Civil Procedure
Fall Term 2024

Lecture Notes No. 4

II. WHO PAYS FOR THE LITIGATION? (cont'd)

3. Champerty & Maintenance

At common law, "maintenance" refers to a wrong whereby one person aids another in bringing meritless litigation for an import purpose; "champerty" adds that the wrongdoer receives, or will receive, a share of the damages or award. At common law, these were crimes as well as torts.

McIntyre Estate v. Ontario (Attorney General)
2002 CanLII 45046 (Ont. C.A.)

This case dealt with continency agreements. O'Connor ACJO surveyed the law at large and held:

> 78 The applications judge granted a declaration that the proposed fee agreement does not violate the Champerty Act. **The proposed agreement provides for payment to the respondent's lawyers of a fee in the amount of 30 percent of compensatory damages recovered, 40 percent of punitive damages, costs recovered in the action and any unrecovered disbursements. Depending on the amount recovered in the underlying action, the fees to be paid to the lawyer could be enormous.** The lawyers who drafted the agreement provided an example of the potential fees which totalled over $9,000,000. While the amount of the damages on which the example is based may or may not be realistic, the example does make the point that unacceptably large fees could become payable under the agreement.
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> 79 The fee structure in the proposed agreement is related to the amount of money that is recovered on behalf of the respondent. The fee structure has no relationship to the amount of time spent by the lawyers, the quality of the services provided, the level of expertise of the lawyers providing the services, the normal rates charged by the lawyers who provide the services, or the stage of the litigation at which recovery is achieved. Under the terms of this agreement, the respondent would be obliged to pay the lawyers the same amount of fees if the litigation is settled early in the process as she would if the same amount of money was recovered after a lengthy trial and appeal. In addition, the agreement raises the prospect of double recovery for the lawyers — fees from the respondent as well as costs recovered from

the defendants in the action. **There is no way of telling at this point whether the fees that would be paid to the lawyers under this proposed agreement would be reasonable and fair. When an agreement like this one is structured so that the fees are based on a percentage of the recovery, the determination of whether the fees are reasonable and fair will normally have to await the outcome of the litigation.**

80 I have concluded in subsection (d) above that contingency fee agreements do not per se contravene the Champerty Act. However, in my view, **contingency fee agreements that provide for the payment of fees that are unreasonable or unfair are agreements that have an improper motive and come within the prohibition** in the Act. Because it is premature to address the issue of the reasonableness and fairness of the proposed agreement, it is my respectful view that the applications judge should not have granted the declaration sought by the respondent.

81 I want to address three other matters that were touched on during the arguments of counsel. The first relates to the criteria that should be used in assessing the reasonableness and fairness of fees in a contingency fee agreement. Contingency fee agreements have been expressly permitted by statute in many jurisdictions. Often, the authorizing legislation has also provided for a regulatory regime that addresses the manner in which the propriety of contingency fees may be determined. See for example, the Class Proceedings Act, s. 33(1).

82 Ontario, of course, does not have legislation specifically directed at regulating non-class action contingency fee agreements. Until such legislation is passed, **the regime in the Solicitors Act for assessing lawyers' accounts will apply. When assessing a contingency fee arrangement, the courts should start by looking at the usual factors that are considered in addressing the appropriateness of lawyer-client accounts.** See Cohen v. Kealey & Blaney (1985), 10 O.A.C. 344 (Ont. C.A.), at 346.

83 In addition, **I see no reason why courts should not also consider compensation to a lawyer for the risk assumed in acting without the guarantee of payment. This is, of course, where the discussion becomes controversial. Some argue that allowing a lawyer to be compensated for the risk assumed increases the concerns about the abuses that historically the law of champerty aimed to prevent. However, I do not think that that needs to be the case. The emphasis here should be on the reasonableness and fairness of the compensation to the lawyer for assuming the risk.** Many jurisdictions that have expressly approved contingency fee agreements have set out the criteria for addressing the amount of compensation that will be permitted.

Indeed, Ontario has done so in the Class Proceedings Act. In these instances, one element giving rise to compensation is often the acceptance of risk and an assessment of the level of risk involved.

84 That said, **I want to sound a note of caution about the potential for unreasonably large contingency fees. It is critical that contingency fee agreements be regulated and that the amount of fees be properly controlled. Courts should be concerned that excessive fee arrangements may encourage the types of abuses that historically underlay the common law prohibition against contingency fee agreements and that they can create the unfortunate public perception that litigation is being conducted more for the benefit of lawyers than for their clients. Fairness to clients must always be a paramount consideration.**

85 Notwithstanding my conclusion that contingency fee agreements should no longer be absolutely prohibited at common law, I urge the government of Ontario to accept the advise that it has been given for many years to enact legislation permitting and regulating contingency fee agreements in a comprehensive and co-ordinated manner. There are obvious advantages to having a regulatory scheme that is clearly and specifically addressed in a single legislative enactment. There is no reason why Ontario, like all the other jurisdictions in Canada, should not enact such a scheme. Again, I wish to make clear that this comment is not intended to apply to family law matters, where different factors apply.

86 The second matter I wish to briefly address is the effect of the Solicitors Act of Ontario on the disposition of this appeal. I start by noting that the underlying application does not raise the question whether the proposed agreement breaches the Solicitors Act and, strictly speaking, it is not necessary to comment on the effect of that Act on the issues raised in this case. However, for completeness, I think a few comments are warranted.

87 Section 28 of the Solicitors Act reads as follows:

> 28. Nothing in sections 16 to 33 gives validity to a purchase by a solicitor of the interest or any part of the interest of his or her client in any action or other contentious proceeding to be brought or maintained, or gives validity to an agreement by which a solicitor retained or employed to prosecute an action or proceeding stipulates for payment only in the event of success in the action or proceeding, or where the amount to be paid to him or her is a percentage of the amount or value of the property recovered or preserved or otherwise determinable by such amount or value or dependent upon the result of the action or proceeding.

> 88 I agree with the applications judge and others who have observed that this section and other similarly worded sections do not prohibit contingency fee agreements. See Bergel & Edson at 791-92; and Thai Trading, supra, at 785. The section says nothing more than contingency fee agreements are not permitted by the Solicitors Act if they are not otherwise permitted.
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> 89 Finally, I want to address the Rules of Professional Conduct of the Law Society of Upper Canada. Again, the application that underlies this appeal does not call for a determination whether the proposed agreement contravenes these Rules. Because this argument was not fully developed on the appeal, I think the issue of the application of those Rules is better left for another occasion. That said, the Rules of Professional Conduct and the complaints and disciplinary regimes of the Law Society clearly have a role to play in ensuring that lawyers who enter into contingency fee agreements follow the ethical and professional standards set out in the Rules, so that the abuses feared in the past do not become a reality in the future.

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).

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

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

Ferrier J.:

> 17 ... **Cases in the United States have indicated that a typical Mary Carter agreement contains the following features:**
>
> **1. The contracting defendant guarantees the plaintiff a certain monetary recovery and the exposure of that defendant is "capped" at that amount.**
>
> **2. The contracting defendant remains in the lawsuit.**
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> **3. The contracting defendant's liability is decreased in direct proportion to the increase in the non-contracting defendant's liability.**
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> **4. The agreement is kept secret.**
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> See *Hoops v. Watermelon City Trucking*, 846 F.2d 637, 640 (10th Cir. 1988); *General Motors v. Lahocki*, 410 A.2d 1039, 1042 (My. 1980); and *Elbaor v. Smith*, 845 S.W.2d 240 (Tex. 1992).
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> 18 In reported decisions, the majority of the courts in the United States which have considered the validity of Mary Carter agreements have allowed them to stand provided the agreement is disclosed to the parties and to the court. See *General Motors v. Lahocki*, supra; *Ratterree v. Bartlett*, 707 P.2d 1063 (Kan. 1985); *City of Tucson v. Gallagher*, 493 P.2d 1197 (Ariz. 1972); *Dosdourian v. Carsten*, 580 So.2d 869 (Fla. App. 4 Dist. 1991) and *Ward v. Ochoa*, 284 So.2d 385 (Fla. 1973).

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

...

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

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

26 Commentary 6 to R. 10 provides:

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

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

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

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

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

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

1. When must such agreements be disclosed?

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

...

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

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

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

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

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

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

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

...

Champerty and Maintenance

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

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

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

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

48 Such is not the case here.

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

50 Such is not the case here.

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

III. PARTICIPATION

1. Status and Standing

'Status':

One must have **legal personality** to sue or be sued in Ontario, with some exceptions (e.g. the Crown, foreign states, 'Indian Bands', unions, statutory bodies, etc. – sometimes status for such actors is provided in another statute than the Rules).

For example, see Rules 8 (partnerships) and 9 (estates and trusts).

'Standing':

One must have **a sufficient interest** in the dispute to have the right to participate in the litigation; i.e. a person's sufficient and protectable legal rights or interests are affected by the resolution of the dispute. However, this does not mean that just because a person may be affected by litigation, that he or she has the right to participate – there are considerations used by the Court to contain the litigation. In most private law disputes standing is clear – a person suffered a loss and has a claim recognized in substantive law. At other times, particularly with respect to public law, standing is less clear – but a person or organization may be permitted to participate as an **intervenor**.

A person might have standing *in a procedural aspect* of the litigation but not in the outcome; e.g. whether a business record (like a bank record or a medical record) must be produced by a third party (like a bank or hospital) so that one of the parties may adduce it in evidence. The third party has standing in respect of the motion for production but not 'in the cause'.

Carroll v. Toronto-Dominion Bank
2021 ONCA 38 (Ont. C.A.)

A former employee of the bank sued, but in a rather curious fashion. She asserted that the bank had acted improperly in obtaining fees from customers and argued that a trust obligation arose which she could enforce. The Court denied her standing to do so.

Paciocco J.A.:

> 30 **Ms. Carroll argues that if standing is required, the motion judge was obliged to apply a flexible, discretionary, purposive approach to standing that asks whether there is a "real and legitimate basis for asking the court to adjudicate legal issues". Ms. Carroll contends that the motion judge erred by not applying this test**, and that, had she done so, Ms. Carroll would have been found to have standing given that she is a whistleblower who has sacrificed a great deal, thereby acquiring a "genuine interest and real stake in the outcome of the proceedings".
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> 31 I do not agree with Ms. Carroll's conception of the test to be used in determining her standing. As I will explain, **where legislation does not provide standing, there are two paths to securing standing to initiate proceedings, "private interest standing" and "public interest standing". These paths are distinct.** Ms. Carroll does not seek public interest standing since it is clearly unavailable in her case. Instead, she argues that public interest standing principles should inform whether she has private interest standing. I do not agree with this proposition. Public interest standing principles do not apply where the private interest standing test governs. The motion judge would have erred had she applied the standing test Ms. Carroll proposes.
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> 32 I will begin by describing the tests for private interest and public interest standing.
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> **33 To have private interest standing, a person must have a personal and direct interest in the issue being litigated:** Campisi v. Ontario (Attorney General), 2018 ONCA 869, 144 O.R. (3d) 638 (Ont. C.A.), at para. 4, leave to appeal refused, [2019] S.C.C.A. No. 52 (S.C.C.). **They must themselves be "specifically affected by the issue":** Downtown Eastside Sex Workers United Against Violence Society v. Canada (Attorney

General), 2012 SCC 45, [2012] 2 S.C.R. 524 (S.C.C.), at para. 1. **It is not enough that the person has a "sense of grievance" or will gain "the satisfaction of righting a wrong" or is "upholding a principle or winning a contest":** Finlay v. Canada (Minister of Finance), [1986] 2 S.C.R. 607 (S.C.C.), at para. 21, citing Australian Conservation Foundation Inc. v. Australia (1980), 28 A.L.R. 257 (Australia H.C.), at p. 270. As it is sometimes put, **to have private interest standing, a person must have a "personal legal interest" in the outcome**: Landau v. Ontario (Attorney General), 2013 ONSC 6152, 293 C.R.R. (2d) 257 (Ont. S.C.J.), at para. 16. **Where the party initiating the litigation has a personal legal interest in the outcome, standing exists as of right**: Landau, at para. 21. An appeal of a private interest standing decision is therefore evaluated using a correctness standard: Miner v. Kings (County), 2017 NSCA 5, 60 M.P.L.R. (5th) 1 (N.S. C.A.), at para. 23.

34 **"In public law cases, however, Canadian courts have relaxed these limitations on standing and have taken a flexible, discretionary approach to public interest standing, guided by the purposes which underlie the traditional limitations" (emphasis added): Downtown Eastside, at paras. 1, 22. This more flexible approach is warranted "to ensure that legislation is not immunized from challenge":** Downtown Eastside, at para. 33, citing Canadian Council of Churches v. R., [1992] 1 S.C.R. 236 (S.C.C.), at p. 256. As Cromwell J. explained in Downtown Eastside, at para. 37:

> **In exercising the discretion to grant public interest standing, the court must consider three factors: (1) whether there is a serious justiciable issue raised; (2) whether the plaintiff has a real stake or a genuine interest in it; and (3) whether, in all the circumstances, the proposed suit is a reasonable and effective way to bring the issue before the courts.** The plaintiff seeking public interest standing must persuade the court that these factors, applied purposively and flexibly, favour granting standing. [Emphasis added, citations omitted.]

35 I have added emphasis to the above passages from Downtown Eastside to reinforce that the flexible, discretionary, purposive approach that has been adopted applies only in public interest litigation. Similar developments have not occurred in private law proceedings. There are good reasons why this is so.

36 First, the reasons for liberating standing requirements in public interest litigation do not apply in the same degree to private litigation. For example, there will invariably be greater justification for using public legal resources to address matters of public interest than there will be for using public legal

resources to vindicate private interests that the parties affected are not seeking to vindicate.

37 As well, public interest litigation tends to affect the interests of many, particularly where laws are being challenged. In contrast, the outcome of private litigation has a unique impact on those whose legal interests are directly affected by the litigation. They are therefore the ones who should carry out the litigation so that they can make decisions relating to the protection of their interests.

38 Ms. Carroll's proposed action illustrates the point. She is suing for an investigation and for the passing of accounts without notice to the unitholders and has requested that unitholders be compensated. If she were to be granted standing, the private information of unitholders would be accessed for the lawsuit without their input. Further, if she were to be given standing to litigate, she would not only control the tactical choices made during litigation but would also have standing to settle the litigation. Despite her lack of personal legal interest in the outcome, she would be empowered to manage the litigation in ways that could potentially compromise the financial interests of the unitholders, who hold the personal legal interests in question.

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43 In my view, the motion judge considered the correct standing tests in determining whether Ms. Carroll had standing. She determined that the statutory standing provisions that govern standing to pass accounts do not apply, and she considered whether Ms. Carroll had a personal legal interest in the litigation that could support private interest standing. She also considered and correctly rejected Ms. Carroll's contention that her status as a knowledgeable whistleblower gave her standing to bring the application, or that more generous standing rules apply in breach of trust cases. I would therefore reject this ground of appeal.