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EXTRICATING YOURSELF FROM MULTI-PARTY LITIGATION AND THE EFFECTIVENESS OF CONTRACTUAL RELEASES

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June 2015

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I. INTRODUCTION

This paper describes two common types of partial settlement agreement, which are insurers can use to extricate their insureds from multiparty litigation where not all litigants are motivated to settle: Pierringer and Mary Carter Agreements. We also answer several common technical questions regarding the implementation of Pierringer and Mary Carter Agreements, illustrate some of the procedural pitfalls which have emerged from the caselaw, and explain how these agreements are treated by the Courts in different jurisdictions in Canada.

The paper also comments on recent issues discussed by law reformers across Canada as they relate to joint and several liability. Law reform in the area of joint and several liability could greatly impact the frequency with which Pierringer Agreements are utilized in multiparty litigation because such agreements sever liability, which may spur plaintiffs to accept partial settlements. For example, if Ontario municipal governments were no longer to be held jointly liable for negligence claims, it is likely that municipalities would be able to negotiate Pierringer Agreements far more frequently and on more favourable terms.

The second part of this paper deals with releases, which are often important elements of settlement agreements. We describe ways in which releases have been set aside by the Canadian Courts, and suggest practical measures for ensuring that a release remains effective in concluding a claim.

Finally, we include as Appendices “A” and “B” sample wording for both Pierringer and Mary Carter Agreements.

II. PARTIAL SETTLEMENT AGREEMENTS

A. PIERRINGER AGREEMENTS

A Pierringer Agreement is an agreement entered between a settling defendant and the plaintiff, which allows the settling defendant to extricate itself from multi-party litigation, while allowing the plaintiff to continue to prosecute its claim against the remaining defendants. The agreement provides that the plaintiff will no longer seek to recover in the action or by any other proceeding any portion of the losses which the

plaintiff claims in the action which a court or other tribunal may attribute and apportion solely to the fault of the settling defendant. The agreement also provides that the plaintiff will no longer seek to recover any judgment from any person who could in turn claim contribution and or indemnity pursuant to the common law or statute. Further, the agreement provides that the plaintiff will advise the court of the agreement and amend the pleading to remove allegations as against the settling defendant.

The agreement may also provide that if a trial proceeds as against the remaining defendant and that defendant seeks an apportionment of fault, the plaintiff will instruct their counsel to defend the settling defendant in the apportionment at the plaintiff's cost. The agreement also

The leading case on Pierringer Agreements is the Supreme Court of Canada's 2013 decision in *Sable Offshore Energy Inc. v. Ameron International*.¹ The Court commented that even partial settlements should be encouraged as they allow parties to avoid the time and expense of participating in litigation, and frees up the Court system to deal with other matters:

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

. . . the courts consistently favour the settlement of lawsuits in general. To put it another way, there is an overriding public interest in favour of settlement. This policy promotes the interests of litigants generally by saving them the expense of trial of disputed issues, and it reduces the strain upon an already overburdened provincial court system. [p. 230]

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

Recent cases which consider Pierringer Agreements consider the extent of information about the settlement and the procedural relief the non-settling defendants are entitled to from the settling defendants. Generally, non-settling defendants are not entitled to

¹ *Sable Offshore Energy Inc. v. Ameron International*, 2013 SCC 37.

know the amount of the settlement, but are often entitled to procedural orders dependant on the facts of the case.

B. MARY CARTER AGREEMENTS

Mary Carter Agreements (“MCA”) as opposed to Pierringer Agreements, require the settling defendant to attend and participate in the trial, which proceeds against non-settling defendants. The settling defendant under a MCA agrees not to lead evidence regarding quantum, but can lead evidence directed towards liability being apportioned against the non-settling defendant (and not them). The settling defendant continues to have a stake in the outcome of the litigation on the basis that if liability is apportioned to a greater extent against the non-settling defendants, the settling defendant can have some of their settlement payment returned. If the non-settling defendant is successful at trial in limiting liability apportioned against them, there can be a cost award against the non-settling defendant in addition to the settlement payment.

Mary Carter Agreements need to be disclosed to the non-settling parties. In *Moore v. Bertuzzi*, the Court, dismissed Orca Bay and Bertuzzi’s appeal of the decision, which required the terms of the Mary Carter Agreement to be disclosed despite the argument that the terms were privileged on account of settlement negotiation privilege:²

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

[77] As a matter of ensuring procedural fairness, as an element of its assessment of evidence, as a factor in determining the truth of the facts, and as a factor in administering justice, the court needs to know the reality of the adversity between the parties. The court's interest in knowing the genuine state of adversity explains why so much attention is paid by the court: (a) to standing and status; (b) to whether a person is a proper or necessary party; (c) to whether a person is affected by a proceeding and entitled to notice and an opportunity to be heard; (d) to

² *Moore v. Bertuzzi*, 2012 ONSC 3248

the order of openings, the presentation of evidence, closings and argument; (e) to the right to cross-examine; (f) to whether a [page628] party or affected person consents, does not oppose or opposes the relief sought in a proceeding, be it interlocutory relief or a final order; (g) to the doctrines of res judicata, issue estoppel and abuse of process; and (h) to the avoidance of a multiplicity of proceedings.

In *Laudon v. Roberts*, the Court held that the non-settling defendant would not benefit from the settling defendants Mary Carter Agreement payment.³ The plaintiff was severely injured when the boat he was riding in, as a passenger, collided with another boat. Before trial, one of the boat owners agreed, on a Mary Carter basis, to settle with the plaintiff for \$438,000 inclusive of costs and disbursements. Given that it was a Mary Carter agreement, the settling defendant would still participate in the subsequent trial, but would not be required to pay more than \$438,000 if the jury award exceeded that amount. The agreement provided that if the jury award was less than that amount, Roberts would not be refunded a portion of the \$438,000.00. The jury awarded damages of \$312,000 and held the plaintiff 11% contributorily negligent.

The Court commented:

[36] *A MCA is a type of agreement which partly settles a lawsuit. It permits participating or contracting claimants to settle their claims while maintaining their claims against remaining or non-contracting participants. A plaintiff who enters such an agreement with one of several defendants receives a certain recovery and maintains the chance to better that recovery in proceeding against the remaining defendants. On the other side, the contracting (paying) defendant buys peace at a sum certain and in the usual MCA, although not in this case, the opportunity to recover some part of the money they paid if the plaintiff succeeds in recovering more than the contracting defendant has paid. It is thought such agreements bring additional pressure on those non-contracting parties to settle the lawsuit.*

The Court also commented that a true Mary Carter Agreement contains a provision whereby the settling defendant is to recover some of the monies paid in the event that the plaintiff recovers more than he/she was paid under the agreement.

In *Edmonton (City of) v. Lovat Tunnel Equipment Inc.* the Court held that a Mary Carter Agreement reached between Edmonton and Lovat which allowed Edmonton to continue to pursue the third party proceedings of Lovat against Rotek was not an abuse of process and did not require the Court to strike the third party proceeding as argued

³ *Laudon v. Roberts (and Sullivan)*, 2009 ONCA 383

by Rotek.⁴ The Court held that Edmonton could receive payment from Lovat along with the assignment of their third party action. Because the agreement was promptly disclosed to all parties and to the Court, the Court could control its process with full knowledge of all relevant facts despite Rotek's argument that the Court could not fairly assess Rotek's relative fault, since Edmonton would control Lovat's witnesses and present evidence so as to shift fault to Rotek. The Court also commented that the agreement stipulated that Edmonton and Lovat would not cross-examine each other's witnesses which protects against the common concern of sweetheart cross-examinations.

C. TERMS FOR NON-SETTLING PARTIES

Non-settling parties are often concerned that they will not be on the same footing to argue apportionment of fault had a several settlement agreement not been entered. Insurers are well advised to discuss with their counsel what procedural entitlements they would benefit from and should bargain for as a term of consenting to other parties Pierringer Agreement proceeding.

In *Re Hollinger Inc.*, the Court heard an application in a Companies' Creditors Arrangement Act proceeding.⁵ The Court was asked to approve a Pierringer Agreement reached by Hollinger with its former lawyers and accountants. In approving the Pierringer Agreement, the Court commented that a number of procedural entitlements the opposing non-settling parties sought, could be provided through active case management available under Ontario's Commercial List and especially given that Hollinger limited its claims against the non-settling defendants to several liabilities. The Court reviewed the case of *Ontario New Home Warranty* in canvassing the procedural entitlements often sought by the non-settling defendants – namely documentary discovery, oral discovery, and the ability to serve notices to admit on the settling defendants.⁶

If a several settlement agreement is not reached, all parties would have to lead evidence at a trial of the matter. Defendants would be entitled to cross examine one and other's witnesses. Non settling parties often make it a term of consenting to the consent dismissal order or notice of discontinuance being filed, that the settling party provide a suitable witness for the purposes of trial.

Parties are often concerned when several settlement agreement is reached at a stage in the litigation before they have had an opportunity to examine settling parties for

⁴ *Edmonton (City of) v. Lovat Tunnel Equipment Inc.*, 2000 ABQB 133.

⁵ *Re Hollinger Inc.*, 2012 ONSC 5107

⁶ *Ontario New Home Warranty v. Chevron Chemical Co.*, [1999] OJ No. 2245 (QL)(SC).

discovery. As an example, non-settling defendants may require discovery evidence to address apportionment of fault issues at trial.

If the document production of the settling parties has been somewhat dilatory, a non-settling party may want to consider using the juncture to obtain fuller document production, answers to interrogatories or admissions pursuant to notices to admit as a concession for providing their consent to entry of the consent dismissal order and pleading amendment which is a term of a Pierringer Agreement.

D. PROCEDURAL PITFALLS

Procedural pitfalls often arise when attempting to have the non-settling parties sign the consent dismissal order or notice of discontinuance dismissing the claim as against the settling party, particularly so where the non-settling defendant has taken out a third party notice against the settling defendant.

If liability is not several, but joint, such as in a situation where a plaintiff in a bodily injury case has sustained an indivisible injury, being a scenario where there are consecutive, not concurrent torts, the court has held that the third party proceedings are not to be struck, *Patterson v. Williams*.⁷

In order to protect against this, counsel often draft terms into BC Ferry settlement agreements whereby the plaintiff will defend and indemnify the settling party from any joint liability apportioned against them.

If the non-settling defendant's third party notice seeks indemnity based on a separate cause of action in contract or tort owed by the settling defendant to the non-settling defendant, the third party notice will stand, despite the fact that the defendant has settled with the plaintiff.

In *Amoco Canada Petroleum Company Ltd. V. Propak Systems Ltd.*, the Court held that where a Pierringer Agreement does not contain a clause which indicates that the plaintiff will indemnify a settling party from any third party notice a non-settling party has issued, the court will not strike the third party notice where the former is owed an independent duty of care beyond a claim for contribution and indemnity by the latter.⁸

Where a third party notice of a non-settling party seeks indemnity grounded in either contract or tort alleging an independent duty owed to the non-settling defendant by the settling defendant, a Pierringer Agreement will be permitted but the third party notice

⁷ *Patterson v. Williams*, 2010 BCSC 1455.

⁸ *Amoco Canada Petroleum Company Ltd. V. Propak Systems Ltd.*, 2001 ABCA 110

will remain outstanding. In order for the third party notice to be extinguished, the Pierringer Agreement would have to provide that the plaintiff does not seek to recover any amount from a non-settling defendant which the non-settling defendant could indemnify from a third party.

Pierringer Agreements which call for the claim to be amended to only claim amounts from non-settling defendants which they are not owed indemnity from settling defendants are effective in striking the claim and the third party notice.

In *BC Ferry Corp. v. T & N*, BC Ferry Corp. brought a claim against T & N, an asbestos manufacturer, to recover the cost of removal of asbestos from their fleet after it learned of health risks posed by asbestos. T & N commenced a third party proceeding against Yarrows Limited who installed the asbestos.⁹ T & N sought contribution and indemnity from Yarrows Ltd. on account of their alleged failure to warn the plaintiff of the risk of asbestos or that they had improperly installed the asbestos. Yarrow (and other third parties) brought applications to have the third party notices struck. Braidwood J. struck the third party notice. He commented “*if the plaintiff, at the hands of two tortfeasors, suffers a loss and despite the fact that the loss was caused from both, elects only to claim from one defendant, that portion of the loss that the one defendant caused, that defendant can have no right.*” The Court commented that the plaintiff has expressly waived any right to claim against the defendants for damage caused or contributed to by the fault of the third parties and commented at para 15:

“...In order to avoid any uncertainty that may arise with respect to the need for a determination at trial of the degree of fault, if any, attributable to non-defendants, I am of the view that the express waiver is clearly set out. When that is done, there will be no doubt as to the limits of the plaintiff’s claim for damages, nor will there be any uncertainty as to the obligation of the trial judge to determine what fault, if any, for the plaintiffs’ loss is attributable to others than the defendants.”

Further, the Court stated s. 4 of the *Negligence Act* gives them an independent right to claim contribution and indemnity from concurrent tortfeasors, and that no act of the plaintiffs can deprive them of that statutory right.... If the defendants are saved harmless from any damages caused or contributed to by the fault of a concurrent tortfeasor, there is no need to exercise that right—indeed, in such circumstances there is no basis upon which the right to contribution or indemnity, provided for in s. 4 of the *Negligence Act*, could be exercised.¹⁰

⁹ *BC Ferry Corp. v. T & N*, [1993] B.C.J. No. 2611 (QL)(SC).

¹⁰ A Pierringer Agreement is commonly referred to as a “BC Ferry Agreement” in British Columbia as a result of this decision.

E. DISTINCTIONS BETWEEN CANADIAN JURISDICTIONS

There are very few distinctions with respect to Pierringer and Mary Carter Agreements among Canadian jurisdictions, given that the Supreme Court of Canada has reviewed the law.

The Supreme Court of Canada has reviewed the law of Pierringer Agreements in determining that the settling defendant need not disclose the quantum of settlement to the non-settling defendant, *Sable Offshore Energy Inc.*:¹¹

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

In Alberta the settling parties are required to disclose that quantum of the agreement, whereas all other Canadian Jurisdictions allow for this to be kept confidential.

However, distinctions among different Canadian jurisdictions negligence act with respect to whether there is joint and several liability in the face of contributory negligence does create slight variations which are important to discuss with counsel when negotiating these agreements.

For example, in British Columbia, a settling party may remain in the litigation as a named defendant where the plaintiff indicates they seek a declaration regarding apportionment of fault.

F. DISCLOSURE OF THE AGREEMENT

A party to the agreement needs to disclose the existence of the agreement to all other parties of record as soon as is practicable.

In *Aecon Building v. Brampton*, the Court held that a Mary Carter Agreement needed to be disclosed immediately to all other parties and the Court.¹² Aecon and Brampton reached an agreement wherein Aecon would cap damages it sought from Brampton at the amount recovered from parties third parties by Brampton. The Court set out that

¹¹ *Sable Offshore Energy Inc., supra.*

¹² *Aecon Building v. Brampton*, 2010 ONCA 898.

because such agreements change entirely the landscape of the litigation, they need to be disclosed and where this was not done the Court had to sanction the abuse of process with consequences of the most serious nature for the defaulting party in that the Third and any Fourth Partly proceedings were to be stayed.

In all Canadian jurisdictions, except Alberta, the settlement amount under a Pierringer Agreement need not be disclosed. In Alberta, the settlement amount must be disclosed to the other parties.

G. LAW REFORM

Alberta's *Tort-Feasors Act* and *Contributory Negligence Act*, Ontario's *Negligence Act* BC's *Negligence Act* and Manitoba's *Tortfeasors and Contributory Negligence Act* all enable the Courts to apportion degrees of fault and allow defendants to pursue joint tortfeasors for contribution. This is not provided for by common law, but statute, and accordingly, is subject to change by the amendment of legislation.

The various law reform proposals outlined below could affect the usefulness of partial settlement agreements in extricating parties from multi-party litigation. It would be prudent to confirm with defence counsel, before instructing them to proceed with negotiating a partial settlement agreement, that there is no recent law reform in the relevant Canadian jurisdiction.

1. Law Commission of Ontario - Joint and Several Liability Final Report 2011

Joint and Several Liability under the Ontario Business Corporations Act was reviewed in 2011 to determine if the Business Corporations Act needed to be amended to limit the application of joint and several liability to professional advisors. The final report indicated that the business corporations act did not need to be amended as contractual caps, financial statement insurance and catastrophic bond securitization can address at least some of the concerns.

In 2014, the Ontario Legislature considered a motion which would see several liability for municipalities in negligence lawsuits to prevent against situations where municipalities were found 1% at fault needing to satisfy an entire judgment and attempt to collect from other defendants.

2. Alberta Institute of Law Research and Reform - Report No. 31 Contributory Negligence and Concurrent Wrongdoers - April, 1979

The Alberta Institute of Law, Research and Reform reviewed issues of joint and several liability in 1979.

This report made 25 recommendations for legislative reform to the *Contributory Negligence Act* and *Tort-Feasors Act* including a consolidation of the two statutes. The report recommended the abolition of the last clear chance doctrine which allows a plaintiff to avoid “harshness” associated with the contributory negligence bar to joint and several liability (followed in 1997).

The report recommended that contribution should not only be provided for where there is joint liability in negligence, but also where a co-defendant is liable for the same act in breach of contract or trust.

The report recommended that the legislation should clarify that a concurrent wrongdoer includes a person who is vicariously liable for the act of another. The Institute also recommended a defendant who settled their claim with the plaintiff should not be obliged to contribute to the remaining defendants or be permitted to seek contribution from them.

3. Manitoba Law Reform Commission - Contributory Fault : The Tortfeasors and Contributory Negligence Act September 2013.

The Commission recommended that the Act be amended to provide for contribution for intentional tort as well as unintentional torts, so that there is apportionment of liability for those at fault not just those who were negligent including apportionment of liability for a party who is a fault by reason of vicarious liability. The Act should not provide for apportionment of damages for contributory fault for breaches of fiduciary duty but should be amended for contribution where breach of contract creates a liability for damages and breach of statutory duty. Where a party gives consideration for a release of a claim, they have right to recover contribution from another person liable and are liable to pay contribution.

4. British Columbia Law Institute - Report on Contribution and Settlement under the Negligence Act - December 2013

In December 2013, the BCLI released its latest report making recommendations to reform to British Columbia’s *Negligence Act*. These recommendations target issues in

bodily injury litigation and do not address issues which arise in non-bodily injury litigation multi-party litigation.

BCLI recommends that the *Negligence Act* should be amended, as follows:

1. The *Negligence Act* should provide guidance on a wrongdoer's right to contribution and indemnity from another wrongdoer who has settled with the injured party.
2. In scenarios where there are concurrent (as opposed to consecutive) wrongdoers, the injured person's claim is reduced to the extent fault is apportioned against the settling wrongdoers and the settling wrongdoers aren't required to contribute or indemnify non-settling wrongdoers who are responsible for the injured person's loss.
3. Non settling defendants found to be at fault for an injured person's claim are jointly and severally liable;
4. After partial settlement a settling wrongdoer has no rights to contribution or indemnity from a non-settling wrongdoer.

The best method for determining if a release is valid is to assess the manner in which a release may be rescinded. This paper will outline some of the ways in which releases have been set aside by the Canadian Courts as well as provide some suggestions on how to ensure a release is effective in concluding a claim.

III. WAYS IN WHICH RELEASES ARE SET ASIDE

A litigant may attempt to have a release set aside by demonstrating one of four positions, as discussed below.

A. INCORRECT TERMS (*NON EST FACTUM*)

In order to succeed on this argument, the person complaining must establish that the release should be avoided under the ordinary principles of contract law. The plaintiff must establish that the release is something different than what the parties agreed upon.

In *Clancy v. Linquist*,¹³ the plaintiff successfully argued that her prior release was not a valid action against the second of two drivers. Clancy's spouse was killed in a two vehicle motor vehicle accident and she signed a release in return for ICBC death benefits. She then initiated an action against the other driver, believing that the other driver was insured by someone other than ICBC. ICBC relied upon the release to prevent the continuance of the lawsuit.

Although the ICBC adjuster included a release of the claim, the adjuster did not explain its concept to the claimant. The Court accepted the plaintiff's evidence that she did not fully understand what she was signing and the release was set aside. This decision evidences a heavy onus upon insurance adjusters and their representatives to ensure that a plaintiff fully understands the nature and effect of a release *before* it is signed.

Recently, the British Columbia Supreme Court reviewed the defence of *non est factum* in *Adams v. British Columbia*.¹⁴ In this case, Mr. Adams who attended Jericho Hill School for the Deaf and Blind between 1962 and 1975 commenced a lawsuit against the Provincial Government wherein he claimed that the defendant Province breached its duty to protect him from sexual and physical assault. Mr. Adams commenced this lawsuit after already signing a release and accepting a \$60,000 settlement payment. Mr. Adams's claim was dismissed despite his defence of non est factum. The Court held that the terms of the release were explained to Mr. Adams with the benefit of an interpreter and he was given an opportunity to ask further questions, if needed. In weighing the evidence, the Court upheld the release and held it was not reasonable for Mr. Adams to allege that he did not understand the import of the document he was signing.

B. MUTUAL OR UNILATERAL MISTAKE OF FACT

Also known as a "common mistake of fact on a matter of fundamental importance", this doctrine will apply to set aside a release if it can be established that the mistake existed at the date the release was agreed upon. It is important to note the Canadian caselaw is clear that the mere fact a plaintiff made a mistake is *insufficient* to set aside a release. The Courts must examine more than the mere mistake to ascertain if the agreement was unjust or inequitable.

In *Burns v. Wellington Insurance Co.*, the Court rectified a release provided to the defendants Insurer to provide that it did not release the Plaintiff's first party insurer from the under insured motorist claim.¹⁵ Both parties were aware that the claim against

¹³ *Clancy v. Linquist*, [1991] BCJ No. 497 (SC); see also *Barriault v. Scherger*, 1998 ABQB 281.

¹⁴ *Adams v. British Columbia*, 2013 BCSC 557

¹⁵ *Burns v. Wellington Insurance Co.*, [1994] OJ No. 96 (QL)(CA)

the first party insurer existed at the time the release was agreed to and did not intend it to release the first party insurer. The Court commented that it would be unconscionable to allow Employers Insurance of Wausau the first party insurer to rely on the release and therefore ordered rectification of the wording of the release.

Unfortunately, what constitutes an “unjust or inequitable” agreement has not been clearly established by the Canadian Courts. The Courts have essentially blurred the doctrine of “Mistake of Fact” with the principles of “Unconscionable Bargain”.

C. MISREPRESENTATION

Where a misrepresentation is made in the settlement negotiations and the misrepresentation is substantial, material or goes to the root of the settlement, and the misrepresentation is acted upon, the release can be rescinded. In *Jetty v. ING Insurance Co. of Canada*, a release was rescinded on the basis that the plaintiff was not made aware of his right under the *Accident Benefits Schedule* to have 80% of his business losses added to his income replacement benefit calculation.¹⁶ The Court accepted that the Plaintiff would not have settled the claim had he been aware of this information and held that the claim was not settled, but rescinded, as a result of the misrepresentation.

D. UNCONSCIONABLE BARGAIN

Inequality as between the parties must be shown to have existed. Early Canadian decisions emphasized the importance of a finality of a release. The Ontario High Court in *Hoyer v. Toronto Transportation* warned of the danger in cases that were settled in the most solemn and formal manner, and then reopened by the mere claim of a plaintiff that he did not realize the seriousness of his injuries at the time of the settlement.¹⁷

The Saskatchewan Court of Appeal went a step further *Hurman v. Canadian National* by finding that the validity of the release depends not on whether the injured person knew what was wrong with him or her and the possibility of further problems, but whether he or she *understood* that the release covered subsequent and consequential injuries.¹⁸

Despite judicial enforcement of the validity and finality of a release, the B.C. Supreme Court reinforced the heavy onus upon insurance adjusters to explain fully the extent of the settlement to the Releaser. In *Dickens v. Parker*, the British Columbia Supreme Court found that the Plaintiff did not understand her entitlement to claim damages for pain

¹⁶ *Jetty v. ING Insurance Co. of Canada*, [2008] OFSCD No. 21 (QL)(FSCO), affirmed 2010 ONSC 1091.

¹⁷ *Hoyer v. Toronto Transportation*, [1952] OWN 261 (HCJ); see also *Floyd v. Couture*, 2004 ABQB 238; *Gindis v. Brisbourne*, 2000 BCCA 73; *McNeill v. Vandenberg*, 2010 BCCA 583.

¹⁸ *Hurman v. Canadian National* (1957), 23 WWR (NS) 119 (SKCA).

and suffering and had no concept of future earning capacity. For that reason, the release was rescinded.¹⁹

Recently, in *Jones v. Jenkins*, the Court set aside the release and settlement of an automobile claim obtained by an examiner.²⁰ The Court found that there was an inequality of bargaining position and the agreement reached was sufficiently divergent from standards of commercial morality on the basis that the damages were discounted by 75% for liability despite there being no evidence of liability on the part of the plaintiff.

In determining if a release should be set aside the Court commented that there needs to be evidence:

- a) That there is an inequality of bargaining power arising out of ignorance, need or distress of the weaker party;
- b) That the stronger party has unconscientiously used the position of power to achieve an advantage; and
- c) That the agreement reached is substantially unfair to the weaker party or is sufficiently divergent from community standards of commercial morality that it should be set aside.

The B.C. Court of Appeal in *Smyth v. Szep* concluded that to establish equality among the parties, the insurance adjuster must not make an improvident offer without a true appreciation the value of the claim. The adjuster must have acted fairly if he or she had no factual basis on which to assess the plaintiff's present condition or future prognosis.²¹

The *Smyth* decision also makes clear that, once an inequality of the parties has been established, the defendant then bears the burden of proof to show that the bargain was fair and reasonable. If it cannot be established that the bargain was fair and reasonable, the release will be rescinded.

Regardless of whether the release was obtained by a broker, agent, private or public insurer, the facts surrounding how the release was obtained is the sole test applied by the Courts in considering whether or not a release should be set aside.

¹⁹ *Dickens v. Parker*, [1995] B.C.D. Civ.3389-01 (SC).

²⁰ *Jones v. Jenkins*, 2011 ONSC 1426.

²¹ *Smyth v. Szep*, [1992] B.C.D. Civ. 3359-05 (CA).

IV. STEPS TO AVOID A RELEASE BEING SET ASIDE

There is a stronger probability that a release will be upheld if the following steps are taken:

- *Let the plaintiff seek the settlement*

In cases where the insurer has sought out the plaintiff and offered a figure to resolve a claim, the Courts appear to consider this step as coercing the plaintiff to settle when they otherwise might not have. However, as insurers wish to avoid an ongoing claim that could and should be settled, perhaps the more appropriate approach would be to advise the plaintiff that the insurer wishes to settle when the plaintiff is prepared to do so. This approach allows the plaintiff to “seek out” the insurer when they wish to settle.

- *Allow the plaintiff an opportunity to consider the settlement*

Resist the pressure to obtain a plaintiff’s signature on a release at the first settlement meeting. Even if the plaintiff does not feel the need to do so, instruct the plaintiff to take the settlement offer away from the meeting to consider it for a period of time before he or she signs the release.

- *Recommend the plaintiff obtain legal advice*

Always advise the claimant of their option to obtain legal advice prior to accepting the settlement. If they refuse legal advice, obtain confirmation of their refusal to obtain legal advice on the release.

- *Identify all the parameters of the claim*

One of the main reasons releases are rescinded is because a claimant subsequently discovers a “new” injury or financial loss that they were not aware of at the time of signing the release. If the claim is such that there is a possibility of ongoing or unknown problems, advise the plaintiff to seek advice from their medical practitioner. Ensure that the terms of the release include reference to the fact that the plaintiff has sought medical advice regarding ongoing and/or unknown problems and is prepared to settle based on the advice sought.

- *Education of the Plaintiff*

While no one in the insurance industry wishes to educate a plaintiff on the merits of his or her claim, a release has easily been set aside when the plaintiff did not understand

the essential elements of their claim, such as “pain and suffering” or “loss of future earning capacity” (*Dickens v. Parker*).²²

If such a plaintiff does not appear to understand these concepts, the insurance representative should make an effort to educate the plaintiff and, preferably, advise the plaintiff to seek legal advice.

V. CONCLUSION

The Canadian Courts continue to emphasize the heavy onus placed upon insurance representatives to treat unrepresented claimants in a fair and reasonable manner. What constitutes “fair and reasonable” is constantly being tested, based on the merits of each case.

Whether the insurer is a private or public body, the level of inequality at the bargaining table is always assessed against the insurer. In order to “level the playing field”, the insurer must not only establish that it has taken steps to do so, but must be satisfied that the plaintiff fully understood these steps had been taken for their benefit.

There are numerous steps that can be undertaken to level the inequality of bargaining, only some of which have been identified in this paper. The more effort that is undertaken to explain and inform, the reduced probability a release will be set aside.

Insurers including insurers of parties involved in multi-party litigation should however continue to explore settlement options to take advantage of the fact that the settlement amount can be kept privileged and a reasonable settlement can avoid the cost associated with continued involvement in the litigation and the risk associated with trial.

VI. SAMPLE LANGUAGE

Below is some sample language which we have assembled which would need to be tailored to the specific circumstances of your case but would govern any necessary pleading amendment and any agreement reached.

In addition to deleting reference to the settling defendant in the Amended Notice of Civil Claim and style of cause and filing a Notice of Discontinuance in favour of the

²² *Dickens v. Parker, supra.*

settling defendant, the following paragraph has been included in the Amended Notice of Civil Claim:

The Plaintiffs expressly waive any right to recover from the Defendants any portion of the loss which the Plaintiffs claim and which the court may attribute to the fault, liability or responsibility of the [settling defendant] for which the Defendants might reasonably be entitled to claim contribution, indemnity or an apportionment against [the settling defendant] pursuant to section 1 or 4 of the Negligence Act, R.S.B.C. 1996, c. 333 or any successor equivalent legislation.

A. APPENDIX "A" - SAMPLE BC FERRY AGREEMENT

No. [Number]

Vancouver Registry

IN THE SUPREME COURT OF BRITISH COLUMBIA

BETWEEN:

[Name]

PLAINTIFF

AND:

[Names]

DEFENDANTS

AND:

[Names]

THIRD PARTIES

SETTLEMENT AGREEMENT AND COVENANT NOT TO SUE

Whereas:

A. This action arises from a motor vehicle accident that occurred on or about [Date], in the City of [Name]. The Plaintiff, [Name], was riding as a passenger in a vehicle driven by the Defendant, [Name], and owned by the Defendant, [Name], when the vehicle left the road at or near the intersection of [Name] and [Name] Street, resulting in injuries to the Plaintiff.

B. The Plaintiff has brought action No. [Number] in the Vancouver Registry of the Supreme Court of British Columbia (the "Action") in relation to the accident described above.

C. The Plaintiff has named [Name], as a Defendant in the Action. The Plaintiff alleges, *inter alia*, that [Name] was negligent in its provision of alcohol to, and in its supervision of consumption of alcohol by, [Name] on the date of the accident.

D. The Plaintiff has named [Name], as a Defendant in the Action. The Plaintiff alleges, *inter alia*, that [Name] was negligent in its provision of alcohol to, and in its supervision of consumption of alcohol by, Mr. [Name] on the date of the accident.

E. The Plaintiff has named [Name], as a Defendant the Action. The Plaintiff alleges, *inter alia*, that [Name] was negligent in its control over a construction site at or near the location of the accident, thereby creating a hazard or a risk.

F. The Plaintiff has named the City of [Name], as a Defendant in the Action. The Plaintiff alleges, *inter alia*, that [Name] was negligent in its control over a construction site and public works at or near the location of the accident, thereby creating a hazard or a risk.

G. The Defendants [Names] have issued Third Party Notices to the Defendants [Names].

H. A trial of the Action is scheduled to commence on [Date].

I. The Plaintiff and certain (but not all) Defendants and Third Parties have agreed to resolve and settle the issues arising out of the Action between themselves on certain terms.

J. The Defendants and Third Parties that have agreed to resolve and settle the issues arising out of the Action with the Plaintiff and between themselves are the Defendants [Names], and the Defendant and Third Party [Name] (collectively, the "Settling Defendants").

K. The Plaintiff and the Settling Defendants acknowledge that the total value of the claims of the Plaintiff identified in the Statement of Claim against the Defendants in the Action may exceed the consideration passing from the Settling Defendants to the Plaintiff under this Settlement Agreement and Covenant not to Sue.

L. The Plaintiff wishes to preserve any claims which he may have against the Defendants and Third Parties to the Action who have chosen not to resolve and settle the issues between the Plaintiff and themselves (the "Remaining Defendants").

NOW THEREFORE AND IN CONSIDERATION of the mutual covenants and agreements herein, the receipt and sufficiency of which is hereby acknowledged, the parties agree together as follows:

1. The Settling Defendants shall pay the sum of [Written Amount] (\$[Number Amount]) to the Plaintiff as damages.

2. Additionally, the Settling Defendants shall pay the sum of \$[Number Amount] as fees and \$[Number Amount] as disbursements.
3. Additionally, the Settling Defendants shall pay the Plaintiff's share of the costs of mediation that took place on [Date].
4. Should the Settling Defendants choose to attend the trial of the Action as nominal defendants, they will take no position with respect to liability, apportionment, or damages.
5. The Settling Defendants shall instruct all experts retained by the Settling Defendants to provide all remaining parties to the Action with an opportunity to meet with them individually and to cooperate with any requests to attend at trial. The costs of any such meetings or attendance at trial shall be borne by the requesting party.
6. The Defendant [Name] shall provide a statutory declaration as to his assets to the Plaintiff within two weeks of the date of settlement. The Plaintiff retains the right to nullify this Settlement Agreement and Covenant not to Sue at his discretion, and as against the Defendant [Name] only, if the Defendant [Name] has assets in excess of \$[Number Amount].
7. The Plaintiff shall satisfy any subrogated claim brought by the Province of [Name] for sums it has paid or will pay to the Plaintiff or on the Plaintiff's behalf pursuant to the [Name of Province] Health Insurance Program. The Plaintiff shall indemnify and hold harmless the Settling Defendants in relation to any such claim.
8. The Plaintiff shall and does hereby covenant not to sue the Settling Defendants, their servants, agents, employees, insurers, successors and assigns, in respect of any and all actions, causes of action, contracts, claims, demands or damages of any nature or kind whatsoever brought or which reasonably could have been brought by the Plaintiff against the Settling Defendants in connection with the subject matter of the Action.
9. The Plaintiff shall and does hereby instruct his counsel to apply to file a Discontinuance in the Action, without costs to any party, as against the Settling Defendants.
10. In the event that the Plaintiff maintains the Action or makes or takes any further proceedings against any other persons, companies, partnerships or legal entities who might claim contribution or indemnity, an indemnity for defence costs or

any declaratory relief from the Settling Defendants, the Plaintiff hereby covenants that it will:

11. At the first reasonable opportunity, advise the Court, Tribunal or Arbitrator(s) in any such proceedings that the Plaintiff will not seek to recover any Judgment or award against any other person which would provide a right to such person to in turn claim contribution or indemnity against the Settling Defendants pursuant to either ss. 1 or 4 of the Negligence Act, R.S.B.C. 1996. c. 333, or any successor legislation, or at common law;
12. Not to seek to recover in the Action or by any other proceeding, any portion of the losses which it claims in the Action which a court or other tribunal may attribute and apportion solely to the fault of the Settling Defendants;
13. At the first reasonable opportunity, advise the Court in the Action that it expressly waives any right to recover from any of the Remaining Defendants in the Action any portion of the loss which the Plaintiff claims and which the Court may attribute and apportion to the fault of the Settling Defendants;
14. At the first reasonable opportunity, apply to amend the Statement of Claim in the Action to plead:
15. "The Plaintiff waives all right to recover from any of the Remaining Defendants and Third Parties any damages which the Honourable Court may attribute and apportion to the fault, liability or responsibility in law of [Names], and their servants, agents or employees."
16. The Settling Defendants do each hereby covenant not to commence or maintain any action, claim or demand of any nature or kind whatsoever against any Defendant or Third Party to the Action or any other person, or entity, its successors or assigns with whom the Plaintiff has or with whom the Plaintiff does reach an agreement to resolve and settle the issues arising out of or potentially arising out of the subject matter of the Action.
17. The Settling Defendants shall and do each hereby covenant to immediately dismiss or discontinue, at the Settling Defendants' own expense, any action, claim, demand or proceeding of any nature or kind which they have commenced or which they may at some future time commence against any Defendant or Third Party to the Action or any other person, or entity, its successors or assigns with whom the Plaintiff has or with whom the Plaintiff does reach an agreement to resolve and settle the issues arising out of or potentially arising out of the subject matter of the Action upon notice from the Plaintiff to the Settling

Defendants that the Plaintiff has reached a settlement with the said Defendant, Third Party, other person or entity.

18. The Plaintiff hereby acknowledges that in making this Settlement Agreement and Covenant not to Sue, that he has had the benefit of independent legal counsel, that he has exercised his own independent judgment and he has not been influenced to any extent whatsoever by any representations, statements or conduct of any description whatever on the part of the Settling Defendants. The Plaintiff further declares that he has carefully read this Settlement Agreement and Covenant not to Sue, the terms of which are contractual and not a mere recital, that the entire contents hereof are fully understood by him and that the same is being executed as his own free act and without any pressure or duress of any description and that any signatory on the Plaintiff's behalf has full authority to execute this Settlement Agreement and Covenant not to Sue.
19. The Settling Defendants hereby acknowledge that in making this Settlement Agreement and Covenant not to Sue, that they have had the benefit of independent legal counsel, that they have exercised their own independent judgment and they have not been influenced to any extent whatsoever by any representations, statements or conduct of any description whatever on the part of the Plaintiff. The Settling Defendants further declare that they have carefully read the Settlement Agreement and Covenant not to Sue, the terms of which are contractual and not a mere recital, that the entire contents hereof are fully understood by them and that the same is being executed as their own free act and without any pressure or duress of any description and that any signatory on the Settling Defendants' behalf has full authority to execute this Settlement Agreement and Covenant not to Sue.
20. If the facts in respect of which this Settlement Agreement and Covenant not to Sue is made prove to be other than or different from the facts in that connection now known or believed to be true, the Plaintiff and the Settling Defendants expressly accept and assume the risk of the facts being different and agree that all terms of this Settlement Agreement and Covenant not to Sue shall be in all respects effective and not subject to termination or rescission by the discovery of any difference in the facts.
21. It is further understood and agreed that neither the payment of the aforesaid sum of money nor anything contained herein shall constitute or be construed as an admission of liability by the Settling Defendants.
22. It is further understood and agreed that the terms of this Settlement Agreement and Covenant not to Sue are to be kept confidential by the Plaintiff and the

Settling Defendants, and are not to be disclosed by either party to any person without prior written consent of the other parties, a Court Order or by operation of law.

23. This Settlement Agreement and Covenant not to Sue shall be binding upon, and for the benefit of, the Plaintiff, the Settling Defendants, and their respective heirs, successors, and assigns.
24. This Settlement Agreement and Covenant not to Sue shall be governed by and construed in accordance with the laws of British Columbia.
25. This Settlement Agreement and Covenant not to Sue may be executed in counterparts.

THIS SETTLEMENT AGREEMENT AND COVENANTS NOT TO SUE is given under seal this ____ of [Date].

B. APPENDIX "B" - SAMPLE MARY CARTER AGREEMENT

** Some agreements, unlike the sample below, may contain terms relating to participation of the settling defendant in the continuing trial proceeding*

This Agreement dated for reference the ____ day of June, 2007 (the "Agreement")

WHEREAS:

- A. The Plaintiff, has commenced Supreme Court of British Columbia Action No. 1 in the Vancouver Registry (the "Action"), concerning alleged design and construction defects in the development (the "Claims"), on its own behalf and representatively on behalf of each and every present owner of the strata title units comprising strata plan LMS 1, otherwise known as Deficient Building, located at 1 East No. 1 Road, Richmond, British Columbia;
- B. Company and Person (collectively, the "Settling Defendants"), are each Defendants in the Action;
- C. The Owners and the Settling Defendants have reached a settlement of the issues between them in the Action;
- D. The Owners and the Settling Defendants acknowledge that the total of the claims of Owners in the Action exceeds the consideration paid by the Settling Defendants hereunder;
- E. The Owners have not reached settlement with the other Defendants in the Action (the "Remaining Defendants"). In this Agreement, the term "Remaining Defendants" shall also include any party that may be added to the Action subsequent to the execution of this Agreement;
- F. The Parties hereto agree that the interests of the Settling Defendants should be formalized and protected as provided herein.

FOR AND IN CONSIDERATION of the execution of this Agreement, the payment noted herein, and other good and valuable consideration, the receipt and sufficiency of which is hereby acknowledged by the execution of this Agreement, the Owners and the Settling Defendants each agree as follows:

- 1. The Settling Defendants shall pay the total sum of CAN\$5000.00 (five thousand dollars) as consideration to the Owners for this Agreement (the "Consideration"). Such payment shall be made to the solicitors for the Owners, within ____ calendar days of the date of this Agreement.

2. The Settling Defendants shall not be liable to make any payment whatsoever with respect to the Action of the Claims, other than the payment of the Consideration.
3. The Owners will not actively prosecute the Action as against the Settling Defendants or seek to impose liability upon the Settling Defendants at any trial of the Action.
4. The Settling Defendants will not take any adversarial position against the Owners in the Action.
5. If the Owners pursue the Claims against the Remaining Defendants, the Owners will limit their claim for recovery to the aggregate of the several extent of liability of the Remaining Defendants, and will not seek to recover against the Remaining Defendants or any other person or corporation, any portion of its losses which it claimed or could have claimed from the Settling Defendants in the Action and which a Court may attribute to the fault, tort, negligence, and/or the breach of any equitable, common law or statutory duty of any one or more of the Settling Defendants. In no event will the Settling Defendants be liable to the Owners for damages arising from or associated with the Action or the Claims for any amount other than, or in excess of, the Consideration.
6. In addition, in the event that the Owners pursue the Action against the Remaining Defendants, and the Remaining Defendants, or any of them, seek contribution or indemnity from the Settling Defendants, the Owners shall indemnify the Settling Defendants and save each of them harmless from any and all liability (including, but not limited to, any judgment, order, or award of damages of any kind, or any award of costs or disbursements) to the Remaining Defendants.
7. It is understood and agreed that upon execution of this Agreement, the terms of this Agreement shall be disclosed to all parties to the Action. In the event that the Action proceeds to trial, the terms of this Agreement shall be disclosed to the Court prior to the commencement of the trial.
8. In the event that the Action is resolved by all parties prior to trial, the plaintiff will consent to, seek to obtain the consent of all other parties to an order dismissing all of the claims in the action, including any Third Party claims, on a without costs basis.
9. Nothing herein shall constitute or be construed as an admission of liability on the part of the Settling Defendants.

10. Each of the parties to this Agreement will, at the request of any or all of the other parties, execute and deliver such further documents and do such further acts and things as may reasonably be requested in order to evidence, carry out and give full force and effect to the terms, conditions intent and meaning of this Agreement.
11. The terms of this Agreement are contractual, not a mere recital, and this Agreement is executed for the purposes of dealing with the Action and the Claims of the Owners as described in this Agreement.
12. There are no representations, collateral agreements, or conditions with respect to this Agreement affecting the liability of any or all of the Parties to this Agreement except as contained herein.
13. Should any part of this Agreement be declared or held invalid for any reason, such invalidity shall not affect the validity of the remainder which shall continue in force and effect and be construed as if this Agreement had been executed without the invalid portion and it is hereby declared the intention of the parties hereto that this Agreement would have been executed without reference to any portion which may, for any reason, be hereafter declared or held invalid.
14. Before executing this Agreement, the undersigned represent and warrant that they have read and understood the Agreement, have caused the Agreement to be executed of their own free will, and that any signatory has full authority to execute this Agreement.
15. If the facts in respect of which this Agreement is made prove to be other than or different from the facts in that connection now known or believed to be true, the undersigned expressly accept and assume the risk of the facts being different and agree that all terms of this Agreement shall be in all respects effective and not subject to termination or rescission by the discovery of any difference in the facts.
16. Every reference to the Parties in this Agreement including the "Settling Defendants" and the "Owners", includes their respective heirs, executors, administrators, committees, receivers, interim receivers, receiver/managers, monitors, trustees, predecessors, successors, officers, directors, shareholders, employees, insurers, agents and assigns, as the case may be.
17. The Owners hereby acknowledge that executing this Agreement, they have had the benefit of independent legal counsel, have exercised their own independent judgement and have not been influenced to any extent whatsoever by any

representation, statements or conduct of any description whatever on the part of the Settling Defendants or their counsel.

18. This Agreement may be executed in counterparts with the same effect as if each party had signed the same documents and all counterparts and adopting instruments will be construed together and will constitute one and the same Agreement. Faxed copies of the executed counterparts are binding until the parties exchange the original executed counterparts.
19. This Agreement shall be governed by and construed in accordance with the laws of British Columbia. All disputes arising out of or in connection with this Agreement shall be submitted to and subject to the exclusive jurisdiction of the courts of British Columbia.

IN WITNESS WHEREOF, the parties have duly executed this Agreement on the date above written.