will be shielded from the exception and will remain confidential forever.

D. *Application of the Law to the Facts*

[116] The application of these principles to the facts of this case confirms that the trial judge was right not to allow Ms. Bisailon's objection and, as the Court of Appeal held, that there was no reason to intervene on appeal.

[117] Before participating in family mediation, Ms. Bisailon and Mr. Bouvier signed a mediation contract modelled on the COAMF's standard contract. Their contract contained a general confidentiality clause and an unambiguous statement that the objective of their mediation process was to come to an agreement. None of the contract's clauses clearly displaced settlement privilege or its exceptions, and the interpretation of the contract in this case cannot lead to the contrary conclusion. According to *Union Carbide*, this means that the confidentiality clause in the contract signed by the parties leaves room for the exception that allows the existence and terms of a settlement to be proved.

[118] In keeping with the terms of the standard contract, the parties attempted to negotiate a proposed agreement and took the time to think about whether it was



appropriate after the family mediator gave them the summary. They never signed the summary of mediated agreements and did not have it homologated. However, their subsequent conduct indicates that they had an agreement of wills that was clear enough for the formation of a true agreement, which also reflected the terms recorded in the summary of mediated agreements. In this regard, it must be noted that the fact that one party cashes cheques written by the other is not always sufficient to establish an intention to be bound: it is, of course, possible that a party will accept money out of need rather than in recognition of an agreement resolving their dispute. In this case, however, the trial judge did not accept Ms. Bisaillon's explanation that she had cashed the cheques out of need and rejected her claim that they did not reach an agreement (Sup. Ct. reasons, at paras. 59 and 61; C.A. reasons, at para. 113).

[119] Because the *Union Carbide* exception to settlement privilege applied, the parties could prove the existence and terms of their agreement, subject to the rules of the law of evidence set out in the *Civil Code of Québec*. Together, the emails, the cheques written and cashed and the parties' testimony allowed the trial judge to conclude that that subsequent agreement, unlike the proposed one recorded in the summary, met the conditions of contract formation and was therefore binding on the parties. As Hogue J.A. rightly noted, the summary of mediated agreements was not needed to reach that conclusion.

[120] There were other grounds on which Ms. Bisaillon could have objected to the admission of the unsigned summary of mediated agreements to prove the existence

or terms of the settlement agreement. Since she did not raise those grounds, the trial judge could not raise them of his own motion because of art. 2859 *C.C.Q.* In these exceptional circumstances, he could therefore admit the summary of mediated agreements in evidence given the fact that the *Union Carbide* exception applied and that the objections had not been raised. The judge was correct in law in considering whether the [TRANSLATION] “circumstances show[ed] that the spouses intended to bind themselves by contract”, while declining to recognize the contract as enforceable without any review of its appropriateness (Sup. Ct. reasons, at para. 56).

## VI. Conclusion

[121] Accordingly, the trial judge did not err in giving effect to the contract in the circumstances, and the Court of Appeal’s conclusion was correct. I too would dismiss the appeal.

[122] Party and party costs are generally awarded to the successful party, but this Court may, in its discretion, decide otherwise (*Supreme Court Act*, R.S.C. 1985, c. S-26, s. 47; *Caron v. Alberta*, 2015 SCC 56, [2015] 3 S.C.R. 511, at paras. 110 and 114; *Montréal (City) v. Octane Stratégie inc.*, 2019 SCC 57, at para. 95). The Association, no doubt guided by the usual rule that is applied in family matters in Quebec, argues that the parties should each pay their own costs in view of the nature of the appeal. Mr. Bouvier argues that we should award him costs on a solicitor-client basis because the Association sought leave to raise issues of general importance and

asked that the judgment under appeal be overturned, in order to make this appeal a test case. He notes that the Association is asking us to set aside the judgment of the Court of Appeal, which, despite the difference of opinion between Doyon J.A. and Hogue J.A., unanimously concluded that the trial judgment should be affirmed. He also maintains that the Association imposed upon him [TRANSLATION] “a debate that would not otherwise have taken place before this Honourable Court, given that the Respondent Bisailon did not seek leave to appeal the Court of Appeal’s decision” (R.F., at para. 146).

[123] This Court has the discretion to depart from the usual practice and to order solicitor-client costs in exceptional circumstances (*Octane Stratégie inc.*, at para. 95; *Mackin v. New Brunswick (Minister of Finance)*, 2002 SCC 13, [2002] 1 S.C.R. 405, at para. 86; *Roberge v. Bolduc*, [1991] 1 S.C.R. 374). Such costs are awarded mainly in two types of circumstances: where there has been reprehensible, scandalous or outrageous conduct by one of the parties (see, e.g., *Young v. Young*, [1993] 4 S.C.R. 3, at p. 134) or where an appeal raises issues of general interest that go beyond the particular case of the successful party (see, e.g., *Finney v. Barreau du Québec*, 2004 SCC 36, [2004] 2 S.C.R. 17, at para. 48). There is nothing to suggest that the Association’s conduct could justify such an order under the first category of exceptional cases. Rather, the question is whether the request made by the respondent Mr. Bouvier is justified under the second category.

[124] In my view, several factors weigh in favour of finding that this is an exceptional case that justifies an award of costs on a solicitor-client basis. That being said, the specific circumstances and the Association's status as a non-profit organization call for caution in this regard.

[125] Not only has Mr. Bouvier been successful in this Court, as he was in the Superior Court and the Court of Appeal, but he has also had to mount a defence against a third party to the original litigation, a third party that, despite Ms. Bisailon's absence from the proceeding, is asking that the appeal be allowed. In the Court of Appeal, the Association intervened as a friend of the court; as directed by the judge who authorized its intervention, the Association confined itself to making submissions on questions of law relating to family mediation in order to provide the Court of Appeal with guidance (2017 QCCA 1793, at paras. 5-6). When Ms. Bisailon chose not to appeal the Court of Appeal's decision, the Association decided to give up its role as intervener and to seek leave to be substituted as appellant and to appeal the judgment. The Court granted the Association's motion and its application with costs in the cause. In contrast to its role in the Court of Appeal, the Association is asking this Court to allow the appeal and uphold the objection to the evidence made by Ms. Bisailon at trial. Despite the Association's stated intention of limiting its arguments to questions of law, it has taken a formal position on the merits of the decisions of the Superior Court and the Court of Appeal, decisions that, as we know, were based on significant findings of fact. The respondent Mr. Bouvier therefore had to defend the decisions of the trial judge and the Court of Appeal or risk losing his case in this Court. I also note that the Association

neglected to file in this Court's record several pieces of evidence on which the decisions of the courts below were based, including the emails and cheques exchanged by the parties and excerpts from the transcripts of the testimony of Mr. Bouvier and Ms. Bisailon. This meant that Mr. Bouvier had to file in his respondent's record the evidence needed to defend the judgments appealed from, in accordance with r. 39 of the *Rules of the Supreme Court of Canada*, SOR/2002-156.

[126] At the hearing in this Court, counsel for the Association argued that [TRANSLATION] “[t]he respondent Bouvier, with respect, . . . did not have to be before you. He could have deferred to the Court's decision. He could also have done like the respondent Bisailon, who isn't present, and not intervened” (transcript, at p. 50). This argument must be rejected. The outcome of this appeal had serious implications for Mr. Bouvier given that his rights in the immovable that had served as a residence for the family were at stake and he risked incurring a direct and significant financial loss. He therefore had to defend the conclusions of the courts below, in addition to having to file the evidence the appellant had failed to file and to take a position on general questions of law. Mr. Bouvier did not have to personally bear the cost of such a “test case”, which went far beyond the facts of his original dispute (see *Friends of the Oldman River Society v. Canada (Minister of Transport)*, [1992] 1 S.C.R. 3).

[127] In addition, the Association was on notice pursuant to the rules applicable in this Court that it might have to pay exceptional costs in seeking to be substituted as appellant. It is true that the Court agreed that the Association could be substituted for

Ms. Bisailon as a party, but if it feared not being able to pay costs, it could have expressed this concern in its application for leave to appeal or requested a special undertaking as to costs, as was done by the respondents in *Roberge v. Bolduc*.

[128] However, I am of the view that we should limit the total amount of solicitor-client costs to be awarded to Mr. Bouvier.

[129] The Association is a non-profit organization that, on the face of it, has no direct financial interest in the outcome of this appeal. Moreover, Mr. Bouvier has not argued that he cannot bear the financial burden of this appeal. While he states that he is of more modest means than the Association, it is clear from the evidence in the trial record that his situation is not comparable to that of the respondents in other cases where solicitor-client costs were awarded. In *Roberge v. Bolduc*, for example, the respondents' resources were so limited that, without a favourable costs order, their counsel would have ceased representing them.

[130] Most importantly, I am mindful of the fact that awarding solicitor-client costs against the Association could have a deterrent effect on other, less well-off organizations or litigants, who might hesitate to defend their rights or other unrepresented interests for fear that very high costs awards may be made against them if they raise questions of more general interest. It is thus necessary to proceed with caution. In the very specific context of this case, I am of the view that a compromise is in order.

[131] Having regard to all of these considerations, I would dismiss the appeal and award Mr. Bouvier solicitor-client costs not exceeding \$15,000, in addition to disbursements.

The reasons of Abella, Karakatsanis and Martin JJ. were delivered by

KARAKATSANIS J. —

I. Overview

[132] The specific issue in this case is whether the exception to settlement privilege in *Union Carbide Canada Inc. v. Bombardier Inc.*, 2014 SCC 35, [2014] 1 S.C.R. 800, applies to the family mediation regime in Quebec. More importantly, this case is about the centrality of confidentiality to family mediation and raises the appropriateness of importing a private law rule from the civil and commercial context without adapting it to address the special context of family law.

[133] My colleague Kasirer J. concludes that the *Union Carbide* exception to settlement privilege applies to communications that occur during family mediation sessions in Quebec. Although I agree with many aspects of Kasirer J.'s thoughtful reasons, I cannot agree with this conclusion. In my view, discussions that occur within mediation sessions remain confidential and cannot be disclosed or adduced as evidence

unless the parties specifically agree otherwise. Rules relating to the confidentiality of settlement negotiations applied in civil and commercial cases cannot simply be transposed to the family law context: doing so undermines both the unique legal approach to family law settlements developed by our courts and the broader objectives of the family mediation regime.

[134] Our Court has long recognized that family law settlements are unique. In decisions spanning at least four decades, this Court has highlighted the central reality of vulnerability in family negotiations; the importance (and limitations) of legal representation to address that vulnerability; the need for distinct modes of calculating spouses' economic contributions; the critical role of disclosure and informational symmetry; the influence of negotiations upon children; and the difficulties of balancing the personal autonomy of spouses to arrange their affairs, with rights granted under family legislative regimes.<sup>2</sup> It has resisted importing principles that apply to commercial settlements into the family context, accepting that principles appropriate to other settings are often ill suited to address the issues that arise in the wake of a family breakdown. And its leading case law on confidentiality in the commercial setting has referred to the family jurisprudence only by way of contrast: see *Union*

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<sup>2</sup> *Rathwell v. Rathwell*, [1978] 2 S.C.R. 436; *Pettkus v. Becker*, [1980] 2 S.C.R. 834, at p. 850; *Richardson v. Richardson*, [1987] 1 S.C.R. 857, at p. 883, per La Forest J., dissenting; *Pelech v. Pelech*, [1987] 1 S.C.R. 801, at p. 850; *Lacroix v. Valois*, [1990] 2 S.C.R. 1259, at p. 1278; *Moge v. Moge*, [1992] 3 S.C.R. 813, at p. 848; *Peter v. Beblow*, [1993] 1 S.C.R. 980; *Bracklow v. Bracklow*, [1999] 1 S.C.R. 420; *Boston v. Boston*, 2001 SCC 43, [2001] 2 S.C.R. 413, at para. 55; *Miglin v. Miglin*, 2003 SCC 24, [2003] 1 S.C.R. 303, at paras. 74 and 82; *Rick v. Brandsema*, 2009 SCC 10, [2009] 1 S.C.R. 295, at paras. 1 and 43; *L.M.P. v. L.S.*, 2011 SCC 64, [2011] 3 S.C.R. 775, at para. 15; *Quebec (Attorney General) v. A*, 2013 SCC 5, [2013] 1 S.C.R. 61, at paras. 114 and 254; *Colucci v. Colucci*, 2021 SCC 24, at para. 51.



*Carbide*, at para. 41. The two realms have developed separately for good reason. I would not depart from that approach in this case.

[135] The reasons for a unique approach to family law disputes are simple. Family law seeks to manage human relationships in a particularly unique and challenging context. The breakdown of a spousal relationship is often wrought with emotional turmoil, power imbalance and vulnerability. Typically, family disputes cover a broad range of issues, from the primary legal issues of support, custody and access, and division of property, to the intricate untangling of interdependent family affairs — issues that often require cooperation on a sustained basis. When children are involved, the best interests of the child deserve the ongoing ability of parents to communicate and resolve disputes. And in this context, settlement agreements must respond to changing circumstances and may not represent the final resolution of the parties' issues.

[136] Because the family unit is an organizing feature of everyday life, efforts to reduce the collateral harm flowing from family separations have broad societal implications beyond the effects on the separating couple, particularly for children. Given the pervasive incidence of family breakdowns, *how* family matters are resolved has implications for society more broadly.

[137] Special alternative dispute resolution (ADR) regimes for family disputes now exist in each province, reflecting the increasing awareness by legislators and judges of the need to encourage a cooperative environment, particularly for the sake of

children: B. Landau, “Overview of Dispute Resolution Options”, in B. Landau et al., *The Family Dispute Resolution Handbook* (6th ed. 2018), 1, at p. 3. Special rules enhance the ability of parties to participate; provide better information and support as the parties navigate the process; ensure that vulnerable parties are protected; and institute more judicial involvement and oversight.

[138] The family mediation process, therefore, not only strives to reach settlements. It also aims to restructure relationships by cultivating dialogue and equipping the parties with the necessary tools to collectively navigate the traumatic upheaval of a family breakdown. It invites the parties to work together to forge a stronger foundation for a continuing relationship, and the ability to respond to future circumstances. At the same time, mediation aims to compensate for pre-existing power imbalances that are often exacerbated by the economic consequences of separation. Creating a confidential space where parties can speak freely and without prejudice is essential to achieving these goals.

[139] In Quebec, confidentiality is particularly crucial because the family mediation regime prohibits the presence of lawyers during mediation sessions, which take place before a trained and accredited mediator, who need not have legal training. The prohibition of lawyers means that parties do not necessarily know or contemplate the legal implications of what they say in an environment that is designed to be confidential. The absence of lawyers in the mediation room can also enhance, rather than mitigate, a power imbalance between the parties.

[140] Commercial mediation is intrinsically different: the parties are often sophisticated, they are usually assisted by counsel, and in most cases the *only* objective is reaching a settlement. Thus, in the commercial context, the justification for settlement privilege and its exception is to promote the settlement of *legal* disputes. But the disclosure of mediation discussions does not advance — and indeed, may undermine — other broader objectives of family mediation. A rule that applies in the context of commercial negotiations should not be used to undermine a unique mediation regime, which relies on confidentiality to support broader objectives of family law settlements.

[141] The reasoning in *Union Carbide* is also incompatible with the framework of family mediation in Quebec. As my colleague convincingly concludes, the unique structure of the regime does not permit the parties to reach any settlements during the mediation sessions, and there can be no binding offer and acceptance. It follows that the *terms* of an agreement can only be reached *outside* the mediation process.

[142] Even if *Union Carbide* were to apply to the family law context, it remains open to the parties to contract for greater confidentiality than is available at common law: paras. 49, 50 and 56. In my view, the standard mediation contract in Quebec, properly interpreted, evinces an intention by the parties to maintain complete confidentiality with respect to any discussions that took place during mediation unless both parties otherwise agree.

[143] Thus, I agree with the Association de médiation familiale du Québec that any communications in the mediation sessions were inadmissible because they were protected by settlement privilege and the confidentiality terms of the contract. And while I adopt Kasirer J.'s conclusion that the summary of mediated agreements is merely the mediator's understanding of the potential for agreement and does not reflect any contract, in my view, the summary of mediated agreements was inadmissible. In the unusual circumstances of this appeal, however, I am unable to conclude that the particular disposition in this case must be set aside. I would dismiss the appeal.

[144] My reasons proceed as follows. First, I expand on the unique context of family disputes and settlement processes. Second, I explain that confidentiality is necessary to advance the broader objectives of family mediation. Third, I demonstrate why the basis for the *Union Carbide* exception to settlement privilege is incompatible with the family law context. Fourth, I set out how the standard mediation contract in Quebec contemplates absolute confidentiality. Finally, I address the merits and explain why the summary of mediated agreements was inadmissible in this case, before turning to the issue of costs.

## II. The Unique Context of Family Mediation

[145] The long arc of our family law jurisprudence reflects an evolving understanding of the distinct challenges relating to the settlement of disputes in the family law context: *Rick v. Brandsema*, 2009 SCC 10, [2009] 1 S.C.R. 295, at para. 1.

Indeed, a family breakdown is no ordinary legal issue. Familial relationships are “not an economic partnership nor a mere business relationship, nor a casual encounter”: *Pettkus v. Becker*, [1980] 2 S.C.R. 834, at p. 850. They may “be the location of safety and comfort . . . where [their] members have their most intimate human contact”; may represent an “emotional and economic support system”; and may serve as “a means to pass on the values that we deem to be central to our sense of community”: *Moge v. Moge*, [1992] 3 S.C.R. 813, at p. 848. Their dissolution may be a catastrophic event in the lives of participants. In these respects, “family law cases, and in particular cases involving marital settlements, stand on an entirely different footing from commercial cases”: *Logan v. Williams* (1989), 41 B.C.L.R. (2d) 34 (C.A.), at p. 42.

[146] This Court has consistently recognized the need for a discrete approach to address the challenges of resolving family disputes, adjusting the general private law for that purpose: see *Rathwell v. Rathwell*, [1978] 2 S.C.R. 436; *Pettkus*; *Lacroix v. Valois*, [1990] 2 S.C.R. 1259, at p. 1278; *Peter v. Beblow*, [1993] 1 S.C.R. 980; *Miglin v. Miglin*, 2003 SCC 24, [2003] 1 S.C.R. 303, at para. 82; *Rick*, at para. 43; *L.M.P. v. L.S.*, 2011 SCC 64, [2011] 3 S.C.R. 775, at para. 15. It has noted the sometimes devastating effects of separation (*Lacroix*, at p. 1275; *Moge*, at p. 871; *Bracklow v. Bracklow*, [1999] 1 S.C.R. 420; *Boston v. Boston*, 2001 SCC 43, [2001] 2 S.C.R. 413, at para. 55; *Hartshorne v. Hartshorne*, 2004 SCC 22, [2004] 1 S.C.R. 550, at para. 91, per Deschamps J., dissenting in part), which can render parties “uniquely vulnerable” (*Rick*, at para. 47), and “ill-equipped to form decisions of a permanent and legally binding nature”: *Miglin*, at para. 74, citing J. D. Payne and M. A. Payne, *Dealing with*

*Family Law: A Canadian Guide* (1993), at p. 78; see also *Richardson v. Richardson*, [1987] 1 S.C.R. 857, at p. 883, per La Forest J., dissenting. It has acknowledged that those vulnerabilities may beget or enable unseen forms of influence (*Miglin*, at para. 75); and has emphasized the importance — and limitations — of independent legal advice in attenuating that risk: *Pelech v. Pelech*, [1987] 1 S.C.R. 801, at p. 850; *Miglin*, at para. 212, per LeBel J., dissenting; *Hartshorne*, at para. 60; *Rick*, at paras. 60-61. It has emphasized the need for full and frank disclosure as a “precondition to good faith negotiation” (*Colucci v. Colucci*, 2021 SCC 24, at para. 51), and a means of “protect[ing] the integrity of the result of negotiations undertaken in these uniquely vulnerable circumstances”: *Rick*, at para. 47. And it has been alive to the breadth and prospective nature of family agreements, which may affect third parties, including children: *Miglin*, at para. 76; *L.M.P.*, at para. 15. It has explained, in light of this, that “contract law principles are not rigidly applied in the family law context”: *L.M.P.*, at para. 15.

[147] The majority’s conclusion that the rule in *Union Carbide* applies to mediation discussions in this case is grounded in the view that family mediation is not intrinsically different from commercial mediation (at paras. 43 and 106), and that the overarching objective of family mediation is to settle a legal dispute. But the jurisprudence emphasizes that it is important to recognize the unique dimensions of family disputes, which fit uneasily within a civil and commercial paradigm. The objectives of family mediation are much broader than simply promoting the settlement

of a specific legal dispute. In particular, two overarching public interest objectives are key.

[148] First, family mediation sets the groundwork for restructuring relationships that can navigate the traumatic consequences of familial breakdowns on a long-term basis, especially when children are involved: M.-C. Belleau, “La médiation familiale au Québec: une approche volontaire, globale, interdisciplinaire et accessible”, in P.-C. Lafond, ed., *Régler autrement les différends* (2nd ed. 2018), 299, at No. 8-38. The aim of reshaping relationships carries much greater significance in the family context given the intimacy of family bonds. Indeed, “the restructuring of familial relationships rather than their termination . . . is the central objective of the family justice process”: N. Bala, “Reforming Family Dispute Resolution in Ontario: Systemic Changes and Cultural Shifts”, in M. Trebilcock, A. Duggan and L. Sossin, eds., *Middle Income Access to Justice* (2012), 271, at p. 275; see also Belleau, at No. 8-8. This objective is achieved through family mediation’s unique focus on promoting earnest discussions, dialogue and active listening: see Belleau, at No. 8-16. In Quebec, the priority placed on restructuring relationships is reflected in the interdisciplinary nature of the regime: it deals with every aspect of a relationship breakdown, whether the issues are emotional, relational, financial or legal in nature: M.-C. Belleau and G. Talbot-Lachance, “La valeur juridique des ententes issues de la médiation familiale: présentation des mésententes doctrinales et jurisprudentielles” (2008), 49 *C. de D.* 607, at p. 615. This explains why mediators do not necessarily come from the legal

profession; they may, for example, be guidance counsellors, psycho-educators, psychologists or social workers: Belleau, at No. 8-13.

[149] Second, family mediation strives to protect vulnerable parties and compensate for power imbalances to achieve equitable outcomes. The process is designed for parties who, in the tumult of separation, enter not as “emotionally neutral economic actors negotiating in the commercial context”, but as actors who “inevitably bring to the table a host of emotions and concerns that do not obviously accord with the making of rational economic decisions”: *Miglin*, at para. 74. This objective plays a broader role in family mediation and negotiation than it does in commercial settings because the intimate nature of the relationship between the parties “makes it difficult to overcome potential power imbalances and modes of influence”: *ibid.*, at paras. 74-75. Family mediation in Quebec aims to reach a *fair* settlement, not just any form of settlement: Committee of Accrediting Organizations in Family Mediation, *Standards of Practice in Family Mediation* (2016), at pp. 6 and 8.

[150] Quite simply, the family law context is not the same as a commercial law context. As the Association argues, the situation of the parties, the processes, and the objectives of settlement in the two spheres are markedly different. That is why this Court has [TRANSLATION] “repeatedly emphasized the uniquely emotional context surrounding the negotiation of agreements between spouses, which, as a result, cannot be looked upon as commercial contracts”: P. J. Dalphond and A. Nag, “Le contexte



social dans l'exercice du droit de la famille”, in Collection de droit de l'École du Barreau du Québec 2020-2021, vol. 4, *Droit de la famille* (2020), 25, at p. 35.

### III. The Importance of Confidentiality to the Objectives of Family Mediation

[151] In my view, confidentiality *further*s mediation's participatory and consensual foundations, as well as the objective of reaching settlements in the family context. Moreover, the broader objectives of family mediation — restructuring familial relationships, protecting vulnerable parties — depend on complete confidentiality in the mediation sessions. The effectiveness of family mediation in promoting settlements is predicated on the creation of a *confidential* space where the parties can fully explore common ground on a diverse range of interrelated issues and engage without fear of legal repercussions.

[152] First, confidentiality is essential for full and frank discussions, which are necessary to establishing functional familial dynamics going forward. It is often a precondition to honest, open and constructive dialogue and negotiations: L. D. Elrod, “The Need for Confidentiality in Evaluative Processes: Arbitration and Med/Arb in Family Law Cases” (2020), 58 *F.C.R.* 26. The problem-solving focus of mediation depends upon the participants disclosing their underlying interests and needs, rather than just their bargaining positions or demands: J. Watson Hamilton, “Protecting Confidentiality in Mandatory Mediation: Lessons from Ontario and Saskatchewan” (1999), 24 *Queen's L.J.* 561. If the sessions are not confidential, parties may hesitate

to speak openly or to explore compromises for fear that their words may later be used against them in legal proceedings. Indeed, confidentiality in family mediation “offers the needed reassurance that shared information will not be weaponized to injure family members or escalate family conflict”: F. Tetunic and G. Firestone, “Confidentiality and Privilege for Family and Child Protection Mediation: A Roadmap for Navigating the Innovation, Inconsistency and Confusion” (2020), 58 *F.C.R.* 46, at p. 46. In this way, complete confidentiality during the mediation sessions promotes the objective of restructuring family relationships.

[153] Second, confidentiality is critical for protecting vulnerable parties and compensating for power imbalances. I agree with Kasirer J.’s thorough outline of the procedural guarantees offered to vulnerable parties in the family mediation regime in Quebec: paras. 55-88. I also endorse his conclusions that the unique structure of the regime does not permit the parties to reach any settlements during the mediation sessions and that the summary of mediated agreements cannot reflect a binding agreement between the parties: paras. 79 and 84. However, in my view, the regime’s protections do not guarantee that vulnerable parties will not unwittingly bind themselves to ill-advised agreements. Thus, I cannot accept that complete confidentiality is unnecessary for the protection of vulnerable parties.

[154] Complete confidentiality prevents the more powerful party from using the words of the more vulnerable party to substantiate an unfair agreement. This risk is pronounced in Quebec given the regime’s prohibition on lawyers being present during

the sessions: *Code of Civil Procedure*, CQLR, c. C-25.01, art. 617. As Kasirer J. observes, this prohibition is designed to prevent mediation sessions from devolving into a dialogue between lawyers, and to facilitate cooperation by encouraging parties to address their issues together: paras. 50-51. Yet, it is well recognized that lawyers help attenuate power imbalances between parties: *Miglin*, at paras. 82 and 93; *Rick*, at paras. 60-61. Thus, in the absence of lawyers, confidentiality provides a necessary guard against the risk that the more powerful spouse may abuse the mediation process and capitalize on pre-existing power dynamics and vulnerabilities to elicit unfair compromises from the other spouse.

[155] Further, while family law mediators must be accredited and impartial, and have the duty to protect the integrity of the process and the rights of the participants, in practice, they will not always be able to intervene to protect vulnerable parties: see W. Wieggers and M. Keet, “Collaborative Family Law and Gender Inequalities: Balancing Risks and Opportunities” (2008), 46 *Osgoode Hall L.J.* 733, at pp. 739, 750-51 and 754. Abusive dynamics are not always evident. And while judicial oversight of agreements provides a level of protection for the vulnerable party, its reach is limited, since only agreements involving issues of public order are subject to review by a court to determine their appropriateness. Notably, it does not apply to questions of support and transfer of property between *de facto* spouses.

[156] Thus, I agree with the Association that while the family mediation regime includes special protections for the vulnerable party, those protections cannot eliminate

power imbalances between spouses, who participate in the mediation sessions without legal counsel.

[157] In sum, the features unique to family mediation are best served by complete confidentiality over mediation sessions. Confidentiality is an added protection that permits full, meaningful and equitable participation without fear of legal repercussions. It is essential to meeting the broader objectives of the regime, both with respect to restructuring family dynamics and the protection of vulnerable parties, as well as to finding common ground between the parties.

#### IV. Union Carbide and Family Mediation

[158] There are two overriding problems with the application of the settlement exception discussed in *Union Carbide* to confidential communications during the family mediation sessions. First, the justification for the exception to settlement privilege — to encourage settlement of legal disputes — does not account for the unique context of family settlement, nor the broader objectives of family mediation. Second, the exception's underlying reasoning is fundamentally incompatible with the nature of family mediation in Quebec. I address each in turn.

[159] Settlement privilege is a common law evidentiary rule that applies to all communications undertaken with the purpose of settling an action: *Union Carbide*, at para. 34, quoting *Sable Offshore Energy Inc. v. Ameron International Corp.*, 2013 SCC

37, [2013] 2 S.C.R. 623, at para. 14. It is subject to exceptions where “a defendant . . . show[s] that, on balance, ‘a competing public interest outweighs the public interest in encouraging settlement’”: *Union Carbide*, at para. 34, quoting *Sable Offshore*, at para. 19. Exceptions should be applied with regard to their purpose and not mechanically: *Meyers v. Dunphy*, 2007 NLCA 1, 262 Nfld. & P.E.I.R. 173, at para. 19, citing *Unilever plc v. The Procter & Gamble Co.*, [2001] 1 All E.R. 783 (C.A.), at p. 789.

[160] *Union Carbide* addressed one such exception. As Wagner J. (as he then was) explained, protected communications may be disclosed in order to prove the existence or scope of a settlement: para. 35. He reasoned that the exception “makes sense because it serves the same purpose as the privilege itself: to promote settlements”: para. 35.

[161] But as I have noted, encouraging the settlement of legal disputes is not the only public interest at stake in the family law context. Finding common ground and cultivating safe environments for families to address disputes in the wake of conflict has significant societal implications. Restructuring familial relationships and protecting vulnerable parties are additional policy interests. Confidentiality is essential to meeting those objectives. The justifications for waiving settlement privilege set out in *Union Carbide* cannot, therefore, simply be transposed into family mediation.

[162] In addition to the dissymmetry between the objectives of family mediation and the purpose of the exception to settlement privilege, the reasoning of *Union Carbide* does not hold in the family mediation context. In *Union Carbide*, the objective of promoting settlement was served by the possible disclosure of communications constituting the offer and acceptance of a contract. As explained by A. W. Bryant, S. N. Lederman and M. K. Fuerst (quoted in *Union Carbide*, at para. 35):

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

(*The Law of Evidence in Canada* (3rd ed. 2009), at §14.340)

Yet, in the present context, no offer and acceptance can occur *during* mediation sessions. It follows that the *terms* of an agreement can only be reached *outside* the mediation process.

[163] *Union Carbide* suggests that it would be unreasonable, “[a]bsent an express provision to the contrary, . . . to assume that parties who have agreed to mediation for the purpose of reaching a settlement would renounce their right to prove the terms of the settlement”: para. 65. But the Quebec mediation regime forecloses parties from reaching a settlement in mediation sessions — they are a forum for exploratory negotiations that may, but need not, lead to a settlement outside of mediation.

[164] In summary, the reasoning in *Union Carbide* is incompatible with family mediation in Quebec. The unique context and broader objectives of family mediation dictate a different approach. The family mediation regime in Quebec requires that the mediation sessions be completely confidential, except where the parties expressly state otherwise.

#### V. Confidentiality in the Mediation Contract

[165] In any event, a straightforward interpretation of the mediation contract reveals an intention to provide *greater* confidentiality protections in this context than are otherwise afforded by settlement privilege. *Union Carbide* makes clear that “parties [may] contract for greater confidentiality protection than is available at common law”: para. 49; see also paras. 50 and 56. As explained in *Union Carbide*, at para. 47: “The question is whether an absolute confidentiality clause in a mediation agreement displaces the common law exception . . . .” Furthermore, “[i]t must be asked whether the confidentiality clause actually conflicts with settlement privilege or with the recognized exceptions to that privilege”: para. 49.

[166] The inquiry, in each case, begins with an interpretation of the contract: *Union Carbide*, at para. 49. This is centered on the intent of the parties and their true will at the time of forming the contract: *Civil Code of Québec (C.C.Q.)*, art. 1425. When a court is called upon to interpret a contract, it must consider its “nature . . . , 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”: art. 1426 *C.C.Q.*; see also *Union Carbide*, at para. 60. Therefore, art. 1426 *C.C.Q.* permits the court to consider contextual elements external to the contract that can help reveal the common intention of the parties: *Groupe Blouin inc. v. Société Radio-Canada*, 2016 QCCA 1715, at para. 9 (CanLII).

[167] In this case, the trial judge (2017 QCCS 3788) did not interpret the clauses of the contract to determine whether, in this context, those clauses displaced the exception to settlement privilege discussed in *Union Carbide*. A review of the text and nature of the contract, as well as the circumstances in which it was formed, leads to the conclusion that the parties intended complete confidentiality during mediation sessions, therefore displacing the exception to settlement privilege.

[168] Clauses 8 and 10 of the mediation contract state:

[TRANSLATION]

8. We acknowledge that the content of our meetings, of the interviews and of our file is confidential. We commit ourselves to not use as a proof in front of a court any document contained in the file, including the Summary of Mediated Agreements, without the consent of both parties. The mediator cannot communicate this information to anyone except when the law expressly orders it.
10. We are informed that the Summary of Mediated Agreements prepared at the end of the mediation process will not constitute a legal document nor an enforceable agreement. It will serve to help the legal advisers who will be retained to prepare the appropriate legal documents. We are also informed that the signature of the Summary of Mediated Agreements produces legal effects, even if it is not enforceable, and



that it is preferable to obtain independent legal advice [before] signing it.

(A.R., at p. 95)

[169] These clauses confirm the vital importance of confidentiality. A plain reading of cl. 8 implies that complete confidentiality reigns, unless and until both parties specifically agree otherwise. The complementary cl. 10 makes it clear that the mediation sessions are exploratory discussions that will not constitute binding agreements. References to the aim of resolving a dispute do not, in my view, limit the effect of these more specific clauses.

[170] The text of the confidentiality clause in *Union Carbide* was similar to cl. 8 in this case. But whether the terms of the contract were “intended to . . . displace the exception . . . that applies where a party seeks to prove the existence or the scope of a settlement” (*Union Carbide*, at para. 62), cannot depend on similar wording alone.

[171] The confidentiality clause in *Union Carbide* — part of a protracted thirty million dollar commercial lawsuit — was entered into in far different circumstances. The Court’s interpretation of the contract reflected the dispute’s commercial backdrop. For example, the Court referred to the United Nations Commission on International Trade Law’s Model Law on International Commercial Conciliation: paras. 52-53. Further, the parties — large corporations — were advised and assisted by lawyers at every stage of the process. This can readily be distinguished from family mediation in both respects.

[172] Indeed, in the present context, the circumstances affirm what is made plain by the text: family mediation sessions are meant to assure complete confidentiality except where parties otherwise consent to disclosure. The mediation contract's unambiguous text carries particular importance because the parties sign the contract in front of the mediator, without legal counsel present: *Code of Civil Procedure*, art. 617. The contract itself educates the parties about the process of family mediation, including any confidentiality protections they may be entitled to: Belleau, at No. 8-41. They cannot be said to intend to accept a lesser confidentiality based on the settlement privilege exception that they most likely do not know exists.

[173] Moreover, as Doyon J.A. explains in his concurring opinion in the judgment under appeal, in interpreting this mediation contract it is necessary to consider the information made readily accessible to the public by the Government of Quebec (2020 QCCA 115). That information emphasizes the complete confidentiality of communications during family mediation in order to encourage its use. Justice Québec's website advises the public:

Mediation is confidential and takes place behind closed doors. Nothing revealed during a mediation session can be used as evidence in court.

*(Mediation: nature and goals (online))*

As Doyon J.A. notes, the Government has consistently emphasized family mediation's confidential nature: para. 15 (CanLII). The way this information is presented shapes the expectations of the parties with respect to mediation: R. Field and N. Wood,

“Marketing Mediation Ethically: The Case of Confidentiality” (2005), 5 *Q.U.T.L.J.J.* 143, at p. 145.

[174] In addition, many characteristics unique to family law and family mediation are relevant to understanding the parties’ true intentions in signing the mediation contract. First, the regime’s design and special rules promote an expectation that nothing parties say in the absence of counsel will be used against them to impose legal obligations. Second, family mediation occurs when spouses are separating and touches upon the most intimate facets of their lives; facets the parties would naturally expect to remain confidential. Third, as I have explained, reaching an agreement is not family mediation’s sole purpose — it also aims to restructure the familial relationship and protect vulnerable parties. This is predicated on earnest discussions, honest dialogue and active listening; features best served by a confidential environment.

[175] Considered in light of all the circumstances, the mediation contract shows that the parties intended to maintain complete confidentiality. The contract, interpreted in context, implicitly excludes (and indeed conflicts with) the exception to settlement privilege during mediation sessions. The discussions that occurred during mediation sessions were confidential and could not be relied upon as evidence of the terms of a subsequent contract.

## VI. Merits and Costs

[176] As I have already stated, I agree with Kasirer J. and the Association that no binding agreement can be reached during the mediation sessions. I also agree that the summary of mediated agreements cannot reflect a binding agreement and it is simply the mediator's understanding of the potential basis for agreement at the conclusion of the mediation sessions.

[177] However, I conclude that the summary of mediated agreements was not admissible. The summary of mediated agreements contains protected confidential information. Moreover, it is an out-of-court written statement made by the mediator and, when adduced to prove the truth of its contents, would be inadmissible under the prohibition against hearsay evidence (art. 2843 *C.C.Q.*).

[178] Thus, the trial judge erred in proceeding on the basis that a contract could have been formed during mediation sessions. He also erred in admitting confidential information from the mediation sessions and the summary of mediated agreements into evidence. I would sustain Ms. Bisailon's objection to the admissibility of the summary of mediated agreements to prove the terms of a contract formed *after* mediation sessions.

[179] The trial judge concluded that a contract had been formed on December 10, 2012, concerning both property and financial compensation. He relied, at least in part, on the summary of mediated agreements, dated December 10, 2012, which he considered central to this case: para. 11 (CanLII). Further, the entirety of the

evidence contained in the record before this Court (apart from the summary of mediated agreements) refers only to child support and not to the transfer of property. However, given the limited record before this Court, it is difficult to assess whether the evidence would otherwise have been sufficient to justify the trial judge's conclusion regarding the existence of a contract. In these unusual circumstances — indeed, Ms. Bisailon is not a party to this appeal — I am not persuaded that the disposition appealed from should be overturned. I would dismiss the appeal. In light of the Association's success on the legal issues, I would make no order as to costs.

[180] The majority's award of solicitor-client costs against the Association in this case is unprecedented and unwarranted. Of all the reported cases of this Court, I could find only four cases where the Court ordered solicitor-client costs against a private party that raised a question of public importance: see *Ouellet (Trustee of)*, 2004 SCC 64, [2004] 3 S.C.R. 348; *Lefebvre (Trustee of)*, 2004 SCC 63, [2004] 3 S.C.R. 326; *CIBC Mortgage Corp. v. Vasquez*, 2002 SCC 60, [2002] 3 S.C.R. 168; and *Roberge v. Bolduc*, [1991] 1 S.C.R. 374. This Court has *never* ordered costs on a solicitor-client basis against a non-profit organization that raised an issue of public importance.

[181] In this case, the Association was substituted as a party and granted leave to appeal because this Court considered that the Association raised an issue of public importance to family mediation in Quebec. The importance of these legal issues is evident from the extent of both the majority and concurring reasons in this case. An award of full indemnity or solicitor-client costs is an extraordinary measure that

effectively penalizes this non-profit organization for bringing forth an issue of obvious importance to an area of law that touches the lives of so many Canadians. It can only deter such parties from doing so in the future.

*Appeal dismissed.*

*Solicitors for the appellant: Schirm & Tremblay, Laval.*

*Solicitors for the respondent Michel Bouvier: Miller Thomson, Montréal.*