

# MULTI-PARTY SETTLEMENTS

Strong reputation, fresh approach.

By: Dean Winterton  
[dwinterton@guildyule.com](mailto:dwinterton@guildyule.com)  
604 844 5565

Jeevan Mand  
[jmand@guildyule.com](mailto:jmand@guildyule.com)  
604 84 5553



---

**Guild Yule** LLP  
BARRISTERS AND SOLICITORS

THE LAW ON DISCLOSURE OBLIGATIONS WHEN ONE PARTY SETTLES IN A MULTI-PARTY ACTION, AND HOW THAT SETTLEMENT AFFECTS WITHOUT PREJUDICE SETTLEMENT PRIVILEGE AND LITIGATION PRIVILEGE, IN THAT ACTION AND RELATED ACTIONS.



## Partial settlement agreements in British Columbia

- **THE MARY CARTER AGREEMENT**

*Booth v. Mary Carter Paint Co.* (1967), 202  
So. 2d 8 (U.S. Fla. Ct. App. 2 Dist.)

- **THE BC FERRIES AGREEMENT**

*British Columbia Ferry Corp. v. T & N plc* 1995 CanLII 1810 (BC CA)



## Features of the Mary Carter agreement

- plaintiff guaranteed monetary recovery;
- exposure “capped” at guaranteed amount;
- defendant remains in lawsuit;
- liability decreased in direct proportion to the increase in the non-contracting defendants' liability; and
- agreement is kept secret.

*Edmonton (City of) v. Lovat Tunnel Equipment Inc.,*  
2000 ABQB 133 [Lovat], at para. 9



## Features of the BC Ferries Agreement

- settlement between plaintiff and one or more of the defendants;
- settlement of claims for which all the defendants may be jointly and severally liable;
- settling defendant(s) have limited their liability to the amount of the settlement;
- remaining defendants continue to be sued by the plaintiff on the same or related causes of action, but only for the losses caused by the remaining defendants.

*British Columbia Ferry Corp. v. T & N, 1995 CanLII 1810 (BC CA)*



## The principal difference between Mary Carter and Pierringer agreements

- settling defendant still remains a party in the litigation
- strict rules relating to disclosure

*Bioriginal Food & Science Corp. v. Gerspacher* 2012 SKQB 14 (CanLII)



## Competing Interests

1. preventing abuse of process; and
2. promoting settlement



## IMMEDIATE DISCLOSURE OF MARY CARTER AGREEMENTS

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





## Disclosure of BC Ferries Agreements

- Settlement amount not disclosable
- Provision construed as release, convent not to sue or reservation of rights disclosable;
- Provisions containing admissions
- Provisions dealing with evidentiary arrangements

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

*British Columbia Children's Hospital v. Air Products Canada Ltd.*  
*/Prodair Canada Ltée, 2003 BCCA 177*



## Disclosure of the Settlement Amounts

- Settlement amounts need not be disclosed to the non-settling parties prior to the conclusion of trial



## Early Decisions: Settlement Amounts Must be Disclosed

- Early decisions called for the disclosure of the settlement amount as it was necessary for the non-settling defendant to make decisions related to the ongoing litigation

*Hayes Heli-Log Services Ltd. v. Acro Aerospace Inc.,  
2006 CarswellBC 2628 (B.C. S.C.) at paragraphs 16-17*



## Current Law on Disclosure Obligations

- Settlement Amounts Need Not Be Disclosed

*Sable Offshore Energy Inc. v. Ameron International Corp.*  
*2013 CarswellNS 428 (S.C.C.)*



## Related Actions

- The Courts have decided that the settlement figures do not need to be produced when there has been a settlement in a previous action and the defendants in the current action are attempting to obtain the settlement figures in that previous action.

*Accredit Mortgage Ltd. v. Cook Roberts, 2017 BCSC 1078*



## Exceptions to Privilege

- A defendant must show that, on balance, "a competing public interest outweighs the public interest in encouraging settlement"

*Dos Santos Estate v. Sun Life Assurance Co. of Canada*,  
2005 BCCA 4, 207 B.C.A.C. 54, at para. 20).



## Arguments for Exceptions

- Exceptions are “narrowly defined” and “seldom applied”

*Accredit Mortgage Ltd. v. Cook Roberts, 2017 BCSC 1078*



## Deduction of the Settlement Amount at Trial

- The settlement amount will be disclosed at the conclusion of the trial in order to prevent double recovery on the part of the plaintiff

*Henry v. British Columbia (Attorney General),  
2016 CarswellBC 316 (B.C.S.C.)*





## Procedural Pitfalls

- Third Party Notices
  - Draft terms into BC Ferry settlement agreements whereby the plaintiff will defend and indemnify the settling party from any joint liability apportioned against them.



## Practice Tip for Settling-Defendant's Counsel

- Seek an indemnity for legal costs



## Practice Tip for Plaintiff's Counsel

- The risks of these agreements fall on the plaintiff. Exercise care in the negotiation of any partial settlement agreement.
- If the plaintiff settles and "under-recovers" from the settling defendant, it will not be able to make up that shortfall from the non-settling defendants. If it "over-recovers" from the settling defendant, it will not be allowed to keep the windfall

*Henry v. British Columbia, 2016 CarswellBC 3164 (B.C. S.C.),*



## Practice Tips for Non-Settling Defendants

- Document disclosure
- Witnesses at trial
- Expert Repos



# Thank you!



# Questions?

