# UPDATE: COMMON LAW PRIVILEGE VERSUS MEDIATION PRIVILEGE

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**Judgment:**

*Union Carbide Canada Inc & Dow Chemical Canada Inc -v- Bombadier Inc and Others and the Attorney General of British Columbia* - 2014 SCC 35 - 8 May 2014 - Supreme Court of Canada - *click here to read the judgment >>*

**Questions:**

Does the exception in common law privilege permitting evidence as to whether an agreement was reached in a mediation trump the confidentiality and privilege provisions in the mediation agreement itself?

**Quick Overview:**

The Supreme Court of Canada decided on the facts of this case that evidence of without prejudice matters could be led, only so far as is necessary, as to whether or not a binding settlement had been reached in a mediation. In short, the common law privilege exception trumped the provisions of the mediation agreement.

The Supreme Court of Canada also said that mediation agreements could be drafted to have the effect of preventing the application of the recognised exception to

common law settlement privilege, but in order to have that effect, its terms must be clear.

**The Detail:** There have been cases in England where the exception to common law privilege has trumped the provisions of a mediation agreement in relation to a purported agreement. Two examples are where an offer was made and then purportedly accepted after the day of the mediation: *Brown -v- Rice and Patel and ADR Group* and *AB & AB -v- CD Limited*. In *Rice*, there had even been a provision to the effect that there could be no settlement absent it being recorded in writing and signed by or on behalf of the parties but even so the Judge permitted evidence to be led as to what went on in the mediation in relation to a possible oral settlement. In *AB*, the judge even directed the mediator to give evidence and produce his notes to the court. Both those decisions are first instance.

So to have this issue looked at by the Supreme Court of Canada (Canada's highest court) is of great interest. Even though its decision is not binding on the English courts, it would be persuasive authority here in England.

The parties in *Union Carbide & Dow -v- Bombadier* were entangled in a decades-long, multi-million dollar civil suit about defective gas tanks used on Sea-Doo personal watercraft. Bombadier claimed that the tanks supplied by Dow were unfit for the use for which they had been intended and commenced an action for damages in Montréal, in the Quebec Superior Court.

The parties agreed to private mediation and a "standard mediation agreement" (as it was called in the decision) was signed. It contained the following clause regarding the confidentiality of the process: "*Nothing which transpires in the Mediation will be alleged, referred to or sought to be put into evidence in any proceeding*". It did not contain a provision that there could be no settlement absent it being recorded in writing and signed by or on behalf of the parties

In the mediation, Dow made a settlement offer of CAN$7 million which was agreed to be kept open for 30 days. Bombadier accepted the offer within that thirty days.

Two days after Bombadier's acceptance, counsel for Dow stated that his client considered this to be a global settlement amount. Counsel for Bombadier replied that the settlement amount was for the Montréal litigation only. In short, there was a disagreement about the scope of what was purported to be settled.

That was the background that led the parties to the Supreme Court of Canada. The Attorney General of Canada intervened in the case because it was seen as involving important public policy questions in mediation which is now a central part of dispute resolution in Canada.

At common law, settlement privilege is a rule of evidence that protects communications exchanged by parties as they try to settle a dispute. It applies even in the absence of statutory provisions or contract clauses with respect to confidentiality. The rule promotes honest and frank discussions between the parties, which can make it easier to reach a settlement. However, a communication that has led to a settlement will cease to be privileged if disclosing it is necessary in order to prove the existence or the scope of the settlement. Both the common law privilege and this exception to it form part of the law of Quebec that applied in this case (and part of the common law of England and Wales).

In summary, the approach of the Supreme Court of Canada was as follows: to determine whether an absolute confidentiality clause in a mediation agreement displaces this common law exception to settlement privilege, one must begin with an interpretation of the contract. It must be asked whether the confidentiality clause actually conflicts with settlement privilege or with the recognised exceptions to that privilege. Where parties contract for greater confidentiality protection than is available at common law, the will of the parties should presumptively be upheld absent such concerns as fraud or illegality. However, the mere fact of signing a mediation agreement that contains a confidentiality clause does not automatically displace the privilege and the exceptions to it. Where an agreement could have the effect of preventing the application of a recognised exception to settlement privilege, its terms must be clear.

So it came to be decided that the mediation agreement confidentiality provision in this case did not exclude the applicability of the common law exception to settlement

privilege. It was decided that the parties may produce evidence insofar as it is necessary in order to prove the terms of the settlement. If sensitive information should not be made available to the public, an application could be made to the judge for a confidentiality order and to consider the evidence *in camera*.

Might this decision have been different if there had been a provision in the mediation agreement (as is commonly the case in the UK) that there is no settlement unless it is recorded in writing and signed by or on behalf of the parties? Would that have been sufficient to exclude the common law exception to settlement privilege in attempting to prove an oral agreement? It did not apparently influence the Judge in *Rice* but might a superior court in England and Wales decide the point in the same way?

Interestingly, however, the Supreme Court of Canada left open the possibility that a mediation agreement could be drafted in such a way as to exclude the exception to common law settlement privilege provided the drafting was "clear". The Court found that parties are at liberty to sign mediation contracts under which the protection of confidentiality is different from the common law protection.

Should parties in England to mediations and mediators now consider whether such drafting should be attempted? Will it create other unforeseen problems whilst at the same time it tries to help prevent satellite litigation arising from mediation? Is there an appetite amongst litigation lawyers to exclude the exception to common law settlement privilege? Alternatively, litigation about settlement arising post-mediation is not very common so perhaps things should be left as they are. There is much to think about after this Canadian decision from Canada's highest court.

Postscript: interestingly, the whole hearing is available to watch online (4 hours or so) on the Supreme Court of Canada's web site: *click here>>* and then go to the tab for "December 2013", the case is there listed. Clicking on "Archived" adjacent to the case name brings up the video. The submissions for the Attorney General in relation to public policy are of particular interest. They last about 10 minutes and are at 149 minutes or so into the video.