

B-20



SUPREME COURT OF CANADA

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

DATE: 20130621
DOCKET: 34678

BETWEEN:

Sable Offshore Energy Inc., as agent for and on behalf of the Working Interest Owners of the Sable Offshore Energy Project, ExxonMobil Canada Properties, Shell Canada Limited, Imperial Oil Resources, Mosbacher Operating Ltd., Pengrowth Corporation, ExxonMobil Canada Properties, as operator of the Sable Offshore Energy Project

Appellants
and

Ameron International Corporation, Ameron B.V., Alcolour Paint Limited, Amercoat Canada, Rubyco Ltd., Danroh Inc. and Serious Business Inc.

Respondents

CORAM: McLachlin C.J. and LeBel, Abella, Cromwell, Moldaver, Karakatsanis and Wagner JJ.

REASONS FOR JUDGMENT:
(paras. 1 to 31)

Abella J. (McLachlin C.J. and LeBel, Cromwell, Moldaver, Karakatsanis and Wagner JJ. concurring)

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SABLE OFFSHORE ENERGY v. AMERON INTERNATIONAL

**Sable Offshore Energy Inc., as agent for and on behalf of
the Working Interest Owners of the Sable Offshore Energy
Project, ExxonMobil Canada Properties, Shell Canada
Limited, Imperial Oil Resources, Mosbacher Operating
Ltd., Pengrowth Corporation and ExxonMobil Canada
Properties, as operator of the Sable Offshore Energy Project**

Appellants

v.

**Ameron International Corporation, Ameron B.V.,
Allcolour Paint Limited, Amercoat Canada, Rubyco Ltd.,
Danroh Inc. and Serious Business Inc.**

Respondents

Indexed as: Sable Offshore Energy Inc. v. Ameron International Corp.

2013 SCC 37

File No.: 34678.

2013: March 25; 2013: June 21.

Present: McLachlin C.J. and LeBel, Abella, Cromwell, Moldaver, Karakatsanis and
Wagner JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR NOVA SCOTIA

Civil Procedure — Access to justice — Disclosure — Privilege — Promoting Settlement — Settlement privilege — Scope of protection offered by settlement privilege — Appellants entering into Pierringer Agreements with some defendants to multi-party litigation — Non-settling defendants seeking disclosure of amount of settlements prior to trial — Whether amounts of negotiated settlements protected by settlement privilege.

Sable Offshore Energy Inc. sued a number of defendants who had supplied it with paint intended to prevent corrosion of Sable's offshore structures and onshore facilities. Sable also sued several contractors and applicators who had prepared surfaces and applied the paint. The paint allegedly failed to prevent corrosion. Sable entered into Pierringer Agreements with some of the defendants, allowing those defendants to withdraw from the litigation while permitting Sable's claims against the non-settling defendants to continue. Pierringer Agreements allow one or more defendants in a multi-party proceeding to settle with the plaintiff, leaving the remaining defendants responsible only for the loss they actually caused. All of the terms of those agreements were disclosed to the remaining defendants with the exception of the amounts the parties settled for. The remaining defendants sought disclosure of the settlement amounts.

The trial judge dismissed the application seeking disclosure of the settlement amounts, concluding they were covered by settlement privilege. The Court of Appeal overturned that decision and ordered the amounts disclosed.

Held: The appeal should be allowed.

The purpose of settlement privilege is to promote settlement. Settlements allow parties to reach a mutually acceptable resolution to their dispute without prolonging the personal and public expense and time involved in litigation. Settlement privilege protects the efforts parties make to settle their disputes by ensuring that communications made in the course of those negotiations are inadmissible. The protection is for settlement *negotiations*, whether or not a settlement is reached. That means that successful negotiations are entitled to no less protection than ones that yield no settlement. Since the negotiated amount is a key component of the content of successful negotiations, reflecting the admissions, offers, and compromises made in the course of negotiations, it too is protected by the privilege.

As with other class privileges, there are exceptions. To come within those exceptions, a defendant must show that, on balance, a competing public interest outweighs the public interest in encouraging settlement.

The non-settling defendants have received all the non-financial terms of the Pierringer Agreements. They have access to all the relevant documents and other evidence that was in the settling defendants' possession. They also have the assurance that they will not be held liable for more than their share of damages. As for any concern that the non-settling defendants will be required to pay more than their share of damages, it is inherent in Pierringer Agreements that non-settling

defendants can only be held liable for their share of the damages and are severally, and not jointly, liable with the settling defendants. The defendants remain fully aware of the claims they must defend themselves against and of the overall amount that Sable is seeking. There is therefore no tangible prejudice created by withholding the amounts of the settlements which can be said to outweigh the public interest in promoting settlements.

Cases Cited

Referred to: *Pierringer v. Hoger*, 124 N.W.2d 106 (1963); *Sparling v. Southam Inc.* (1988), 66 O.R. (2d) 225; *Kelvin Energy Ltd. v. Lee*, [1992] 3 S.C.R. 235; *Rush & Tompkins Ltd. v. Greater London Council*, [1988] 3 All E.R. 737; *Cutts v. Head*, [1984] 1 All E.R. 597; *Middelkamp v. Fraser Valley Real Estate Board* (1992), 71 B.C.L.R. (2d) 276; *Brown v. Cape Breton (Regional Municipality)*, 2011 NSCA 32, 302 N.S.R. (2d) 84; *Amoco Canada Petroleum Co. v. Propak Systems Ltd.*, 2001 ABCA 110, 281 A.R. 185; *Hudson Bay Mining and Smelting Co. v. Wright* (1997), 120 Man. R. (2d) 214; *Dos Santos Estate v. Sun Life Assurance Co. of Canada*, 2005 BCCA 4, 207 B.C.A.C. 54; *Unilever plc v. Procter & Gamble Co.*, [2001] 1 All E.R. 783; *Underwood v. Cox* (1912), 26 O.L.R. 303; *Bioriginal Food & Science Corp. v. Sascopack Inc.*, 2012 SKQB 469 (CanLII).

Statutes and Regulations Cited

Nova Scotia Civil Procedure Rules, rr. 20.02, 20.06.

Authors Cited

Bryant, Alan W., Sidney N. Lederman and Michelle K. Fuerst. *The Law of Evidence in Canada*, 3rd ed. Markham, Ont.: LexisNexis, 2009.

Knapp, Peter B. "Keeping the *Pierringer* Promise: Fair Settlements and Fair Trials" (1994), 20 *Wm. Mitchell L. Rev.* 1.

Vaver, David. "'Without Prejudice' Communications — Their Admissibility and Effect" (1974), 9 *U.B.C. L. Rev.* 85.

APPEAL from a judgment of the Nova Scotia Court of Appeal (MacDonald C.J.N.S. and Oland and Farrar JJ.A.), 2011 NSCA 121, 310 N.S.R. (2d) 382, 983 A.P.R. 382, 26 C.P.C. (7th) 1, 346 D.L.R. (4th) 68, 12 C.L.R. (4th) 129, [2011] N.S.J. No. 687 (QL), 2011 CarswellNS 893, reversing a decision of Hood J., 2010 NSSC 473, 299 N.S.R. (2d) 216, 947 A.P.R. 216, [2010] N.S.J. No. 713 (QL), 2010 CarswellNS 907. Appeal allowed.

Robert Belliveau, Q.C., and *Kevin Gibson*, for the appellants.

John P. Merrick, Q.C., and *Darlene Jamieson, Q.C.*, for the respondents Ameron International Corporation and Ameron B.V.

Terrence L. S. Teed, Q.C., and *Ronald J. Savoy*, for the respondents Allcolour Paint Limited, Amercoat Canada, Rubyco Ltd., Danroh Inc. and Serious Business Inc.

The judgment of the Court was delivered by

ABELLA J. —

[1] The justice system is on a constant quest for ameliorative strategies that reduce litigation's stubbornly endemic delays, expense and stress. In this evolving mission to confront barriers to access to justice, some strategies for resolving disputes have proven to be more enduringly successful than others. Of these, few can claim the tradition of success rightfully attributed to settlements.

[2] The purpose of settlement privilege is to promote settlement. The privilege wraps a protective veil around the efforts parties make to settle their disputes by ensuring that communications made in the course of these negotiations are inadmissible.

[3] Sable Offshore Energy Inc. sued a number of defendants. It settled with some of them. The remaining defendants want to know what amounts the parties settled for. The question before us is whether those negotiated amounts should be disclosed or whether they are protected by settlement privilege.

Background

[4] Sable undertook the Sable Offshore Energy Project, whose purpose was the building of several offshore structures and onshore gas processing facilities in

Nova Scotia. Ameron International Corporation and Ameron B.V. (Ameron) and Allcolour Paint Limited, Amercoat Canada, Rubyco Ltd., Danroh Inc. and Serious Business Inc. (collectively Amercoat) supplied Sable with paint for parts of the Sable structures. Sable brought three lawsuits alleging that the paint failed to prevent corrosion.

[5] In the lawsuit that is the subject of this appeal, Sable sued Ameron, Amercoat, and 12 other contractors and applicators who were responsible for preparing surfaces and applying the paint coatings. The claims against Ameron and Amercoat were for negligence, negligent misrepresentation and breach of a collateral warranty. The claims against the other defendants were similar.

[6] Sable entered into three Pierringer Agreements with some of the defendants. Named for the 1963 Wisconsin case of *Pierringer v. Hoyer*, 124 N.W.2d 106 (Wis. 1963), a Pierringer Agreement allows one or more defendants in a multi-party proceeding to settle with the plaintiff and withdraw from the litigation, leaving the remaining defendants responsible only for the loss they actually caused. There is no joint liability with the settling defendants, but non-settling defendants may be jointly liable with each other.

[7] As part of the terms of the Agreements, Sable agreed to amend its statement of claim against the non-settling defendants to pursue them only for their share of liability. In addition, all the relevant evidence in the possession of the

settling defendants, would, in accordance with the Agreements, be given to the Plaintiffs and be discoverable by the non-settling defendants.

[8] Ameron and Amercoat did not settle. All the terms of the Pierringer Agreements were disclosed to Ameron and Amercoat except the amounts agreed to.

[9] These settlement agreements were approved by court order on April 27, 2010. On December 3, 2010, Ameron filed an application pursuant to Rules 20.02 and 20.06 of Nova Scotia's 1972 *Civil Procedure Rules* (which the parties previously agreed would govern the litigation) for disclosure of the settlement amounts paid under the Pierringer Agreements. Sable's position was that the amounts were subject to settlement privilege.

[10] Hood J. dismissed the defendants' application for disclosure of the settlement amounts. She concluded that the public interest was best served by preserving settlement privilege and keeping the settlement amounts confidential. The Court of Appeal overturned that decision and ordered the amounts disclosed.

Analysis

[11] Settlements allow parties to reach a mutually acceptable resolution to their dispute without prolonging the personal and public expense and time involved in litigation. The benefits of settlement were summarized by Callaghan A.C.J.H.C. in *Sparling v. Southam Inc.* (1988), 66 O.R. (2d) 225 (H.C.J.):

[T]he 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.
[p. 230]

This observation was cited with approval in *Kelvin Energy Ltd. v. Lee*, [1992] 3 S.C.R. 235, at p. 259, where L'Heureux-Dubé J. acknowledged that promoting settlement was "sound judicial policy" that "contributes to the effective administration of justice".

[12] Settlement privilege promotes settlements. As the weight of the jurisprudence confirms, it is a class privilege. As with other class privileges, while there is a *prima facie* presumption of inadmissibility, exceptions will be found "when the justice of the case requires it" (*Rush & Tompkins Ltd. v. Greater London Council*, [1988] 3 All E.R. 737 (H.L.), at p. 740).

[13] Settlement negotiations have long been protected by the common law rule that "without prejudice" communications made in the course of such negotiations are inadmissible (see David Vaver, "'Without Prejudice' Communications — Their Admissibility and Effect" (1974), 9 *U.B.C. L. Rev.* 85, at p. 88). The settlement privilege created by the "without prejudice" rule was based on the understanding that parties will be more likely to settle if they have confidence from the outset that their

negotiations will not be disclosed. As Oliver L.J. of the English Court of Appeal explained in *Cutts v. Head*, [1984] 1 All E.R. 597, at p. 605:

[P]arties should be encouraged so far as possible to settle their disputes without resort to litigation and should not be discouraged by the knowledge that anything that is said in the course of such negotiations . . . may be used to their prejudice in the course of the proceedings. They should, as it was expressed by Clauson J in *Scott Paper Co v. Drayton Paper Works Ltd* (1927) 44 RPC 151 at 157, be encouraged freely and frankly to put their cards on the table.

What is said during negotiations, in other words, will be more open, and therefore more fruitful, if the parties know that it cannot be subsequently disclosed.

[14] *Rush & Tompkins* confirmed that settlement privilege extends beyond documents and communications expressly designated to be “without prejudice”. In that case, a contractor settled its action against one defendant, the Greater London Council (the GLC), while maintaining it against the other defendant, the Carey contractors. The House of Lords considered whether communications made in the process of negotiating the settlement with the GLC should be admissible in the ongoing litigation with the Carey contractors. Lord Griffiths reached two conclusions of significance for this case. First, although the privilege is often referred to as the rule about “without prejudice” communications, those precise words are not required to invoke the privilege. What matters instead is the intent of the parties to settle the action (p. 739). Any negotiations undertaken with this purpose are inadmissible.

[15] Lord Griffiths' second relevant conclusion was that although most cases considering the "without prejudice" rule have dealt with the admissibility of communications once negotiations have failed, the rationale of promoting settlement is no less applicable if an agreement is actually reached. Lord Griffiths explained that a plaintiff in *Rush & Tompkins*' situation would be discouraged from settling with one defendant if any admissions it made during the course of its negotiations were admissible in its claim against the other:

In such circumstances it would, I think, place a serious fetter on negotiations . . . if they knew that everything that passed between them would ultimately have to be revealed to the one obdurate litigant. [p. 744]

[16] *Middelkamp v. Fraser Valley Real Estate Board* (1992), 71 B.C.L.R. (2d) 276 (C.A.), subsequently endorsed the view that settlement privilege covers any settlement negotiations. The plaintiff James Middelkamp launched a civil suit against Fraser Valley Real Estate Board claiming that it had engaged in practices that were contrary to the *Competition Act*, R.S.C. 1985, c. C-34, and caused him to suffer damages. He also complained about the Board's conduct to the Director of Investigation and Research under different provisions of the *Act*, resulting in an investigation by the Director and criminal charges against the Board. The Board negotiated a settlement with the Department of Justice, leading to the criminal charges being resolved. Middelkamp sought disclosure of any communications made during the course of negotiations between the Board and the Department of Justice.

McEachern C.J.B.C. refused to order disclosure of the communications on the basis of settlement privilege, explaining:

. . . the public interest in the settlement of disputes generally requires “without prejudice” documents or communications created for, or communicated in the course of, settlement negotiations to be privileged. I would classify this as a “blanket, *prima facie*, common law, or ‘class’” privilege because it arises from settlement negotiations and protects the class of communications exchanged in the course of that worthwhile endeavour.

In my judgment this privilege protects documents and communications created for such purposes both from production to other parties to the negotiations and to strangers, and extends as well to admissibility, *and whether or not a settlement is reached*. This is because, as I have said, a party communicating a proposal related to settlement, or responding to one, usually has no control over what the other side may do with such documents. Without such protection, the public interest in encouraging settlements will not be served. [Emphasis added; paras. 19-20.]

[17] As McEachern C.J.B.C. pointed out, the protection is for settlement negotiations, whether or not a settlement is reached. That means that successful negotiations are entitled to no less protection than ones that yield no settlement. The reasoning in *Brown v. Cape Breton (Regional Municipality)*, 2011 NSCA 32, 302 N.S.R. (2d) 84, is instructive. A plaintiff brought separate claims against two defendants for unrelated injuries to the same knee. She settled with one defendant and the Court of Appeal had to consider whether the trial judge was right to order disclosure of the amount of the settlement to the remaining defendant. Bryson J.A. found that disclosure should not have been ordered since a principled approach to settlement privilege did not justify a distinction between settlement *negotiations* and what was ultimately negotiated:

Some of the cases distinguish between extending privilege from negotiations to the concluded agreement itself. . . . *The distinction . . . is arbitrary.* The reasons for protecting settlement communications from disclosure are not usually spent when a deal is made. *Typically parties no more wish to disclose to the world the terms of their agreement than their negotiations in achieving it.* [Emphasis added; para. 41.]

Notably, this is the view taken in Alan W. Bryant, Sidney N. Lederman and Michelle K. Fuerst, *The Law Of Evidence in Canada* (3rd ed. 2009), where the authors conclude:

... the privilege applies not only to failed negotiations, but also to the *content of successful negotiations*, so long as the existence or interpretation of the agreement itself is not in issue in the subsequent proceedings and none of the exceptions are applicable. [Emphasis added; para. 14. 341.]

[18] Since the negotiated amount is a key component of the “content of successful negotiations”, reflecting the admissions, offers, and compromises made in the course of negotiations, it too is protected by the privilege. I am aware that some earlier jurisprudence did not extend the privilege to the concluded agreement (see *Amoco Canada Petroleum Co. v. Propak Systems Ltd.*, 2001 ABCA 110, 281 A.R. 185, at para. 40, citing *Hudson Bay Mining and Smelting Co. v. Wright* (1997), 120 Man. R. (2d) 214 (Q.B.)), but in my respectful view, it is better to adopt an approach that more robustly promotes settlement by including its content.

[19] There are, inevitably, exceptions to the privilege. To come within those exceptions, 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). These countervailing interests have been found to include allegations of misrepresentation, fraud or undue influence (*Unilever plc v. Procter & Gamble Co.*, [2001] 1 All E.R. 783 (C.A.), *Underwood v. Cox* (1912), 26 O.L.R. 303), and preventing a plaintiff from being overcompensated (*Dos Santos*).

[20] The non-settling defendants argue that there should be an exception to the privilege for the amounts of the settlements because they say they need this information to conduct their litigation. I see no tangible prejudice created by withholding the amounts of the settlements which can be said to outweigh the public interest in promoting settlements.

[21] The particular settlements negotiated in this case are known as Pierringer Agreements. Pierringer Agreements were developed in the United States to address the obstacles to settlement that arose in multi-party litigation. Professor Peter B. Knapp summarized the value — and complexity — of trying to settle multi-party litigation as follows:

Settlement of complicated multi-defendant civil litigation is particularly valuable, because complicated civil trials can consume enormous amounts of a judge’s time and can be expensive for the parties. However, settling multi-defendant civil litigation can be especially difficult. Different defendants have different tolerances for risk, and some defendants are simply far less willing to settle than others.

“Keeping the *Pierringer* Promise: Fair Settlements and Fair Trials” (1994), 20 *Wm. Mitchell L. Rev.* 1, at p. 5.

[22] Professor Knapp also explained why, prior to Pierringer Agreements, settlements had been difficult to encourage:

On one hand, a plaintiff contemplating settlement with one of several defendants faced the possibility that release of the one defendant would also extinguish all claims against the nonsettling defendants. On the other hand, in jurisdictions which permitted contribution among joint tortfeasors, a settling defendant faced the possibility of post-settlement contribution claims made by the nonsettling defendants. [pp. 6-7]

[23] In the United States, Pierringer Agreements were found to significantly attenuate the obstacles in the way of negotiating settlements in multi-party litigation. Under a Pierringer Agreement, the plaintiff's claim was only "extinguished" against those defendants with whom it settled; the claims against the non-settling defendants continued. The settling defendants, meanwhile, were assured that they could not be subject to a contribution claim from the non-settling defendants, who would be accountable only for their own share of liability at trial.

[24] Pierringer Agreements in Canada built on these American foundations and routinely included additional protections for non-settling defendants, such as requiring that non-settling defendants be given access to the settling defendants' evidence. In this case, for example, the court order approving the settlement required that the plaintiffs get production of all relevant evidence from the settling defendants and make this evidence available to the non-settling defendants on discovery. It also ordered that, with respect to factual matters, there be no restrictions on the non-settling defendants' access to experts retained by the settling defendants. In addition,

the Agreements in this case specified that their non-financial terms would be disclosed to the court and non-settling defendants "to the extent required by the laws of the Province of Nova Scotia and the rulings and ethical guidelines promulgated by the Nova Scotia Barristers' Society" (A.R., at pp. 142 and 184).

[25] The non-settling defendants have in fact received all the non-financial terms of the Pierringer Agreements. They have access to all the relevant documents and other evidence that was in the settling defendants' possession. They also have the assurance that they will not be held liable for more than their share of damages. Moreover, Sable agreed that at the end of the trial, once liability had been determined, it would disclose to the trial judge the amounts it settled for. As a result, should the non-settling defendants establish a right to set-off in this case, their liability for damages will be adjusted downwards if necessary to avoid overcompensating the plaintiff.

[26] As for any concern that the non-settling defendants will be required to pay more than their share of damages, it is inherent in Pierringer Agreements that non-settling defendants can only be held liable for their share of the damages and are severally, and not jointly, liable with the settling defendants.

[27] It is therefore not clear to me how knowledge of the settlement amounts materially affects the ability of the non-settling defendants to know and present their case. The defendants remain fully aware of the claims they must defend themselves against and of the overall amount that Sable is seeking. It is true that knowing the

settlement amounts might allow the defendants to revise their estimate of how much they want to invest in the case, but this, it seems to me, does not rise to a sufficient level of importance to displace the public interest in promoting settlements.

[28] The non-settling defendants also argued that refusing disclosure impedes their own possible settlement initiatives since they are more likely to settle if they know the settlement amounts already negotiated. Perhaps. But they may also, depending on the amounts, arguably come to see them as a disincentive. In any event, theirs is essentially a circular argument that the interest in *subsequent* settlement outweighs the public interest in encouraging the *initial* settlement. But the likelihood of an initial settlement decreases if the amount is disclosable.

[29] Someone has to go first, and encouraging that first settlement in multi-party litigation is palpably worthy of more protection than the speculative assumption that others will only follow if they know the amount. The settling defendants, after all, were able to come to a negotiated amount without the benefit of a guiding settlement precedent. The non-settling defendants' position is no worse. As Smith J. noted in protecting the settlement amount from disclosure in *Bioriginal Food & Science Corp. v. Sascopack Inc.*, 2012 SKQB 469 (CanLII):

. . . imperfect knowledge is virtually always the case in settlement negotiations. There are always knowns and known unknowns . . . [para. 33].

And Bryson J.A. compellingly summarized the competing arguments in *Brown* as follows:

Some courts have argued that it is necessary to go further and disclose the settlement amount itself. . . . They hold either that the agreement (unlike negotiations) is not privileged or that the settling parties have an advantage which should be redressed by disclosure. . . . If indeed settling parties thereby enjoy an advantage over non-settling parties, it is one for which they have bargained. The court should hesitate to expropriate that advantage by ordering disclosure at the instance of non-settling parties, intransigent or otherwise. The argument that disclosure would facilitate settlement amongst the remaining parties ignores that, but for the privilege, the first settlement would often not occur. [Citations omitted; para. 67.]

[30] A proper analysis of a claim for an exception to settlement privilege does not simply ask whether the non-settling defendants derive some tactical advantage from disclosure, but whether the reason for disclosure *outweighs* the policy in favour of promoting settlement. While protecting disclosure of settlement negotiations and their fruits has the demonstrable benefit of promoting settlement, there is little corresponding harm in denying disclosure of the settlement amounts in this case.

[31] I would therefore allow the appeal with costs throughout.

Appeal allowed with costs throughout.

Solicitors for the appellants: McInnes Cooper, Halifax.

*Solicitors for the respondents Ameron International Corporation and
Ameron B.V.: Merrick Jamieson Sterns Washington & Mahody, Halifax.*

*Solicitors for the respondents Allcolour Paint Limited, Amercoat Canada,
Rubyco Ltd., Danroh Inc. and Serious Business Inc.: Bingham Law, Moncton.*