Civil Procedure
Law 225

Winter Term 2023

Lecture Notes No. 14

COSTS AND SETTLEMENT

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.
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> (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, which makes anticipating an award of costs really difficult.

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.**

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).

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 At issue is whether either of two offers to settle served by the plaintiff had been withdrawn before being accepted by the defendants.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:
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> It must be in writing.
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> It must be effectively delivered to the opposing party.
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> It must be a proposal that can be construed as an offer to settle, open for acceptance and binding if accepted.
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> 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:
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> 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.
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> 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
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> In the result, the motion by the defendants for judgment in the terms of either

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

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

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- An offer to settle may be withdrawn explicitly or implicitly.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

Settlement Approval

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

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

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

Per Curiam:

> 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:
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> > 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.
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> We conclude from this analysis that immediately prior to Rebecca Wu's death there was in law an agreement, which the respondents could not disavow, to settle her claim on the terms recorded in the minutes of settlement, but that the operation of that agreement was suspended pending "necessary" court approval.

Enforceability of a Settlement

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

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

Per Herman J.

> 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.
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> 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.

STRATEGIC SETTLEMENT OPTIONS

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

Mary Carter Agreements

This is a relatively new litigation tool in Canada.

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

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

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

- the contracting parties agree that the plaintiff will receive a minimum amount of

damages, regardless of the outcome of the trial;

- the liability of the settling defendant is capped at the amount agreed;
- the settling defendant remains in the litigation;
- the plaintiff agrees to limit its claims against the other defendants to a set amount (which protects the settling defendant from claims for contribution from other defendants);
- the settling defendant's liability is decreased as agreed based on the plaintiff being awarded damages in excess to that received to be paid by the non-settling defendants' liability (i.e. damages ordered above the amount agreed upon).

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

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

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

Ferrier J.:

> **... 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.

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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.

Tallman Truck Centre Limited v. K.S.P. Holdings Inc.
2022 ONCA 66 (Ont. C.A.)

This was a breach of contract action brought against two defendants. The plaintiff settled with one defendant whereby that defendant would give evidence against the other in exchange for the claim against it being dismissed. The same day as the agreement was reached, the settling defendant delivered an Affidavit in support of the plaintiff's motion for summary judgment. The terms of the settlement were not disclosed to the other defendant. The Motion Judge ordered a stay on the basis that the agreement should have been disclosed immediately.

By the Court:

> [1] Tallman Truck Centre Limited ("Tallman") appeals from an order staying its action on the basis that it failed to immediately disclose to one defendant, K.S.P. Holdings Inc. ("K.S.P."), that it had entered into a settlement agreement with the other defendant, Secure Capital Advisors Inc. ("Secure"). Under this settlement agreement, Secure reversed its pleaded position and joined cause with Tallman. The agreement was not disclosed until three weeks after it was made…
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> …
>
> [16] In any event, the motion judge did not misapprehend the nature of the relationship between the defendants. Although there were no cross-

claims between K.S.P. and Secure (their dispute having been addressed in earlier litigation that settled), Secure's realignment with Tallman was a dramatic change from K.S.P.'s perspective. As the motion judge said:

> [A]fter the settlement between the plaintiff and Secure, Secure reversed its position and went from opposing the plaintiff to supporting the plaintiff's claim. It is no longer submitting a position in the litigation that is adverse in interest to the plaintiff.
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> . . .
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> On June 7, 2018, Secure's counsel provided a written acceptance. From that point onward at least, Secure was no longer adverse in interest to the plaintiff. Rather, to obtained its bargained-for release, the quality of its continuing support of the plaintiff was subject to the plaintiff's approval.
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> …

[26] **We also reject the submission that the three-week period between reaching the agreement and disclosing it was negligible and ought not to be caught by the immediate disclosure rule. The standard is "immediate"; it is not "eventually" or "when it is convenient". As the motion judge said: "The rules really can't be any clearer. Where an agreement involves a party switching sides from its pleaded position, it must be disclosed as soon as it is made." Here, Tallman and Secure attempted to implement the settlement agreement before disclosing it to K.S.P. More troubling, it is unclear on this record whether Tallman would have disclosed the agreement had K.S.P.'s counsel not asked for it. Even then, it was disclosed for tactical reasons, not in observance of a legal obligation.**

Waxman v. Waxman
2022 ONCA 311 (Ont. C.A.)

Sossin J.A.:

[24] In the course of his analysis in *Handley Estate v. DTE Industries Limited,* 2018 ONCA 324 (Ont. C.A.), Brown J.A. set out the key principles of this kind of abuse of process that arises from a failure to disclose an agreement which changes entirely the litigation landscape, at para. 45:

> By contrast, *Aecon* squarely addressed the consequences that should flow from a specific kind of abuse of process – a party's failure to disclose immediately an agreement that alters the adversarial posture of the litigation. Several clear messages emanate from *Aecon*:
>
> **(i) The obligation of immediate disclosure of agreements that "change entirely the landscape of the litigation" is "clear and unequivocal" – they must be produced immediately upon their completion: at paras. 13 and 16;**
>
> **(ii) The absence of prejudice does not excuse the late disclosure of such an agreement: at para. 16;**
>
> **(iii) "Any failure of compliance amounts to abuse of process and must result in consequences of the most serious nature for the defaulting party": at para. 16; and**
>
> **(iv) The only remedy to redress the wrong of the abuse of process is to stay the claim asserted by the defaulting, non-disclosing party. Why? Because sound policy reasons support such an approach:**
>
> **Only by imposing consequences of the most serious nature on the defaulting party is the court able to enforce and control its own process and ensure that justice is done between and among the parties. To permit the litigation to proceed without disclosure of agreements such as the one in issue renders the process a sham and amounts to a failure of justice: at para. 16.**

[25] In applying these principles as set out in *Handley Estate* to this case, the motion judge stated, at para. 29:

> What must be disclosed are agreements that alter the relationship among the parties from those set out in the pleadings. The agreements at issue here does [sic] so. The settlement clearly changed the relationship between the plaintiffs and the settling defendants from parties adverse in interest to parties who were cooperating. That cooperation extended to providing affidavits and subjecting themselves to cross examinations. [Footnote omitted.] [Emphasis added.]

[26] Subsequently, the motion judge returned to the question of how the settlement agreements at issue in this case changed the litigation landscape, at para. 49:

> There is no doubt that the settlement here would have had a material impact on the litigation strategy employed by Elko going forward. At a minimum it might have considered a crossclaim against the settling defendants, sought the right to examine them for discovery and sought documentary production from them. While those rights might still be available to them, the failure to disclose information before Albert's death has seriously impaired Elko's ability to defend itself.

[27] The motion judge's finding with respect to the change to the litigation landscape was a question of mixed fact and law and is entitled to deference: *Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235, at paras. 36-37.

Poirier v. Logan
2022 ONCA 350 (Ont. C.A.)

Paciocco J.A.:

> [23] Upon learning that the settlement had not been disclosed for six months, the respondents brought motions to have Mr. Poirier's action dismissed as an abuse of process. In responding affidavits, counsel for Mr. Poirier and Mr. Friedberg attested that they did not believe that disclosure was urgent and had always intended to disclose the settlement once the motion materials for the dismissal of the action against Mr. Friedberg were completed. Those motion materials were unexpectedly delayed, in part because Mr. Friedberg's lead lawyer, who was charged with preparing the motion materials, became seriously ill.
>
> …
>
> [41] It follows that the usual principles that apply in granting a stay, an otherwise discretionary remedy that is to be used only in the clearest of cases, do not apply. Essentially, any breach of the obligation to disclose

falls among the clearest of cases that require a stay. There is a one-part test, not a two-part test. Put simply, if it is found that immediate disclosure of a settlement was required but not made, it follows automatically that an abuse of process has occurred and that the action must be stayed.

[42] In *Aecon*, MacFarland J.A. explained why a stay is required for any breach of the obligation to disclose a settlement agreement: "Only by imposing consequences of the most serious nature on the defaulting party is the court able to enforce and control its own process and ensure that justice is done between and among the parties": at para. 16. As Ferrier J. elaborated in *Pettey v. Avis Car Inc*. (1993), 1993 CanLII 8669 (ON SC), 13 O.R. (3d) 725 (Gen. Div.), at para. 32, justice between and among the parties requires immediate disclosure:

> **The [non-settling] defendants must be advised immediately because the agreement may well have an impact on the strategy and line of cross-examination to be pursued and the evidence to be led by them. The [non-settling] parties must also be aware of the agreement so that they can properly assess the steps being taken from that point forward […].**

Crestwood Preparatory College Inc. v. Smith
2022 ONCA 743 (Ont. C.A.)

Feldman J.A.:

[39] A number of recent cases from this court have restated and reinforced the principles from *Handley Estate*. Most recently in *Hamilton-Wentworth*, the court emphasized that the rule from *Aecon* is intended to be a bright line rule that requires immediate disclosure of a settlement agreement: at para. 11. If there is an issue about whether certain terms of the agreement remain privileged, that issue can be brought to court following the initial disclosure, as occurred in *Tree of Knowledge: Hamilton-Wentworth*, at para. 8. The court added that the purpose of making the rule so clear is to avoid the type of motion that is being pursued in the recent cases: *Hamilton-Wentworth*, at para. 11. It emphasized again that whether prejudice has resulted from the non-disclosure is not a factor to be considered *Hamilton-Wentworth*, at para. 9.

…

[43] The principles that arise from the case law were most recently summarized by this court in *Tree of Knowledge*, at para. 55. **For the purposes of this appeal, the following are the relevant principles:**

(a) The "clear and unequivocal" obligation of immediate disclosure is triggered where partial settlement agreements

"change entirely the landscape of the litigation": *Handley Estate*, at para. 45, citing *Aecon* at paras. 13, 16;

(b) The disclosure obligation applies to *Mary Carter*, *Pierringer* and any other settlement agreement that has the effect of changing the pleaded or expected adversarial position of the parties into a co-operative one: *Handley Estate*, at paras. 39, 41; see also *Tallman*, at para. 23; *Waxman*, at paras. 24, 37; *Poirier*, at para. 47;

(c) Identifying a change in the parties' pleaded positions is not an essential part of the disclosure test: *Poirier*, at para. 47.

(d) Parties may bring a motion for directions where the extent of the duty to disclose may be unclear: *Handley Estate*, at para. 47; see also *Hamilton-Wentworth*, at para. 8;

(e) The absence of prejudice does not justify late disclosure of such an agreement: *Handley Estate*, at para. 45, citing *Aecon*, at para. 16; and

(f) The failure to provide immediate disclosure in these circumstances amounts to an abuse of process where the sole remedy is an automatic stay of proceedings: *Handley Estate*, at para. 45; *Tallman*, at para. 28; *Waxman*, at paras. 24, 45-47; *Poirier*, at paras. 38-40.