Civil Procedure
Law 225

Fall 2018

Lecture Notes No. 6

IX. EXTRA-ORDINARY MOTIONS

(a) Introduction

Injunctive relief is an extraordinary remedy. It will only be granted in the clearest of cases. The test for an interlocutory injunction was set out by the Supreme Court of Canada in *R.J.R.-MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 SCR 311, at paras. 41-43, 49-50 (S.C.C.). The moving party must establish that:

(a) there is a serious issue to be tried;

(b) they will suffer irreparable harm or harm not compensable by an award of damages, if the injunction is not granted; and,

(c) the balance of convenience favours the moving party, in the sense that the harm to the moving party if the injunction is not granted must exceed the harm to the defendant if the injunction is granted.

The **Courts of Justice Act** provides the jurisdiction of the court:

96 (1) Courts shall administer concurrently all rules of equity and the common law.

…

Injunctions and receivers
101 (1) In the Superior Court of Justice, an interlocutory injunction or mandatory order may be granted or a receiver or receiver and manager may be appointed by an interlocutory order, where it appears to a judge of the court to be just or convenient to do so.

Terms
(2) An order under subsection (1) may include such terms as are considered just.

The **Rules** provide the procedure to be followed, subject to modification by the court:

RULE 40

40.01 An interlocutory injunction or mandatory order under section 101 or 102 of the Courts of Justice Act may be obtained on motion to a judge by a party to a pending or intended proceeding.

40.02 (1) An interlocutory injunction or mandatory order may be granted on

motion without notice for a period not exceeding ten days.

(2) Where an interlocutory injunction or mandatory order is granted on a motion without notice, a motion to extend the injunction or mandatory order may be made only on notice to every party affected by the order, unless the judge is satisfied that because a party has been evading service or because there are other exceptional circumstances, the injunction or mandatory order ought to be extended without notice to the party.

(3) An extension may be granted on a motion without notice for a further period not exceeding ten days.

(4) Subrules (1) to (3) do not apply to a motion for an injunction in a labour dispute under section 102 of the Courts of Justice Act.

40.03 On a motion for an interlocutory injunction or mandatory order, the moving party shall, unless the court orders otherwise, undertake to abide by any order concerning damages that the court may make if it ultimately appears that the granting of the order has caused damage to the responding party for which the moving party ought to compensate the responding party.

40.04 (1) On a motion under rule 40.01, each party shall serve on every other party to the motion a factum consisting of a concise argument stating the facts and law relied on by the party.

(2) The moving party's factum shall be served and filed with proof of service in the court office where the motion is to be heard at least seven days before the hearing.

(3) The responding party's factum shall be served and filed with proof of service in the court office where the motion is to be heard at least four days before the hearing.

One must also consult both provincial and regional **Practice Directions** respecting procedures for injunctive relief/

(b) Anton Piller Orders

An *Anton Piller* Order is essentially a civil search warrant; it is granted *ex parte* (without notice). The order derives its name from the case of *Anton Piller K.G. v. Manufacturing Processes Ltd.*, [1976] 1 All. E.R. 779 (C.A.).

Requirements:

1. The moving party must demonstrate a strong prima facie case.

2. The damage to the moving party of the defendant's alleged misconduct, potential or actual, must be very serious.

3. There must be convincing evidence that the defendant has in its possession incriminating documents or things.

4. It must be shown that there is a real possibility that the defendant may destroy such material before the discovery process can do its work.

5. The moving party is under a heavy obligation upon the moving party to make full and frank disclosure of all relevant facts to the Court.

6. The moving party must give an undertaking for damages.

Process:

1. The Order must be served under the supervision of an independent lawyer who will take custody of the original evidence.

2. The Order is returnable within a short time to allow for its continuance and to allow the respondents to make submissions before the Court.

3. Failure to abide by the Order is punishable in contempt.

4. The defendant needs to be provided reasonable time to consult with legal counsel;

5. The premise is not to be searched except in the presence of the defendant or a responsible employee of the defendant;

6. The order should set out provisions for dealing with solicitor-client privilege;

7. A detailed list of the evidence seized should be made and provided to the defendants for inspection before removing the evidence;

8. No material should be removed from the premises unless it is clearly set

out in the order.

[See *Celanese Canada, Inc. v. Murray Demolition Corp.*, 2006 SCC 36 (S.C.C.)]

Dish Network LCC v. Ramkissoon
2010 ONSC 773 (Ont. S.C.J.)

Per Cummins J.

The Execution of the Second Anton Piller Orders and the Motions for Findings of Contempt

[36] **Injunctions such as Anton Piller orders are "readily enforceable through the court's contempt power", and when one party alleges that another has failed to comply with such a court order, a motion for contempt may be made**: see Robert J. Sharpe, *Injunctions and Specific Performance*, looseleaf (Aurora: Canada Law Book, 1992) at para. 2.10.

[37] As stated above, **Anton Piller orders find their legitimacy in the court's inherent power to prevent the frustration of its process through destruction of evidence.** This inherent power extends to finding parties who so frustrate court orders to be in contempt.

[38] **A contempt motion is quasi-criminal in nature, as there is a potential for imprisonment. Therefore, proof beyond a reasonable doubt is required.**

[39] The plaintiffs are not required to prove that a defendant intended to act contemptuously. Instead, the plaintiffs are required to prove that a defendant must have intentionally committed an act prohibited by the Order.

[40] The test for a finding of contempt was considered recently by the Court of Appeal in Bell ExpreesVu Ltd. Partnership v. Torroni, 2009 ONCA 85 (CanLII), 2009 ONCA 85, 94 O.R. (3d) 614 [Torroni]. In Torroni, the court overruled a contempt finding on the basis that the motion judge failed to consider each element in the three-part test for contempt. At para. 21 of the decision, these elements are set forth as follows:

- the order that was breached must state clearly and unequivocally what should and should not be done;

- the party who disobeys the order must do so deliberately and wilfully; and

- the evidence must show contempt beyond a reasonable doubt.

[41] The first prong of the test can be determined by looking at the contents of the Orders. Are they clear? Do they make sense? Are they "clear to

a party exactly what must be done to be in compliance with the terms of an order"?: Torroni at para. 22.

[42] In the second prong of the test, one must consider the conduct of the alleged contemnors. What do their actions demonstrate? Evidence on the conduct of the Ramkissoons included an audio recording, affidavits from the ISS and representatives of legal counsel for the Plaintiffs and viva voce evidence from the Ramkissoons themselves.

[43] If there is legitimate confusion about the nature and scope of the contents of the Orders, contempt cannot be made out. In this instance, Orders were issued which allow for a search of the home and business of the Defendants and their cars. The items subject to the Orders are listed at para. 1 of the Orders. The rights and responsibilities of the Ramkissoons are laid out in the Orders, as well as the permissible method of execution. As stated above, the terms are clear and unequivocal.

[44] The rights and responsibilities of the Ramkissoons are clearly spelled out in the Orders, which are to, inter alia, allow the ISS to exercise their rights and discharge their duties and require the Defendants to "render any necessary assistance" to the ISS.

…

[49] On December 16, 2009, the Plaintiffs' representatives attended at the Digital Store premises at 34 Futurity Gate and the Jane Street residence to execute the Second Anton Piller Orders. The representatives included Mark Abradjian ("Abradjian"), Brad Wiseman ("Wiseman") and Renata Kis ("Kis"), the ISS appointed pursuant to the Second Anton Piller Orders, Steve Rogers ("Rogers") from the computer forensic firm Digital Evidence International Inc. ("DEI"), and Ira Nishisato ("Nishisato") and Isabella Massimi ("Massimi") from the Plaintiffs' law firm.

[50] Mr. Abradjian, the senior person of the ISS group, was not cross-examined on his affidavit dated December 29, 2009. Nor did counsel for Mr. and Ms. Ramkissoon ask that Mr. Abradjian or Mr. Nishisato be cross- examined at the hearing on the return of the motion for contempt. I accept the affidavit evidence of Mr. Abradjian and Mr. Nishisato and I prefer their evidence where there is conflict with the evidence of Mr. and Ms. Ramkissoon.

[51] I do not find either Mr. Ramkissoon nor Ms. Ramkissoon to be credible witnesses in their testimony, including their recounting of, and explanations for, their actions and behaviour during the execution of the

Second Anton Piller Orders by the ISS and Plaintiffs' counsel. I accept the evidence of Mr. Abradjian and Mr. Nishisato in preference to that of the Ramkissoons where their evidence is in conflict. I add that the detailed notes of

Mr. Abradjian, affixed to his affidavit, as to the events of December 16, 2009, together with the audio recording (and transcription thereof) for part of the time in the course of the events upon the execution of the Orders, support and confirm the affidavit testimony of Messrs. Abradjian and Nishisato and contradict the claims of the Ramkissoons. The audio recording confirms that Messrs. Abradjian and Nishisato calmly and patiently tried to explain why they were on the premises, the efforts at service of the Second Anton Piller Orders, the efforts at explaining the contents and nature of the Orders, and that they were seeking to preserve and protect the Evidence.

[52] Mr. Abradjian states that the execution of the Second Anton Piller Orders commenced at about 5:23 p.m. December 16, 2009 when Mr. and Ms. Ramkissoon arrived by car outside the Digital Store. Mr. Ramkissoon entered the Digital Store. Ms. Ramkissoon waited in the car. The Digital Store has a carpeted store area with a doorway leading to a hallway and outer office area with a back office which is entered by a doorway from the outer office area.

[53] Mr. Abradjian, followed by Mr. Nishisato within about 30 seconds, entered the premises following upon Mr. Ramkissoon's entrance. Mr. Abradjian states that Mr. Ramkissoon and another man, later determined to be Mr. Krishna Ramkissoon ("Krishna"), met him just inside the doorway leading from the carpeted store area into the outer office area. Mr. Abradjian says he identified himself as the ISS appointed officer pursuant to a Court Order and observed Mr. Nishisato identify himself and attempt to serve the Orders on both of them, together with a box containing the court materials to be served, although the Orders were not taken by Mr. Ramkissoon.

[54] Mr. Abradjian says he explained that the Second Anton Piller Orders required them to permit entry to the premises and that he wished to explain the Orders. Mr. Ramkissoon said he wanted to call his lawyer and took out his cell phone whereupon Mr. Abradjian says he said that Mr. Ramkissoon would have an opportunity to call his lawyer but was asked to put down his cell phone until Mr. Abradjian had a chance to explain the Orders and that nothing would happen while he explained it.

[55] Mr. Abradjian states that he was "…trying to ease a tense situation and was continuing to try to explain that they would have an opportunity to refuse entry to certain people for up to two hours and speak to their lawyers and that we could all go into the store area where I could explain the Order in an orderly way….".

[56] Mr. Nishisato confirms the account by Mr. Abradjian in Mr. Nishisato's own affidavit. Mr. Nishisato says he attempted to serve the Orders but that Mr. Ramkissoon refused to accept them. Mr. Nishisato says that Mr. Ramkissoon:

refused to permit Abradjian to explain the Orders at this time and walked

back towards the Office, and out of our view, with his phone to his ear….Krishna emerged from the Outer Office Area into the Hallway where Abradjian and I were standing …[and] would not permit Abradjian to move towards the Office to observe Ravin and physically blocked Abradjian's way.

[57] Ms. Ramkissoon had entered the premises by this point and was served by Mr. Nishisato. Mr. Abradjian states that Ms. Ramkissoon "took up the cause of demanding we leave and was insisting that we leave into the front store area and was edging us out of the back area".

[58] Ms. Ramkissoon prevented the passage of Messrs. Abradjian and Nishisato beyond the doorway from the store area into the outer office area while Mr. Ramkissoon went to the back office where he called his lawyer but could not be seen.

…

[62] Following upon further discussions between counsel, Mr. Moldaver and Mr. Nishisato agreed on a process to facilitate the execution of the Orders. Mr. Abradjian then explained the Orders to the Ramkissoons and, at approximately 7:55 p.m., the implementation of the search began with the ISS, Nishisato and Rogers, a computer forensic expert from DEI, walking through the premises to identify the Evidence.

[63] Mr. Abradjian states that, for the better part of the first hour following his initial entry, the Ramkissoons and Krishna "refused to allow me into the back office area and refused to come out the front store area for an explanation of the Order…":

I explained to both Mr. Ramkissoon and Mrs. Ramkissoon that I was concerned with the possibility that evidence could be deleted while Mr. Ramkissoon was in the back and Mrs. Ramkissoon refused entry thereto and my requests to attend in the backroom were repeatedly refused.

[64] While it is understandable that the Ramkissoons would be surprised and angry about the fact of the Orders, they knew the purpose of those Orders and the importance of being cooperative. They had experienced the execution of the First Anton Piller Orders and their aftermath. The Ramkissoons knew the Plaintiffs' accusations that they had deliberately prevented timely access to the execution of the First Anton Piller Orders. They were aware of the Plaintiffs' accusations that Mr. Ramkissoon had deliberately destroyed evidence while delaying access.

[65] Moreover, the Ramkissoons knew there was no objection to their calling their counsel, with privacy, for advice. Indeed, Mr. Nishisato told them he wanted them to speak with their counsel. But they also knew that the ISS wanted to keep Mr. Ramkissoon away from the Evidence while the ISS explained the nature of the Orders and while counsel was being contacted. The Ramkissoons knew that the predominant concern of the ISS and Plaintiffs' counsel from the point of their entry to the premises was to ensure that the Evidence was

preserved and protected. The Ramkissoons knew and understood that Messrs. Abradjian and Nishisato had real and serious concerns that the Orders might be compromised and rendered ineffective if they could not ensure that the premises and Evidence therein were secure while they explained the Orders and the Ramkissoons spoke with their counsel. Indeed, from 5:27 p.m. to 5:37 p.m., Mr. Ramkissoon spoke with his counsel but Mr. and Ms. Ramkissoon denied the ISS and Mr. Nishisato access beyond the doorway of the store area into the outer office area and the back office until about 6:55 p.m.

[66] Diagrams or sketches of the premises were put into evidence by both sides to the dispute. I find on the evidence that Mr. Ramkissoon and Krishna could not be observed by the ISS and Mr. Nishisato for much of the time between 5:23 p.m. and 6:55 p.m. such that the objective of preserving the Evidence was compromised and jeopardized by their actions and the actions of Ms. Ramkissoon.

[67] Computers that are the subject of the Second Anton Piller Orders were determined to be in the outer office area and the back office beyond the view of the ISS and Mr. Nishisato but were not delivered up to the ISS prior to 7:55 p.m.

[68] Mr. Ramkissoon and Ms. Ramkissoon refused to permit the ISS to fully explain the Second Anton Piller Orders between 5:20 p.m. and 6:55 p.m. despite repeated requests by the ISS to be able to do so. Telephone discussions between Messrs. Nishisato and Abradjian with Mr. Moldaver ultimately resulted in the ISS gaining access about 7:55 p.m. to the outer office area and the back office for the purpose of effectively executing the Second Anton Piller Orders.

[69] I find beyond any reasonable doubt on the evidence that Mr. and Ms. Ramkissoon intentionally did not disclose, deliver up and grant access to the outer office area and back office in a timely manner during the execution of the Second Anton Piller Orders. They wilfully and deliberately blocked and prevented entry and access to these areas of the premises to frustrate the purpose of the Orders in preserving the Evidence. They intentionally prevented the ISS upon their entry to the premises from being able to observe Mr. Ramkissoon and Krishna who had access to the Evidence in the outer office area and back office. They were intentionally in breach of ss. 2 , 4, 5, 17, 18 and 19 of the Orders by not allowing the ISS to keep the Evidence under observation until access would be granted. They did not render the necessary assistance to the ISS to effectively carry out their responsibilities under the Orders.

[70] I find beyond a reasonable doubt that the Ramkissoons deliberately and wilfully disobeyed the Second Anton Piller Orders. I find that Mr. and Ms. Ramkissoon are in contempt of the Second Anton Piller Orders. I turn now to a consideration of the specific components of the Evidence sought through the Second Anton Piller Orders.

On appeal, 2011 ONCA 478:

> [1] We view the actions of the appellants in refusing to comply with the Second Anton Pillar order as quite serious. Their conduct was both prejudicial to the respondents and an affront to the court. In our view, the sentences of four months' imprisonment for Mr. Ramkissoon, two months' imprisonment for Mrs. Ramkissoon and the order requiring that they pay the respondents' costs were fit sentences when imposed.
>
> [2] That said, the appellants have filed fresh evidence indicating they have now purged their contempt to the extent that they are able to do so, setting out their circumstances and expressing their remorse to the court. Importantly, the respondents do not oppose the motion to introduce fresh evidence or the appeal.
>
> [3] In the circumstances, the appeal is allowed and the sentence of imprisonment imposed on Mr. Ramkissoon is varied to time served (64 days); and the sentence of imprisonment imposed on Mrs. Ramkissoon is vacated. The order that the appellants pay the respondents costs shall remain in full force and effect.

Bergmanis v. Diamond & Diamond
2012 ONSC 5762 (Ont. S.C.J.)

Per Perrell J.:

> [44] **I accept that evidence of dishonesty, suspicious circumstances or misappropriation of property, etc. can justify the inference that there is a risk that evidence will be destroyed, but the onus remains on the plaintiff or applicant for an Anton Piller Order to prove that there is a real possibility that the defendant may destroy evidence before the discovery process can do its work**: Celanese Canada Inc. v. Murray Demolition Corp., supra, at para. 35, but it is not enough that an inference of dishonesty can be drawn from the evidence; rather, **the inference of dishonesty must be compelling**: Catalyst Partners Inc. v. Meridian Packaging Ltd., 2007 ABCA 201 (CanLII), [2007] 10 W.W.R.
> 436, at para. 34 (Alta. C.A.).
>
> [45] **To obtain an Anton Piller order, opinion, supposition or the plaintiff's fear or paranoia that documents will be destroyed will not suffice**: PricewaterhouseCoopers LLP v. Phelps, 2010, 2010 ONSC 1061, at para. 30 (S.C.J.); Agracity Ltd. v. Skinner, [2009] S.J. No. 555 (Sask. Q.B.), 52, 97-102, at paras. 52 and 53.
>
> [46] In my opinion, no dishonesty or suspicious circumstances or misappropriation of property has been shown in the case at bar. There is no

evidence of wrongdoing by Jeremy Diamond or Alex Ragozzino, nor does the evidence establish any grounds for believing that there is any risk that Jeremy Diamond or Alex Ragozzino would destroy any evidence in their possession.

[47] At best, the evidence on this motion establishes that there has been a breach of contract by the Respondents for which the normal remedy is damages. An interlocutory injunction is an extraordinary remedy and an Anton Piller order is an extraordinary-extraordinary remedy and it is not shelled out simply because the target of the order has relevant information that it has the ability to destroy.

[48] In his text, R.J. Sharpe, Injunctions and Specific Performance, (Canada Law Book: Aurora, ON, looseleaf, 2009) at ¶ 2.1240, Justice Sharpe writes:

It is one thing to justify a significant invasion of the defendant's privacy where there is strong evidence of an intent to flout the ordinary process and effectively deprive the plaintiff of rights but quite another to grant such drastic relief where there is no more than a possibility that the defendant might destroy evidence which might assist the plaintiff in making out his or her case.

[49] **It is not and cannot be the case that courts grant intrusive orders akin to a criminal search warrant with nothing more than evidence that there has been a breach of contract, and it is not and cannot be the case that courts grant intrusive orders akin to a criminal search warrant against a non-party, even a non-party who may be the means by which a contract has been breached, with nothing more than evidence that there has been a breach of contract.**

[50] Anton Pillar orders and Norwich orders are not a dime a dozen remedies; they are rare and precious remedies. With the light of a contested fully argued motion, in my opinion, the Anton Piller Order granted in this case should not be continued, and it should rather be set aside.

[51] I do not know why the Respondents did not move to have the order set aside, since it besmirches their reputation, and it may be that they have a grievance against Jeremy Diamond and are content to have the order go against him and Mr. Ragozzino. But, be that as it may, an Anton Pillar order or a Norwich order is not justified in the case at bar and the order should be set aside in its entirety.

[52] If the parties cannot agree about the matter of costs, they may make submissions in writing beginning with Messrs. Diamond and Ragozzino within 20 days of the release of these reasons followed by the Applicants'

submissions within a further 20 days.

[53] Order accordingly.

Question

A new client tells you that he wants to fire his sales manager for copying confidential information respecting products in development in express violation of his contract. He advises that he had been contacted earlier that day on an informal basis by an employment recruiter to sound him out about the employee who evidently provided a CV and assured the recruiter that he would be an "invaluable asset" to a competitor of your client. Your client advises that he checked the computer logs and noted that the employee had downloaded a huge amount of confidential company information to his laptop which is missing. Assuming there are valid grounds to fire the employee, what considerations are important in deciding whether to apply for an Anton Piller Order?

(c) 'Norwich' Orders

A 'Norwich' or 'Norwich Pharmacal' Order is an equitable order of the court - an 'equitable bill of discovery' to be precise - which allows a party to obtain pre-action discovery; for example, access to businesses files held by a third party to obtain the identity and address of the party to be sued or the location of assets. It is most often used in the context of fraud.

The use of such orders can be traced to an English case, *Norwich Pharmacal Co. v. Customs and Excise Commissioners*, [1974] A.C. 133 . The rationale for the rule was set out in that case by Lord Reid:

> On the whole I think they favour the appellants, and I am particularly impressed by the views expressed by Lord Romilly M.R. and Lord Hatherley L.C. in *Upmann v. Elkan* (1871) L.R. 12 Eq. 140; 7 Ch.App. 130. They seem to me to point to a very reasonable principle that **if through no fault of his own a person gets mixed up in the tortious acts of others so as to facilitate their wrong-doing he may incur no personal liability but he comes under a duty to assist the person who has been wronged by giving him full information and disclosing the identity of the wrongdoers.** I do not think that it matters whether he became so mixed up by voluntary action on his part or because it was his duty to do what he did. **It may be that if this causes him expense the person seeking the information ought to reimburse him. But justice requires that he should co-operate in righting the wrong if he unwittingly facilitated its perpetration.**

The utility of such an order is quite obvious in the age of the Internet; equally, that context well points out the problem, intrusion on a legitimate expectation of privacy.

Autopoietic Telemetric Solutions Limited v. Loughlin
2012 ONSC 2305 (Ont. S.C.J.)

Quigley J.:

> [1] The plaintiff Autopoietic Telemetric Solutions Limited ("ATS"), moves ex parte under Rule 37.12.1(1) based on allegations of fraud for Mareva Injunction and other related orders freezing the bank accounts in Canada held at TD Canada Trust by the defendant Michael Loughlin, trading as Eurologix Security. The related relief sought includes an order preventing the dissipation of assets owned by the defendant in Canada or elsewhere, an order preventing the sale or other disposition of the real estate located at 5 Hesham Dr., Whitby, Ontario, and finally, a Norwich Order requiring the Toronto Dominion Bank, or TD Canada Trust to provide access and information to ATS regarding the bank account to which the it transferred U.S. $1,873,070.28 to or for the credit of the defendants.
>
> [2] ATS is a company registered in the United Kingdom with a

registered address at 18 Hartman Lane, South Shields, Tyne & Wear, England, NE34 0EF, and it carries on business as a supplier of telemetric products and counterterrorism consultancy and equipment. It was formed in 2010 with contacts in the Nigerian government. It has websites that can be found on the Internet at www.autopoietic.com and www.ATS – guickby.com.

[3] The individual defendant is a director of a registered company in the United Kingdom by the name of Eurologix Security Limited. In Ontario, however, the defendant does not carry on business through a corporate entity, but rather, as a sole proprietorship with the registered business name of "Eurologix Security." Its business registration number of 190118562 is attributed to that business at a registered place of business, which is reflected in the business registration records as being located at 15 Heaver Dr., Whitby, Ontario L1N 9K4.

[4] In support of the injunctive relief sought by the plaintiff in this motion, an affidavit is filed by one Nkiruka Ochei, an assistant to Mr. Christian Chijindu, the solicitor for the plaintiff, ATS. That affidavit is largely based upon an affidavit filed by Mr. Philip Tann, Director and Chief Technical Officer of ATS, which was filed in the High Court of Justice, Queen's Bench Division in the United Kingdom in support of a Mareva Injunction and similar relief that has been granted there freezing the assets of Mr. Loughlin and Eurologix Security Limited in the similar action commenced by ATS in the United Kingdom. Particulars of that claim, the affidavit of Dr. Tann, and the Order of the Hon. Mr. Justice Eder of the High Court of Justice, Queen's Bench Division issued on December 29, 2011 and filed on December 30, 2011 in the Queen's Bench Listing of the High Court of Justice, were attached as Exhibit 2 to Mr. Ochei's affidavit.

[5] **The specific claims of the plaintiff relate to three purchase orders under which the defendant is alleged to have agreed to supply certain detection equipment upon receipt of funds in its Canadian bank account in Whitby, Ontario in the sums of $1,534,995.06, $214,845.12, and $123,230.10, for a total of $1,873,070.28, all in United States dollars. ATS transferred those amounts electronically into a TD Canada Trust account that is under the sole and absolute control of the defendant at the TD Canada Trust branch located at 110 Taunton Rd., Whitby, Ontario. The last transfer of funds is alleged to have taken place on October 17, 2011. Notwithstanding the transfer of funds, however, no goods were ever delivered to the consignment address in Nigeria.**

[6] **Then, in November of 2011 and after allegedly receiving all of the monies paid for the supply of the contracted goods, Mr. Loughlin advised the plaintiff that Eurologix Security Canada had met its demise, that he had been laid off and that the company had "gone bankrupt." As a result, Mr. Loughlin indicated to the UK purchasers that the equipment would not be supplied. He told them that the money might not be refunded in light of the alleged bankruptcy of Eurologix Security Canada. He told**

them not to contact him further.

[7] Based on its investigations and these assertions of fact, however, ATS contends that there is no such company as "Eurologix Security Limited" or "Eurologix Canada" registered in any province in Canada. Contrary to John Loughlin's claims as reflected in e-mail exchanges between himself and Dr. Philip Tann and which were included as exhibits in the application record, "Eurologix Security Canada" does not actually exist. It is not a bankrupt company. Eurologix Security Canada is not an incorporated entity reflected in the files of bankrupt corporations. Rather, as noted, that name appears merely to be a trade name used by Mr. Loughlin for the purposes of operating his "business."

[8] Rather, **ATS contends that Michael Loughlin, the defendant, is the sole owner and proprietor of Eurologix Security and, accordingly, that he is individually liable and responsible for the defalcation and fraud that is alleged to have been perpetrated by him against ATS as set out in its Statement of Claim dated April 3, 2012, and in the similar claims it has commenced in the United Kingdom. ATS contends that the defendant is singularly responsible for the operation and running of the accounts to which ATS deposited its monies in respect of contracts entered into for the purchase of the goods which were to be supplied to addresses in Nigeria. ATS claims that those contracts have been breached by the defendants by their failure to deliver the goods to the purchaser as agreed. It claims that the failure of these contracts is due to fraudulent conduct and that the defendant is the commanding mind behind the frauds that are alleged to have been perpetrated against it by the individual defendant in his own right, and under Eurologix Security's trade name.**

[9] The position of the plaintiff is that the defendant misrepresented these matters as part of a deliberate effort to embezzle funds belonging to ATS with the intention of unjustly enriching himself with the plaintiff's money. ATS says that its investigations have disclosed that Mr. Loughlin bought a house in Whitby, Ontario for $369,500 in cash and without a mortgage in December 2011. Further, it is claimed that Mr. Loughlin has paid off all of his debt and his mortgage in the United Kingdom, relative to the UK residential addresses reflected in the UK court documentation, and it is believed that he has been embezzling the funds continuously since they have been received.

[10] It is for these reasons that the plaintiff seeks not only a Mareva Injunction and non-dissipation orders relative to the assets of the defendant, but also a Norwich Order requiring the Toronto Dominion Bank to disclose

the receipt and disbursement of funds relative to this account in order to assist the plaintiff to trace the allegedly embezzled funds.

Analysis

[11] ATS seeks this interim injunctive relief under Rule 40 of the Rules of Civil Procedure and section 101 of the Courts of Justice Act. The injunction is requested on an interlocutory or interim basis in order to prevent the defendant from dissipating assets allegedly wrongly received by him. To succeed in obtaining the injunction it seeks, the applicant must establish that there is either a prima facie case or that the claim is not frivolous or vexatious. In a case such as this, where it is an interim injunction that is sought without notice in an effort to restrain the respondent from disposing of his assets until the disposition of the case or further order of the court, it is the higher prima facie threshold that applies. The applicant must demonstrate the existence of a serious question to be tried.

[12] Secondly, ATS must show that it would suffer irreparable harm if the injunction were to be refused. In assessing that question, the court is to determine whether the harm caused is of such a nature that it is not compensable by damages. Irreparable harm may be also be found where one party will suffer permanent market loss or irrevocable damage to its business reputation which is not capable of being calculated: see R.J.R. MacDonald Inc. v. Canada (Attorney General), 1994 CanLII 117 (SCC), [1994] 1 S.C.R. 311 (S.C.C.) at para. 64, and Canpages Inc. v. Québecor Media Inc., (2008) reflex, CarswellOnt 3193 (Ont. Sup. Ct.) at para. 14.

[13] Finally, the applicant must show that it will suffer the greater harm from the refusal of the injunction to be granted them the respondent will likely suffer from the granting of the injunction: see R.J.R. MacDonald, above, at paragraph 48. Reduced to its essence, however, the law requires that these three conditions must be considered simultaneously to determine if it is appropriate that the Mareva Injunction be granted, and the central question in that determination is whether it is just and equitable in the circumstances of the case to grant the injunctive relief: 2645 Skymark Investments Inc. v. Canadian Neher Holdings Corp., reflex, 2000 CarswellOnt 23 (Ont. Sup. Ct.)

[14] **As for the Norwich Order, the test set out in Isophoton S.A. v. Toronto Dominion Bank, 2007 CanLII 14626 (ON SC), 2007 CanLII 14626 (ONSC), requires that five separate elements be considered before the order is granted. First, there should be evidence of a valid bona fide claim or a reasonable claim and the standard required is that the claim not be frivolous or vexatious. This test is essentially the same as that established under the Mareva Injunction requirements. Secondly, the applicant must establish that the bank from which the information is sought is somehow connected in the wrongful act, albeit innocently. Thus, in a case such as this one, when the bank is allegedly unknowingly in receipt of allegedly fraudulent funds, it will be considered to be an "innocently involved" third party.**

[15] Third, the bank must be the only practicable source of information in light of the inability of the victim to approach the alleged

wrongdoer for the information. The case law shows that financial institutions are often the only real source of the information required to prove a claim and permit the wronged party to locate fraudulently transferred assets or funds. Fourth, the victim is required to indemnify the third party for any costs associated with complying with the order, but in Isophoton, the court rejected the argument that an undertaking as to damages was required, stating that it was difficult to envisage a situation in which a financial institution that is subject to a Norwich Order would be subjected to liability and a damages award for disclosing financial information pursuant to a court order. The court advised there that should a concern materialize for the financial institution in the facts of a specific case, the financial institution in question could seek the additive protection of being able to retain legal counsel and return to court for further directions if necessary.

[16] **Finally, a Norwich Order will only be issued after the court has considered all the respective interests and weighed the benefits of revealing the information against the interest of maintaining confidentiality. This follows since there is serious prejudice to an alleged wrongdoer in releasing confidential financial records without their knowledge or consent, but on the other hand, our courts are reluctant to protect the rights of wrongdoers if maintaining confidentiality in essence protects fraudulent conduct, or acts.**

[17] I agree that the plaintiff, ATS has established a prima facie case as against the defendant, based on the affidavit evidence and exhibits set out in their ex parte motions materials. As such, their application will succeed and they will be granted the orders they seek freezing the bank accounts at Toronto Dominion and TD Canada Trust and to trace and preserve the assets of the defendant with the account held at TD Canada Trust on the authority of the R.J.R. MacDonald and Isophoton decisions. It is of considerable support and relevance to my conclusion that asset-freezing and non-dissipation orders have already been obtained by the ATS from the High Court of Justice - Court of Queen's Bench Division in the United Kingdom based on the thorough and detailed affidavit of Dr. Philip Tann, dated December 29, 2011. Moreover, having regard to the almost U.S. $2 million value of the claim made by the plaintiff as against the defendant, Michael Loughlin, with respect to funds allegedly transferred to the TD Canada Trust bank account in Whitby, Ontario, it seems clear to me that the balance of convenience in a circumstance such as this unquestionably favors the plaintiff.

[18] The prima facie evidence presented on this motion for an ex parte Mareva Injunction and Norwich Order satisfies me that justice demands that the freezing order sought by the plaintiff be granted on an interim without prejudice basis for at least such time until the matter can return after the orders have been implemented and a return date is established for the return of the motion. Obviously it will be up to the motions judge on the return date
to determine whether the injunctive relief ought to be continued beyond that date

and if so, on what terms. In light of the fact that the injunction is being issued on April 12, 2012, it strikes me that the motion should be initially returnable in two weeks for the purposes of the matter to at least be spoken to at that time, and to enable the court to obtain an update on what the circumstances are and what the fallout has been from the granting of its order freezing Mr. Loughlin's Canadian assets, and requiring the Toronto Dominion Bank to produce the information sought by the plaintiffs pursuant to the Norwich Order granted hereunder.

[19] Orders are to go as follows:

(a) an order of interlocutory or interim injunction against the defendant from the moving of any of his assets in Canada; in particular, his bank accounts held at the TD Canada Trust into which the plaintiff claims to have made payments;

(b) an order freezing the bank accounts or any account held at TD Canada Trust by the defendant, in his personal capacity, or his capacity trading as Eurologix Security;

(c) an order preventing the defendant Michael Loughlin, on his own or carrying on business as Eurologix Security, from disposing of, dealing with or diminishing the value of any assets owned by him in Canada or elsewhere;

(d) an order preventing the defendant, Michael Loughlin from selling or otherwise disposing of the real estate known as 5 Hesham Dr., Whitby, Ontario; and

(e) an order requiring the Toronto Dominion Bank or TD Canada Trust to provide access and information to the plaintiff regarding the bank account to which the plaintiff transferred the sum of $1,873,070.28 in United States dollars to or for the credit of the defendant.

[20] In light of the circumstances, costs of this ex parte order are reserved to the motions return judge on April 26, 2012.

(d) Mareva Injunctions

A Mareva injunction is a freezing order, most often in relation to a bank account.

Sibley & Associates LP v. Ross
2011 ONSC 2951 (Ont. S.C.J.)

Strathy J.:

Requirements of a Mareva Injunction

> **[11] There are five requirements for a Mareva injunction:**
>
> **(a) the plaintiff must make full and frank disclosure of all material matters within his or her knowledge;**
>
> **(b) the plaintiff must give particulars of the claim against the defendant, stating the grounds of the claim and the amount thereof, and the points that could be fairly made against it by the defendant;**
>
> **(c) the plaintiff must give grounds for believing that the defendant has assets in the jurisdiction;**
>
> **(d) the plaintiff must give grounds for believing that there is a real risk of the assets being removed out of the jurisdiction, or disposed of within the jurisdiction or otherwise dealt with so that the plaintiff will be unable to satisfy a judgment awarded to him or her; and**
>
> **(e) the plaintiff must give an undertaking as to damages.**
>
> See Chitel v. Rothbart (1982), 1982 CanLII 1956 (ON CA), 39 O.R. (2d) 513, [1982] O.J. No. 3540, 141 D.L.R. (3d) 268 (C.A.), referred to C.A. by Andersen J. in (1982), 1982 CanLII 2031 (ON SC), 36 O.R. (2d) 124, [1982] O.J. No. 3197 (H.C.J.); Third Chandris Shipping Corp. v. Unimarine S.A., [1979] 1 Q.B. 645, [1979] 2 All E.R. 972 (C.A.).
>
> **[12] It is a condition-precedent to the order that the plaintiff demonstrate a strong prima facie case**: Aetna Financial Services Ltd. v. Feigelman, 1985 CanLII 55 (SCC), [1985] 1 S.C.R. 2, [1985] S.C.J. No. 1, 15 D.L.R. (4th) 161, at p. 27 S.C.R.
>
> [13] When this matter initially came before me, I was satisfied that the plaintiff had made out a very strong prima facie case. I also concluded that the plaintiff had satisfied items (a), (b) and (e), which are requirements of the standard injunction test, as noted at p. 532 O.R. of Chitel v. Rothbart, above.
>
> [14] I was also reasonably satisfied that the plaintiff had met the requirement of item (c) as there is evidence that the defendants have assets, in the form of bank accounts, in this jurisdiction.

Strathy J. then considered whether allegations of fraud changed the nature of the approach to the granting of a Mareva injunction. After a near comprehensive analysis of the cases, he held there was no such exception but the nature of the allegations coloured the application of the test:

> **[62] From Chitel v. Rothbart to the present day, the law has sought to draw a fair balance between leaving the plaintiff with a "paper judgment" and the entitlement of the defendant to deal with his or her property until judgment has issued after a trial. In my respectful view, a plaintiff with a strong prima facie case of fraud should be in no more favoured position than, say, a plaintiff with a claim for libel, battery or spousal support. On the other hand, there may be circumstances of a particular fraud that give rise to a reasonable inference that the perpetrator will attempt to perfect the deception by making it impossible for the plaintiff to trace or recover the embezzled property. To this extent, it seems to me that cases of fraud may merit the special treatment they have received in the case law.**
>
> **[63] Rather than carve out an "exception" for fraud, however, it seems to me that in cases of fraud, as in any case, the Mareva requirement that there be risk of removal or dissipation can be established by inference, as opposed to direct evidence, and that inference can arise from the circumstances of the fraud itself, taken in the context of all the surrounding circumstances. It is not necessary to show that the defendant has bought an air ticket to Switzerland, has sold his house and has cleared out his bank accounts. It should be sufficient to show that all the circumstances, including the circumstances of the fraud itself, demonstrate a serious risk that the defendant will attempt to dissipate assets or put them beyond the reach of the plaintiff.**

2092280 Ontario Inc. v. Voralto Group Inc.
2018 ONSC 2305 (Ont. Div. Ct.)

This was an unusual case procedurally in that the Divisional Court allowed for an *ex parte* appeal of an *ex parte* motion for a Mareva injunction. The chief complaint accepted on appeal was that notice of the motion need not be given to the defendants notwithstanding that a statement of claim had already been delivered. The Court held:

> [27] As all of the requirements for a Mareva injunction appear to be satisfied, there is reason to doubt the correctness of the order in question.
>
> **[28] The proposed appeal involves matters that in the panel's opinion require that leave to appeal should be granted. Fraud is a serious crime which threatens unwitting victims with substantial and often devastating financial losses. The Mareva injunction is an important tool for Plaintiffs to try and recover their losses due to fraud or theft. A requirement to notify the perpetrators of a fraud in advance of an impending Mareva injunction would significantly water-down an important remedy for protecting innocent victims. Judgments for damages cannot reasonably be expected to be**

affordable or collectable against fraudsters. If funds cannot be frozen in advance, a vital arrow in the civil law's quiver to address serious fraud will be lost. This is a narrow exception to the general rule against prejudgment execution. It is therefore a remedy that is not readily available. However, where evidence discloses a strong prima facie case that Defendants perpetrated a premeditated, substantial fraudulent scheme against innocent victims, the law's reluctance to allow prejudgment execution must yield to the more important goal of ensuring that the civil justice system provides a just and enforceable remedy against such serious misconduct.

[29] There are adequate safeguards associated with the Mareva order which provide for the protection of defendants who are the subject of a Mareva order. The Defendants may be able to use frozen funds to defend themselves and for living expenses provided they satisfy the applicable legal tests and accept the usual safeguards. In addition, as discussed above, the Plaintiffs are required to give an undertaking with respect to damages. Further, the Plaintiffs are required to promptly serve a copy of the order on the Defendants affected. The matter will be scheduled to come back before a single judge hearing motions in the Superior Court within 10 days of the court order to hear the Remaining Defendants' submissions and ensure that there is a prompt opportunity by the court to reconsider the appropriateness of the order.

X. COSTS AND SETTLEMENT

(a) Introduction

The ***Courts of Justice Act*** provides the Court's substantive jurisdiction to order costs:

> 131 (1) Subject to the provisions of an Act or rules of court, the costs of and incidental to a proceeding or a step in a proceeding are in the discretion of the court, and the court may determine by whom and to what extent the costs shall be paid.
>
> (2) In a proceeding to which Her Majesty is a party, costs awarded to Her Majesty shall not be disallowed or reduced on assessment merely because they relate to a lawyer who is a salaried officer of the Crown, and costs recovered on behalf of Her Majesty shall be paid into the Consolidated Revenue Fund.

It is important to note the **discretionary nature** of costs.

Procedurally, two Rules are important: Rule 49 (dealing with the costs consequences attached to settlement offers) and Rule 57 (costs generally). **Please read these two rules carefully.**

(b) Settlement

(i) 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:

> 49.01 In rules 49.02 to 49.14,
>
> "defendant" includes a respondent; ("défendeur")
>
> "plaintiff" includes an applicant. ("demandeur") R.R.O. 1990, Reg. 194, r. 49.01.
>
> WHERE AVAILABLE
>
> 49.02 (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).
>
> (2) Subrule (1) and rules 49.03 to 49.14 also apply to motions, with necessary modifications.
>
> TIME FOR MAKING OFFER
>
> **49.03 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.

WITHDRAWAL OR EXPIRY OF OFFER

Withdrawal

49.04 (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.

Offer Expiring after Limited Time

(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.

Offer Expires when Court Disposes of Claim

(4) An offer may not be accepted after the court disposes of the claim in respect of which the offer is made.

EFFECT OF OFFER

49.05 An offer to settle shall be deemed to be an offer of compromise made without prejudice.

DISCLOSURE OF OFFER TO COURT

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.

ACCEPTANCE OF OFFER

Generally

49.07 (1) An offer to settle may be accepted by serving an acceptance of offer (Form 49C) on the party who made the offer, at any time before it is withdrawn or the court disposes of the claim in respect of which it is made.

(2) Where a party to whom an offer to settle is made rejects the offer or responds with a counter-offer that is not accepted, the party may thereafter

accept the original offer to settle, unless it has been withdrawn or the court has disposed of the claim in respect of which it was made.

Payment into Court or to Trustee as Term of Offer

(3) An offer by a plaintiff to settle a claim in return for the payment of money by a defendant may include a term that the defendant pay the money into court or to a trustee and the defendant may accept the offer only by paying the money in accordance with the offer and notifying the plaintiff of the payment.

Payment into Court or to Trustee as a Condition of Acceptance

(4) Where a defendant offers to pay money to the plaintiff in settlement of a claim, the plaintiff may accept the offer with the condition that the defendant pay the money into court or to a trustee and, where the offer is so accepted and the defendant fails to pay the money in accordance with the acceptance, the plaintiff may proceed as provided in rule 49.09 for failure to comply with the terms of an accepted offer.

Costs

(5) Where an accepted offer to settle does not provide for the disposition of costs, the plaintiff is entitled,

(a) where the offer was made by the defendant, to the plaintiff's costs assessed to the date the plaintiff was served with the offer; or

(b) where the offer was made by the plaintiff, to the plaintiff's costs assessed to the date that the notice of acceptance was served.

Incorporating into Judgment

(6) Where an offer is accepted, the court may incorporate any of its terms into a judgment. R.R.O. 1990, Reg. 194, r. 49.07 (6).

Payment out of Court

(7) Where money is paid into court under subrule (3) or (4), it may be paid out on consent or by order. R.R.O. 1990, Reg. 194, r. 49.07 (7).

PARTIES UNDER DISABILITY

49.08 A party under disability may make, withdraw and accept an offer to settle, but if approval of the settlement is required under rule 7.08, 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 that approval has been given.

FAILURE TO COMPLY WITH ACCEPTED OFFER

49.09 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.

COSTS CONSEQUENCES OF FAILURE TO ACCEPT

Plaintiff's Offer

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.

Defendant's Offer

(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.

Burden of Proof

(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).

MULTIPLE DEFENDANTS

49.11 Where there are two or more defendants, the plaintiff may offer to settle with any defendant and any defendant may offer to settle with the plaintiff, but where the defendants are alleged to be jointly or jointly and severally liable to the plaintiff in respect of a claim and rights of contribution or indemnity may exist between the defendants, the costs consequences prescribed by rule 49.10 do not apply to an offer to settle unless,

(a) in the case of an offer made by the plaintiff, the offer is made to all the defendants, and is an offer to settle the claim against all the defendants; or

(b) in the case of an offer made to the plaintiff,

(i) the offer is an offer to settle the plaintiff's claim against all the defendants and to pay the costs of any defendant who does not join in making the offer, or

(ii) the offer is made by all the defendants and is an offer to settle the claim against all the defendants, and, by the terms of the offer, they are made jointly and severally liable to the plaintiff for the whole amount of the offer.

OFFER TO CONTRIBUTE

49.12 (1) Where two or more defendants are alleged to be jointly or jointly and severally liable to the plaintiff in respect of a claim, any defendant may serve on any other defendant an offer to contribute (Form 49D) toward a settlement of the claim.

(2) The court may take an offer to contribute into account in determining whether another defendant should be ordered,

(a) to pay the costs of the defendant who made the offer; or

(b) to indemnify the defendant who made the offer for any costs that defendant is liable to pay to the plaintiff, or to do both.

(3) Rules 49.04, 49.05, 49.06 and 49.13 apply to an offer to contribute as if it were an offer to settle.

DISCRETION OF COURT

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.

APPLICATION TO COUNTERCLAIMS, CROSSCLAIMS AND THIRD PARTY CLAIMS

49.14 Rules 49.01 to 49.13 apply, with necessary modifications, to counterclaims, crossclaims and third party claims.

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

(ii) 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:

> An offer to settle made pursuant to Rule 49 ("Rule 49 offer") has the following features:
>
> It must be in writing.
>
> It must be effectively delivered to the opposing party.
>
> It must be a proposal that can be construed as an offer to settle, open for acceptance and binding if accepted.
>
> It may be in Form 49A, but the use of that form is permissive.
>
> It may be communicated in correspondence between counsel.
>
> 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]
>
> 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:

> [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:
>
> 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.
>
> 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:

> 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
>
> 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.

(iii) 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:

> 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.
>
> 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.
>
> 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.
>
> 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.
>
> 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.
>
> 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.

(iv) 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.

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

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

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.

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?

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

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

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

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.

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.

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.

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.

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:

no order giving effect to the settlement had been taken out, so that the parties' pre-settlement positions remained intact;

apart from losing the benefit of the impugned settlement, the defendant would not be prejudiced if the settlement was not enforced;

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

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

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.

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.

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.

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.

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.

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.

(c) 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.

(i) 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.:

> ... Cases in the United States have indicated that a typical Mary Carter agreement contains the following features:
>
> - The contracting defendant guarantees the plaintiff a certain monetary recovery and the exposure of that defendant is "capped" at that amount.
>
> - The contracting defendant remains in the lawsuit.
>
> - The contracting defendant's liability is decreased in direct proportion to the increase in the non-contracting defendant's liability.
>
> - The agreement is kept secret.
>
> ...
>
> 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.
>
> 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.

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.

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

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.

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.

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.

When must such agreements be disclosed?

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.

...

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

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.

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).

Does such an agreement amount to an abuse of process?

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

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.

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

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.

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.

Such is not the case here.

> 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.

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.

…

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.

…

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.

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.

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".

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 [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.

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.

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.

…

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.

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

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.

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.

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.).

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.

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.

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:

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.

(ii) 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).

(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.:

'Pierringer' Settlement Agreements

…

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.

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'.

'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.

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.

...

Public Interest in Promoting Settlement

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.

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.

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.:

…

> 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).
>
> 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…
>
> …
>
> 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).
>
> 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.
>
> 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.
>
> 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.
>
> 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.
>
> …

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 privilege attach?]

> 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.
>
> 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.

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.

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.

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.

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.

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.

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.

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.

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.

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."

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

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?]

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.

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.

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.

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.

(d) *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.:

> 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.
>
> 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...
>
> 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.

> 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 .

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.:

> 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.
>
> 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.
>
> 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.
>
> 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.

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.