Disclosure of Litigation Agreements Must be "Immediate"

*(photo) John Aikins**

The City of Brampton has learned a hard lesson that Ontario Courts will not abide delayed disclosure of litigation agreements. As a result of its failure to make immediate disclosure of its Mary Carter agreement in *Aecon Buildings v. Stephenson Engineering Limited*, 2010 ONCA 898, the City saw its action dismissed.

The first Ontario decision to explicitly deal with Mary Carter agreements was *Pettey v. Avis Car Inc.* (1993), 13 O.R. (3d) 725. With respect to disclosure, Ferrier J. stated:

> "The agreement must be disclosed to the parties and to the Court as soon as the agreement is made. The non-contracting defendants must be advised immediately because the agreement may well have an impact on the strategy and line of cross-examination to be pursued and evidence to be led by them…. In short, procedural fairness requires immediate disclosure. 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."

Years later, in *Laudon v. Roberts* (2009) 66 C.C.L.T. 207, the Ontario Court of Appeal, in the course of determining that a plaintiff was obliged to deduct from a jury's damage award the payment received pursuant to a Mary Carter agreement, noted:

> "The existence of a Mary Carter agreement significantly alters the relationship among the parties to the litigation. Usually the position of the parties will have changed from those set out in their pleadings. It is for this reason that the existence of such an agreement is to be disclosed, as soon as it is concluded, to the Court and to the other parties to the litigation."

The Court quoted from the *Pettey* decision to set out the reasons for disclosure.

The question remained, however, what was meant by "immediate disclosure" or how Mary Carter agreements were to be disclosed to the Court. In *Aecon* we finally learn the answer to the first question, although not the second.

The facts in *Aecon* are somewhat unusual. Aecon was the construction manager for the building of the Brampton Performing Arts Centre. There were delay claims made by Aecon. Before commencing an action, however, Aecon reached a verbal agreement with the City of Brampton capping Brampton's exposure to amounts Brampton could recover from third parties. An action was then commenced by Aecon, the verbal agreement was reduced to writing and signed, and Brampton issued third party proceedings. The third parties then issued fourth party proceedings.

A motion was brought by the fourth parties to dismiss the proceeding on the basis that the litigation was champertous. The motion court had no hesitation in rejecting that argument. The motion also sought a dismissal on the basis of abuse of process. The court agreed that the agreement was not disclosed "immediately," but found that there was no resulting prejudice, and the motion was dismissed.

The decision was appealed to the Court of Appeal. With respect to disclosure, the Court stated:

> "In this case, the agreement was not voluntarily produced immediately upon its completion. It was only produced several months after its existence was discovered by the appellant and it was specifically requested.
>
> Other parties to the litigation are not required to make inquiries to seek out such agreements. The obligation is that of the parties who enter such agreements to immediately disclose the fact."

The Court had earlier stated:

> "The agreement was, however, disclosed to the appellant before it was required to deliver its pleading. The motion judge found on that basis that there was no prejudice caused to anyone from the delay in disclosing the agreement. We agree that there was no prejudice. However, in our view the matter does not end there."

The obligation to disclose such agreements was stated by the Court as follows:

> "While it is open to parties to enter into such agreements, the obligation upon entering such an agreement is to *immediately* [the Court's emphasis] inform all other parties to the litigation as well as to the court."

The court stated that immediate disclosure is not optional and any failure of compliance amounts to abuse of process and must result in consequences of the most serious nature for the defaulting party:

> "Where, as here, the failure amounts to abuse of process, the only remedy to redress the wrong is to stay the Third Party proceedings and of course, by necessary implication, the Fourth Party proceedings commenced at the instance of the Third Party. Only by imposing consequences of the most serious nature on the defaulting party is the court able to enforce and control its own process and ensure that justice is done between and among the parties. To permit the litigation to proceed without disclosure of agreements such as the one in issue renders the process a sham and mounts to a failure of justice."

The third and fourth party proceedings were therefore stayed.

Although the Court appears to be clear in its ruling that "any failure" with respect to immediate disclosure amounts to an abuse of process, the Court's ruling is somewhat ambiguous. If "any failure" means even a day of delay and if "any failure" is abuse of process, why did the Court say: "*Where, as here,* the failure amounts to…"? This would suggest that not "any failure" qualifies as an abuse of process.

It is also surprising that the Court chose to impose the harshest possible "penalty": ending the entire proceeding. How does dismissing an action, in the absence of prejudice to the other side, results in "justice between the parties"? With the benefit of submissions from counsel, the Court could have chosen a less severe penalty, such as:

1. An order for immediate payment of costs to all parties on a full indemnity basis by the "defaulting" parties;

2. Determine whether there should be a finding of civil contempt made against any of the parties to the agreement; or

3. An order that the defaulting party post security for costs to ensure compliance with the *Rules* in the future.

The Court could also have sent the matter back to the motion judge to determine whether fault lay at the hands of counsel rather than the client. It is not often that the court saddles a litigant with an error made by counsel.

It is interesting to note that in *Hamilton v. Svedas Koyanagi Architects Inc.*, 2010 ONCA 887, which was decided only two days before *Aecon*, the Court of Appeal refused reinstate an action brought by another municipality, this time the City of Hamilton. However, in refusing to set aside a Registrar's Order dismissing the action, the Court did consider what it called one of "the two key principles of the civil justice system and the *Rules of Civil Procedure*":

> "The first, reflected in Rule 1.04 (1), is that civil actions should be decided on their merits. As the motion judge said at para. 31 of his reasons: "the court's bias is in favour of deciding matters on their merits rather than terminating rights on procedural grounds."

Why did this principle not merit discussion in *Aecon*?

The Court of Appeal also made the following comment about public interest in promoting settlements in *M., (J.) v. Bradley (2004)*, 71 O.R. (3d) 171:

> "Finally, there is an additional, and powerful, reason to support the implementation of the Agreements in this case: the overriding public interest in encouraging the pre-trial settlement of civil cases. This laudatory objective has

> long been recognized by Canadian courts as fundamental to the proper administration of civil justice… Furthermore, the promotion of settlement is especially salutary in complex, costly, multi-party litigation…"

Again, how can this statement be reconciled with the result in *Aecon?* Does the Court really encourage the use of settlement agreements when the penalty for failing to immediately disclose it, even in the absence of prejudice, is a dismissal of the claim?

The question also remains: how does one disclose to the court the existence of an agreement, especially when it is reached shortly after the proceeding is commenced? Does one bring a motion? Does one amend the pleadings? Does one mail it to the court office? Or does one simply advise the Court any time there is any communication with the Court with respect to any issue in the litigation? And what kinds of "litigation agreements" are caught by this ruling? If two defendants agree that they will not crossclaim against each other, would it have to be disclosed?

Despite the uncertainties that remain, there is no doubt that *Aecon's* "immediate disclosure" requirement must be seriously considered whenever counsel enter into a litigation agreement.

**John Aikins is a partner at Forbes Chochla LLP*