

## **An exception to settlement privilege – *Moore v. Bertuzzi***

*Moore v. Bertuzzi* is a June 2012 decision by Justice Perell on appeal from a Master's decision. In *Moore*, Justice Perell addressed issues concerning disclosure of a settlement agreement that is normally protected by privilege.

The underlying facts of the *Moore* decision are known to many. The action arises from an incident that occurred during an NHL hockey game between the Vancouver Canucks and Colorado Avalanche. During the game, a Canucks player named Todd Bertuzzi struck an Avalanche player named Steve Moore from behind and drove his head into the ice. As a result of Bertuzzi's actions, Moore broke his neck and suffered a brain injury. Bertuzzi later pled guilty to a charge of assault causing bodily harm.

Subsequently, Moore and his parents commenced a civil action against Bertuzzi and the owners of the Canucks, Orca Bay. Sometime later, Bertuzzi issued a third party claim against his coach, Marc Crawford.

After both the main and third party actions were set down for trial, Bertuzzi, Orca Bay, and Crawford signed a settlement agreement, whereby they agreed to a liability split regardless of any finding or apportionment of liability made in the action. They did not disclose to Moore that an agreement had been signed and, when Moore's lawyer requested disclosure, they refused.

### *Disclosure of settlement agreements*

The issue, as framed by Justice Perell, was when, if at all, a settlement agreement that would normally be protected by the privilege for without prejudice settlement communication must be disclosed to the Court and to the adverse parties.

In reviewing the case law, Justice Perell observed that *Mary Carter* and *Perringer* settlement agreements must be disclosed. There are a number of factors which make an agreement a *Mary Carter* or a *Pierringer* agreement. However, in short, both agreements involve the plaintiff settling with the defendant where there remain non-settling defendants. As stated by Justice Perell:

Under a *Mary Carter* agreement or a *Pierringer* agreement, the plaintiff and a defendant, apparently opponents, are in truth no longer opponents and disclosure of the agreement brings that situation to the attention of the court.

After reviewing case law from across the country, Justice Perell concluded that there is an overarching general principle that establishes an exception to the privilege and confidentiality of settlement agreements that is not confined to circumstances of *Mary Carter* agreements and *Pierringer* agreements.

Justice Perell continued to find that:

- The case law establishes that settlement privilege is not absolute and that it admits of exceptions where the settlement agreement must be disclosed to non-settling parties.
- An important exception that is not confined to *Mary Carter* agreements or *Pierringer* agreements is that an otherwise privileged settlement agreement must be immediately disclosed when the agreement changes the adversarial orientation of the lawsuit or the court needs knowledge of the settlement in order to maintain the fairness and integrity of its process.
- The case law establishes if an exception applies to the settlement privilege, then the disclosure of the settlement agreement must be immediate.

Justice Perell held that the Master made no error in applying the above principles and finding that the settlement agreement be disclosed.

### *Comments*

Moving forward, the *Moore* decision means that parties and their lawyers need to be aware that settlement agreements that are normally protected by settlement privilege, in certain circumstances, need to be disclosed to non-settling parties. Pursuant to *Moore*, the exceptions to settlement privilege are not necessarily restricted to *Mary Carter* or *Pierringer* agreements. Of note, where disclosure is required then the disclosure must be immediate.