August 26th 2014

BRIEFING NOTE

Bilfinger Berger (Canada) Inc. v Great Vancouver Water District, 2014 BCSC 1560

http://www.courts.gov.bc.ca/jdb-txt/SC/14/15/2014BCSC1560.htm

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Sometimes it seems attractive, and beneficial, to reach agreements between parties that may have a common interest on more than one issue. One such situation may be for co-defendants to agree to hold off on making cross-claims and to combine their efforts to defeat the plaintiff's claims.

A recent decision from Madam Justice Griffin outlines a party's disclosure obligation regarding partial settlements and other agreements between parties in multi-party litigation. The decision is a must read for counsel as it highlights the best practices and pitfalls that can be present when parties reach agreements amongst themselves to settle portions of a claim or to co-operate in the litigation. The decision also provides a thorough discussion of the application of common interest privilege and settlement privilege to these agreements, and the circumstances in which such privilege must give way to the fair administration of justice.

The two most common forms of these agreements are known as the Mary Carter Agreement and the Pierringer Agreement (known as a BC Ferries Agreement in British Columbia). The nature and scope of a partial settlement or cooperation agreement is only restricted by the ingenuity of counsel and the parties.

In *Bilfinger*, the plaintiff applicants were applying to strike out the defendants pleadings for failing to disclose a cooperation agreement between them. The agreement also contained a reservation of rights regarding evidence and future claims.

After reviewing the applicable authorities, Justice Griffin set out the circumstances where an agreement between parties needs to be disclosed, including (para 152):

a) the agreement's existence could cast light on the quality of the evidence or motivation of a witness, or could affect the weight a court might give to the evidence;

b) the agreement's existence could be relevant to another party's decisions regarding the conduct of trial; and/or

c) the court or opposing party could otherwise be misled about the position of the parties in the adversarial process.

As a result, the Court said that disclosure (of some nature) is required in the following circumstances (para. 153)

a) where there are evidentiary arrangements in the agreement;

b) where the agreement contains a release, covenant not to sue, or reservation of rights; and/or

c) where the agreement makes the parties' true adversarial positions in the lawsuit different than what might otherwise be expected from the pleadings.

As for the timing of disclosure of the agreement, the Court held that immediate disclosure is required where a party's position is different than that revealed by the pleadings. This would include any full or partial settlements, releases, reservations of rights or a degree of cooperation not expected between adverse parties. Any agreement that deals with evidentiary arrangements must be disclosed at least by the commencement of the trial and possibly prior to examination for discovery. (paras 160 and 161)

Ultimately the Court found that the agreement ought to have been produced at least by the start of trial (which it had) because it contained a reservation of rights. As a result, there was no miscarriage of justice that warranted the striking of any pleadings.

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