THE BALANCING ACT FOR CANADIAN LITIGATORS: ENCOURAGING SETTLEMENT BETWEEN PARTIES AND THE PROCEDURAL RISKS OF ENTERING INTO SETTLEMENT AGREEMENTS IN MULTI-PARTY LITIGATION

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Table of Contents

An Overview – Settlement Agreements in Canada

Canadian court systems encourage and facilitate settlement. For example, there is an entire regime encapsulated by Rule 49 of the Ontario *Rules of Civil Procedure*[1] regarding the importance of early and reasonable offers to settle, as well as an emphasis on proportionality in litigation as set out in Rule 1.04 of the Ontario *Rules*.[2]Additionally, Rule 3.2 of the Law Society of Ontario's Rules of Professional Conduct[3] further emphasizes the importance of encouraging clients to settle when appropriate.[4] A Table of Concordance has been provided at the end of this paper, which will highlight the pertinent sections for every province and territory across Canada.

However, as noted over twenty years' ago by the Alberta Court of Appeal, "now past is the day when 'settlement agreement' can be understood to refer solely to the final resolution of all outstanding issues between all parties to a lawsuit, effectively bringing the suit to an end."[5] Rather, a new generation of partial settlement agreements

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1. *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194 [the *Rules*] at Rule 49.
2. *Rules* at Rule 1.04.
3. The Law Society of Ontario, *Rules of Professional Conduct*, Toronto: The Law Society of Ontario, 2000.
4. These cost regimes are not unique to Ontario. See the addendum to this article with references to the civil litigation rule regimes and rules of professional conduct across the various provinces and territories within Canada.

endeavor to attain a risk-management objective, whereby the parties to these agreements seek to settle partial issues of liability between some, but not all of the parties, thereby reducing the number of issues, simplifying the litigation and expediting the action.[6]

However, where there is an action with multiple defendants involved, partial settlement agreements between only some parties to an action may land some unwary litigants facing a motion to strike or stay. In order to understand the issues that these parties may face, it is essential to first review the background and context of settlement agreements in Canada.

Generally, settlement agreements, otherwise known as "Pierringer Agreements", are designed to allow one or more defendants in a multi-party action to settle with the plaintiff and withdraw from litigation, leaving the remaining non-settling defendants in the action jointly liable with each other.[7] Pierringer Agreements derive their name from *Pierringer v Hoger*, 124 N.W. 2d 106 (U.S. Wis. S.C., 1963), a Wisconsin case in which this type of agreement was first considered.[8] By contrast, a "Mary Carter Agreement" is one in which a settling defendant guarantees to the plaintiff a minimum financial recovery. In return, the Plaintiff agrees to limit the exposure to the settling defendant including to indemnify against the settling defendant for any cross-claims.[9] The origins of a "Mary Carter Agreement" arose out of the Florida case of *Booth v Mary Carter Paint Co*., 202 So. 2d 8 (U.S. Dist. Ct. App. 1967).[10]

One key distinction between a Mary Carter Agreement and a Pierringer Agreement or Settlement Agreement is that traditionally, the defendant in a Mary Carter Agreement will remain in the litigation, but the settling defendant will normally agree not to take any position regarding damages but will instead try to impart liability upon any non-settling defendants. As such, the settling defendant will often play a limited role at the trial.[11]

5. *Amoco Canada Petroleum Co. v. Propak Systems Ltd.*, 2001 ABCA 110, 200 D.L.R. (4th) 667, 2001 CarswellAlta 575 (Alta. C.A.) at para. 12, leave to appeal refused (2002), 281 W.A.C. 398 (note), 312 A.R. 398 (note), 292 N.R. 396 (note) (S.C.C.) [*Amoco*].
6. *Amoco ibid*, at para. 13.
7. *Sable Offshore Energy Inc. v. Ameron International Corp*., 2013 SCC 37, [2013] 2 S.C.R. 623, 359 D.L.R. (4th) 381 (S.C.C.) ["*Sable*"], at para. 6.
8. *Amoco, supra*, footnote 5, at para. 3.
9. Beard Winter LLP Defender, "Mary Carter and Pierringer Agreements: What Are They and How Do They Work?", Vol. 5, Issue 4, December 2011.
10. *Edmonton (City) v. Lovat Tunnel Equipment Inc*., 2000 ABQB 63, 44 C.P.C. (4th) 170, 2000 CarswellAlta 87 (Alta. Q.B.), reconsideration / rehearing refused 2000 ABQB 132, 259 A.R. 376, 95 A.C.W.S. (3d) 287 (Alta. Q.B.) [*Lovat*].

In contrast, the settling defendant to a Pierringer Agreement will be completely removed from the lawsuit, and as with a conventional settlement agreement, all outstanding issues between the settling parties are concluded. As such, these types of agreements have the potential to greatly simplify an action by reducing the number of litigants. This is unlike a Mary Carter Agreement where there is a clear façade by the settling parties as they continue in the litigation.

Notably the Court in Lovat pointed out that "in a true Mary Carter arrangement the contracting defendant has an interest in the outcome of the litigation as the liability of that defendant decreases in direct proportion to any increase in the non-contracting defendant's liability."[12]

Notwithstanding the clear differences between the two types of agreements, both a Mary Carter Agreement and a Pierringer Agreement have a significant effect on the remainder of the litigation and may potentially alter the interests of the parties.

Whether the settling parties use a Mary Carter Agreement or a Pierringer Agreement, the court retains the inherent jurisdiction to control the settlement process. In so doing, it will recognize the privilege that attaches to the settlement but will also seek to protect the procedural rights of the non-settling parties.[13] As a result, a bright-line rule has been established requiring the immediate disclosure of a partial settlement agreement to the remaining parties in the action.

The strategic considerations for choosing to enter into either type of settlement agreement are beyond the scope of this paper. However, as will be seen, the bright-line rule requires that the settlement agreement must be immediately disclosed to the other parties to the litigation, but disclosure of the quantum of the agreement will not be required. The parameters of the rule also beg the question as to whether the terms of the settlement agreement are subject to settlement privilege, or whether they must be disclosed to the non-settling parties, as well.

Disclosure of Quantum – Pierringer Agreements

In addition to the rule requiring immediate disclosure of the settlement agreement itself (addressed further in this paper),

11. Beard Winter LLP Defender, "Mary Carter and Pierringer Agreements: What Are They and How Do They Work?", Vol. 5, Issue 4, December 2011.
12. *Lovat, supra*, footnote 10, at para. 10.
13. Chris Blom, "Pierringer Agreements in Ontario", Miller Thomson LLP, August 20, 2015.

questions had previously arisen in the case law as to whether the settling defendant was also required to disclose the quantum of the settlement to other non-settling defendants.

In *Sable Offshore Energy Inc. v. Ameron International Corp.*,[14] a case originating out of Nova Scotia, the Supreme Court of Canada settled the longstanding issue and held that the non-settling defendants were not entitled to disclosure of the amount of the settlements.

In *Sable*, the plaintiff sued several defendants who had supplied it with paint and contractors that had applied the paint to the plaintiff's offshore structures and onshore facilities in order to prevent corrosion. The plaintiff alleged that the paint failed to prevent the corrosion.[15]

The plaintiff entered into Pierringer Agreements with only some of the defendants.[16] As part of the terms of the Agreements, the plaintiff agreed to amend its statement of claim against the non-settling defendants to pursue them only for their share of liability. In addition, all relevant evidence in the possession of the settling defendants would be given to the plaintiffs and be discoverable by the non-settling defendants.[17] All of the terms of the settlement agreements were disclosed to the non-settling defendants except for the settlement amounts[18], however, the plaintiff agreed to disclose the amounts to the trial judge once liability of the non-settling defendants had been determined.

The non-settling defendants filed an application to the Nova Scotia Supreme Court to compel the plaintiff to disclose the settlement amounts paid under the Pierringer Agreements. The plaintiff took the position that the amounts were subject to settlement privilege.[19]

Justice Hood of the Nova Scotia Supreme Court dismissed the application, concluding that the public interest was best served by keeping the settlement amounts confidential. The Nova Scotia Court of Appeal overturned that decision and ruled that the amounts were to be disclosed.[20]

Justice Abella, writing for a majority panel of the Supreme Court of Canada, allowed the appeal, and ordered that the settlements

14. *Sable Offshore Energy Inc. v. Ameron International Corp.*, 2013 SCC 37, [2013] 2 S.C.R. 623, 359 D.L.R. (4th) 381 (S.C.C.) ["*Sable*"].
15. *Sable ibid*, at para. 4.
16. *Sable ibid*, at para. 6.
17. *Sable ibid*, at para. 7.
18. *Sable ibid*, at para. 8.
19. *Sable ibid*, at para. 9.
20. *Sable ibid*, at para. 10.

amounts did not need to be disclosed. In her analysis, Justice Abella first reviewed and emphasized the importance and benefits of settlement amongst parties and the Canadian court system. Specifically, Her Honour noted the importance of settlement privilege and its *prima facie* presumption of inadmissibility.[21]

In reaching the conclusion that the amounts need not be disclosed, Justice Abella found that the negotiated amount is a "key component of the 'content of successful negotiations'", and as such, ought to be protected. Her Honour stated that "it is better to adopt an approach that more robustly promotes settlement by including its content."[22]

Moreover, Justice Abella found no prejudice to the non-settling defendants by withholding the amounts. In response to the non-settling defendants' arguments that they required the settlement amounts to properly conduct their litigation, Her Honour found that:

> 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, [the plaintiff] 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.[23]

The Court further stated that any non-settling defendants may only be held liable for their share of damages and are not jointly liable with the settling defendants.[24] Considering all these factors, the Court was satisfied that knowledge of the settlement amounts did not materially affect the ability of the non-settling defendants to continue with the litigation.[25]

Despite the clarity that *Sable* provided regarding disclosure of the amounts involved in Pierringer Agreements, a live issue remained as to the immediate disclosure rule that is triggered upon entering into a settlement agreement, whether that be a Pierringer Agreement or a Mary Carter Agreement.

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21. *Sable ibid*, at paras. 11-12.
22. *Sable ibid*, at para. 18.
23. *Sable ibid*, at para. 25.
24. *Sable ibid*, at para. 26.
25. *Sable ibid*, at para. 27.

The Immediate Disclosure Rule

Notwithstanding the fact that the quantum of a settlement agreement need not be disclosed to the non-settling defendants to litigation, parties to an action are still required to comply with the immediate disclosure rule.

In Ontario, immediate disclosure is required when any agreement has been entered into between a plaintiff and defendant or defendants to a multi-party litigation whereby the agreement changes the landscape of the litigation and may affect the adversarial nature of the parties.

The immediate disclosure rule has been broadly applied across the country. For example, in *Bilfinger Berger (Canada) Inc. v Greater Vancouver Water District,*[26] the British Columbia Supreme Court stated that "in British Columbia our Court of Appeal has indicated that when there is a settlement agreement between some parties to the litigation there must be disclosure at least close to the start of trial of any evidentiary arrangements and earlier disclosure of any agreement to release, not sue, or to reserve rights to sue."[27]

Moreover, the BC Supreme Court recognized that the need to disclose these arrangements is consistent with Ontario cases which emphasize the need for opposing parties and the court to be able to know where the parties stand in relation to each other in the adversarial process where that may be different from what is contained in the pleadings.[28]

Likewise, in *Bioriginal Food & Science Corp. v Gerspacher*,[29] the Saskatchewan Court of Queen's Bench found "without hesitation, that the Settlement Agreement is relevant to the remaining defendants." The court went on to accept the test as stated in the Ontario authorities and held that "[the Settlement Agreement's] existence substantially changes the litigation landscape and the relationship between the defendants."[30]

Finally, in *Hudson Bay Mining & Smelting Co. v. Fluor Daniel Wright*[31], the Manitoba Court of Queen's Bench correctly

26. 2014 BCSC 1560, [2014] 10 W.W.R. 526, 70 B.C.L.R. (5th) 349 (B.C. S.C.).
27. *Ibid*, at para. 146.
28. *Ibid*, at para. 150.
29. 2012 SKQB 469, 410 Sask. R. 158, 2012 CarswellSask 823 (Sask. Q.B.).
30. *Bioriginal Food & Science Corp. v. Gerspacher*, 2012 SKQB 469, 410 Sask. R. 158, 223 A.C.W.S. (3d) 605 (Sask. Q.B.), at para. 26.
31. (1997), 12 C.P.C. (4th) 94, [1997] 10 W.W.R. 622, 1997 CarswellMan 388 (Man. Q.B.), affirmed (1998), 23 C.P.C. (4th) 268, (*sub nom.* Hudson Bay Mining & Smelting Co. v. Wright) 187 W.A.C. 133, (*sub nom.* Hudson Bay Mining & Smelting Co. v. Wright) 131 Man. R. (2d) 133 (Man. C.A.).

distinguished between a settlement agreement and settlement negotiations and concluded that "the settlement agreement is relevant for the purposes of disclosure."[32]

The 2018 Ontario Court of Appeal decision in *Handley Estate v. DTE Industries Limited*[33] further emphasizes the importance of immediate disclosure and demonstrates the severe consequences to a party in Ontario who does not comply with it.

In *Handley Estate*, the plaintiff's insurer commenced a subrogated claim for damages sustained as a result of a leaking oil tank in the plaintiff's home. The insurer, Aviva Insurance Company Of Canada, entered into a litigation agreement with one of the defendants, whereby the defendant agreed to defend the action and commence a third party claim against the wholesaler of the tank, which the insurer would fund. As part of the agreement, the insurer and the defendant agreed that all communications regarding the third-party claim were protected by common-interest privilege.

Following examinations for discovery and an unsuccessful mediation, the plaintiff's insurer and the defendant entered into a second agreement whereby the defendant assigned all of its interest in the lawsuit to the plaintiff, who indemnified the defendant from any exposure in the litigation. None of these agreements were disclosed to the other parties to the litigation.

The moving party, third party defendant argued that the agreements between the plaintiff's insurer and the defendant related to the conduct of the litigation such that immediate disclosure of the agreement was required, and due to the failure to disclose, the action should be stayed. In response, the plaintiff and defendant both argued that the agreement was a litigation funding agreement, disclosure of which was not required, but even if it was, that a stay of the action would be a disproportionate remedy.

In *Handley*, the Court applied the principles from *Aecon Buildings v. Brampton (City)*,[34] an earlier Court of Appeal case which involved alleged deficiencies in the construction of a performing arts centre. The plaintiff and the City of Brampton entered into a Mary Carter

32. *Hudson Bay Mining & Smelting Co. v. Fluor Daniel Wright* (1997), 12 C.P.C. (4th) 94, [1997] 10 W.W.R. 622, 1997 CarswellMan 388 (Man. Q.B.) at para. 37, affirmed (1998), 23 C.P.C. (4th) 268, (*sub nom.* Hudson Bay Mining & Smelting Co. v. Wright) 187 W.A.C. 133, (*sub nom.* Hudson Bay Mining & Smelting Co. v. Wright) 131 Man. R. (2d) 133 (Man. C.A.).

33. 2018 ONCA 324, 421 D.L.R. (4th) 636, 79 C.C.L.I. (5th) 34 (Ont. C.A.).

34. *Aecon Buildings v. Brampton (City)*, 2010 ONCA 898, (*sub nom.* Aecon Buildings v. Stephenson Engineering Ltd.) 328 D.L.R. (4th) 488, 98 C.L.R. (3d) 1 (Ont. C.A.), leave to appeal refused (2011), 425 N.R. 400 (note), 2011 CarswellOnt 5517, 2011 CarswellOnt 5518 (S.C.C.) [*Aecon*].

agreement but failed to disclose it to the remaining defendants and third and fourth parties until several months after it was completed. In *Aecon*, the Court of Appeal held that the failure to disclose was a failure of justice and an abuse of process. As a result, the Court struck the third and fourth party claims, leaving the City of Brampton entirely responsible for the claims by Aecon. Undoubtedly, this seems to be a very harsh and draconian result.

In *Handley*, the Superior Court of Justice held that there was a settlement agreement between the plaintiff's insurer and the defendant that ought to have been disclosed.[35] In coming to this conclusion, the Court stated that "agreements between parties to litigation that change the landscape of the litigation are agreements that cause the apparent adversarial orientation of the contracting parties to differ from their actual adversarial orientation."[36]

Notwithstanding the Court finding that the settlement agreement ought to have been disclosed, the Court dismissed the motion for a stay of the action. The Court disagreed that the parties to the litigation who were not parties to the agreement are automatically entitled to a stay of the action.

On appeal, the Court of Appeal reversed the Superior Court's decision, and held that the action should be stayed as the agreements were covered by the obligation of immediate disclosure. The Court of Appeal outlined the following principles with respect to the immediate disclosure obligation:

- The disclosure obligation extends to any agreement between or amongst parties to a lawsuit that has the affect of changing the adversarial position of the parties as set out in their pleadings into a co-operative one; and
- In order to maintain fairness, the court must "know the reality of the adversity between the parties" and whether any agreement changes the "adversarial orientation" between the parties.

The Court of Appeal proposed the following test to determine whether an agreement triggers the immediate disclosure obligation: do the terms of the agreement alter the apparent relationships between any parties to the litigation that would otherwise be

35. 2017 ONSC 4349, 70 C.C.L.I. (5th) 261, 6 C.P.C. (8th) 81 (Ont. S.C.J.) at para. 41, reversed *Handley Estate v. DTE Industries Limited*, 2018 ONCA 324, 421 D.L.R. (4th) 636, 79 C.C.L.I. (5th) 34 (Ont. C.A.).

36. 2017 ONSC 4349, 70 C.C.L.I. (5th) 261, 6 C.P.C. (8th) 81 (Ont. S.C.J.) at para. 38, reversed *Handley Estate v. DTE Industries Limited*, 2018 ONCA 324, 421 D.L.R. (4th) 636, 79 C.C.L.I. (5th) 34 (Ont. C.A.).

assumed from the pleadings or expected in the conduct of the litigation?

Review of Decisions Following *Handley Estate*

Proceeding Stayed

Following the Ontario Court of Appeal's 2018 decision in *Handley Estate*, the Ontario Superior Court was faced with this issue again in a series of four additional cases: *Tallman Truck Centre Limited vs. K.S.P. Holdings Inc.*, *Waxman v. Waxman*, *CHU de Quebec-Universite Laval v. Tree of Knowledge International Corp.* and *Poirier v. Logan*.[37]

In three out of four of these decisions, the Court of Appeal held that the failure to immediately disclose a settlement agreement that changes the adversarial nature of the litigation will constitute an abuse of process that will result in an automatic and permanent stay of the action.

In *Poirier v Logan*, the plaintiff settled with one of the defendants, but that defendant did not settle with the cross-claiming co-defendants. Neither the plaintiff nor the defendant's counsel immediately disclosed the settlement to the remaining defendants. The cross-claiming defendants brought a motion to have the plaintiff's action dismissed as an abuse of process, relying on the Court of Appeal's decision in *Handley Estate*.

In keeping with the strict holding in *Handley Estate*, the Superior Court held that where there are co-defendants and the plaintiff or applicant settles with one or more of them, but not all, and the settlement changes the adversarial orientation of the proceeding, the plaintiff must immediately disclose to the non-settling defendants

37. 2022 ONCA 66, 466 D.L.R. (4th) 324, 79 C.P.C. (8th) 1 (Ont. C.A.), leave to appeal refused 2022 CarswellOnt 14975, 2022 CarswellOnt 14976, [2022] S.C.C.A. No. 170 (S.C.C.) [*Tallman*]; 2022 ONCA 311 2022 ONCA 311, 471 D.L.R. (4th) 52, 83 C.P.C. (8th) 1 (Ont. C.A.), leave to appeal refused *Morris Waxman as assignee of the Estate Of I. Waxman & Sons Limited, et al. v. Elko Industrial Trading Corp., et al.*, 2022 CarswellOnt 14979, 2022 CarswellOnt 14980, [2022] S.C.C.A. No. 188 (S.C.C.) [*Waxman*]; 2022 ONCA 467, 162 O.R. (3d) 514, 2022 CarswellOnt 8402 (Ont. C.A.) [*CHU de Quebec-Universite Laval*]; and 2022 ONCA 350, 87 C.P.C. (8th) 245, 2022 A.C.W.S. 1597 (Ont. C.A.) [*Poireir*]. See also Hilary Book and William McLennan, "The Duty to Disclose Settlement/Litigation Agreements", The Advocates Journal Vol. 41, No. 2, Fall 2022 p. 10, for a further discussion of the "trio" of Ontario Court of Appeal 2022 decisions.

that there is a settlement and the terms of the settlement that changed the adversarial nature of the proceeding.

Relying on *Handley Estate*, the Superior Court then stated that the failure to disclose immediately or the failure to disclose the terms of a settlement that changes the proceeding's adversarial orientation is an abuse of process for which the only remedy is a dismissal of the proceeding.[38] The Court stated that "it is no answer that the non-settling defendant or respondent was not prejudiced by the time that it learned of the settlement."[39]

However, the Court went on to state that "a settlement agreement may and most often will change the litigation landscape but whether that change actually occurs will ultimately depend on the circumstances of each particular case."[40] The Court provided an example whereby "simple settlement agreements where a plaintiff just lets one of several defendants out of the litigation" may be a situation where immediate disclosure is not required. However, the Court qualified this statement as depending on the facts of each particular case.

The Court of Appeal dismissed the appeal, stating that the material rules surrounding the issue of disclosure of litigation agreements are "settled by decisions of this court" and are "binding on us".[41] The Court of Appeal further noted that no palpable or overriding errors occurred.

Firstly, the Court of Appeal in *Poirier* disagreed with the appellant that the motion judge applied the incorrect test from *Aecon*. The Court of Appeal found that the usual principles that apply in granting a stay, an otherwise discretionary remedy, do not apply. Rather, the Court held that "any breach of the obligation to disclose falls among the clearest of cases that require a stay. There is a one-part test ... 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 *Tallman*, the plaintiff and one defendant entered into a settlement agreement, pursuant to which the defendant reversed its pleaded position and "joined cause" with the plaintiff.[43] In finding that the plaintiff's failure to immediately disclose the settlement

38. *Poirier*, *ibid*, at para. 48 (Ont. S.C.J.).
39. *Poirier*, *ibid*, at para. 49 (Ont. S.C.J.).
40. *Poirier*, *ibid*, at para. 57 (Ont. S.C.J.).
41. 2022 ONCA 350, 87 C.P.C. (8th) 245, 2022 A.C.W.S. 1597 (Ont. C.A.), at para. 34.
42. *Poirier*, *ibid*, at para. 41.
43. 2022 ONCA 467, 162 O.R. (3d) 514, 2022 CarswellOnt 8402 (Ont. C.A.) at para. 52.

agreement amounted to an abuse of process, the Court of Appeal noted that a three-week delay does not meet the test as being "immediate". As a result, the court ordered an immediate stay of the plaintiff's proceeding.

Finally, in *Waxman*, the plaintiffs entered into settlement agreements with three of the defendants which provided that those defendants would provide lump sum payments to the plaintiffs in exchange for being released from any claims in the underlying action.[44] In Waxman, the Court of Appeal held that these agreements altered the adversarial position of the parties and, as such, an automatic stay of the proceedings was the appropriate remedy.[45]

Interestingly, in three out of four of the recent Court of Appeal decisions (*Tallman*, *Waxman* and *Poirier*), the Court of Appeal confirmed that a breach of the disclosure obligation will result in an automatic finding of an abuse of process and a stay of the proceeding. In all three of these matters, leave to appeal to the Supreme Court of Canada was sought. On October 20, 2022, the Supreme Court of Canada dismissed the application for leave to appeal for *Waxman* and *Tallman*, and on December 8, 2022, dismissed the application for leave to appeal the *Poirier* decision. Unfortunately, this means that the highest court in Canada will not be providing the much needed clarity and guidance on this issue for lawyers and litigants across the country.

Stay of Proceedings Not Ordered

A review of the relevant case law reveals that a stay of proceedings will not always be ordered, despite parties not complying with the bright-line rule of immediate disclosure.

For example, in the fourth 2022 Ontario Court of Appeal decision, *CHU de Quebec-Universite Laval v. Tree of Knowledge International Corp.*,[46] the Court did not order a stay of proceedings, but rather, found that the "essential terms of the agreement were disclosed immediately" and that "because any delay in disclosure occurred within the context of a motion before the court to approve

44. 2022 ONCA 467, 162 O.R. (3d) 514, 2022 CarswellOnt 8402 (Ont. C.A.), at para. 53.
45. For a review on the *Waxman* decision, and the quadrilogy of Court of Appeal decisions, see Barbara L. Grossman and Ara Basmadjian. "*Waxman v. Waxman*: Failure to Immediately disclose a Partial Settlement Agreement that Changes the Litigation Landscape Will Result in a Stay of Proceedings." (2022) 53 AQ Issue 2-December 2022.
46. 2022 ONCA 467, 162 O.R. (3d) 514, 2022 CarswellOnt 8402 (Ont. C.A.).

the Settlement Agreement itself, and amend the pleadings accordingly, the rationale underlying the rule that failure to disclose is an abuse of process was not engaged".[47]

In this case, the motion judge was satisfied by the fact that the existence of the Settlement Agreement was disclosed to the non-settling defendants "the day after it was executed". Moreover, the motion judge found that the "essential terms" of the Settlement Agreement were disclosed immediately, and that it was not required that the "entire Settlement Agreement be disclosed immediately." As such, the motion judge held that the plaintiff's action should not be stayed or dismissed.

In upholding the motion judge's decision, the Court of Appeal first considered the principles arising from the previous cases including *Handley Estate*, *Tallman*, *Waxman* and *Poirier*. Specifically, the Court of Appeal noted the following principles which have been drawn from the Court's previous decisions on the abuse of process arising from the failure to immediately disclose a Settlement Agreement:

> a) There is a "clear and unequivocal" obligation of immediate disclosure of agreements that "change entirely the landscape of the litigation". They must be produced immediately upon their completion: *Handley Estate*, at para. 45, citing *Aecon Buildings v. Stephenson Engineering Limited*, 2010 ONCA 898, 328 D.L.R. (4th) 488 ("Aecon Judgment"), at paras. 13 and 16, leave to appeal refused (2011), 425 N.R. 400 (note), 2011 CarswellOnt 5517 (S.C.C.); see also *Waxman*, at para. 24;
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> b) The disclosure obligation is not limited to pure Mary Carter or Pierringer agreements. The obligation extends to any agreement between or amongst the parties "that has the effect of changing the adversarial position of the parties into a co-operative one" and thus changes the litigation landscape: *Handley Estate*, at paras. 39, 41; see also *Tallman*, at para. 23; *Waxman*, at paras. 24, 37; *Poirier*, at para. 47;
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> c) The obligation is to immediately disclose information about the agreement, not simply to provide notice of the agreement, or "functional disclosure": *Tallman*, at paras. 18-20; *Waxman*, at para. 39;
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> d) Both the existence of the settlement and the terms of the settlement that change the adversarial orientation of the proceeding must be disclosed: *Poirier*, at paras. 26, 28, 73;
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> e) Confidentiality clauses in the agreements in no way derogate from the requirement of immediate disclosure: *Waxman*, at para. 35;

47. *CHU de Qubec-Universit Laval*, *ibid*, at para. 4.

> f) The standard is "immediate", not "eventually" or "when it is convenient": *Tallman*, at para. 26;
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> g) The absence of prejudice does not excuse a breach of the obligation of immediate disclosure: *Handley Estate*, at para. 45; *Waxman*, at para. 24; and
>
> h) Any failure to comply with the obligation of immediate disclosure amounts to an abuse of process and must result in serious consequences: *Handley Estate*, at para. 45; *Waxman*, at para. 24; *Poirier*, at para. 38. The only remedy to redress the abuse of process is to stay the claim brought by the defaulting, non-disclosing party. This remedy is necessary to ensure the court is able to enforce and control its own processes and ensure justice is done between the parties: *Handley Estate*, at para. 45; *Tallman*, at para. 28; *Waxman*, at paras. 24, 45-47; *Poirier*, at paras. 38-42.[48]

At issue in *CHU de Quebec Universite Laval* was not the nature of the Settlement Agreement, but rather, the "piecemeal nature" of the disclosure by the plaintiff.

In upholding the motion judge's finding on this issue, the Court of Appeal reaffirmed that "functional disclosure" is not sufficient, while on the other hand, not all terms of a settlement agreement need to be disclosed, either. For example, the Court stated that "it is not enough simply to notify the affected parties and the court that an agreement affecting the litigation landscape has been reached", but that immediate disclosure of "those aspects of the Settlement Agreement that changed the litigation landscape" was sufficient to meet the requirement. The Court noted that the application of the term "immediate disclosure" will depend on the specific facts of each case.

Notably, the Court of Appeal distinguished the *CHU* case from *Handley Estate*, *Tallman*, *Waxman* and *Poirier* on the basis that the plaintiff intended to put the entire Settlement Agreement before the court.[49] As such, there Court found there was no basis to find that the failure to disclose was an abuse of process.

In *Tribecca Finance Corp v Harrison*,[50] the Ontario Superior Court of Justice also held that a stay of proceedings was not necessary, but on the basis that the litigation landscape had not been so affected by the settlement agreement that was not immediately disclosed.

48. *CHU de Qubec-Universit Laval, ibid*, at para. 55.
49. *CHU de Qubec-Universit Laval, ibid*, at para. 70.
50. 2019 ONSC 1926, 307 A.C.W.S. (3d) 510, 2019 CarswellOnt 5167 (Ont. S.C.J.).

In *Tribecca*, the plaintiff, Tribecca, advanced monies to the defendant, Harrison, on the security of a mortgage placed on a cottage jointly owned by Mr. Harrison and his wife from whom he was separated, Ms. Pamela Downward. Tribecca referred Mr. Harrison and Ms. Downward to Mr. Grivogiannis, a lawyer, for independent legal advice. The mortgage went into default, and Tribecca commenced enforcement proceedings. Mr. Harrison did not defend and was ultimately noted in default.

Ms. Downward defended the action on the basis that she was assured by Mr. Harrison and the principal of Tribecca that there would be no personal liability on her part. As a result, Ms. Downward brought third-party proceedings as against the principal of Tribecca and as against Mr. Grivogiannis on the basis that he did not advise her that she could be personally liable.

Tribecca and Ms. Downward settled the main action in or around October 2017 with a formal order being taken out in or around February 2018, however, the third party claim asserted by Ms. Downward continued. Ms. Downward did not advise Mr. Grivogiannis that the third party claim as against the principal of Tribecca had settled until approximately one year later, in October 2018, when the parties were scheduling examinations for discovery.

Mr. Grivogiannis brought a motion for a permanent stay of proceedings on the basis that the settlement of the third party claim was not immediately disclosed to the parties, and that such settlement changed the landscape of the litigation.

In finding that the settlement with the principal of Tribecca did not change the landscape of the litigation, the Court noted that,

> the only consequence of the agreement is that [the principal of Tribecca] is no longer a defendant to the third-party claim. There is no agreement that he participate in the trial of the third-party claim in any way, or to provide assistance in any other manner to Ms. Downward. Before the agreement was entered into, Mr. Grivogiannis was subject to a claim by Ms. Downward, based on his alleged negligence in ensuring her interests were protected, and he remains in that situation. The absence of [the principal of Tribecca] from the proceeding does not affect that state of affairs.[51]

Moreover, the court distinguished *Handley Estate* on the basis that "there was no deliberate decision made to hide the agreement from the remaining parties to the third party claim. It was purely by inadvertence that the agreement was not disclosed."

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51. *Tribecca, ibid,* at para. 33.

As a result, the court held that the agreement did not need to be immediately disclosed. As can be seen by comparing *CHU* and *Tribecca*, both cases were situations in which the court held that a stay of proceedings was not the appropriate remedy in the circumstances. However, each court came to this conclusion based on two very distinct lines of reasoning.

Elsewhere in the country, the harsh outcome as evidenced in the above cases may also not apply. For example, in *Northwest Waste Solutions Inc. v Super Save Disposal Inc.*,[52] five employees of the plaintiff left to work for the defendant, Super Save Disposal Inc. Northwest filed a claim alleging that Super Save induced the employees to leave Northwest, and that the personal defendants had disclosed confidential information to Super Save.[53]

One of the personal defendants ultimately terminated his employment with Super Save and took up employment with a company controlled by the plaintiff, Mountain Spring Water. Mountain Spring Water agreed to arrange for a lawyer to represent that individual defendant should Super Save commence legal proceedings against him. A claim was never brought by Super Save, and as such, no lawyer was retained.[54]

Eventually, a different lawyer was retained by Northwest to defend the individual defendant in the underlying action. This agreement was never disclosed to Super Save.[55] Northwest entered into a further agreement with the individual defendant not to enforce any judgment it might obtain against him. This agreement was likewise not immediately disclosed to Super Save or the other defendants.[56]

The British Columbia Court of Appeal in *Northwest Waste* ultimately held that the motions judge was correct in finding that the failure to immediately disclose the settlement agreements was an abuse of process.[57] However, the Court went on to note that "when the agreement in this case was made, the law on the duty to disclose in this province was not as clear as that in Ontario. As a result, I do not find that the judge in this case erred by failing to stay the proceedings or strike the claim as a remedy for Northwest's breach of its duty to disclose."[58]

52. *Northwest Waste Solutions Inc. v. Super Save Disposal Inc.*, 2017 BCCA 312, 416 D.L.R. (4th) 171, 2 B.C.L.R. (6th) 95 (B.C. C.A.) [*Northwest Waste*].
53. *Northwest Waste, ibid*, at para. 5.
54. *Northwest Waste, ibid*, at para. 6.
55. *Northwest Waste, ibid*, at paras. 6-7.
56. *Northwest Waste, ibid*, at para. 8.
57. *Northwest Waste, ibid*, at para. 33.
58. *Northwest Waste, ibid*, at para. 59.

Notably, the Court of Appeal stated that "the duty, clearly entrenched in the law and practice in Ontario, was not as clear here."[59]

In *Northwest Waste*, the Court of Appeal did accept that *Bilfinger Berger (Canada) Inc. v. Greater Vancouver Water District* was the first case in which a British Columbia Court required immediate disclosure of this type of settlement agreement.[60] Since then, the immediate disclosure requirement has been cited with approval in other British Columbia cases.[61]

Most recently, the Ontario Superior Court of Justice in *Healthplex Pharmacy Inc. v Panda et al*,[62] addressed a situation where counsel for the respondent, Premananda Panda brought a motion to stay the proceeding on four separate grounds, the principal ground being an alleged failure to fully disclose a settlement with another respondent.

In *Healthplex*, the applicant pharmacy commenced an application against a former pharmacist employee and other employees, seeking a variety of relief, including an accounting of profits, general and punitive damages, as well as injunctive relief.

Prior to commencing the application, one of the respondents, Tejal Patel, had provided a handwritten voluntary confession to the principal of Healthplex dated September 24, 2021, wherein she made a variety of statements as to the conduct of another respondent, Mr. Panda, which supported the allegations being made against him by the applicant.

On or about November 12, 2021, Ms. Patel then provided a further statement in which she contradicts her earlier statement and offers evidence against the positions being advanced by the applicant.

Then, on January 10, 2022, Ms. Patel delivered an affidavit wherein she provided evidence similar to the details as set out in her November 2021 statement and further evidence contrary to the position of the applicant.

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59. *Northwest Waste, ibid*, at para. 59.
60. *Northwest Waste, ibid*, at para. 56.
61. See *Taherkhani v. Este*, 2020 BCSC 101, 37 R.F.L. (8th) 418, 316 A.C.W.S. (3d) 647 (B.C. S.C.), at paras. 81-81 and *Coburn and Watson's Metropolitan Home v. BMO Financial Group*, 2019 BCSC 1456, 309 A.C.W.S. (3d) 490, 2019 CarswellBC 2543 (B.C. S.C.), at paras. 14-15.
62. *Healthplex Pharmacy Inc. v. Premananda Panda et al.*, 2022 ONSC 6986, 2022 CarswellOnt 17751 (Ont. S.C.J.) [*Healthplex*]. Note that Lawrence, Lawrence, Stevenson LLP firm previously represented the applicant at the time the settlement agreement was entered into.

Mere days later, and just before Ms. Patel was scheduled to be cross-examined by applicant's counsel, counsel for Ms. Patel emailed counsel for the applicant, advising that she had suffered a miscarriage and requesting that her cross-examination be adjourned.

Following receipt of this information, counsel for the applicant presented a settlement offer to Ms. Patel, the terms of which included that Ms. Patel's affidavit would be withdrawn and the applicants agree to settle the application as against Ms. Patel, without costs. Ms. Patel accepted the offer.

The day after Ms. Patel accepted the offer to settle, counsel for the applicant requested that Ms. Patel's counsel inform all counsel that "Ms. Tejal Patel and the Applicant have reached a settlement, a terms of which includes that her affidavit has been withdrawn from the proceeding, forthwith."[63] On the same day, Ms. Patel's counsel sent an email to all counsel stating that "Tejal Patel and Healthplex have agreed to settle this matter on a final basis. Hence, Tejal Patel's affidavit will be withdrawn from the record, and shall not be relied on in future proceedings."[64]

Prior to the first court attendance on February 14th, counsel for Mr. Panda in his factum alleged that the e-mail sent by Ms. Patel's counsel did not fully disclose the nature of the settlement in that it did not clearly state that it was a term of the settlement that Ms. Patel's affidavit must be withdrawn.[65]

In the Court's analysis, Justice Daley reviewed the jurisprudence on this issue, and the bright-line rule requiring the immediate disclosure of the settlement agreement. Justice Daley also carefully examined the litigation chronology and evidentiary record, and found that "it would have been readily apparent to counsel for the non-settling respondents that there was a significant change in the litigation landscape by the information contained in the email Patel's counsel sent in that the application was to be dismissed as against her, and her affidavit, which clearly supported the position advanced by the respondents, would be withdrawn." Justice Daley further found that "although it is not stated expressly that withdrawing the affidavit was a term or condition of the dismissal of the application against her, a reasonable reading of the email would lead experienced counsel to conclude that it was a term of the settlement; otherwise, there would be no need to mention this."[66]

63. *Healthplex, ibid*, at para. 14(e).
64. *Healthplex, ibid*, at para. 14(f).
65. *Healthplex, ibid*, at para. 46.
66. *Healthplex, ibid*, at para. 47.

In terms of the timing of the disclosure, Justice Daley noted that the return date for the application was three (3) days after the settlement was completed and communicated to all counsel, and there was disclosure to the court in the applicant's reply factum dated February 11. As such, His Honour found that disclosure of the settlement had been made to all counsel and the court just days following the agreement.[67] In the result, Justice Daley held that immediate and proper disclosure was made of the settlement, and no stay of the proceeding was warranted on this ground nor on the other grounds raised.[68]

Comment

Although the outcome of some of these cases indicate that the courts will take a draconian approach when crafting a remedy to deal with the failure to disclose settlement agreements between the parties, the additional cases that have been canvassed above suggest that courts may not take this approach in every case. Rather, the courts will look at the individual facts of each case and determine whether or not the adversarial nature of the proceedings have been affected before ordering a stay of the proceedings.

Moreover, as was evidenced by the statements by the British Columbia Court of Appeal in *Northwest Waste*, the rule and the consequences may not be as engrained in other parts of the country as it is in Ontario.

In our view, the application of the disclosure of settlement agreement rule ought not to be applied without any discretion, but rather, should be determined on a case-by-case basis. As the cases above demonstrate, the facts surrounding specific settlement agreements will vary widely between parties and the issues in the actions. For example, the court came to the same conclusion in Tribecca and Chu, but as a result of a very different set of facts.

Indeed, a stay of proceeding has been cited as the "most drastic" remedy a court can order, [69] and one of the harshest and draconian remedies available. As such, a bright-line rule, such as the immediate disclosure rule canvassed above, may be inappropriate for situations where an entire action may be prejudiced as the result of an inadvertent failure to disclosure.

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67. *Healthplex, ibid*, at para. 51.
68. *Healthplex, ibid*, at para. 53.
69. *R. v. Babos*, 2014 SCC 16, [2014] 1 S.C.R. 309, 367 D.L.R. (4th) 575 (S.C.C.), at para. 30 [Justice Moldaver opining on a stay of proceedings in the context of a criminal prosecution].

For example, the Tribecca case above highlights the importance of the intention of the parties with respect to the non-disclosure of a settlement agreement. We must ask ourselves, as the Court did, was the non-disclosure an inadvertent oversight, or was it purposeful, active concealment in an effort to deceive the other parties to the litigation? In our view, the latter situation calls for a harsher remedy, whereas the former situation, may not. The court in Tribecca seemed to agree.

Quite frankly, the courts ought to further consider whether the disclosure of a settlement agreement truly makes a difference where the other parties to the lawsuit will continue with the action, in any event.

Moreover, there is a significant difference between a Mary Carter agreement, whereby the settling parties participate in an ongoing façade vis-à-vis the non-settling parties, and a settlement agreement that has the effect of entirely removing a party from the proceedings. In our view, entering into the former agreement without disclosure to the non-settling parties is a much more serious abuse of process and would warrant a harsher remedy such as a stay of proceedings.

Finally, further questions may arise in the context of the level of disclosure required. As canvassed above, the question of whether the quantum of the settlement agreement ought to be disclosed has been clearly decided. Our Courts must be cognizant of the fact that parties may also be grappling with whether the facts and circumstances of their case require disclosure of the settlement agreement where it also includes non-monetary terms or negotiations leading up to the agreement that may fall under settlement privilege.

For example, a settlement agreement may not only provide for a payment of a sum of money, but also include terms such as the withdrawing of the settling parties' affidavit or documentary evidence. Would these terms of settlement be analogous to the "quantum" of the settlement and subject to settlement privilege, thereby dispensing with the requirement for immediate disclosure? With respect to this question, we would adopt Justice Abella's comments in *Shore*, that "it is better to adopt an approach that more robustly promotes settlement by including its content."[70]

As a result of the questions that may arise and the various factual circumstances that may lead a party to believe that they were not subject to the immediate disclosure rule, less drastic remedies ought to be fashioned in order to remedy prejudice that may occur, if at all, as a result of the failure to immediately disclose any settlement

70. *Sable*, at para. 18.

agreement. For example, the British Columbia Court of Appeal in Northwest Waste noted that an adjournment of trial is a "common remedy for abuse of process", and further, that the defendant ought to receive "full indemnity for the costs it incurred in obtaining disclosure of the agreement."[71]

On the one hand, lawyers are encouraged by the courts, their Rules of Civil Procedure, and their Rules of Professional Conduct, to encourage settlement where possible. However, on the other hand, lawyers face a landmine and significant risk to their clients if the settlement is entered into without compliance with the bright-line rule. This seems to be the case especially with respect to settlement agreements in Ontario.

At the time of writing this paper, the Ontario Court of Appeal released *Hamilton-Wentworth District School Board v Zizek*, a further decision which sought to address this issue. In Zizek, the Court of Appeal clearly and unequivocally found that:

The principle itself is clear.

This is not a matter of discretion, nor is it a matter of 'context', nor of factual analysis.[72]

However, from a review of the case law and literature, it does not seem that a stay of proceedings ought to be the immediate choice of remedy in these cases, notwithstanding how "entrenched" in the law it may be.

Unfortunately, the Supreme Court of Canada has dismissed three Ontario leave to appeal applications with respect to the Waxman, Tallman and Poirier decisions. Although it is disappointing that the Supreme Court of Canada has dismissed applications for leave in all three cases, it is unknown as to whether Zizek will be appealed to the Supreme Court of Canada. It is hoped that the top court in the country will ultimately provide some much needed judicial guidance in this area.

71. *Northwest Waste, supra*, footnote 52, at paras. 60 and 62.
72. *Hamilton-Wentworth District School Board v. Zizek*, 2022 ONCA 638, 2022 CarswellOnt 12675 (Ont. C.A.), at para. 10.

Addendum: Provincial Civil Litigation Rule Regimes and Rules of Professional Conduct

Province	Legislation	Relevant Sections	Rules of Professional Conduct
British Columbia	*British Columbia Supreme Court Civil Rules*, B.C. Reg. 168/2009	R. 9-1 (4) – (6)	Code of Professional Conduct for British Columbia **See 3.2-4** Encouraging Compromise or Settlement
Alberta	*Alberta Rules of Court*, Alta. Reg. 124/2010	R. 4.24 and R. 4.29	Code of Conduct Law Society of Alberta **See 3.2-10** Encouraging Compromise or Settlement
Saskatchewan	*The Queen's Bench Rules*, Sask. Q.B. Rules 2013	R. 4-31	Code of Professional Conduct Law Society of Saskatchewan **See 3.2-4** Encouraging Compromise or Settlement
Manitoba	> Manitoba Court of Queen's Bench Rules, Man. Reg. 553/88	R. 49.02, 49.03, 49.10, and 49.14	Code of Professional Conduct Law Society of Manitoba **See 3.2-4** Encouraging Compromise or Settlement
New Brunswick	*Rules of Court New Brunswick*, Reg 82-73.	R. 49	Law Society of New Brunswick Code of Professional Conduct **See 3.2-4** Encouraging Compromise or Settlement

Province	Legislation	Relevant Sections	Rules of Professional Conduct
Nova Scotia	*Nova Scotia Civil Procedure Rules*, N.S. Civ. Pro. Rules 2009	R. 10	Nova Scotia Barristers' Society Code of Professional Conduct **See 3.2-4** Encouraging Compromise or Settlement
Prince Edward Island	*Rules of Civil Procedure* under the *Judicature Act*, P.E.I. Rules	R. 49	Law Society of Prince Edward Island Code of Professional Conduct **See 3.2-4** Encouraging Compromise or Settlement
Newfoundland and Labrador	*Rules of the Supreme Court*, 1986, S.N. 1986, c. 42, Sched. D	R. 20A	Law Society of Newfoundland and Labrador Code of Professional Conduct **See 3.2-4** Encouraging Compromise or Settlement
Northwest Territories	*Rules of the Supreme Court of the Northwest Territories*, N.W. T. Reg.R-010-96	R. 197, 201	Code of Professional Conduct of the Northwest Territories **See 3.2-4** Encouraging Compromise or Settlement
Yukon Territories	*Supreme Court of Yukon Rules*	R. 39	Code of Conduct **See 3.2-4** Encouraging Compromise or Settlement

Province	Legislation	Relevant Sections	Rules of Professional Conduct
Nunavut	See above: *Rules of the Supreme Court of the Northwest Territories*	R. 197, 201	Law Society of Nunavut Model Code of Professional Conduct **See 3.2-4** Encouraging Compromise or Settlement