
Multi-Party Settlements: Breaking the Logjam

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Introduction:

Modern litigation has become more and more concerned with achieving the early settlement of disputes. As stated by Callaghan A.C.J.H.C.:

“...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.¹”

Also it is important to remember that Rule 2.02 (2) of the *Rules of Professional Conduct* provides:

“ A lawyer shall advise and encourage the client to compromise or settle a dispute whenever it is possible to do soon on a reasonable basis...”

When the case involves a small number of parties, achieving a settlement can be relatively straightforward. Each party can assess their relative positions, and negotiate an agreement based on a risk/benefit analysis. However, the same cannot be said of complex cases involving multiple parties.

Where several parties are involved, especially in complex litigation, there usually are differing opinions on liability and damages. Obviously, these differing opinions will hinder any attempts at settlement. A method of breaking through these impasses, which is often overlooked, has been to make use of partial settlement agreements. These agreements allow some of the participants of multi-party litigation to settle their claims, while maintaining the claims against the remaining participants. The plaintiff achieves partial success and some certainty. In addition to that, the partial settlement agreement usually brings additional pressure upon the remaining parties, thereby facilitating a complete settlement of all the claims.

This paper examines two forms of partial settlement agreements: the Mary Carter Agreement, and the Pierringer Agreement. Both have their origination in the United States. However, as with many other aspects of modern society, the trend of using such agreements has migrated north and they are now more and more often being used in Canadian litigation. This paper includes a brief review of the development of these agreements in Canadian jurisprudence and a discussion of the issues to be considered when entering into either one of them.

¹ *Sparling v. Southam Inc.* (1988), 66 O.R. (2d) 225 at 230.

The Mary Carter Agreement:

The most well known form of partial settlement agreement is the Mary Carter Agreement, whose roots trace back to the 1967 case of *Booth v. Mary Carter Paint Co.*² The essential features of a “true” Mary Carter Agreement³ are where the plaintiff enters into a settlement agreement with one or more defendants (the “settling defendants”) whereby:

- the plaintiff receives a specific amount of money, regardless of the outcome of the trial
- the plaintiff places a cap on the liability of the settling defendants at this amount
- the settling defendants remain in the lawsuit
- the plaintiff agrees not to pursue the non-settling defendants for any amount beyond their several liabilities in order to protect the settling defendant from any potential crossclaims for contribution and indemnity from the non-settling defendants
- the plaintiff will agree to decrease the amount to be paid by the settling defendants in direct proportion to any increase in the liability of the non-settling defendants.⁴

² 202 So.2d 8 (1967).

³ The Mary Carter Agreement is actually very flexible. As one author has commented: “the precise terms of a Mary Carter Agreement are limited only by the ingenuity of counsel” (R.F. Horak, “Mary Carter Agreement: Who is Mary Carter and How Can She Help Me?”, in Canadian Bar Association (Ontario) *Settlement: Getting There and Staying There* (CBA (Ont.), 2000) at 2). This inherent flexibility has led to the creation of many “pseudo-Mary Carter Agreements”, which might lack some of the traditional characteristics of the “true Mary Carter Agreement”. See e.g. Master Quinn’s decision in *Bodnar et al. v. Home Insurance Co. et al.* (1987), 25 C.P.C. (2d) 152, [1987] O.J. No. 2365 (Ont. Master) at 154 [cited to C.P.C.].

⁴ See generally R.F. Horak, *ibid*; B. Billingsley, “*Margetts v. Timmer Estate*: The Continuing Development of Canadian Law Relating to Mary Carter Agreements”, (Dec1998) 36 Alta L.Rev. 1017-1031; H. David, “Mary Carter Agreements: *Petty v. Avis Car Inc* (Case Comment), (May 1994) 16 Advocates’ Q. 266-269; P.M. Iacono, “The Mary Carter Agreement in Canada”, (Apr 1991) 2 C.I.L.R. 171-179; R. G. Oatley, *infra*, note 5; B.A. Percival, Q.C., *infra* note 6; and P.M. Iacono Q.C., S. Liquornik, “‘Mary Carter’ Revisited”, (May 1994) 4 C.I.L.R. 289-300. See also Ferrier J.’s decision in *Petty et al. v. Avis Car Inc. et al.* (1993), 103 D.L.R. (4th) 298, 13 O.R. (3d) 725 (Ont. Ct. (Gen. Div)) at 304-305 [cited to D.L.R.]; and Dea J.’s decision in *Margetts (Next friend of) v. Timmer Estate* (1996), 192 A.R. 42, 43Alta. L.R. (3d) 283 (Q.B.). Please note that the American jurisprudence also indicates that a “true” Mary Carter Agreement is secretive in nature, and cannot be disclosed to either the court, or the non-settling defendants. This position has been expressly rejected in the Canadian jurisprudence. As will be seen, the Canadian jurisprudence requires disclosure of the agreement (*J. & M. Chartrand Realty Ltd. v. Martin* (1981), 22 C.P.C. 186, [1981] O.J. No. 739 (H.C.J.) at para 13).

Example:

A is suing both B and C for \$1,000,000 in a personal injury action. Both B and A are interested in settling the claim, but C is holding firm to their position. A and B can enter into a Mary Carter Agreement, whereby B pays A \$500,000 as a settlement of A's claim against B. Thus, regardless of the outcome of the trial, A will receive at least \$500,000 and B will never have to pay more than \$500,000. B will then participate in the trial, and help A maximize the claim for damages against C, receiving the benefit of any finding of liability against C. Thus, if the trial results in a judgment of \$1,000,000 with C being 50% liable, B would be entitled to a 50% reduction in the settled amount B has paid to A. As a result, C would be responsible for their full liability (\$500,000); B would only pay \$250,000 (the \$500,000 original settlement less 50% of the amount paid to A by C: \$250,000) and A would recover \$750,000 (after refunding \$250,000 to B under the agreement).

If the case does not settle in its entirety, these agreements have a profound impact upon the conduct of the trial. The plaintiff may now proceed with the litigation with reduced risk, as he or she is guaranteed to receive the settled amount regardless of the outcome of the trial. In addition, the upside is that the amount to be awarded can only be increased.

A settling defendant is also in a position to carry on with the litigation without further risk, as they will never have to pay the plaintiff more than the amount specified in the agreement. Where an insurer is involved, the damages can be capped within the limits of the insurance policy and they would avoid any potential claim of bad faith by the insured. The settling defendant is then given an opportunity to recapture some of what they have paid, as the settlement amount stands to be decreased in proportion to the liability of the non-settling defendants.

From the perspective of both the plaintiff and settling defendants, both can now co-operate in a joint effort to ensure that the non-settling defendants are found liable to the highest degree possible and for the highest possible damages. It is in both of their respective best interests.

The non-settling defendants are now placed in the unenviable position of either settling with the plaintiff (something that they were obviously looking to avoid) or continuing with the litigation while being targeted by both the plaintiff and settling defendants. The nature of the dilemma in which the non-settling defendants are placed has led to a rather mixed reception in Canada. For some, the Mary Carter Agreement has been lauded as: "an extraordinary and powerful settlement tool."⁵ Others have condemned such agreements as vile devices that: "only promote litigation, skew the trial process, promote unethical behaviour, and bring about an absurdity that a less culpable non-settling Defendant may be burdened with the full Judgment for damages."⁶

⁵ R. G. Oatley, "The Mary Carter agreement: A powerful strategy for settlement" (Spring 1998) 17 *Advocates' Soc. J.* No. 2, 23-30 at 27.

⁶ B.A. Percival, Q.C., "Mary Carter Orders", in *The Six Minute Personal Injury Litigator: Plaintiff's Dilemmas* (The Law Society of Upper Canada: Department of Continuing Legal Education, 1997) at 20-8.

Mary Carter Agreements radically alter the alignment of the parties in any proceedings. The parties' interests are no longer the same as disclosed in the pleadings. Detractors argue that they:

- are an abuse of process – witnesses who may have been called will not be; questions which may have been asked will not be; cross-examinations could be conducted when the parties are not in fact adverse in interest; a defendant will not be endeavouring to reduce damages as expected but rather increase them.
- will impact the ability of the non-settling defendants to have a fair and impartial hearing – the argument of a non-settling defendant that the plaintiff's damages should be minimized would be compromised by those of a settling defendant that indeed the plaintiff's damages are sound; if the agreement is disclosed to the court, the fact of a settlement could cause a trier of fact to pre-judge the liability of the non-settling defendants.
- are potentially champertous – the settling defendant has joined cause with the plaintiffs in order to reduce the amount guaranteed to the plaintiff.

These fears are rooted in the notion that the impact of these agreements could compromise the integrity of the justice system. That laudable concern though must be weighed against the fundamental right of the parties to be able to control the resolution of their dispute. As a result, despite vehement protests, Mary Carter Agreements have been accepted in Canada,⁷ albeit with certain accommodations.

It is almost a certainty that many of the above-noted abuses will occur if one further feature of the traditional Mary Carter agreement is permitted – that of secrecy. While it is permitted in some American jurisdictions to make and keep these agreements secret, it is clear in Canada that such an agreement cannot be held secret once it is concluded. This is clear from the jurisprudence and also from the *Rules of Professional Conduct*. The Commentary under Rule 4.01 provides:

“In civil proceedings, the lawyer has a duty not to mislead the tribunal about the position of the client in the adversary process. Thus, a lawyer representing a party to litigation who has made or is party to an agreement made before or during the trial by which a plaintiff is guaranteed recovery by one or more parties notwithstanding the judgment of the court, should immediately reveal the existence and particulars of the agreement to the court and to all parties to the proceedings.”

In the first appearance of a Mary Carter Agreement in Canada, the case of *J. & M. Chartrand Realty Inc. v. Martin*⁸, it was made clear that at a bare minimum, secrecy would not be permitted. While the court did not explicitly approve of the use of Mary Carter Agreements, the door to approval was opened slightly by the following comments of Gray J.:

⁷ The Canadian acceptance of Mary Carter Agreements can be traced at least as far back as *Nash v. Glickman and Gibson* (1975), 7 O.R. (2d) 711 (C.A.).

⁸ [1981] O.J. No. 739 (H.C.J.).

“I do not propose to determine the validity of a “Mary Carter Agreement” in Ontario as the validity of the agreement itself was not in issue between its contracting parties. If such an agreement is entered into however it should be revealed to counsel for all parties and to the Court before the trial of the action.”⁹

The door left slightly ajar by *J. & M. Chartrand* was later opened by the landmark decision of *Petty et al. v. Avis Car Inc. et al.*¹⁰ While cautioning that the judgement should not be interpreted as a “blanket approval of all Mary Carter type agreements,”¹¹ Ferrier J. upheld a Mary Carter Agreement in circumstances where there was immediate disclosure of the details of the agreement,¹² and sufficient procedural safeguards could be imposed so as to prevent an abuse of process.¹³

In the course of the judgement, Ferrier J. concluded that the wording of Commentary 4 to Rule 10 of the Rules of Professional Conduct of the Law Society of Upper Canada (which is almost identical to the commentary under the current Rule 4.01) was: “specifically enacted to take account of Mary Carter type agreements”.¹⁴ Ferrier J. concluded by stating:

“I fail to see why a plaintiff cannot achieve a guaranteed minimum result by such an agreement, preserving its ability to continue against the other defendants in an attempt to better that result. Nor can I see why a defendant who wishes to settle is prohibited from so doing unless it gives up its right to proceed against its co-defendants.”¹⁵

Finally, Ferrier J. also dismissed the argument that the Mary Carter Agreement, constituted champerty or maintenance by granting a de facto interest in the plaintiff’s claim to the settling defendants. Ferrier J. concluded that this argument was untenable since there was no “officious intermeddling”, and the agreement did not alter the positions of any of the parties prior to the agreement being reached.¹⁶

The judgment of Ferrier J. in *Petty* has subsequently been adopted as providing the groundwork for the adoption of Mary Carter Agreements in Canada.¹⁷

⁹ *Ibid*, at para 13. This passage indicates an initial departure from the American jurisprudence. As mentioned above the American jurisprudence indicates that secrecy is a traditional element of a Mary Carter Agreement. In this passage of the *J. & M. Chartrand* decision however, Gray J. expressly indicates that adequate disclosure of the agreement is a requirement for acceptance by the court. This position has been repeatedly affirmed in subsequent cases, e.g. *Bodnar v. Home Insurance Co.* (1987), 25 C.P.C. (2d) 152 (Ont. Master), and *Petty et al v. Avis Car Inc. et al., infra* note 10.

¹⁰ (1993), 103 D.L.R. (4th) 298 (Ont. Ct. (Gen. Div.)).

¹¹ *Ibid*, at 309.

¹² *Ibid*, at 310-311. Such disclosure was held to include the details of the agreement except for the dollar amounts of the settlement. It was held that the court could exercise its discretion and order the dollar amounts disclosed, but that was not done in this case.

¹³ *Ibid*, at 312.

¹⁴ *Ibid*, at 309.

¹⁵ *Ibid*, at 312.

¹⁶ *Ibid*, at 313-314.

¹⁷ See e.g. *Normerica Inc. v. 1406716 Ontario Inc.* (2002), 58 O.R. (3d) 464, [2002] O.J. No. 654 (S.C.J.); *Edmonton (City) v. Lovat Tunnel Equipment Inc.* (2000), 76 Alta. L.r. (3d) 389, [2000] A.J. No. 238 (Q.B.).

Recently, the jurisprudence surrounding Mary Carter Agreements has simply applied the principles outlined in *Petty* to other situations. Most of the post-*Petty* jurisprudence has therefore been concerned with procedural details, such as: whether certain procedural safeguards were appropriate;¹⁸ whether certain facts amounted to an abuse of process;¹⁹ whether the agreement would affect any award of costs;²⁰ and whether the details of the agreement necessitate striking the jury.²¹ However, there have been some recent cases that broaden the scope of the principles enunciated in *Petty*.

In *Margetts (Next friend of) v. Timmer Estate*²² the Alberta Court of Appeal upheld a more extreme form of the agreement, in which the plaintiff assigned their entire interest in the action to the settling defendants. Berger J.A. (Nash J.A. concurring) stated:

“It follows that there is no magic in the descriptive words used to characterize a settlement agreement between a plaintiff and a defendant in a multi-party suit. That described as a Mary Carter agreement may, upon careful scrutiny, be found to contain elements that promote the sort of mischief that the rule [against champerty and maintenance] is intended to foreclose. Each agreement must be separately considered to determine whether the principles that underlie the prohibition against the assignment of a personal injury action are affected. Once the content of the agreement is disclosed, the integrity of the process may, in some circumstances, still be preserved by the imposition of safeguards to ensure that there is no abuse. Evidence of ‘trafficking in litigation’ would tend to vitiate an agreement. Some agreements may require, with the consent of the contracting parties, an amendment to remove the potential for interference with the integrity of the process, failing which the Court may intervene.”²³

Similarly, the *Petty* decision has also been applied to less extreme circumstances, and its principles have been applied to “pseudo-Mary Carter Agreements” – agreements in which not all of the elements of a traditional Mary Carter Agreement have been present.²⁴

The current state of the law demonstrates that Mary Carter Agreements are widely available to parties involved in multi-party litigation throughout Canada. It is imperative that they be disclosed immediately. The courts will review the agreements to ensure that they maintain control over the judicial process and prevent abuse.

The Pierringer Agreement:

¹⁸ See e.g. *Waterworth (Litigation guardian of) v. Freeman* (2001), 10 M.V.R. (4th) 241, [2001] O.J. No. 624 (C.A.).

¹⁹ See e.g. *Edgar Estate v. Queensway General Hospital* (1996), 2 O.T.C. 5, [1996] O.J. No. 1531 (Ont. Ct. (Gen. Div.)).

²⁰ See e.g. *Walker Estate v. York Finch General Hospital*, [1998] O.J. No. 2271 (Ont. Ct. (Gen. Div.)), varied on other grounds (1998), 169 D.L.R. (4th) 689 (Ont. C.A.).

²¹ See e.g. *Bartosek (Litigation guardian of) v. Turret Realities Inc.* (2000), 7 C.P.C. (5th) 372, [2000] O.J. No. 5253 (S.C.J.); *John v. Flynn*, [2000] O.J. No. 4034 (S.C.J.); and *Tellier v. Stevenson Transport*, [2000] O.J. No. 3663 (S.C.J.).

²² (1999), 178 D.L.R. (4th) 577, 73 Alta. L.R. (3d) 110 (Alta. C.A.), aff’g (1996) 43 Alta. L.R. 42, [1996] A.J. No. 842 (Q.B.).

²³ *Ibid.*, at para 17.

²⁴ See e.g. *Leadbetter v. Penncorp Life Insurance Co.*, [1999] O.J. No. 496 (Ont. Ct. (Gen. Div.)); *Walker Estate v. York Finch -6- General Hospital*, [1998] O.J. No. 2271 (Ont. Ct. (Gen. Div.)); and *Edmonton (City) v. Lovat Tunnel Equipment Inc.*, [2000] A No. 238 (Q.B.).

An alternative to the Mary Carter Agreement is the Pierringer Agreement.²⁵ Like Mary Carter, this type of agreement originated in the American jurisprudence,²⁶ and has subsequently been adopted by Canadian courts.

Under a Pierringer Agreement, the plaintiff agrees to accept a specific amount in full satisfaction of his or her claim against one or more settling defendants, and the plaintiff then discontinues the actions against the settling defendants. The essential difference between a Mary Carter Agreement and a Pierringer Agreement is that the settling defendant in a Pierringer Agreement does not continue their involvement in the case.

The following are the hallmarks of a Pierringer Agreement²⁷:

- the settling defendant's liability is segregated
- the satisfaction of the settling defendant's liability to the credit of all parties to the litigation
- the plaintiff's ability to continue with the action against the remaining defendants
- the plaintiff's agreement that it will indemnify the settling defendant for any contribution sought from it by the non-settling defendant(s).

Example:

A is suing both B and C for \$1,000,000 in a personal injury action. Both B and A are interested in settling the claim, but C is holding firm to their position. A and B can enter into a Pierringer Agreement, whereby B will pay A \$500,000 in full satisfaction of the claim as against B. A would then apply to have the action against B discontinued. Under the agreement, A would promise not to claim any damages from C that would exceed C's liability, which would therefore protect B from any crossclaims for contribution and indemnity. So if C was ultimately held 40% liable and B 60% and damages were assessed at \$1,000,000, A would only seek \$400,000 from C as opposed to seeking payment of \$500,000 to make up the shortfall fall, as the extra \$100,000 could be claimed by C from B by way of crossclaim.

The Pierringer Agreement is perceived as being somewhat less Machiavellian than the Mary Carter Agreement because the settling defendants in a Pierringer Agreement are removed from the action. Since the settling defendants are removed, there is not the same degree of pressure imposed upon the non-settling defendants as under a Mary Carter Agreement because the plaintiff cannot count on the settling defendants' cooperation at trial. As a result, the use of these agreements has not generated quite the same controversy as Mary Carter Agreements. However, there still are procedural issues which must be ironed out.

The importation of the Pierringer Agreement to Canada has been slower than that of the Mary Carter Agreement, and the first major consideration by a Canadian court did not occur until 1995 in *British Columbia Ferry Corp. v. T&N*,

²⁵ Pierringer Agreements are sometimes referred to as Pierringer Releases in some of the cases.

²⁶ This agreement originated in the case of *Pierringer v. Hoyer* 124 N.W.2d 106 (Wis. 1963).

²⁷ The elements of a Pierringer Agreement are discussed by Hamilton J., in *Hudson Bay Mining and Smelting Co. v. Fluor Daniel Wright*, [1997] M.J. No. 398 (Q.B.), aff'd (1998) 131 Man. R. (2d) 133 (C.A.), at para 26.

*plc.*²⁸ In *B.C. Ferry* the British Columbia Court of Appeal upheld the ability of the plaintiff to insulate the settling defendants from crossclaims for contribution and indemnity by expressly waiving their right to any claim of damages beyond the several liability of the non-settling defendants. In order to be effective however, the Court ruled that this waiver should form part of an Amended Statement of Claim.²⁹ However, the Court of Appeal also indicated that the settling defendants should not be completely released from the action where to do so would deprive the non-settling defendants of the ability to establish an essential element of proof for their case.³⁰

This reluctance to remove the settling defendants from an action where to do so would prejudice the non-settling defendant's procedural rights has been adopted in some decisions,³¹ although its scope has been somewhat limited. In assessing whether the non-settling defendants would be prejudiced, the court must keep in mind the strong public policy encouraging settlement.³² This is especially the case in jurisdictions like Ontario where rights to examine third parties for discovery exist.³³ Furthermore, the discretion to refrain from removing settling defendants solely to protect the procedural rights of non-settling defendants should rarely be exercised when its effect would be to circumvent the consequences of the settlement of a significant part of the action through a Pierringer Agreement.³⁴

Probably the biggest hurdle with these agreements is the practical obstacle of the contribution claim of any non-settling defendant. The critical element of the Pierringer Agreement is that the settling defendant wishes to extract itself from the action completely. Like the Mary Carter Agreement, the settling defendant is looking to reduce risk but in addition to that the defendant wishes to avoid any further litigation expense. Obviously, the non-settling defendant will wish to preserve any and all potential recovery by way of crossclaim or third party claim and in doing so could frustrate the purpose of the settling defendant.

In the United States, a number of jurisdictions have passed legislation to circumvent this problem. The legislation permits the courts to grant a "contribution bar order" – an order which insulates a settling defendant from any further claims for contribution and indemnity from a non-settling defendant. The American experience suggests that this can be achieved in the following ways:

- "proportional reduction rule"³⁵ – the plaintiff agrees to limit his or her recovery to the non-settling defendants proportionate share of the liability
- "*pro tanto* rule" – the actual amount of the settlement received from the settling defendant is deducted from the total amount owing by the non-settling defendant

²⁸ (1995), 27 C.C.L.T. (2d) 287, [1995] B.C.J. No. 2116 (C.A.) [hereinafter *B.C. Ferry*].

²⁹ *Ibid* at para 15.

³⁰ *Ibid* at para 31.

³¹ See *Vandevelde v. Smith*, (2000) 77 Alta. L.R. (3d) 160, [2000] 5 W.W.R. 405 (Alta. Q.B.) at para 18; and *Ontario New Home Warranty Program et al. v. Chevron Chemical Company et al.* (1999), 46 O.R. (3d) 130 (S.C.J.) at para 68.

³² *Ontario New Home Warranty Program, ibid*, at paras 70-71; and *Amoco Canada Petroleum*, [2001] A.J. No. 600 (Alta. C. para 41.

³³ *Amoco, ibid* at para 36.

³⁴ *Wright (Next friend of) v. VIA Rail Canada Inc.*, [2000] A.J. No. 19 (Q.B.) at para 47.

³⁵ See *Franklyn v. Kaypro Corp.*, 884 F. 2d 1222 (9th Cir., 1989).

- “modified proportional rule” – a pre-trial hearing occurs; if it is determined the settlement is reasonable, then the *pro tanto* rule would apply and if it is seen as improvident, then the proportional reduction rule would apply.

There is no similar legislation in Canada³⁶. But the Courts that have dealt with Pierringer Agreements so far (principally in B.C. and Alberta) demonstrate a desire to see these settlements stand and at the same time preserve the rights of the non-settling defendants.

Considerations for Partial Settlement Agreements:

When contemplating either a Mary Carter Agreement, or a Pierringer Agreement, there are certain issues that should be given consideration. The most important of these issues are the following: (1) proper disclosure of the agreement; (2) procedural safeguards to prevent prejudice to the non-settling defendants; (3) champerty and maintenance; (4) costs; and (5) the limits of protection.

1. Proper Disclosure

Whenever a Partial Settlement Agreement is entered into, that agreement must be disclosed to both the non-settling defendants, and the court.³⁷ Procedural fairness dictates that this disclosure must occur immediately after the agreement is made.³⁸ While immediate disclosure is an absolute rule where the agreement is made during the trial,³⁹ this requirement can be relaxed where the settlement is made in a pre-trial context, and there is no prejudice to the non-settling defendants as a result of the delay in disclosure.⁴⁰ “What is needed is a clear understanding that parties have not changed their positions or put themselves at risk in ways that would not have occurred had they been aware of the settlement.”⁴¹

The disclosure of the agreement must also be sufficient, although this will not always require complete disclosure of the entire agreement. When dealing with Mary Carter Agreements, it is well established that the dollar amount of the settlement need not be disclosed, although ordering such disclosure is within the discretion of the trial judge.⁴² The same principle has been applied to Pierringer Agreements.⁴³

2. Procedural Safeguards

Where a Partial Settlement Agreement has been reached, the primary concern of the court is avoiding an abuse of process. In circumstances where a Mary Carter Agreement is in issue, the court will naturally be concerned about the

³⁶ In the case of *Ontario New Home Warranty Program et al. v. Chevron Chemical Company et al*, 46 O.R. (3d) 130, Winkler J. held that in the context of class proceedings, s. 13 of the *Class Proceedings Act, 1992*, S.O. 1992, c.6 provides a mechanism through which the objectives of a ‘bar order’ can be achieved.

³⁷ For Mary Carter Agreements, see *J. & M. Chartrand*, *supra* note 8 at para 13; *Petty*, *supra* note 10 at 310; and *Nora* -9-
supra note 17 at para 26. For Pierringer Agreements, see *Amoco*, *supra* note 32 at para 40.

³⁸ *Petty*, *supra* note 10 at 310.

³⁹ *Ibid.*

⁴⁰ *Margetts*, *supra* note 22 at paras 21-22.

⁴¹ *Ibid.*

⁴² *Petty*, *supra* note 10 at 310-311; *Schultz v. Spiak*, [2001] O.J. No. 2806 (S.C.J.).

⁴³ *Amoco*, *supra* note 32 at 41.

effect of the settling defendants joining sides with the plaintiff. The American jurisprudence indicates that these circumstances, if left unchecked, can lead to distortions that result in an abuse of process because of the settling defendants' remaining interest in a finding of liability against the non-settling defendants.⁴⁴ As a result, it is appropriate that the court limit some of the procedural rights of the settling defendants, *e.g.* the right to cross-examine on issues relating to the quantum of damages.⁴⁵ These safeguards can be included in the text of the agreement itself.⁴⁶

In the context of Pierringer Agreements, procedural safeguards may have to be implemented where removing the settling defendants from the action outright could cause prejudice to the non-settling defendants.⁴⁷ In particular, where non-settling defendants wish to establish the proportionate share of liability of any non-settling defendant, methods for documentary and oral discovery may have to be preserved.

⁴⁴ See *eg. Elbaor v. Smith*, 845 S.W.2d 240 (1992); rehearing of cause overruled January 20, 1993.

⁴⁵ *Petty*, *supra* note 10 at 312. See also *Noramercia*, *supra* note 17 at para 26.

⁴⁶ See the Appendices included in R.G. Oatley's article "The Mary Carter agreement: A powerful strategy for settlement", *supra* note 5 at 27-30.

⁴⁷ See *e.g. Bucknor v. Ryder*, [2001] A.J. No. 1699 (Q.B.).

3. Champerty and Maintenance

Although there is case law indicating that Mary Carter Agreements do not constitute champerty or maintenance per se, this is an issue to be determined on a case-to-case basis.⁴⁸ Thus, any Mary Carter agreement should be carefully drafted so as not to constitute champerty or maintenance. This is not an issue for Pierringer Agreements.

4. Costs

Additionally, some consideration should be given to including an amount for costs into the text of the agreement.⁴⁹ Again, this is consideration for Mary Carter Agreements because of the continued participation of the settling defendants, and thus is not a concern for Pierringer Agreements.

5. Limits of Protection

Finally, it must be remembered that in either a Mary Carter Agreement, or a Pierringer Agreement, a plaintiff can only protect the settling defendants from claims for contribution and indemnity where these claims stem from the plaintiff's own action. In other words, the plaintiff can only offer protection from contribution and indemnity based upon joint and several liability. Where the non-settling defendants have independent claims against the settling defendants for contribution and indemnity, *e.g.* by contract, the settling defendants cannot be protected.

Conclusion:

The introduction and development of these partial settlement agreements in Canadian jurisprudence has provided excellent opportunities for parties to achieve settlements, which otherwise might not have been achieved, in complex multi-party litigation. While there may still be some disagreement as to the propriety of these agreements, there can be little doubt that such agreements, if properly drafted, will be upheld as valid by the courts. They have also proven to be extremely effective tools in breaking logjams in settlement negotiations and leading to the resolution of cases in their entirety. Thus, it would be foolish to overlook the tactical advantages that can be attained through their use.

When entering into some form of partial settlement agreement, proper care should be taken to ensure that it is drafted in accordance with the principles enunciated in the case law, as failure to do so may vitiate the agreement.

⁴⁸ *Margetts, supra* note 22 at 17.

⁴⁹ See the Appendices included in R. G. Oatley's article, *supra* note 5.