

CITATION: *Yurkovich et al. v. Citibank Canada et al.*, 2024 ONSC 4340
COURT FILE NO.: CV-20-00645630-00CL
DATE: 20240613

ONTARIO - SUPERIOR COURT OF JUSTICE – COMMERCIAL LIST

RE: Robert Yurkovich and Laurene Yurkovich, Plaintiffs

AND:

Citibank Canada and Citibank, N.A., Defendants

BEFORE: Peter J. Osborne J.

COUNSEL: *James Doris, Shimon Sherrington and Andrew Sunter*, for the Plaintiffs
Brett Harrison and Preet Saini, for the Defendants
Andrew Wilson, for Michael Yurkovich, Vladimir Lizunov, & Refraction Asset Management Ltd.

HEARD: June 13, 2024

ENDORSEMENT

[1] The Plaintiffs move for an order approving Pierringer settlement agreements entered into between the Plaintiffs on the one hand and each of the Third Party Defendants on the other hand.

[2] The Citibank Defendants consent to the approval of the Pierringer settlement agreements, but by cross-motion request that certain terms of such relief be imposed specifically providing that they continue to have discovery rights, including the right to examine for discovery Michael Yurkovich as a party.

[3] For the reasons that follow, I am satisfied that the Pierringer settlement agreements should be approved, but on terms that the Third Party Defendants continue to have the obligations they would have if they remained as parties.

[4] In particular, those parties have documentary production and examination obligations, and if the matter proceeds to trial, and if they are not called as witnesses by the Plaintiffs, and the Citibank Defendants require them to be called, the Citibank Defendants have the right to cross-examine them as if they had been called as witnesses by the Plaintiffs.

[5] Defined terms in this Endorsement have the meaning given to them in the motion records, unless otherwise stated.

[6] The Plaintiffs are investors of advanced years. They are residents of Alberta. They commenced this action in August, 2020 seeking damages as a result of the sale by the Citibank

Defendants of shares pledged as collateral for a \$35 million loan, when the facility went into margin.

[7] The Third Party Michael Yurkovich is the adult son of the Plaintiffs and is the CEO of Refraction Asset Management Ltd., the family's investment holding company. Vladimir Lizunov is the Chief Financial Officer of Refraction.

[8] The Plaintiffs were examined for discovery in June, 2022, during which examinations they gave numerous undertakings to make inquiries of Michael Yurkovich and Refraction.

[9] Subsequently:

- a. the Defendants moved for summary judgment;
- b. the Plaintiffs amended the Statement of Claim;
- c. the Defendants opposed the amendments on the basis of the alleged expiry of a limitation period;
- d. leave was granted to amend the claim;
- e. that decision was appealed to the Court of Appeal and the appeal was quashed on the basis that it ought to have been brought to the Divisional Court;
- f. the Defendants delivered a Fresh as Amended Statement of Defence;
- g. the Defendants delivered a Third Party Claim asserting claims against each of the Third Party Defendants for contribution and indemnity; and
- h. the Plaintiffs and each of the Third Party Defendants then entered into the Pierringer settlement agreements.

[10] Pierringer agreements have been recognized as an important tool in settling multi-party litigation and have been held to contribute to the administration of justice through supporting the broader judicial public policy goals of encouraging settlement between parties: *Sable Offshore Energy Inc. v. Ameron International Corp.*, 2013 SCC 37 at paras 21 – 27; and *Allianz v Canada (Attorney General)*, 2017 ONSC 4484 (“*Allianz*”) at para 9.

[11] Pierringer agreements have been held to be appropriate in the context of multi-party litigation specifically involving third, fourth and fifth parties, so long as the effect of the settlement agreement is to limit the liability of the non-settling party to its several liability as would be the case for multiple defendants sued by a plaintiff: *Amoco Canada Petroleum Co. Ltd. v. Propak Systems Ltd.*, 2001 ABCA 110 at para 16, 42.

[12] A Court may decline to approve a Pierringer agreement where the opposing defendant can establish “just and substantive cause” in the sense of prejudice that outweighs the policy goals in

favour of settlement: *J. M. v. Bradley*, 2004 CanLII 8541 (ON CA) at para 67. That case involved a Pierringer agreement which was not strenuously opposed and “fairness of the settlement unchallenged”, but the standard has since been applied in cases where non-settling parties oppose the Pierringer agreement on the basis of prejudice to their litigation position: *Cadieux et al. v. Cadieux et al.*, 2024 ONSC 1938 at para 60. See also *Accel Electrical Contractors Limited v Corporation of the City of Brampton*, 2017 ONSC 6708 at para 27.

[13] Where the partial settlement with the settling defendant may adversely create procedural unfairness for the non-settling defendant, the court may make orders to ensure the fairness of the trial, including allowing remaining parties to cross-examine the settling defendant: Paul M. Perell & John W. Morden in *The Law of Civil Procedure in Ontario*, 5th ed. (Toronto: LexisNexis Canada, 2024) at p 1030.

[14] Courts routinely impose conditions when approving Pierringer agreements: *Ontario New Home Warranty Program v Chevron Chemical Company*, 1999 CanLII 15098 at para 77; and *Allianz*, supra at para. 35.

[15] There is no issue in this case of late disclosure that has prejudiced the litigation position of the Defendants, and none is alleged.

[16] In my view, the Pierringer agreements here can and should be approved. However, I am satisfied that fairness requires that has a condition thereof, the Citibank Defendants have the right to conduct examinations for discovery of the Third Parties as if they were parties, and to have their evidence received at trial, if necessary, as if they were called as witnesses by the Plaintiffs (i.e., the Citibank Defendants may cross-examine them).

[17] I am not satisfied that to require that they be examined for discovery in this manner would prejudice the Plaintiffs and delay the action, as submitted. On the contrary, I am satisfied that documentary production having already been completed, it will minimize delay to simply get on with those examinations.

[18] Moreover, in the particular circumstances of this case, where the parties to the Pierringer agreements (the Plaintiffs and the Third Party Defendants) are not arm’s-length, and where the Plaintiffs are advanced in years and their adult son Michael Yurkovich largely corresponded with the Citibank Defendants and conducted the relevant transactions on behalf of his parents, the Plaintiffs, substantive fairness requires that the Defendants have the right to examine him as a condition of the Pierringer agreements being approved.

[19] Order to go to give effect to these reasons.

Osborne J.