Civil Procedure Law 225
Fall 2017

Lecture Notes No. 7

COSTS

Section 131(1) of the *Courts of Justice Act*, R.S.O. 1990, c.C.43, provides the Court's substantive jurisdiction to order costs generally.

Rule 49 deals with the cost consequences of some types of offers to settle.

Sub-rule 57.01(1) of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, outlines the various factors to be considered by the Court in exercising is discretion in awarding costs.

OFFERS TO SETTLE

Offers to Settle are important, should be considered at all stages, and be crafted to put an end to the litigation completely. The offer itself can be informal (an email saying 'my client will settle the claim for $5000' is quite appropriate) or formal (useful where there is a complex action).

Please read Rule 49 carefully, especially the following provisions:

> **Rule 49**
>
> **49.2 (1) A party to a proceeding may serve on any other party an offer to settle any one or more of the claims in the proceeding on the terms specified in the offer to settle (Form 49A).**
>
> **...**
>
> **49.3 An offer to settle may be made at any time, but where the offer to settle is made less than seven days before the hearing commences, the costs consequences referred to in rule 49.10 do not apply.**
>
> **49.4 (1) An offer to settle may be withdrawn at any time before it is accepted by serving written notice of withdrawal of the offer on the party to whom the offer was made.**
>
> **(2) The notice of withdrawal of the offer may be in Form 49B.**
>
> **(3) Where an offer to settle specifies a time within which it may be accepted and it is not accepted or withdrawn within that time, it shall**

be deemed to have been withdrawn when the time expires.

...

49.06 (1) No statement of the fact that an offer to settle has been made shall be contained in any pleading.

(2) Where an offer to settle is not accepted, no communication respecting the offer shall be made to the court at the hearing of the proceeding until all questions of liability and the relief to be granted, other than costs, have been determined.

(3) An offer to settle shall not be filed until all questions of liability and the relief to be granted in the proceeding, other than costs, have been determined.

.
.
.

49.07
(6) Where an offer is accepted, the court may incorporate any of its terms into a judgment.

.
.
.

49.8 A party under disability may make, withdraw and accept an offer to settle, but no acceptance of an offer made by the party and no acceptance by the party of an offer made by another party is binding on the party until the settlement has been approved as provided in rule 7.08.

49.9 Where a party to an accepted offer to settle fails to comply with the terms of the offer, the other party may,
(a) make a motion to a judge for judgment in the terms of the accepted offer, and the judge may grant judgment accordingly; or
(b) continue the proceeding as if there had been no accepted offer to settle.

49.10 (1) Where an offer to settle,
(a) is made by a plaintiff at least seven days before the commencement of the hearing;
(b) is not withdrawn and does not expire before the commencement of the hearing; and
(c) is not accepted by the defendant,
and the plaintiff obtains a judgment as favourable as or more favourable than the terms of the offer to settle, the plaintiff is

entitled to partial indemnity costs to the date the offer to settle was served and substantial indemnity costs from that date, unless the court orders otherwise.

(2) Where an offer to settle,
(a) is made by a defendant at least seven days before the commencement of the hearing;
(b) is not withdrawn and does not expire before the commencement of the hearing; and
(c) is not accepted by the plaintiff,
and the plaintiff obtains a judgment as favourable as or less favourable than the terms of the offer to settle, the plaintiff is entitled to partial indemnity costs to the date the offer was served and the defendant is

entitled to partial indemnity costs from that date, unless the court orders otherwise.

(3) The burden of proving that the judgment is as favourable as the terms of the offer to settle, or more or less favourable, as the case may be, is on the party who claims the benefit of subrule (1) or (2).

...

49.13 Despite rules 49.03, 49.10 and 49.11, the court, in exercising its discretion with respect to costs, may take into account any offer to settle made in writing, the date the offer was made and the terms of the offer.

It is important to understand the costs rules and how offers to settle figure in the costs regime.

Contents of the Offer

Clark Agri Service Inc. v. 705680 Ontario Ltd. (1996), 2 C.P.C. (4th) 78 (Ont. Gen. Div.)

Justice Quinn's opening paragraph is a terrific piece of Denning-like prose:

This motion is the result of two offers to settle and one tornado. At issue is whether either of two offers to settle served by the plaintiff had been withdrawn before being accepted by the defendants. The defendants move for judgment in the terms of the allegedly accepted offers. The plaintiff hopes for judicial intervention to

undo what divine intervention hath wrought.

This case involved a commercial contract. The parties negotiated the sale of a business including land, a grain silo, and various bits of equipment. The plaintiff in the litigation was the purchaser and the defendant the vendor. The plaintiff's position was that there was a binding contract reached; the defendant's position was that the deal was never completed and that there was no enforceable contract.

The plaintiff made two offers to settle at different stages of the proceedings. Neither offer was accepted; the first did not have an expiry date, the second (more generous to the defendant) did have an expiry date and the offer was not accepted before the offer expired.

Mother Nature then intervened – a tornado caused damage to the buildings. The vendor then indicated that they would accept at least the first offer (but preferred the second and would rather accept that offer). In essence, the vendor sought to shift the tornado damage to the purchaser by accepting the offer made before the tornado caused the damage.

Justice Quinn was first required to determine whether a valid offer had been made and accepted:

> **4 An offer to settle made pursuant to Rule 49 ("Rule 49 offer") has the following features:**
>
> **(a) It must be in writing.**
>
> **(b) It must be effectively delivered to the opposing party.**
>
> **(c) It must be a proposal that can be construed as an offer to settle, open for acceptance and binding if accepted.**
>
> **(d) It may be in Form 49A, but the use of that form is permissive.**
>
> **(e) It may be communicated in correspondence between counsel.**
>
> **5 If these features are present, an offer will be *presumed* to be a Rule 49 offer unless expressly stated otherwise or unless the offeror can demonstrate that he or she did not intend the offer to be a Rule 49 offer. The point was put this way by Blair J. in *McDougall v. McDougall* (1992), 7 O.R. (3d) 732 (Gen. Div.) , at p.735:**
>
> > **Rule 49 was a deliberate departure from the practice as it existed under the former rules and from the common law**

> **approach to settlement. Its purpose was to promote settlement and to encourage offers in this respect by using the carrot of cost advantages for the successful offerer and the stick of cost disadvantages for the reluctant offeree. If we are to give maximum effect to this change in procedure and policy, *parties should know that if an offer complies in substance with the requirements of rule 49.02 it will be treated as a Rule 49 offer unless it is expressly stated not to be such* . [Emphasis added]**

> **6 In the case at bar, the First Offer clearly was intended to be a Rule 49 offer because Form 49A was utilized. As well, it met the criteria for such an offer. The Second Offer was a "letter offer." However, since it complied with the essential features of a Rule 49 offer, and there being no evidence, express or otherwise, that it was intended to be a common law offer, it must be presumed to be a Rule 49 offer. The distinction is important to this motion because a prior counter-offer or rejection of an offer has the effect of terminating a common law offer, whereas a Rule 49 offer may be accepted notwithstanding a prior counter-offer or rejection.**

Quinn J then considered whether the first offer had been implicitly withdrawn by the second offer. Two Court of Appeal cases were relevant. In *Diefenbacher v. Young* (1995), 22 O.R. (3d) 641 (C.A.), Carthy J.A. said that while two offers may remain open under Rule 49 it may also be the case that a first offer may be implicitly withdrawn in the circumstances. Carthy J.A. said:

> **I lean to adopting the parlance and normal understanding of a litigant that a decreasing offer by a plaintiff and an increasing offer by a defendant, without reference to the earlier offer, is by implication a withdrawal of the earlier offer. Its reality has disappeared in the ongoing negotiations and dealings between the parties and, prior to the present judicial debate of the issue, it is not sensible to consider that the parties would give thought to the earlier offer, in the context of costs consequences, after the second offer.**

In another case, *Mortimer v. Cameron* (1994), 17 O.R. (3d) 1 (C.A.), the plaintiffs made a series of decreasing offers to settle and obtained a judgment at trial that was better than any of the offers. In that case Robins J.A. seemed to hold to the contrary of the first case:

> **In some circumstances a subsequent offer may, by necessary implication, constitute the withdrawal of a previous offer. This will**

> **occur where, for instance, the subsequent offer requires payment of a greater sum than the sum stipulated in the previous offer. In this case, however, the subsequent offers were more favourable to the defendants than the offer of March 20, 1989. While one would not expect the defendants to accept an earlier offer over a later one which was more beneficial to them, I do not think it can be implied that the earlier offer had been withdrawn.**

Thus the question became whether the two cases could be reconciled; Justice Quinn held that each was contained to its own facts. In the end the Quinn J. held for the plaintiff:

> **18 [after referring to the *Diefenbacher* case]... I have before me a plaintiff who made an offer that is less favourable to that plaintiff than its earlier offer. Should I, therefore, lean to adopting the normal understanding of a litigant that the earlier offer is "a piece of history"? I answer that question in the affirmative. In the circumstances of this case, I see it as neither sensible nor fair to conclude that, when the Second Offer was made, the parties regarded the First Offer as still open for acceptance. Furthermore, the conduct of the parties (up until the date that the tornado struck) is consistent with this view:**
>
> **(a) When the solicitors for the plaintiff stated, in their letter offer of May 3, 1996, that they would "not be making any further offers", I consider it to have been understood by all that this was not just the last offer but, as well, the only offer.**
>
> **(b) When, in their letter of June 17, 1996, the solicitors for the defendants purported to accept the Second Offer, the solicitors for the plaintiff, before seeking instructions from their client, wanted to know whether the damage caused by the tornado had been repaired. This tells us two things: firstly, the Second Offer, at least in the minds of the plaintiff and its solicitors, was not on the table - other-wise, it would not have been necessary for instructions to be obtained; secondly, the**
>
> **information in respect of the tornado damage was a sine qua non to the plaintiff even considering placing the Second Offer back on the table.**

Thus there was no settlement offer that was still open to the defendants to accept. If there was, Quinn J held that he would not enforce it as it would be unfair:

25 Should I be in error in my views as to the absence of any offer eligible for acceptance by the defendants, I exercise the overriding discretion of the Court not to enforce the settlement sought by the defendants on the grounds that, to do so, would be unfair. As to the existence of such a discretion see, for example, D & R Equipment Repairs Ltd. v. Mardave Construction Ltd. (1989), 35 C.P.C. (2d) 266 (Ont. H.C.) , at p. 271.

V Conclusion

26 In the result, the motion by the defendants for judgment in the terms of either the First Offer or the Second Offer is dismissed. If the parties are unable to agree on the matter of costs, arrangements may be made with the trial co-ordinator at St. Catharines for an appointment to make submissions in that regard. Because I am inclined to view the actions of the defendants as an outrageous and unseemly attempt to visit upon the plaintiff the disastrous effects of the tornado (after all, what, other than the tornado, occurred between May 13, 1996, the date when the defendants purported to reject the Second Offer, and June 17, 1996, the date when the defendants purported to accept the Second Offer) I invite submissions as to the appropriateness of solicitor and client costs fixed and payable forthwith.

Thus, we can take the case as illustrating a number of propositions:

- An offer to settle is assumed to be a Rule 49 offer unless stated to the contrary.
- An offer to settle may be withdrawn explicitly or implicitly.
- A Court may not enforce the settlement if it would be unfair to do so. This is rather more controversial and I would suggest that this proposition is not well established in the jurisprudence.

Settlement Approval

A settlement in favour of a party under a disability must be approved by the Court.

Wu Estate v. Zurich Insurance Co.
(2006), 268 D.L.R. (4th) 670 (Ont. C.A.)

Is a settlement enforceable by the estate of a party under a disability where the settlement had been made but not yet approved by the Court when the party died? Yes. For our purposes the import of the case is in respect of the nature of the Court's jurisdiction in approving settlements rather than its survival post-mortem (but both propositions are significant).

Per Curiam:

> **9 The starting point for analyzing the legal status of the settlement agreement is to consider the situation that existed immediately before Rebecca Wu's unexpected death. In *Smallman v. Smallman*, [1971] 3 All E.R. 717 (Eng. C.A.), at 720, Denning M.R. provided the following helpful statement of the legal status of a settlement agreement that is subject to court approval:**
>
> > **In my opinion, if the parties have reached an agreement on all essential matters, then the clause 'subject to the approval of the court' does not mean there is no agreement at all. There is an agreement, but the operation of it is suspended until the court approves it. It is the duty of one party or the other to bring the agreement before the court for approval. If the court approves, it is binding on the parties. If the court does not approve, it is not binding. But, pending the application to the court, it remains a binding agreement which neither party can disavow.**
>
> **10 The requirement for court approval of settlements made on behalf of parties under disability is derived from the court's *parens patriae* jurisdiction. The *parens patriae* jurisdiction is of ancient origin and is "founded on necessity, namely the need to act for the protection of those who cannot care for themselves...to be exercised in the 'best interest' of the protected person...for his or her 'benefit' or 'welfare'.... The jurisdiction is "essentially protective" and "neither creates substantive rights nor changes the means by which claims are determined"...The duty of the court is to examine the settlement and ensure that it is in the best interests of the party under disability... The purpose of court**

approval is plainly to protect the party under disability and to ensure that his or her legal rights are not compromised or surrendered without proper compensation.

11 The requirement for court approval of settlements involving parties under disability is codified in Ontario in rule 7.08(1):

No settlement of a claim made by or against a person under disability, whether or not a proceeding has been commenced in respect of the claim, is binding on the person without the approval of a judge.

12 As explained by Garry D. Watson & Craig Perkins, *Holmested and Watson: Ontario Civil Procedure*, looseleaf (Toronto: Carswell, 1984) vol. 2 at 7-33

> **Rule 7.08... merely codifies a rule established by case law that a party under disability is bound only by a settlement that is for his or her benefit....it is designed to protect the party under disability from mistakes of the litigation guardian. The settlement of a claim by or against a party under disability, whether or not a proceeding has been commenced, is not binding on the party under disability without the approval of a judge.**

13 The wording of rule 7.08(1) may be contrasted with the language of the English "compromise rule" that provides that no settlement involving a party under disability shall "be valid without the approval of the court." This wording was considered by the House of Lords in *Dietz v. Lennig Chemicals Ltd.* (1967), [1969] 1 A.C. 170 to deprive a settlement that is subject to court approval of any legal effect and to allow either party to repudiate it unless and until it was approved by the court. The situation in Ontario is different: see *Richard v. Worth* (2004), 73 O.R. (3d) 154 (Ont. S.C.J.), holding that an insurer could not repudiate an infant settlement, yet to be approved by the court, on the ground that the law relating the insurer's liability had been changed by a subsequent Court of Appeal decision. The effect of rule 7.08(1) coincides with *Smallman v. Smallman*, *supra*, to this extent: the party under disability has an agreement from which the opposite party cannot resile and that will become fully operational once approved by the court.

14 We conclude from this analysis that immediately prior to Rebecca Wu's death there was in law an agreement, which the respondents could not disavow, to settle her claim on the terms

recorded in the minutes of settlement, but that the operation of that agreement was suspended pending "necessary" court approval.

Enforceability of a Settlement:

Centorame v. Centorame
2012 ONSC 6405 (Ont. S.C.J.)

A married couple separated. They owned and operated a business together but could not come to terms on who would buy who out. One party accepted the offer and then the circumstances changed (the business lost its principal client). Enforceable?

Per Herman J.

[25] On Tuesday, February 7, 2012, Sandy provided the offer to settle that is the subject matter of this motion.

[26] In the offer, Sandy offered to pay Mary $425,000 in full satisfaction of any claim Mary may have in Whitecourt. Immediately upon the acceptance of the offer, Mary's association with Whitecourt would cease and she would not longer attend at Whitecourt offices. Sandy would pay monthly child support of $2,804. There would be no equalization paid by either party. The civil proceeding would be dismissed on consent and the family proceeding would be settled by

way of Minutes of Settlement, incorporating the terms in the offer and containing comprehensive releases from each party.

[27] The offer was open for acceptance until noon on February 9, 2012.

[28] At 4:45 p.m. on Wednesday, February 8, 2012, Corey Hancock of Linamar Corporation, a major customer of Whitecourt, sent an e-mail to Mary, with a copy to Sandy. In the e-mail, Mr. Hancock advised that "due to supply instability for your organization, and a large concern on behalf of our facilities receiving (or not receiving) your product, we are left with no choice but to put you on a 90-day Notice of Termination of our Partnership Agreement". In the meantime, Linamar would be trying out a competing vendor and would have a final decision for Whitecourt

by the end of May 2012.

[29] Mary's counsel faxed Mary's acceptance of Sandy's offer at 7:58 p.m. on February 8.

Sandy then tried to argue that there was no agreement or that it was unenforceable as a matter of general equity. The argument was rejected by the Judge:

Should the settlement be enforced?

[58] The court retains a jurisdiction to decline to enforce a settlement where to do so would be unfair, unjust or unconscionable.

[59] Having concluded that the parties reached an agreement, I must now consider whether, given all the evidence, the agreement should be enforced.

[60] Sandy points to several circumstances that, in his submission, would make it unfair, unjust or unconscionable to enforce the settlement.

[61] Firstly, Sandy maintains that, as a result of losing Linamar's business, what Sandy paid for is no longer what he agreed to pay for, that is, a successful business.

[62] Mary disagrees. According to her, the business was in trouble and at risk of losing Linamar as a customer when Sandy made the offer. Furthermore, in her submission, there is no unfairness to Sandy because he was well aware of the situation when he made his offer.

[63] Secondly, Sandy submits that Mary acted in bad faith. He maintains that Mary had a duty to disclose the Notice of Termination to him. She took advantage of Sandy, faxing in her acceptance late in the evening, instead of waiting until the next morning. Furthermore, Mary

refused to accept Sandy's withdrawal of the offer, in the face of the Notice of Termination.

[64] Mary denies any bad faith. She said she had decided to accept the offer on the day she received it, that is, the day before she received the Notice of Termination. There was an agreement to

proceed with the appointment of a receiver the following week. Mary said she was concerned that proceeding with a receiver would be expensive and would likely result in losing most or all of the value of the business. In her submission, she had no duty to inform Sandy of the Notice of Termination because it was sent to him at the same time it was sent to her.

[65] In Milios *v.* Zagas, [1998] O.J. No. 812 (C.A.) at para. 21, the Court of Appeal considered the following factors when it decided that the acceptance of the offer should not be enforced:

(i) no order giving effect to the settlement had been taken out, so that the parties' pre-settlement positions remained intact;
(ii) apart from losing the benefit of the impugned settlement, the defendant would not be prejudiced if the settlement was not enforced;

(iii) the degree to which the plaintiff would be prejudiced if the settlement was not enforced;

(iv) no third parties were, or would be, affected if the settlement was not enforced.

[66] Sandy contends that the enforcement of the settlement would result in prejudice to him. According to him, the Linamar Notice of Termination effectively destroyed the business. If the settlement is enforced, he will be forced to pay Mary a significant sum of money for an interest in a business that he says is worthless.

[67] Sandy also contends that Mary would not be prejudiced if she lost the benefit of the settlement. However, if the settlement is enforced, Mary will be unjustly enriched by $425,000.

[68] I do not agree that there would be no prejudice to Mary if the settlement is not enforced. Sandy excluded Mary from the business. As a result, Mary was denied: the appointment of a receiver, which the parties agreed would occur in the absence of an agreement; a salary for working in the business, to which she would ordinarily have been entitled; and an opportunity to try and turn the business around and keep Linamar as a customer. She has not had access to the bulk of the proceeds of sale of the matrimonial home, which have remained in trust, and has therefore been unable to proceed with her plans to start a business.

[69] There is no way to know what would have happened if

> **the receiver had been appointed or if Mary had continued to work in the**
>
> **business. According to Mary, the failure of the business after her departure confirmed her fears that Sandy would be unable to manage on his own.**
>
> **[70] The parties' agreement cannot be unraveled. Sandy affirmed the agreement through his conduct and has made it impossible for the parties to return to the pre-settlement situation. When Sandy excluded Mary from the business, he did so with the knowledge of the Notice of Termination. At that point, he assumed the risk of business losses.**
>
> **[71] If a party wishes to assert the position that an agreement is unfair, unjust and unconscionable and should therefore not be enforced, he or she cannot "sit on the fence" and wait to see how things turn out. Sandy made a choice to proceed with the agreement and to try to retain Linamar as a customer. Even assuming Sandy's version of events, that is, Mary acted in bad faith and there was a substantial change in the value of the business either between the time of the offer and the time of its acceptance or since the time of the acceptance, I cannot conclude that it would be unfair, unjust or unconscionable to enforce the settlement given the circumstances.**

What can we take from the case? Absent fraud, courts are reluctant to undo any kind of contract including acceptance of a settlement offer.

STRATEGIC SETTLEMENT OPTIONS

Litigation may be complicated by any number of factors. Where there are multiple parties and claims, the litigation is especially complex as the various parties may have interests shared with some parties and not with others. For example, in negligence actions featuring multiple defendants (not uncommon), each defendant is rationally concerned about costs as he or she does not have complete control of the litigation. Hence the impetus to bargain with the plaintiff or shift costs to others on order of the Court.

***Mary Carter* Agreements**

This is a relatively new litigation tool in Canada.

Suppose that the plaintiff sues a number of defendants, one of whom wishes to settle but also wishes to assert that another defendant should be held liable to pay more damages. In such a case, the 'settling defendant' may enter into a partial settlement with the plaintiff featuring a transfer of money by the settling defendant to the plaintiff pending final judgment, remain in the litigation as a defendant, and make common cause with the plaintiff against another defendant. In essence this allows the defendant to cap its exposure and the plaintiff to fund its litigation against other defendants.

For example, in a tort action brought by the driver of a car against a number of defendants, the defendant driver (or his or her insurer) may wish to settle the action but join the plaintiff in asserting that faulty maintenance of a roadway was the dominant cause of the accident and the plaintiff's injuries (rather than the defendant's driving).

The doctrine originates in an American case - *Booth v. Mary Carter Paint Co.*, 202 So. 2d 8 (1967, Fla. Dist. Ct. - and features a number of elements in its original form:

- the contracting parties agree that the plaintiff will receive a minimum amount of damages, regardless of the outcome of the trial;
- the liability of the settling defendant is capped at the amount agreed;
- the settling defendant remains in the litigation;
- the plaintiff agrees to limit its claims against the other defendants to a set amount (which protects the settling defendant from claims for contribution from other defendants);
- the settling defendant's liability is decreased as agreed based on the plaintiff

being awarded damages in excess to that received to be paid by the non-settling defendants' liability (i.e. damages ordered above the amount agreed upon).

What happens if the final damage award is less than the amount agreed upon? By first principles, the excess obtained from the contracting party should stay with the plaintiff. However, in ***Laudon v. Roberts*, 2009 ONCA 383** (Ont. C.A.), it was held that this would be excess recovery and limited the contracting plaintiff's claim accordingly.

Pettey v. Avis Car Inc.
(1993), 13 O.R. (3d) 725 (Ont. S.C.J.)

This case discusses the fundamental principles respecting Mary Carter agreements and the rules barring 'champerty and maintenance' (that is, litigation subsidized by an uninterested party). The context of the litigation was a serious car accident and claims and counter-claims for negligence on various bases in respect of the 5 parties to the action.

Ferrier J.:

> **17 ... Cases in the United States have indicated that a typical Mary Carter agreement contains the following features:**
>
> **1. The contracting defendant guarantees the plaintiff a certain monetary recovery and the exposure of that defendant is "capped" at that amount.**
>
> **2. The contracting defendant remains in the lawsuit.**
>
> **3. The contracting defendant's liability is decreased in direct proportion to the increase in the non-contracting defendant's liability.**
>
> **4. The agreement is kept secret.**
>
> **See *Hoops v. Watermelon City Trucking*, 846 F.2d 637, 640 (10th Cir. 1988); *General Motors v. Lahocki*, 410 A.2d 1039, 1042 (My. 1980); and**
> ***Elbaor v. Smith*, 845 S.W.2d 240 (Tex. 1992).**
>
> **18 In reported decisions, the majority of the courts in the United States which have considered the validity of Mary Carter agreements have allowed them to stand provided the agreement is disclosed to the parties and to the court. See *General Motors v.***

***Lahocki*, supra; *Ratterree v. Bartlett*, 707 P.2d 1063 (Kan. 1985); *City of Tucson v. Gallagher*, 493 P.2d 1197 (Ariz. 1972); *Dosdourian v. Carsten*, 580 So.2d 869 (Fla. App. 4 Dist. 1991) and *Ward v. Ochoa*, 284 So.2d 385 (Fla. 1973).**

19 In Nevada and Texas, Mary Carter type of agreements have been declared void as against public policy. See *Lum v. Stinnett*, 488 P.2d 347 (Nev. 1971) and *Elbaor v. Smith*, supra; *City of Tucson v. Gallagher*, supra; *Dosdourian v. Carsten*, supra; and *Ward v. Ochoa*, supra.

.
.
.

25 The Rules of Professional Conduct enacted by the Law Society of Upper Canada address the question of the encouragement of settlements and the disclosure of agreements. Commentary 4 to R. 10 under the heading "Abuse of Process" provides as follows:

> **4. In civil proceedings, the lawyer has a duty not to mislead the court as to the position of the client in the adversary process. Thus, a lawyer representing a party to litigation who has made or is party to an agreement made before or during the trial whereby a plaintiff is guaranteed recovery by one or more parties notwithstanding the judgment of the court, shall forthwith reveal the existence and particulars of the agreement to the court and to all parties to the proceedings.**

26 Commentary 6 to R. 10 provides:

> **Encouraging Settlements**
>
> **6. Whenever the case can be fairly settled, the lawyer should advise and encourage the client to do so rather than commence or continue legal proceedings.**

27 The minutes of Convocation of the Law Society of Upper Canada make it clear that Commentary 4 above was specifically enacted to take account of Mary Carter type agreements. While the Law Society Rules of Professional Conduct do not bind the court, they ought to be given significant weight in consideration of the issues.

28 Before addressing the specific issues, some general observations may be made.

29 Quite obviously any consideration of the issues and the principles to be applied must be made in the context of the terms of the agreement in question. The ruling I have made and the application of the principles must be considered only in the context of the agreement before the court and not as a blanket approval of all Mary Carter type agreements.

30 Further, it is trite that parties are free to contract and to settle lawsuits; the court will not lightly interfere with such settlements freely entered into by the parties.

31 Also, it is trite that this court encourages settlements of all issues and when that is not achieved encourages settlement of as many issues as possible.

1. When must such agreements be disclosed?

32 The answer is obvious. The agreement must be disclosed to the parties and to the court as soon as the agreement is made. The non- contracting defendants must be advised immediately because the agreement may well have an impact on the strategy and line of cross- examination to be pursued and evidence to be led by them. The non- contracting parties must also be aware of the agreement so that they can properly assess the steps being taken from that point forward by the plaintiff and the contracting defendants. In short, procedural fairness requires immediate disclosure. Most importantly, the court must be informed immediately so that it can properly fulfil its role in controlling its process in the interests of fairness and justice to all parties.

.
.
.

2. Must the complete terms of the agreement including the dollar amounts of the settlement be disclosed to the court and to the parties?

34 Excepting the dollar amounts, it is rather obvious that all of the terms of the agreement must be disclosed, especially for the purpose of enabling the court to control its own process. I agree with the statements in the Florida case of *Insurance Co. of North America v. Sloan*, 432 So.2d 132 (Fla. App. 4 Dist. 1983) to the effect that gratuitous and self-serving language ought not to be part of the disclosure.

35 The disclosure of the dollar amounts is patently in the

discretion of the court. In the case at bar, as above noted, a copy of the full text of the agreement, including the dollar amounts, was sealed and made an exhibit in the trial, so that full disclosure was entirely within the court's control. I declined to be apprised of the dollar amounts, being of the view that they would be of no assistance to me in controlling the process or in deciding the issues. It is not for me to consider whether, in given circumstances, the court ought to learn the dollar amounts. I note that in some jurisdictions in the United States, disclosure of the amounts to the jury is prohibited. See *Ratterree v. Bartlett*, supra. See also *Hatfield v. Continental Homes*, 610 A.2d 446 at 452 (Pa.1992).

3. Does such an agreement amount to an abuse of process?

36 The agreement here has not been kept secret. Accordingly, the court is able to control its process with full knowledge of all relevant circumstances.

37 The contracting defendants remain in the lawsuit. They remain for the specific purpose of establishing their claims for contribution and indemnity against their co-defendants. Such claims would have been vigorously pursued even in the absence of the agreement. The agreement did not bring those cross-claims into existence, nor did it prejudice the non-contracting defendants' position in defending the cross-claims. I see no reason why the agreement should prohibit the pursuit of those cross-claims.

38 The additional feature similar to a Mary Carter agreement is that the contracting defendants' exposure is decreased in direct proportion to the increase in the non-contracting defendant's exposure. This is so to a degree in the case at bar. With such an agreement, it is in the interests of the contracting defendants to pursue the non-contracting defendants on the issues of liability; but this would be so as well in the absence of an agreement. However, it is also in the interests of the contracting defendants, once having made the agreement, to have the plaintiffs' damages assessed as high as possible in the circumstances. The higher the assessment, the greater the return to the contracting defendants...

.
.
.

Champerty and Maintenance

45 The moving parties assert that the agreements constitute champerty and maintenance in two respects: first, the agreement makes the contracting defendants participants in the plaintiff's recovery; secondly, the indemnity for legal fees and disbursements for the balance of the proceeding is a financing by the contracting defendants of the plaintiffs pursuing their claims against the non-contracting defendants.

46 On the first point, on the questions of liability, the parties are in no different position following the agreement than they were prior to the agreement. The contracting defendants have sought contribution and indemnity from the non-contracting defendants. The contracting defendants have a legitimate interest in the pursuit of their claims against the non-contracting defendants. That has been the case from the commencement of the proceedings. The agreement does not alter that. If they are successful in their cross-claims, then that success enures to their benefit by potentially reducing the net exposure to the plaintiffs. There was no improper purpose. There was no "officious intermeddling with a law suit which in no way belongs to one, by assisting either party with money or otherwise to prosecute or defend a suit"...

47 In *Goodman v. R.*, [1939] 4 D.L.R. 361 at 364, [1939] S.C.R. 446 at 449, Kerwin J. (as he then was) adopted the definition of maintenance given to it by Lord Abinger in *Findon v. Parker*, [1843] 11 M. & W. 675 at 682, 152 E.R. 976 (Exch. Ct.) at 979:

The law of maintenance, as I understand it upon the modern constructions, is confined to cases where a man improperly, and for the purpose of stirring up litigation and strife, encourages others either to bring actions, or to make defences which they have no right to make.

48 Such is not the case here.

49 Champerty is a particular kind of maintenance in which the maintainer stipulates for a portion of the proceeds of the litigation as his reward for the maintenance: *Re Trepca Mines Ltd.*, [1962] 3 All E.R. 351 (C.A.) at 359.

50 Such is not the case here.

Please note that Mary Carter agreements are new to Canada and are used differently in different American states; the law on point is increasing steadily.

Moore v. Bertuzzi
2012 ONSC 3248 (Ont. S.C.J.)

Per Perrell J.

> **[65] A leading case that takes a similar approach to the one I am employing is *Pettey v. Avis Car Inc.* 1993 CanLII 8669 (ON SC), (1993), 13 O.R. (3d) 725, [1993] O.J. No. 1454 (Gen. Div.). In that case, there was a Mary Carter settlement agreement, and the issues for the court were:**
> **(1) when must the agreement be disclosed; (2) how much of the agreement must be disclosed; and (3) are Mary Carter agreements an abuse of process. There is no mention in Justice Ferrier's judgment that the agreement was a privileged communication, which seems rather to have been a given or assumed factor in the case.**
>
> **[66] The facts of Pettey v. Avis Car Inc. were that there were five defendants to a motor vehicle negligence claim. There were cross-claims amongst all of the defendants. Soon after the commencement of a non-jury trial, the plaintiffs settled with two of [page625] the five defendants and there was also a settlement of the cross-claims between the two settling defendants.**
>
> **[67] The settlement in Pettey had the features of a Mary Carter agreement, which originated in the Florida case of Booth v. Mary Carter Paint Co., 202 So. 2d 8 (Fla. 1967). The features are: (1) the settling defendant settles with the plaintiff but remains in the lawsuit and may pursue cross- claims against the non-settling defendant(s); (2) the settling defendant guarantees the plaintiff a specified monetary recovery; (3) the exposure of the settling defendant is "capped" at the specified amount; (4) the settling defendant's liability is decreased in direct proportion to any monetary recovery above the specified amount; and (5) the non-settling defendant is exposed only to several liability and is no longer exposed to joint and several liability.**
>
> **[68] The structure of a Mary Carter agreement provides an incentive for the plaintiff and the settling defendant to co- operate to maximize the quantum of the plaintiff's recovery because the defendant's liability is capped but the amount of payment will be reduced in direct proportion to the amount above the capped amount determined at the trial to be owed to the plaintiff. This structure, which, practically speaking, means that the settling defendant shares in the plaintiff's recovery, explains why Mary Carter agreements have been challenged as champertous. The**

structure also explains why if the agreement is not disclosed, a Mary Carter agreement may be challenged as an abuse of process. The undisclosed settlement agreement distorts the adversarial orientation of the litigation. The abuse is that if the agreement is not disclosed, then the trier of fact will have a misleading basis for understanding the evidence since apparent adversaries are in truth allies.

[69] In Pettey, the three non-settling defendants took the position that the settlement agreement between the plaintiff and two defendants was an abuse of process and void as against public policy. Justice Ferrier, however, reasoned that if the Mary Carter agreement was disclosed, then it was not an abuse of process, because with disclosure, the court would have control of its process and could direct procedural safeguards to counter the skewering of the adversarial orientation of the lawsuit. Thus, in Pettey v. Avis Car Inc., Justice Ferrier ruled that the settling defendants could not cross-examine on issues related to the quantum of damages, except with leave of the court.

[70] Justice Ferrier did not regard the Mary Carter agreement as champertous, because champerty presupposes an officious intermeddling in someone else's lawsuit. In Pettey, the settling defendants had a legitimate interest in the pursuit of their [page626] claims against the non-settling defendants and the Mary Carter agreement did not alter that purpose. If the settling defendants were successful in their cross-claims, then that success could reduce their net exposure to the plaintiff, which was not an improper purpose.

[71] After reviewing the Canadian jurisprudence, Justice Ferrier concluded that Mary Carter agreements could be legal and enforceable, but they had to be disclosed. He concluded that it was a matter of judicial discretion about whether the financial details must be disclosed, and in the case before him, he was satisfied that he had enough disclosure without knowing the financial details to enable him to control the court's process.

[72] In answer to the question of when must a Mary Carter agreement be disclosed, Justice Ferrier stated [at paras. 32-33]:

The answer is obvious. The agreement must be disclosed to the parties and to the court as soon as the agreement is made. The non- contracting [non-settling] defendants must be advised immediately because the agreement may well have an impact on

the strategy and line of cross-examination to be pursued and evidence to be led by them. The non-contracting parties must also be aware of the agreement so that they can properly assess the steps being taken from that point forward by the plaintiff and the contracting [settling] defendants. In short, procedural fairness requires immediate disclosure. Most importantly, the court must be informed immediately so that it can properly fulfil its role in controlling its process in the interests of fairness and justice to all parties.

The non-contracting defendants argue that the agreement should have been disclosed to the court before the commencement of the trial of the action. I would agree with that proposition if the agreement had in fact been made before the trial commenced.

[73] This passage from Pettey v. Avis Car Inc. is authority that a Mary Carter agreement must be disclosed to the court and to the non-settling defendant as soon as it is made and disclosure cannot be postponed to the commencement of the trial. In the case at bar, Bertuzzi and Orca Bay argue, however, that the authority of Pettey v. Avis Car Inc. does not apply to their settlement agreement, which they submit is not akin to a Mary Carter agreement and which agreement they submit does not need to be disclosed to avoid an abuse of process because it does not alter the litigation landscape. In particular, they argue that their agreement does not affect the interlocutory stage of the proceedings.

[74] Bertuzzi and Orca Bay deny that their settlement agreement changes the dynamics of the action in any way similar to the effect of a Mary Carter agreement. They point out that before their settlement agreement, they were united in opposition to the amount being claimed by the Moores and this had not [page627] changed. What has changed is that Bertuzzi no longer will be of much assistance to the plaintiffs in their case against Orca Bay, because Bertuzzi no longer has any motivation for proving that he was urged by the Canucks' management and coach to retaliate against Moore; however, the defendants point out that this assistance was not something to which the Moores were entitled, and therefore, there is no reason to disclose the settlement agreement; what remains unchanged is that the Moores must prove their case against Orca Bay.

[75] I do not agree with the defendants that the authority of Pettey v. Avis Car Inc. does not apply to the circumstances of the case at bar. I note that in Pettey, in addition to settling their dispute with the plaintiff, the settling defendants settled their cross-claims

and this was disclosed to the court. This suggests that Pettey applies not only to Mary Carter agreements but also to other types of settlement agreement. More importantly, while I do agree with the defendants that their settlement agreement is different from a Mary Carter agreement, nevertheless, in my opinion, notwithstanding the differences, their settlement agreement must be disclosed.

[76] The court needs to understand the precise nature of the adversarial orientation of the litigation in order to maintain the integrity of its process, which is based on a genuine not a sham adversarial system and which maintenance of integrity may require the court to have an issue-by-issue understanding of the positions of the parties. The adversarial orientation of a lawsuit is complex because parties may be adverse about some issues and not others. In these regards, it is worth noting from the above passage from Pettey v. Avis Car Inc. that Justice Ferrier explained the need for disclosure of the settlement agreement because of its "impact on the strategy", but he said, "most importantly, the court must be informed immediately so that it can properly fulfil its role in controlling its process in the interests of fairness and justice to all parties".

[77] As a matter of ensuring procedural fairness, as an element of its assessment of evidence, as a factor in determining the truth of the facts, and as a factor in administering justice, the court needs to know the reality of the adversity between the parties. The court's interest in knowing the genuine state of adversity explains why so much attention is paid by the court: (a) to standing and status; (b) to whether a person is a proper or necessary party; (c) to whether a person is affected by a proceeding and entitled to notice and an opportunity to be heard; (d) to the order of openings, the presentation of evidence, closings and argument; (e) to the right to cross-examine; (f) to whether a [page628] party or affected person consents, does not oppose or opposes the relief sought in a proceeding, be it interlocutory relief or a final order;
(g) to the doctrines of res judicata, issue estoppel and abuse of process; and (h) to the avoidance of a multiplicity of proceedings.

[78] I accept that the structure of a Mary Carter agreement creates an alliance between plaintiff and co-defendant and that the structure of the so-called conditional or provisional proportional sharing settlement in the case at bar creates no alliances but just settles the cross-claims. However, in the case at bar, practically speaking, a strategic alliance has ended and the dynamics of the litigation have been changed by the settlement agreement. The

settlement of the cross-claims ends the common cause and informal alliance that the Moores and Bertuzzi had to show that Orca Bay was the instigator and substitutes a mutual non-aggression pact between Bertuzzi and Orca Bay.

[79] It is beside the point that the Moores are not entitled to rely on Bertuzzi pointing an adversarial sword at Orca Bay; the point is that the court administering and overseeing the adversary system needs to know that the adversarial orientation has changed. As I read the authority of Pettey v. Avis Car Inc., the court needs information about a change in the adversarial orientation from the moment the change occurs and that need is not limited to the circumstances of a Mary Carter agreement or to the circumstances that the trial has not yet begun.

...

[99] The case law establishes that settlement privilege is not absolute and that it admits of exceptions where the settlement agreement must be disclosed to non-settling parties. An important exception that is not confined to Mary Carter agreements or Pierringer agreements is that an otherwise privileged settlement agreement must be immediately disclosed when the agreement changes the adversarial orientation of the lawsuit or the court needs knowledge of the settlement in order to maintain the fairness and integrity of its process. The case law establishes if an exception applies to the settlement privilege, then the disclosure of the settlement agreement must be immediate. In the case at bar, the master made no error in the application of these principles.

[100] I see no reason not to disclose the complete details of the proportional sharing between the settling defendants. The provisional or conditional proportional sharing is an aspect of settling the cross- claims, not the Moores' claims, and, in any event, the sharing is provisional upon the Moores establishing some liability, which remains to be determined, because the defendants deny liability. Thus, the proportional sharing is an abstraction, not an admission of any liability by the defendants. Indeed, since the structure of the settlement agreement has already been disclosed, the non-disclosure of the details of the proportional sharing is more harmful than the complete disclosure, because it leads to the speculation that Bertuzzi or Orca Bay have no answer or rejoinder to any prejudicial adverse inferences from having entered into a provisional proportional sharing of any indebtedness to the Moores. 2. The doctrinal nature of settlement privilege and the master's decision

[101] The above analysis arrives at the conclusion that signed settlement agreements that change the adversarial orientation of the lawsuit are one exception to settlement privilege (there are other exceptions) and that a settlement agreement must be promptly disclosed to the opponents and to the court if an exception to privilege applies. The above conclusions do not depend upon the doctrinal nature of settlement privilege. It follows that for the purposes of this appeal, it is not necessary to determine [page635] whether or not the master was correct in his doctrinal characterization of settlement privilege as a case-by-case privilege, the elements of which had not been established by Bertuzzi and Orca Bay, the parties asserting the privilege. Put somewhat differently, if the master made a doctrinal error or a factual mistake about how to classify the settlement communications in the case at bar, then for the purposes of this appeal, nothing turns on the error or errors.

[102] While for the purposes of the appeal, practically speaking, nothing may turn on it, it is necessary to address the master's treatment of settlement privilege because the point was fully argued and because the case at bar shows that there is uncertainty in the legal profession about communications in furtherance of settlement and uncertainty about the exceptions to the privilege. This uncertainty explains in part the problems that arose in the case at bar, where the defendants did not produce their settlement agreement because they sincerely believed that they did not have to. They believed that they were entitled to treat their agreement as a privileged communication until the trial commenced. I think, therefore, that it is necessary and possibly helpful for other cases to address the parties' arguments and grounds of appeal based on the master's treatment of how settlement privilege is established.

[103] For centuries, the law has recognized an evidentiary privilege for communications in furtherance of settlement. In a comprehensive essay "'Without Prejudice' Communications -- Their Admissibility and Effect" (1974), 9 U.B.C. L. Rev. 85, Professor David Vaver traced the idea of settlement privilege as it developed from before 1760 to 1974. He placed the development of the modern rule in the period from 1850 onwards. See, also, P.M. Perell, "The Problems of Without Prejudice" (1992), 71 Can. Bar Rev. 223. In Ontario, the seminal cases are 130 years old, namely, York (County) v. Toronto Gravel Road and Concrete Co. (1882), 3 O.R. 584, [1992] O.J. No. 208 (Ch.) and Pirie v. Wyld (1886), 11 O.R. 422, [1996] O.J. No. 188 (Comm. Pleas Div.).

[104] Historically, a person asserting the evidentiary privilege for settlement communications had to establish three elements: (1) litigation had been commenced or was within contemplation; (2) the communication was made with the express or implied intention it would not be disclosed in the event settlement negotiations failed; and
(3) the purpose of the communication was to bring about a settlement. See I. Waxman & Sons Ltd. v. Texaco Canada Ltd., 1968 CanLII 178 (ON SC), [1968] 1 O.R. 642, [1968] O.J. No. 1068 (H.C.J), affd 1968 CanLII 327 (ON CA), [1968] 2 O.R. 452, [1968] O.J. No. 1174 (C.A.); Rush & Tompkins Ltd. v. Greater London Council, [1988] 3 All E.R. 737, [1989] 1
A.C. 1280 (H.L.); [page636] Middelkamp v. Fraser Valley Real Estate Board, 1992 CanLII 4039 (BC CA), [1992] B.C.J. No. 1947, 96 D.L.R. (4th)
227 (C.A.); Inter-Leasing Inc.v. Ontario (Minister of Finance), supra; Brown v. Cape Breton (Regional Municipality), [2011] N.S.J. No. 164, 331 D.L.R. (4th) 307 (C.A.); IPEX Inc. v. AT Plastics Inc., supra.

[105] Typically, the person claiming the privilege would simply assert that the three elements were present and the party seeking to challenge the privilege would attempt to refute the truth of each element. Based on the rationale that the privilege for settlement communications is a public policy to encourage the settlement of disputes, the historical approach would appear to treat settlement privilege as a categorical or class privilege. The view in British Columbia is that settlement privilege is a class privilege: Middelkamp v. Fraser Valley Real Estate Board,

supra; Dos Santos (Committee of) v. Sun Life Assurance Co. of Canada, supra.

[106] However, in Ontario (Liquor Control Board) v. Magnotta Winery Corp. 2009 CanLII 92118 (ON SC), (2009), 97 O.R. (3d) 665, [2009] O.J. No. 2980 (Div. Ct.), affd 2010 ONCA 681 (CanLII), (2010), 102 O.R. (3d) 545, [2010] O.J. No. 4453, 2010 ONCA 681, the Divisional Court held that settlement privilege is not a class privilege but is a case-by-case privilege that is available in accordance with what is known as the Wigmore test endorsed by the Supreme Court in Slavutych v. Baker, 1975 CanLII 5 (SCC), [1976] 1 S.C.R. 254, [1975] S.C.J. No. 29, at
p. 260 S.C.R. The test for a case-by-case privilege has four steps:

(1) the communication must originate in a confidence that it will not be disclosed; (2) this element of confidentiality must be essential

> **to the full and satisfactory maintenance of the relation between the parties;**
> **(3) the relation must be one which, in the opinion of the community, ought to be sedulously fostered; and (4) the injury that would inure to the relation by the disclosure of the communications must be greater than the benefit gained for the correct disposal of litigation.**

Pierringer Agreements

This is another American development imported into Canadian jurisprudence; see
Pierringer v. Hoger, 124 N.W.2d 106 (Wisc. S.C., 1963).

In this sort of agreement, there is a partial settlement whereby the plaintiff and a defendant settle the claim and the defendant withdraws from participation in the litigation. The defendant's payment is put towards the damages award. In exchange, the plaintiff agrees to indemnify the settling defendant for any contribution sought from it by the non-settling defendant(s).

M. (J.) v. Bradley
(2004), 71 O.R. (3d) 171 (Ont. C.A.)

This was a multi-party litigation featuring claims for sexual assault and negligence and counter-claims and cross-claims. The plaintiffs settled with all defendants except the three principal defendants with a provision limiting their claims against the non-settling defendants. Two of the non-settling defendants died; one remained alive. Jurisdictional issues arose and a special case question was submitted for decision on an interlocutory motion:

> **Does the Court have the jurisdiction to determine whether any fault or neglect of the Settling Defendants or any of them caused or contributed to the damages alleged by the plaintiffs, and the degree of any such contribution, if the Settling Defendants are not parties to the action at the time of trial, in circumstances where the Settling Defendants have entered into Partial Settlement Agreements with the plaintiffs, and consent to the Court so determining the fault or neglect of the Settling Defendants?**

The court of first instance held that there was a lack of jurisdiction. The matter then went to the Court of Appeal which allowed the appeal.

Cronk J.A.:

(1) 'Pierringer' Settlement Agreements

29 In recent years, 'Pierringer' settlement agreements have been increasingly utilized in Canada in a variety of litigation settings. In Amoco Canada Petroleum Co. v. Propak Systems Ltd. (2001), 200 D.L.R. (4th) 667 (Alta. C.A.), at 673-74, the Alberta Court of Appeal outlined the factors leading to their emergent use:

> **Now past is the day when "settlement agreement" can be understood to refer solely to the final resolution of all outstanding issues between all parties to a lawsuit, effectively bringing the suit to an end. In the last several years, in response to increasingly complex and commensurately dilatory and costly litigation, a new generation of settlement agreements has been cautiously adopted by the litigation bar.**
>
> **The new settlement agreements, which include such exotically named species as the Mary Carter agreement and the Pierringer agreement, endeavour to attain a more limited objective: rather than trying to resolve all outstanding issues among all parties, a difficult task in complicated suits, they aim to manage proactively the risk associated with litigation. In short, contracting litigants prefer the certainty of settlement to the uncertainty and expense of a trial and the possibility of an undesirable outcome. This "risk-management" objective is accomplished by settling issues of liability between some but not all of the parties, thereby reducing the number of issues in dispute, simplifying the action, and expediting the suit. Ancillary benefits include a reduction in the financial and opportunity costs associated with complex, protracted litigation, as well as savings of court time and resources.**

30 The court in Amoco described a 'Pierringer" settlement agreement in this way (at p. 671):

> **Such agreements permit some parties to withdraw from the litigation, leaving the remaining defendants responsible only for the loss they actually caused, with no joint liability. As the non- settling defendants are responsible only for their proportionate share of the loss, a Pierringer agreement can properly be characterized as a 'proportionate share settlement agreement'.**

31 'Pierringer' agreements, however, are not free from settlement complications. As observed by the court in Amoco (at pp. 674-75):

> **As a result of third party proceedings, settling defendants are almost always subject to claims for contribution and indemnity from non-settling defendants for the amount of the plaintiff's loss alleged to be attributable to the fault of the settling defendants. Before the settling defendants can be released from the suit, some provision must be made to satisfy these claims.**
>
> **This obstacle is overcome by including an indemnity clause in which the plaintiff covenants to indemnify the settling defendants for any portion of the damages that a court may determine to be attributable to their fault and for which the non-settling defendants would otherwise be liable due to the principle of joint and several liability. Alternatively, the plaintiff may covenant not to pursue the non-settling defendants for that portion of the liability that a court may determine to be attributable to the fault of the settling defendants. . . . [I]n either case the goal of the proportionate share settlement agreement is to limit the liability of the non-settling party to its several liability.**

32 The Agreements in this case, as I have said, contain both an indemnity clause in favour of the Settling Defendants and an agreement by the appellants to restrict their claims against the Non-Settling Defendants to only those defendants' several, rather than joint and several, shares of liability. In respect of the Non-Settling Defendants, therefore, the Agreements effectively represent a contractual 'opting- out' by the appellants of the joint liability provision set out in s. 1 of the Act, save for joint liability, if any, among the Non-Settling Defendants.

.
.
.

34 In Ontario, the implications of a 'Pierringer' settlement agreement for the apportionment of liability at trial must be assessed in light of s. 1 of the [Negligence] Act. That section reads:

> **1. Where damages have been caused or contributed to by the fault or neglect of two or more persons, the court shall**

> **determine the degree in which each of such persons is at fault or negligent, and, where two or more persons are found at fault or negligent, they are jointly and severally liable to the person suffering loss or damage for such fault or negligence, but as between themselves, in the absence of any contract express or implied, each is liable to make contribution and indemnify each other in the degree in which they are respectively found to be at fault or negligent.**

35 The terms of s. 1 of the Act are mandatory. They require the court, in a negligence action involving two or more tortfeasors, to "determine the degree in which *each of such persons* is at fault or negligent" [emphasis added]. In contrast to other sections of the Act, in which express reference is made to the "parties" to an action, s. 1 refers to the apportionment of fault or neglect among "persons" found to have caused or contributed to the damages established at a trial. Thus, Ontario courts have been required to determine whether the word

"persons", as used in s. 1, includes persons who are not parties to the negligence action in which damages are proven.

.
.
.

43 First, the Superior Court of Justice enjoys a wide jurisdiction under s. 11 of the *Courts of Justice Act*, R.S.O. 1990, c. C. 43 that encompasses, "all the jurisdiction, power and authority historically exercised by courts of common law and equity in England and Ontario". This jurisdiction cannot be displaced absent clear and unequivocal statutory language...

44 There is no express indication in s. 1 of the Act of a legislative intention to limit the jurisdiction of the Superior Court of Justice in the apportionment of liability in negligence cases. To the contrary, s. 1 of the Act is a substantive law provision that confirms the jurisdiction of the Superior Court to apportion liability among concurrent tortfeasors: see *Martin* at para. 48.

.
.
.

(ii) Experience in Other Provinces with 'Pierringer' Agreements

.
.

.

61 The motions judge correctly concluded that such decisions should be approached with caution by Ontario courts because the statutory regimes governing the apportionment of negligence vary from province to province. Simply stated, the impact in another province of a 'Pierringer' settlement agreement on the rights of non-settling parties to a lawsuit may have no relevance in Ontario because the applicable statutory regime and the procedural rules of court that govern the forum in which the lawsuit was commenced may be fundamentally different from those that apply in Ontario.

62 In my view, however, the Amoco decision and similar cases are instructive in this respect: they essentially emphasize that the interests of the administration of justice are not facilitated by requiring the involvement at trial of a litigant for purely procedural purposes where this can be avoided without unfairness or prejudice to the parties. I endorse this proposition.

.
.
.

(iii) Public Interest in Promoting Settlement

65 Finally, there is an additional, and powerful, reason to support the implementation of the Agreements in this case: the overriding public interest in encouraging the pre-trial settlement of civil cases. This laudatory objective has long been recognized by Canadian courts as fundamental to the proper administration of civil justice... Furthermore, the promotion of settlement is especially salutary in complex, costly, multi-party litigation. As observed in Amoco at p. 677:

> **In these days of spiralling litigation costs, increasingly complex cases and scarce judicial resources, settlement is critical to the administration of justice.**

66 The negotiated settlement between the appellants and the Settling Defendants, as recorded in the Agreements and reflected in the appellants' amended pleading, is in the public interest and the interests of all active parties to the litigation. The implementation of the Agreements, which necessitates an apportionment of liability at trial against the Settling Defendants, will result in the participation of fewer parties at trial and will

shorten the duration of the trial. This, in turn, will reduce the legal costs of the parties and permit the efficient use of judicial and court resources. As well, and importantly, the implementation of the Agreements is in the interests of all the defendants to the action. The interests of the Settling Defendants are furthered by the release contained in the Agreements and the potential liability of the Non-Settling Defendants is significantly limited under the bargain made by the appellants.

67 I conclude that 'Pierringer' settlement agreements, of the type employed in this case, should be supported in circumstances where, as here, the fairness of the settlement is unchallenged and prejudice arising from the full implementation of the settlement has not been alleged or shown. Cases of this kind cannot be rendered 'unsettleable', for all practical purposes, without just and substantive cause. Such cause does not arise in the case at bar.

Sable Offshore Energy Inc. v. Ameron International Corp. 2013 SCC 37 (S.C.C.)

The plaintiff sued defendants who supplied and applied an anti-corrosive paint which was used on both its off-shore and on shore-facilities alleging that the paint failed to prevent corrosion. The plaintiff entered into Pierringer Agreements with some of the defendants and sought to proceed with its action against the non-settling defendants. The terms of these agreements were disclosed with the exception of the quantum of the settlement. The trial judge found that the quantum of settlement was covered by settlement privileged and refused to order disclosure. The Nova Scotia Court of Appeal disagreed and ordered the amounts disclosed.

Per Abella J.:

[11] Settlements allow parties to reach a mutually acceptable resolution to their dispute without prolonging the personal and public expense and time involved in litigation. The benefits of settlement were summarized by Callaghan A.C.J.H.C. in Sparling v. Southam Inc. 1988 CanLII 4694 (ON SC), (1988), 66 O.R. (2d) 225 (H.C.J.):

[T]he courts consistently favour the settlement of lawsuits in general. To put it another way, there is an overriding public interest in favour of settlement. This policy promotes the interests of litigants generally by

saving them the expense of trial of disputed issues, and it reduces

the strain upon an already overburdened provincial Court system. [p. 230]

This observation was cited with approval in Kelvin Energy Ltd. v. Lee, 1992 CanLII 38 (SCC), [1992] 3 S.C.R. 235, at p. 259, where L'Heureux-
Dubé J. acknowledged that promoting settlement was "sound judicial policy" that "contributes to the effective administration of justice".

[12] Settlement privilege promotes settlements. As the weight of the jurisprudence confirms, it is a class privilege. As with other class privileges, while there is a prima facie presumption of inadmissibility, exceptions will be found "when the justice of the case requires it" (Rush & Tompkins Ltd. v. Greater London Council, [1988] 3 All E.R. 737 (H.L.), at p. 740).

[13] Settlement negotiations have long been protected by the common law rule that "without prejudice" communications made in the course of such negotiations are inadmissible (see David Vaver, "'Without Prejudice' Communications —Their Admissibility and Effect" (1974), 9
U.B.C. L. Rev. 85, at p. 88). The settlement privilege created by the "without prejudice" rule was based on the understanding that parties will be more likely to settle if they have confidence from the outset that their negotiations will not be disclosed. As Oliver L.J. of the English Court of Appeal explained in Cutts v. Head, [1984] 1 All E.R. 597, at p. 605:
[P]arties should be encouraged so far as possible to settle their disputes without resort to litigation and should not be discouraged by the knowledge that anything that is said in the course of such negotiations . . . may be used to their prejudice in the course of the proceedings. They should, as it was expressed by Clauson J in Scott Paper Co v. Drayton Paper Works Ltd (1927) 44 RPC 151 at 157, be encouraged freely and frankly to put their cards on the table.

What is said during negotiations, in other words, will be more open, and therefore more fruitful, if the parties know that it cannot be subsequently disclosed.

[14] Rush & Tompkins confirmed that settlement privilege extends beyond documents and communications expressly designated to be "without prejudice". In that case, a contractor settled its action

against one defendant, the Greater London Council (the GLC), while maintaining it against the other defendant, the Carey contractors. The House of Lords considered whether communications made in the process of negotiating the settlement with the GLC should be admissible in the ongoing litigation with the Carey contractors. Lord Griffiths reached two conclusions of significance for this case. First, although the privilege is often referred to as the rule about "without prejudice" communications, those precise words are not required to

invoke the privilege. What matters instead is the intent of the parties to settle the action (p. 739). Any negotiations undertaken with this purpose are inadmissible.

[15] Lord Griffiths' second relevant conclusion was that although most cases considering the "without prejudice" rule have dealt with the admissibility of communications once negotiations have failed, the rationale of promoting settlement is no less applicable if an agreement is actually reached. Lord Griffiths explained that a plaintiff in Rush & Tompkins' situation would be discouraged from settling with one defendant if any admissions it made during the course of its negotiations were admissible in its claim against the other:

> **In such circumstances it would, I think, place a serious fetter on negotiations . . . if they knew that everything that passed between them would ultimately have to be revealed to the one obdurate litigant. [p. 744]**

[16] In Middelkamp v. Fraser Valley Real Estate Board 1992 CanLII 4039 (BC CA), (1992), 71 B.C.L.R. (2d) 276 (C.A.), subsequently endorsed the view that settlement privilege covers any settlement negotiations. The plaintiff James Middelkamp launched a civil suit against Fraser Valley Real Estate Board claiming that it had engaged in practices that were contrary to the Competition Act, R.S.C. 1985, c. C- 34, and caused him to suffer damages. He also complained about the Board's conduct to the Director of Investigation and Research under different provisions of the Act, resulting in an investigation by the Director and criminal charges against the Board. The Board negotiated a settlement with the Department of Justice, leading to the criminal charges being resolved. Middelkamp sought disclosure of any communications made during the course of negotiations between the Board and the Department of Justice. McEachern C.J.B.C. refused to order disclosure of the communications on the basis of settlement

privilege, explaining:

> **. . . the public interest in the settlement of disputes generally requires "without prejudice" documents or communications created for, or communicated in the course of, settlement negotiations to be privileged. I would classify this as a "blanket, prima facie, common law, or 'class'" privilege because it arises from settlement negotiations and protects the class of communications exchanged in the course of that worthwhile endeavour.**
>
> **In my judgment this privilege protects documents and communications created for such purposes both from production to other parties to the negotiations and to strangers, and extends as well to admissibility, and whether or not a settlement is reached. This is because, as I have said, a party communicating a proposal related to settlement, or responding to one, usually has no control over what the other side may do with such documents. Without such protection, the public interest in encouraging settlements will not be served. [Emphasis added; paras. 19-20.]**

[17] As McEachern C.J.B.C. pointed out, the protection is for settlement negotiations, whether or not a settlement is reached. That means that successful negotiations are entitled to no less protection than ones that yield no settlement. The reasoning in Brown v. Cape Breton (Regional Municipality), 2011 NSCA 32 (CanLII), 2011 NSCA 32, 302 N.S.R. (2d) 84, is instructive. A plaintiff brought separate claims against two defendants for unrelated injuries to the same knee. She settled with one defendant and the Court of Appeal had to consider whether the trial judge was right to order disclosure of the amount of the settlement to the remaining defendant. Bryson J.A. found that disclosure should not have been ordered since a principled approach to settlement privilege did not justify a distinction between settlement negotiations and what was ultimately negotiated:

> **Some of the cases distinguish between extending privilege from negotiations to the concluded agreement itself. . . . The distinction . . . is arbitrary. The reasons for protecting settlement communications from disclosure are not usually spent when a deal is made. Typically parties no more wish to**

> **disclose to the world the terms of their agreement than their negotiations in achieving it. [Emphasis added; para. 41.]**
>
> **Notably, this is the view taken in Alan W. Bryant, Sidney N. Lederman and Michelle K. Fuerst, The Law Of Evidence in Canada (3rd ed. 2009), where the authors conclude:**
>
> **… the privilege applies not only to failed negotiations, but also to the content of successful negotiations, so long as the existence or interpretation of the agreement itself is not in issue in the subsequent proceedings and none of the exceptions are applicable. [Emphasis added; para. 14. 341.]**

**[18] Since the negotiated amount is a key component of the "content of successful negotiations", reflecting the admissions, offers, and compromises made in the course of negotiations, it too is protected by the privilege. I am aware that some earlier jurisprudence did not extend the privilege to the concluded agreement (see Amoco Canada Petroleum Co. v. Propak Systems Ltd., 2001 ABCA 110 (CanLII), 2001 ABCA 110, 281 A.R. 185, at para. 40, citing Hudson Bay Mining and Smelting Co. v. Wright 1997 CanLII 11529 (MB QB), (1997), 120 Man.
R. (2d) 214 (Q.B.)), but in my respectful view, it is better to adopt an approach that more robustly promotes settlement by including its content.**

[19] There are, inevitably, exceptions to the privilege. To come within those exceptions, a defendant must show that, on balance, "a competing public interest outweighs the public interest in

**encouraging settlement" (Dos Santos Estate v. Sun Life Assurance Co. of Canada, 2005 BCCA 4 (CanLII), 2005 BCCA 4, 207 B.C.A.C. 54, at
para. 20). These countervailing interests have been found to include allegations of misrepresentation, fraud or undue influence (Unilever plc
v. Procter & Gamble Co., [2001] 1 All E.R. 783 (C.A.), Underwood v. Cox (1912), 26 O.L.R. 303), and preventing a plaintiff from being overcompensated (Dos Santos).**

[20] The non-settling defendants argue that there should be an exception to the privilege for the amounts of the settlements because they say they need this information to conduct their litigation. I see no tangible prejudice created by

withholding the amounts of the settlements which can be said to outweigh the public interest in promoting settlements.

[21] The particular settlements negotiated in this case are known as Pierringer Agreements. Pierringer Agreements were developed in the United States to address the obstacles to settlement that arose in multi-party litigation. Professor Peter B. Knapp summarized the value — and complexity — of trying to settle multi- party litigation as follows:

Settlement of complicated multi-defendant civil litigation is particularly valuable, because complicated civil trials can consume enormous amounts of a judge's time and can be expensive for the parties. However, settling multi-defendant civil litigation can be especially difficult. Different defendants have different tolerances for risk, and some defendants are simply far less willing to settle than others.

"Keeping the Pierringer Promise: Fair Settlements and Fair Trials" (1994), 20 Wm. Mitchell L. Rev. 1, at p. 5.

[22] Professor Knapp also explained why, prior to Pierringer Agreements, settlements had been difficult to encourage:

On one hand, a plaintiff contemplating settlement with one of several defendants faced the possibility that release of the one defendant would also extinguish all claims against the nonsettling defendants. On the other hand, in jurisdictions which permitted contribution among joint tortfeasors, a settling defendant faced the possibility of post- settlement contribution claims made by the nonsettling defendants. [pp. 6-7]

[23] In the United States, Pierringer Agreements were found to significantly attenuate the obstacles in the way of negotiating settlements in multi-party litigation. Under a Pierringer Agreement, the plaintiff's claim was only "extinguished" against those defendants with whom it settled; the claims against the non-settling defendants continued. The settling defendants, meanwhile, were assured that they could not be subject to a contribution claim from the non-settling

defendants, who would be accountable only for their own share of liability at trial.

[24] Pierringer Agreements in Canada built on these American foundations and routinely included additional protections for non-settling defendants, such as requiring that non-settling defendants be given access to the settling defendants' evidence. In this case, for example, the court order approving the settlement required that the plaintiffs get production of all relevant evidence from the settling defendants and make this evidence available to the non-settling defendants on discovery. It also ordered that, with respect to factual matters, there be no restrictions on the non-settling defendants' access to experts retained by the settling defendants. In addition, the Agreements in this case specified that their non-financial terms would be disclosed to the court and non-settling defendants "to the extent required by the laws of the Province of Nova Scotia and the rulings and ethical guidelines promulgated by the Nova Scotia Barristers' Society" (A.R., at pp. 142 and 184).

[25] The non-settling defendants have in fact received all the non-financial terms of the Pierringer Agreements. They have access to all the relevant documents and other evidence that was in the settling defendants' possession. They also have the assurance that they will not be held liable for more than their share of damages. Moreover, Sable agreed that at the end of the trial, once liability had been determined, it would disclose to the trial judge the amounts it settled for. As a result, should the non-settling defendants establish a right to set-off in this case, their liability for damages will be adjusted downwards if necessary to avoid overcompensating the plaintiff.

[26] As for any concern that the non-settling defendants will be required to pay more than their share of damages, it is inherent in Pierringer Agreements that non-settling defendants can only be held liable for their share of the damages and are severally, and not jointly, liable with the settling defendants.

[27] It is therefore not clear to me how knowledge of the settlement amounts materially affects the ability of the non-settling defendants to know and present their case. The defendants remain fully aware of the claims they must defend themselves against and of the overall amount that Sable is seeking. It is true that knowing the settlement amounts might allow the defendants to revise their estimate of how much they want to invest in the case, but this, it seems to me, does not rise to a sufficient level of importance to displace the public interest in promoting

settlements.

[28] The non-settling defendants also argued that refusing disclosure impedes their own possible settlement initiatives since they are more likely to settle if they know the settlement amounts already negotiated. Perhaps. But they may also, depending on the amounts, arguably come to see them as a disincentive. In any event,

theirs is essentially a circular argument that the interest in subsequent settlement outweighs the public interest in encouraging the initial settlement. But the likelihood of an initial settlement decreases if the amount is disclosable.

[29] Someone has to go first, and encouraging that first settlement in multi-party litigation is palpably worthy of more protection than the speculative assumption that others will only follow if they know the amount. The settling defendants, after all, were able to come to a negotiated amount without the benefit of a guiding settlement precedent. The non-settling defendants' position is no worse. As Smith J. noted in protecting the settlement amount from disclosure in Bioriginal Food & Science Corp. v. Sascopack Inc., 2012 SKQB 469 (CanLII), 2012 SKQB 469 (CanLII):

. . . imperfect knowledge is virtually always the case in settlement negotiations. There are always knowns and known unknowns . . . [para. 33].

And Bryson J.A. compellingly summarized the competing arguments in Brown as follows:

Some courts have argued that it is necessary to go further and disclose the settlement amount itself. . . . They hold either that the agreement (unlike negotiations) is not privileged or that the settling parties have an advantage which should be redressed by disclosure. . . . If indeed settling parties thereby enjoy an advantage over non-settling parties, it is one for which they have bargained. The court should hesitate to expropriate that advantage by ordering disclosure at the instance of non-settling parties, intransigent or otherwise. The argument that disclosure would facilitate settlement amongst the remaining parties ignores that, but for the privilege, the first settlement would often not occur. [Citations omitted; para. 67.]

[30] A proper analysis of a claim for an exception

> **to settlement privilege does not simply ask whether the non-settling defendants derive some tactical advantage from disclosure, but whether the reason for disclosure outweighs the policy in favour of promoting settlement. While protecting disclosure of settlement negotiations and their fruits has the demonstrable benefit of promoting settlement, there is little corresponding harm in denying disclosure of the settlement amounts in this case.**
>
> **[31] I would therefore allow the appeal with costs throughout.**

Drywall Acoustic Lathing and Insulation, Local 675 Pension Fund (Trustees) v. SNC Group Inc.
2013 ONSC 6297 (Ont. S.C.J.)

A company announced an investigation by the company's audit committee into certain improper contracts, which violated the company's internal policies, and that its internal controls over disclosure, compliance, and financial reporting were inadequate. A class action was subsequently brought against the company by those interested in it alleging the company had bribed official to get a lucrative World Bank contract. The World Bank investigated and came to a settlement with the company. The plaintiffs sought the terms of the settlement.

Per Perrell J.:

[Does settlement attach?]

> **[69] Although the venerable settlement privilege emerged during the former times when the courts had a virtual monopoly on access to justice, in contemporary times, the courts have many partners in administering justice. Those partners are both in the public and the private sector of adjudication and of administering justice.**
>
> **[70] The adjudicative jurisdiction of the superior courts has been reduced by numerous public authorities, administrative agencies, administrative tribunals, and by arbitrators in the private sector. The courts do not have a monopoly on litigation. Save for its core jurisdiction and subject to the division of powers and the constraints of**
> **s. 96 of the Constitution Act, 1867, both the federal and the provincial governments can confer adjudicative jurisdiction onto**

administrative tribunals, and in contemporary times these tribunals have enormous workloads in administering justice and providing access to justice.

[71] The purposes of promoting settlement espoused by Justice Abella are not limited to the courts, and given her own experience as a former chair of the Ontario Labour Relations Board, a member of the Human Rights Commission of Ontario, a member of the Ontario Public Service Labour Relations Tribunal, and of the University of Toronto Academic Discipline Tribunal, it is inconceivable that she intended to circumscribe the scope of the settlement privilege to a court-centric privilege. If anything, he comments may be read for a liberal and broad mandate and scope for settlement privilege.

[72] In my opinion, I would cause considerable harm to access to justice and the administration of justice if I were to accept the Plaintiff's narrow scope for the settlement privilege. For instance, such a ruling would imperil the ability of a securities commission to negotiate a settlement with those participating in capital markets under the supervision of the commission.

[73] I accept that not all disputes are litigious in the sense necessary to trigger the settlement privilege, but the sanction procedures of the World Bank Sanctions Procedure, described above, with their superstructure of notices, accusers, (the Evaluation Officer, INT), respondents, statements of accusations, notice of the case to be

met, responses, replies, opportunities to be heard, rights of representation, evidence, onus of proof, and an adjudicative tribunal are patently litigation.

[74] I do not see how the asserted fact, which I doubt, but will accept for the purposes of argument, that the World Bank is never subject to any court's supervision makes the World Bank Sanctions Procedure non-litigious. Practically speaking, many administrative tribunals are immune to court supervision because they have an exclusive jurisdiction, are protected by privative clauses, and very rarely have any difficulty abiding by the rules of natural justice or operating within their exclusive jurisdiction. Notwithstanding the typical absence of any court supervision, the proceedings before these tribunals would qualify as litigation for the purposes of the settlement privilege.

[75] Further, in the immediate case in determining whether the circumstances that led to the Negotiated Resolution Agreement were litigation, it is worth noting that section 11.03(d) of the World Bank Sanctions Procedure provides that if a settlement agreement is to become effective before the commencement of sanctions proceedings, the terms of the agreement shall have the same effect as if sanctions proceedings had been commenced and concluded with the outcome as specified in the settlement agreement.

[76] In any event, having considered the Plaintiffs' arguments to the contrary, I am satisfied that the first element for settlement privilege (that litigation had been commenced or was within contemplation) is satisfied in the case at bar.

[77] I am also satisfied that the second element (the communication was made with the intention that it should not be disclosed) and the third element of settlement privilege (the purpose of the communication was to effect a settlement) are satisfied.

[78] I accept that there was no expressed intention that the communications should not be disclosed, but the circumstances of the immediate case, including, but not limited to, the confidentiality provisions of the World Bank Sanction Procedures, are strongly indicative that the parties to the negotiations intended that their settlement discussions not be disclosed and be treated as confidential.

[79] I do not see how the press releases of the parties, which had public relations purposes, detracted from the expected confidentiality of the settlement negotiations, which to use language of Justice Abella, "wraps a protective veil around the efforts parties make to settle their disputes by ensuring that communications made in the course of these negotiations are inadmissible."

[80] Similarly, the factual circumstances reveal that the primary and predominant purpose of the communications was to effect a settlement.

[81] I, therefore, conclude that the communications that lead to the Negotiated Resolution Agreement are prima facie privileged, and I turn to the Plaintiffs' second argument that in the circumstances of this case, the court should create an exception to the settlement privilege.

[Should there be an exception in this case?]

> **[84] That the settlement documents may contain the best evidence that SNC engaged in bribery and that it will be difficult or impossible to secure the evidence from the authorities in Bangladesh and that the World Bank has leverage that the Plaintiffs do not have are not public policy reasons for abrogating the settlement privilege in the interests of justice.**
>
> **[85] Once again, to repeat the words of Justice Abella, the settlement privilege is designed to provide a protective veil around the efforts parties make to settle their disputes by ensuring that communications made in the course of these negotiations are inadmissible. That protective veil does not come down because settlement privilege will deny a third party important evidence and admissions to prove its case. The protection does not disappear because the third party has a significant claim or a difficult case to make.**
>
> **[86] And, in my opinion, the protective veil does not come down to pursue purposes outside of the litigation, like Canada's responsibilities under the *United Nations Convention Against Corruption*.**
>
> **[87] The Plaintiffs are suing for money because of a violation of domestic securities market legislation, and they and Class Counsel are not on a mission to end corporation in Bangladesh in the interests of justice. Upon examination, the public policy exception that the Plaintiffs seek is not an exception to the settlement privilege but is an overheated submission that the settlement privilege should never apply because it will never be in the interest of justice since it interferes with a litigant's ability to prove a difficult and perhaps important case. This policy argument for an exception to settlement privilege simply does not work, and I reject it.**

Bullock & Sanderson Orders

***Bullock* Orders:**
From *Bullock v London General Omnibus Co.*, [1907] 1 KB 264 (Eng. C.A.).

The unsuccessful defendant is ordered to reimburse the plaintiff for costs ordered in favour of a successful defendant.

***Sanderson* Orders:**
From *Sanderson v Blyth Theatre Co.*, [1903] 2 KB 533 (Eng. C.A.).

The unsuccessful defendant is ordered to pay the successful defendant's costs directly to the successful defendant.

Rooney (Litigation Guardian of) v. Graham
2001 CanLII 24064 (Ont. C.A.)

There was a car accident which injured the plaintiff. The driver of the other car (Graham) said he was 'run off the road' by the driver of another car (Hnatiuk). The plaintiff sued Graham and Hnatiuk. As Graham was uninsured, the plaintiff made a claim against her own insurer based on a provision of the policy in respect of uninsured drivers' liability; the insurer denied the claim on the same grounds as Graham. Was the unsuccessful defendant liable in respect of the costs of the successful defendant? Yes. A *Sanderson* Order was granted.

Carthy J.A.:

> [6] A Bullock order directs an unsuccessful defendant to reimburse the plaintiff for the recovered costs of a successful defendant. A Sanderson order directs that the payment go directly to the successful defendant. The [rationale] behind both orders is the same. Where the allocation of responsibility is uncertain, usually because of interwoven facts, it is often reasonable to proceed through trial against more than one defendant. In these cases, a Bullock or Sanderson order provides a plaintiff with an appropriate form of relief.
>
> [7] A Bullock or Sanderson order has been said to be inappropriate when an independent cause of action is alleged against each defendant, for example when one is based in contract and the other in tort, or when separate actions have been instituted against each defendant...
>
> [8] In my view, these authorities do not provide a blanket rule that a Bullock or Sanderson order can never be made when the causes of action are independent, or when separate actions are instituted. Although such circumstances may indicate the appropriateness of these

orders, and will at times be determinative, each case must be assessed on its own facts. The proper approach to issuing a Bullock or Sanderson order will consider each case in its context. Thus, there may be times where the causes of action are independent or the actions separate, but it is nevertheless fair that the responsible defendant be called upon to pay for the inclusion of others in the trial proceedings.

[9] In this case, a separate action was brought on the contract with State Farm and was tried together with the negligence claims. Recall that Graham, the uninsured motorist, did not defend. It was therefore necessary for State

Farm to present his defence. Further, if State Farm had not been sued directly, it most certainly would have made itself a party in some guise in order to protect its $1 million coverage of Rooney. Therefore, even though State Farm was sued in contract, in reality it was defending against Graham's alleged negligence. To put it another way, if Graham had defended the action and won, a Sanderson or Bullock order against Hnatiuk would have been awarded in the normal course. Why should the outcome be any different simply because Graham's defence was provided by State Farm? I see the form as one of separate actions and distinct causes of action but the substance being one of a plaintiff suing two persons in negligence, one or both of whom may have caused her injuries in the first accident.

[10] In finding that Hnatiuk was not responsible for any of State Farm's costs, the trial judge relied on the plaintiff's refusal to accept State Farm's offer to settle. She concluded at para. 33:

> In the circumstances of this case, I am satisfied that the defendants Hnatiuk should not be responsible for any costs of the defendant State Farm. The decision to include State Farm in the trial and the decision not to accept State Farm's offer to settle was made by the plaintiffs alone and they must abide by the consequences of that decision. The costs in the contract action cannot be settled on the unsuccessful defendant in the negligence action.

[11] State Farm's offer asked Rooney to accept a dismissal of the claim with costs to be assessed. This was not an offer which could engage Rule 49 because that rule, by its wording, only applies when a plaintiff recovers a judgment. A dismissal of a plaintiff's claim is not a recovery. Therefore, a defendant who offers a dismissal is not making a Rule 49 offer... In refusing this offer, Rooney was doing no more than re-affirming her original decision to sue State Farm. It was certainly reasonable to

sue the owner and driver of the vehicle that struck her and, when they didn't defend, to pursue the responsible insurer. There is nothing on the record to show that at the time the offer was made, it would have been unreasonable to continue the action.

[12] Therefore, it is my conclusion that the trial judge erred in relying on the refusal of the offer to settle as a factor in her decision not to make a Bullock or Sanderson order.

.
.
.

[15] The question as to the jurisdiction to award costs against strangers to the action arose in the context of attempts to visit costs upon the principals of corporate plaintiffs. In Rockwell Developments Ltd. v. Newtonbrook Plaza Ltd., 1972 CanLII 531 (ON CA), [1972] 3 O.R. 199, 27 D.L.R. (3d) 651 (C.A.), this court set aside an order for costs against such a principal. Arnup J. held at p. 659 D.L.R. that what is now s. 131 of the Courts of Justice Act, R.S.O. 1990, c. C.43, should be interpreted as restricted to awarding costs against "parties to the proceeding before the court or judge". Exceptions were noted in such cases as where a "straw person" was put forward by the "real plaintiff". The same principle was applied to a similar fact situation in

Television Real Estate Ltd. v. Rogers Cable T.V. Ltd. (1997), 1997 CanLII 999 (ON CA), 34 O.R. (3d) 291, 12 C.P.C. (4th) 381 (C.A.).

[16] That is the context in which the courts have used the term "stranger to the action". Hnatiuk is not a stranger to the action against State Farm in any real sense, and certainly not to the proceedings as a whole. Hnatiuk and State Farm were active opponents in the struggle to deny liability or foist it on the other, albeit from the vantage point of separate actions. I see no reason to limit the jurisdiction of the court under s. 131 in these circumstances.

[17] I conclude that the trial judge erred in failing to recognize that, despite multiple causes of action and separate actions, the plaintiffs were in substance pursuing two potential perpetrators of negligent conduct. Furthermore, the plaintiffs acted reasonably throughout. Under the circumstances, therefore, fairness dictates that the party found to be responsible pay for the consequences of her negligent conduct; those consequences being in part the trial that was held in order to determine who, in fact, was responsible for the collision.

[18] I would therefore allow this appeal and award a Sanderson order

for payment by Hnatiuk of State Farm's party and party costs.

Bhuvanendra v. Sivapathasundram
2014 ONSC 737 (Ont. S.C.J.)

This was a contract case in which the plaintiff claimed on a promissory note. The only issue was whether one defendant (of three) was liable, the other defendants conceding liability. The third defendant was successful. Could the plaintiff shift the costs burden on to the two other defendants?

Gray J.:

> [2] I granted judgment to the plaintiff against two defendants, and dismissed the action against the third. The plaintiff requests costs on a substantial indemnity basis, or in the alternative, on a partial indemnity basis. The plaintiff claims to have incurred fees, disbursements and taxes of approximately $35,000.
>
> [3] In the event that I were to award costs in favour of the defendant against whom the action was dismissed, the plaintiff requests a Sanderson order, that would require those costs to be paid to that defendant directly by the two unsuccessful defendants.
>
> [4] Counsel for the defendants acknowledges that the two unsuccessful defendants should be liable for some costs to the plaintiff, but in a considerably lower amount than the amount requested by the plaintiff. Counsel submits that the successful defendant should be entitled to her costs on a substantial indemnity basis, in the amount of $16,776.18, and that there be no Sanderson order.
>
> [5] In cases where a plaintiff is successful against some defendants and not others, the court has discretion to, in effect, relieve the plaintiff from having to actually pay costs to the successful defendant or defendants, and to instead place the liability for those costs on the unsuccessful defendant or defendants. The techniques used by the court to accomplish that result have come to be referred to as a “Bullock” order and a “Sanderson” order. The Bullock order was named after the case of Bullock v. London General Omnibus Co., [1907] 1 K.B. 260 (C.A.), and the Sanderson order took its name from Sanderson v. Blyth Theatre Co., [1903] 2 K.B. 533 (C.A.). The difference between the two orders was described by Carthy J.A. in Rooney (Litigation Guardian of) v. Graham (2001), 2001 CanLII 24064 (ON CA), 53
> O.R. (3d) 685 (C.A.) at para. 6:

> A Bullock order directs an unsuccessful defendant to reimburse the plaintiff for the recovered costs of a successful defendant. A Sanderson order directs that the payment go directly to the successful defendant. The [rationale] behind both orders is the same. Where the allocation of responsibility is uncertain, usually because of interwoven facts, it is often reasonable to proceed through trial against more than one defendant. In these cases, a Bullock or Sanderson order provides a plaintiff with an appropriate form of relief.

[6] In my view, neither a Bullock order nor a Sanderson order is appropriate here. There was never much doubt about the liability of the two defendants against whom judgment was ordered. The real issue was whether the third defendant was liable. I held that she was not liable, and in so doing I made some rather harsh findings against the plaintiff. I found that he took advantage of his position as a family friend to induce the third defendant, who is the daughter of the other two defendants, into signing the promissory note upon which the action was based. There is no logical basis on which liability for the successful defendant's costs should be transferred from the plaintiff to the unsuccessful defendants.