NOVA SCOTIA COURT OF APPEAL
Citation: ***Ameron International Corporation v. Sable Offshore Energy Inc.***, 2010 NSCA 107

Date: 20101222
Docket: CA 328825
Registry: Halifax

Between:

Ameron International Corporation and
Ameron B.V.

Appellants
Respondents on cross-appeal

v.

Sable Offshore Energy Inc., as agent for and on behalf of the Working Owners of the Sable Offshore Energy Project, Exxon Mobile Canada Properties, Shell Canada Limited, Imperial Oil Resources, Mossbacher Operating Ltd., and Pengrowth Corporation; Exxonmobile Canada Properties, as operator of the Sable Offshore Energy Project, Allcolour Paint Limited, Amercoat Canada, Rubyco Ltd., Danroh Inc., and Serious Business Inc.

Respondents
Appellants on cross-appeal

Judges: Hamilton, Fichaud and Farrar, JJ.A.

Appeal Heard: November 30, 2010, in Halifax, Nova Scotia

Held: Leave to appeal granted and appeal allowed in part; leave to appeal on cross-appeal granted but cross-appeal dismissed per reasons for judgment of Farrar, J.A.; Hamilton and Fichaud, JJ.A. concurring.

Counsel:	John P. Merrick, Q.C. and Tammy Manning, for the appellants/respondents on cross-appeal Robert G. Belliveau, Q.C. and Kevin D. Gibson, for the respondents/appellants on cross-appeal Sable Offshore Energy Inc., as agent for and on behalf of the Working Owners of the Sable Offshore Energy Project, Exxon Mobile Canada Properties, Shell Canada Limited, Imperial Oil Resources, Mossbacher Operating Ltd., and Pengrowth Corporation; Exxonmobile Canada Properties, as operator of the Sable Offshore Energy Project Terrence L.S. Teed, Q.C. and Ronald J. Savoy for the respondents Allcolour Paint Limited, Amercoat Canada, Rubyco Limited, Danroh Inc., and Serious Business Inc.

Reasons for judgment:

Background

[1] The respondent and appellant by cross-appeal Sable Offshore Energy Inc., is the plaintiff in a multiparty lawsuit. It entered into two Pierringer Agreements to settle its claims against a number of the defendants and third parties to the action. A Pierringer Agreement takes its name from a 1963 Wisconsin case; it is an agreement which allows parties to a proceeding to settle claims and the settling defendants to withdraw from the litigation, leaving the remaining defendants responsible only for the loss they actually caused with no joint liability with the settling defendants. The non-settling defendants are responsible only for their proportionate share of the loss. (**Amoco Canada Petroleum Co. v. Propak Systems Ltd.**, 2001 ABCA 110, ¶ 3).

[2] The non-settling defendants are Ameron International Corporation and Ameron BV, the appellants (collectively Ameron or the Ameron defendants) and Allcolour Paint Limited, Amercoat Canada, RubyCo Ltd., Danroh Inc. and Serious Business Inc., respondents (collectively Amercoat Canada or the Amercoat Canada defendants).

[3] This appeal and cross-appeal arise out of a decision of the Honourable Justice Suzanne M. Hood dated January 20, 2010, (2010 NSSC 19) and supplementary decision dated April 19, 2010 (2010 NSSC 155) settling the terms of the order giving effect to the two Pierringer Agreements.

[4] Ameron appeals that the Chambers judge erred in limiting its access to evidence from experts, who had been retained by the settling defendants, to factual matters only.

[5] Sable cross-appeals that the Chambers judge erred by requiring it to maintain the allegations against the settling defendants in its Amended Statement of Claim, after the action against those defendants was settled.

[6] For the reasons that I will develop I would grant leave to appeal and allow the appeal in part. I would also grant leave to cross-appeal, but dismiss the cross-appeal.

[7] I would not award costs to any party on the appeal or cross-appeal.

Facts

[8] The facts are set out in detail in the trial decision. I will review them briefly.

[9] Sable Offshore Energy Inc. is the owner of the Sable Gas Project which includes three offshore structures and two onshore gas processing facilities located at Goldboro and Point Tupper, Nova Scotia.

[10] In April, 2004, Sable commenced action alleging that the paint coating system used for corrosion protection on portions of all of its structures, supplied by Ameron and Amercoat Canada, was not suitable and failed prematurely. Amercoat Canada is an independent franchisee of Ameron products.

[11] Sable also joined 12 other contractors and applicators as defendants to the action who had responsibility for supplying, fabricating and preparing the steel and for applying the paint coatings. It alleged those defendants performed their responsibilities negligently and in breach of contract and that their failures also caused the premature failure of the paint system. To round out the pleadings, there were a number of cross-claims between the defendants. As well, the defendants added third parties who, in turn, counterclaimed against certain of the defendants.

[12] Sable, the 12 other defendants and the third parties entered into two Pierringer Agreements settling the claims, cross-claims, third party claims and counterclaims between them. Ameron and Amercoat are not parties to the settlement agreements.

[13] By notice of motions, dated September 30, 2009, Sable, the settling defendants and third parties moved for an order:

1. dismissing Sable's claims against the settling defendants;

2. dismissing the cross-claims of Ameron against the settling defendants,

3. dismissing the cross-claims between the settling defendants;

4. dismissing the third party proceedings commenced by the settling defendants against third parties; and,

5. dismissing the counterclaims of the third parties against the settling defendants.

[14] All of the dismissals were sought on a without costs basis.

[15] Sable, also, moved for an order to amend its statement of claim to remove any allegations made against the settling defendants.

[16] There was no motion filed by any party for a determination of the issue of litigation privilege for expert evidence. The significance of this will become apparent later in this decision.

[17] The effect of the motions would be to dismiss all of the actions, cross-claims and counterclaims such that the only remaining defendants would be Ameron and Amercoat Canada.

[18] The motions were heard on October 29, 2009, and the Chambers judge gave a written decision dated January 20, 2010 allowing the motions. The parties made post-hearing submissions, both orally and in writing, on the form of order flowing from the decision. Following these submissions, the Chambers judge gave a supplementary written decision on April 19th. The Order approving the Pierringer Agreements was issued on April 27, 2010.

[19] In the original decision, the Chambers judge made a number of determinations. However, only her decision that access to the evidence of the experts of the settling defendants would be limited to factual matters is in issue on this appeal.

[20] The supplementary decision was very brief and simply addressed the amendments to the pleadings. The Chambers judge determined that the portions of the statement of claim which Sable wished to delete were to remain in the

statement of claim and were to be shaded. As well, a paragraph was to be added to the statement of claim to the effect that the plaintiffs are no longer pursuing those allegations against the settling defendants (Supplementary Decision, ¶ 4).

[21] As noted previously, Ameron appeals alleging the Chambers judge erred in limiting access to expert evidence of the settling defendants to factual matters only; Sable cross-appeals alleging the Chambers judge erred in ordering that the allegations in its statement of claim against the settling defendants remain in the amended statement of claim after the action against those defendants was settled.

Issues

[22] The issues raised on the appeal and cross-appeal may be summarized as follows:

1. Whether the Chambers judge erred in restricting the non-settling defendants access to evidence in the possession or knowledge of experts retained by the settling defendants to factual matters only.

2. Whether the Chambers judge erred in ordering that the allegations against settling defendants remain in the amended statement of claim and be shaded.

[23] Both the appeal and cross-appeal arise out of an interlocutory order and, therefore, leave to appeal on both issues is required.

Standard of Review

[24] The parties agree on the standard of review. This Court will not interfere with the exercise of discretion by a Chambers judge unless wrong principles of law have been applied or patent injustice would result. In deciding whether an injustice would result, this Court will consider the importance and gravity of the matter and the consequence of the order. **Smith v. Nova Scotia (Attorney General)**, 2004 NSCA 106; **Society of Lloyd's v. Van Snick**, 2000 NSCA 84, ¶ 13.

Analysis

1. Whether the Chambers judge erred in restricting the non-settling defendants' access to evidence in the possession or knowledge of experts retained by the settling defendants to factual matters only.

[25] Ameron takes issue with three paragraphs in the Order. They are:

> 16. Nothing herein shall restrict the non-settling Defendants from discovering experts retained by the settling Defendants with respect to factual matters only.
>
> 17. Nothing herein shall restrict the non-settling defendants from interviewing experts retained by any of the settling defendants with respect to factual matters only.
>
> 18. Nothing herein shall restrict the non-settling Defendants from calling at trial any experts retained by any of the settling Defendants with respect to factual matters only.

[26] Ameron says the Chambers judge erred in limiting its access to expert evidence to factual materials on the basis that the evidence was litigation privileged. It argues the Chambers judge failed to recognize that any litigation privilege ended with the Pierringer Agreements and the privilege no longer exists. It asks us, on this appeal, to rule litigation privilege has ended.

The Chambers judge's Decision

[27] I will start by reviewing the Chambers judge's discussion of these paragraphs in her decision. But first, in order to understand what is being addressed in the decision, it is necessary to set out the paragraphs Ameron was proposing for the Order. They are as follows:

> 25. Each settling defendant shall make production to non settling defendants of all evidence as to experts and experts testing, opinions, work product and reports as would be the case if the settling defendants were continuing as defendants pursuant to the 1972 Rules.

> 26. The non settling defendants shall be entitled to discovery of experts retained by the settling defendants to the same extent as would be the case if the settling defendants were continuing as defendants pursuant to the 1972 Rules.
>
> 27. Nothing herein shall restrict the right of the non settling defendants to interview experts retained by any of the settling defendants.

[28] The Chambers judge's discussion on the proposed paragraphs in her decision is as follows:

> [91] The paragraphs the non-settling defendants wish to add to the order deal with experts. They refer to the article written by Professor Peter Knapp called *Keeping the Pierringer Promise: Fair Settlements and Fair Trials*, (20 Wm. Mitchell L.Rev. 1, Winter 1994). Professor Knapp at p. 23 proposes two ways in which expert testimony of the settling defendants' experts can be accessed:
>
> > The first avenue is through the settling defendant itself. The settling defendant may be willing to allow the plaintiff access to its experts before and during trial, in effect permitting the plaintiff to hire those experts. If so, then the plaintiff and settling defendant can make this arrangement part of their Pierringer agreement. Without the settling defendants' agreement, however, the attorney work product doctrine may bar the plaintiff from obtaining access to these reports.
> >
> > ...
> >
> > If the expert has been deposed, the plaintiff may introduce the deposition transcript.
>
> [92] The general position of the settling defendants and the plaintiffs is that, until an expert's report is disclosed, it is privileged and a court should not, in effect, order that the privilege be waived and the report disclosed.
>
> ...
>
> [96] *Paragraph 25* - If the settling defendants continued as parties, any expert's opinion would be privileged. If, and only if, it were to be used at trial is there a requirement for disclosure. The *1972 Rules* provide as follows with respect to use of experts' reports:

> **31.08.(1)** Unless a copy of a report containing the full opinion of an expert, including the essential facts on which the opinion is based, a summary of his qualifications and a summary of the grounds for each opinion expressed, has been
>
> (a) served on each opposite party and filed with the court by the party filing the notice of trial at the time the notice is filed, and
>
> (b) served on each opposite party by the person receiving the notice within thirty (30) days of the filing of the notice of trial,
>
> the evidence of the expert shall not be admissible on the trial without leave of the court.

There should be no different obligation with respect to experts' reports placed on the settling defendants. The material is still privileged.

[97] *Paragraph 26* - Until the report containing the expert's opinion is disclosed, it is privileged. Accordingly, until that occurs, if experts are discovered, they can only be asked about factual matters, not their opinions.

[98] As with any person, they may be required to submit to examination for discovery but that discovery examination must be limited to factual matters. The *1972 Rules* provide for examination for discovery, but to prevent any confusion about the extent of that discovery, this paragraph should be re-worded to differentiate between the discovery of experts who have given opinions pursuant to *Rule 31.08*, if any, and discovery in any other case.

[99] *Paragraph 27* - As with para. 18, if such a thing exists, it is not "a right." In any event, experts cannot be interviewed about privileged opinions but only, as with discovery examinations, with respect to factual matters. The distinction should be made clear in the same way as in para. 26.

[100] If the settling defendants were still parties, the non-settling defendants would have no ability to interview their experts. Once they are no longer parties, the settling defendants have no ability to prevent the non-settling defendants from interviewing anyone, including experts previously retained by them. However, the experts' opinions for the settling defendants would still be privileged.

...

> [102] In any event, the testimony of any expert would be limited to factual matters unless the report has been disclosed because, as I have said, the opinions are privileged.
>
> (My emphasis)

[29] All of the parties agreed that the 1972 **Civil Procedure Rules** would continue to apply to this proceeding. Justice Hood reviewed the provisions of the **Civil Procedure Rules** and, in an attempt to maintain the position of the non-settling defendants, as if the settling defendants were still parties, she concluded that Ameron's access to expert evidence could be no greater than it was prior to the settlement. She reasoned that it is only after the expert's evidence is disclosed that it loses its privilege. The Chambers judge did not consider, nor was she asked to consider, whether litigation privilege ceased to exist after the settling defendants were no longer parties to the action.

The Position of the Parties Before the Chambers Judge - Pre-Hearing Written Submissions

[30] A review of the record discloses precisely what the Chambers judge was being asked to consider and why the Chambers judge came to the conclusions she did.

[31] As noted previously, the proposed paragraphs relating to expert evidence, set out above, were first addressed in the pre-trial brief of Ameron. Ameron argued it was seeking to maintain the *status quo* with respect to the discovery of expert evidence. The rationale it put forward is that, without these provisions in the order, the experts' work may be inaccessible because it is protected by litigation privilege. In support of this position Ameron cited the article *Keeping the Pierringer Promise: Fair Settlements and Fair Trials, supra,* as follows:

> 85. In an article entitled, *Keeping the Pierringer Promise: Fair Settlements and Fair Trials, supra,* Law Professor Peter Knapp discusses the impact of the absence of a settling defendants' experts following a Pierringer settlement. He states at page 23:
>
> > Absence of the settling defendant's experts may present a parallel problem for the remaining defendants. It is possible that the settling defendant developed the best expert testimony about the plaintiff's fault. What happens to that testimony? Once again, the

> expert's work may be inaccessible because it is protected by the attorney work product doctrine. If the expert has been deposed, the remaining defendant can introduce the deposition. If not, the remaining defendant can attempt to negotiate an agreement with the settling defendant permitting the expert to be called at trial. Absent this kind of an agreement or a deposition, the jury will never hear the testimony of the settling defendant's expert.
>
> ...
>
> ... In fact, Pierringer releases routinely create tactical disadvantages. After the release, the normal avenues for proof of the settling defendant's fault are too often closed. Because of this, juror's may not hear the best - or any - evidence of a settling defendant's fault. ... When evidence of a settling defendant's fault fails to reach the jury, the jury may well underestimate the settling defendant's share of fault. Some of that fault will be reallocated to the remaining defendant and that remaining defendant can no longer be assured that it will pay no more than its fair share of fault. The Pierringer promise has then been broken.

86. He asks the question: "Must a party simply forego all expert testimony proving a settling defendant's fault?" He provides possible avenues to accessing this expert testimony:

> The first avenue is through the settling defendant itself. The settling defendant may be willing to allow the plaintiff access to its experts before and during trial, in effect permitting the plaintiff to hire those experts. If so, then the plaintiff and settling defendant can make this arrangement part of their Pierringer agreement. Without such agreement, the attorney work product doctrine may bar the plaintiff from obtaining access to these reports.
>
> If the expert has been deposed, the plaintiff may introduce the deposition transcript.

87. Professor Knapp concludes (at page 34) that as a practical matter, judges should allow the non-settling defendants free use at trial of depositions of settling parties and witnesses in a settling party's control - both fact and expert witnesses.

[32] This was the total argument put forward by Ameron on the expert evidence paragraphs. Ameron appears to be conceding that the expert evidence was

protected by litigation privilege and the paragraphs it proposed in the order were necessary to have the evidence accessible to it.

[33] It did not argue that litigation privilege ended on the dismissal of the actions against the settling defendants.

[34] Parker Brothers, one of the settling defendants, boldly asserts privilege without any authority for its position. Its submission on the point is as follows:

> 4. **Experts**
>
> Paragraph 25 - This information is privileged and would otherwise not be obtainable by the non-settling defendants. No report has been provided or disclosed, and the Court does not have jurisdiction to order that this information be produced.
>
> Paragraph 26 - Since the investigations and opinions of the experts are privileged, the non-settling defendants have no right to discover them except as to the facts and circumstances of their observation of the sites.
>
> Paragraph 27 - Again, the opinion, etc. of the experts retained by the settling defendants are privileged. The non-settling defendants would have no ability to interview the expert even if Parker Brothers remained a party to the action and the Court does not have jurisdiction to order this.

[35] Parker Brothers, like Ameron, takes the view that the experts' evidence is privileged without any analysis of the issue.

[36] The issue is not addressed in the pre-trial brief of Sable. However, it is addressed in an affidavit dated October 27, 2009, sworn in support of its motions. Exhibit "D" to the affidavit contains a letter from the solicitor for Sable to the solicitor for Ameron wherein he sets out Sable's position on the impugned paragraphs:

> Paragraph 24 While this is an issue for the settling Defendants, we understand that no expert reports have been produced by any of the settling Defendants to date and, as a result, any work product of any experts retained by the settling Defendants would clearly remain

> within the solicitor client privilege. As would ordinarily be the case, there is no right of any party to gain access to such information until and if an expert report is delivered by a party which, in this case, will never occur because the settling Defendants will be removed from the proceeding.

[37] These are the written submissions of the parties prior to the hearing on October 29th, 2009. None of the parties even alluded to the issue that litigation privilege ended on settlement of the claims against the settling defendants.

[38] I will now turn to the oral submissions made on October 29, 2009.

Oral Submissions- October 29, 2009

Submissions on behalf of Ameron

[39] Ameron submitted as follows:

> Item 24 deals with experts and it's an important one. It seeks to ensure that any experts that have been retained to date by any of the settling parties will continue to preserve evidence even though they may no longer be anticipated to be called as a witness by their retaining entity. What we don't want . . . let me back up, it's arguable that the Ameron defendants can, as this litigation goes forward, have access to some of the expert opinions that may have been formulated and some of the information and evidence that would have gone into formulating those agreements, even if that person was not to be called as an expert at trial. Our Court of Appeal has said that an expert's opinion is a fact and must be dealt with as a fact and if these facts exist out there then we are entitled to actively say, we're entitled to access to them. All this does is put the obligation on the defendant to use reasonable and best efforts to ensure their experts do not destroy any existing evidence that may now exist. We don't want to have to go through a complicated application getting access to an expert having them on the discovery stand asking them where their file is and they say, Oh, yeah we destroyed it as a result of the Pierringer order, because we were told that we were no longer going to be called as a witness at trial. It doesn't prejudice anybody, it merely preserves the evidence.
>
> Item 25, this merely preserves our entitlement to access of evidence as to experts and experts' testing opinions, work product and reports as we would have had if the defendants ... settling defendants were to continue as parties to this proceeding. What that seeks to do is to ensure that we still have the ability to

> make that argument down the road. And if we want to go looking for that expert evidence we don't want anything about this Pierringer order to be deemed to have restricted or taken away substantive right. This provision is not intended to give us any rights, but merely to ensure that we have the same ability to get access as we would if the settling defendants were to continue as parties and the litigation were to continue pursuant to the '72 Rules.
>
> Item 26 is for the same effect. We want to be able to have discovery of experts to the same extent, if any, that we would have had if the settling defendants were continuing as defendants pursuant to the '72 Rules. All we're trying to make sure is all these access to evidence issues applications or hearing that are likely to occur in the future are not restricted by this Pierringer order.
>
> (My emphasis)

[40] Ameron's position, in its oral submission is changed, slightly, from its pre-hearing brief. It was not addressing the privilege issue nor was it asking the Chambers judge to decide the issue at that time. Its oral submissions requested the evidence be maintained so that it could make argument, if and when the issue arose, that it was entitled to have access to the evidence.

Submissions of Sable

[41] Sable submitted as follows:

> We then move on to another section or series of sections regarding experts and those are paragraphs 24 through to 29 inclusive. This is really an issue for the settling defendants, which they have addressed in their correspondence. Most of what is requested in these paragraphs is either privileged or not subject to production in any event. If there is . . . I would make a couple of points, if there is any physical evidence which the non-settling defendants seek there is ample provisions in the 1972 Rules to apply for access to that material. I have no objection to a provision which requires the preservation of any physical evidence so it is not destroyed. I don't have a particular problem with that but beyond that once you get past the physical evidence, if there is any, having in mind that no experts' reports from any of the settling parties have been delivered it seems to me the rest of it is subject to solicitor/client privilege and I assume we'll hear from other parties to that effect, but it seems to me that's the end of the matter virtually in relation to those remaining paragraphs.

[42] Sable argues beyond physical evidence, any evidence of the experts would be subject to solicitor/client privilege (I believe it intended to refer to litigation

privilege). It does not address what effect, if any, the settlement would have on any litigation privilege.

Submissions of the Settling Defendants

[43] The Settling Defendants Submissions are very brief:

> With respect to paragraphs 24 through 29, that dealt specifically with experts. I provided my learned friends with some case law that I'm going to provide, as well, to Your Ladyship. The upshot is that experts whose reports have not been disclosed are privileged and until that privilege is waived it cannot be produced. At least with the wording as it exists now in the proposed order, if there are any experts that have been retained it would seem that the privilege over those reports is to be waived. That seems certainly to be the suggestion in Professor Knapp's paper. But again, there is nothing, no authority whatsoever under these particular circumstances where settling defendants have been required to waive authority ... waive privilege over expert reports. That ought not to happen here.

Reply by Ameron

[44] In response to the Settling Defendants argument, Ameron comments as follows:

> Mr. Tarulli has given you some cases dealing with experts. It goes to the question of whether their expert's evidence is privileged and none of that is affected by the provision we got in the order. <u>All we're trying to do is preserve our rights to make an argument that we are entitled to it.</u>
>
> (My emphasis)

[45] Again, Ameron was not asking the Court for a determination of the privilege issue. It was simply referencing the form of the order and reserving any rights it may have had to access the experts' information and/or opinions.

[46] The submissions of counsel were the only thing the Chambers judge had before her on the expert evidence issue. The Chambers judge did not have a motion before her, there were no affidavits filed nor was it ever suggested to her either in writing or orally, prior to issuance of her decisions, that litigation privilege ended with the dismissal of the actions against the settling defendants.

[47] The argument was focused on the form of order and whether Ameron would be able, at a future date, to argue that it would have access to the expert evidence. The settling defendants, not surprisingly, were objecting to a form of order which would require them to continue to participate in the lawsuit.

This Appeal

[48] Ameron asks this Court to decide an issue, which it never asked the Chambers judge to decide; that is the litigation privilege, if any, attaching to the expert evidence ended with the dismissal of the claims involving those defendants.

[49] Ameron relies on the Supreme Court of Canada decision in **Blank v. Canada (Minister of Justice)**, 2006 SCC 39, and in particular, it cites the following paragraphs:

> 8 As a matter of substance and not mere terminology, the distinction between litigation privilege and the solicitor-client privilege is decisive in this case. The former, unlike the latter, is of temporary duration. It expires with the litigation of which it was born. Characterizing litigation privilege as a "branch" of the solicitor-client privilege, as the Minister would, does not envelop it in a shared cloak of permanency.
>
> ...
>
> 28 R. J. Sharpe (now Sharpe J.A.) has explained particularly well the differences between litigation privilege and solicitor-client privilege:
>
> > ...
> >
> > Litigation privilege, on the other hand, is geared directly to the process of litigation. Its purpose is not explained adequately by the protection afforded lawyer-client communications deemed necessary to allow clients to obtain legal advice, the interest protected by solicitor-client privilege. Its purpose is more particularly related to the needs of the adversarial trial process. Litigation privilege is based upon the need for a protected area to facilitate investigation and preparation of a case for trial by the adversarial advocate. In other words, litigation privilege aims to facilitate a process (namely, the adversary process), while solicitor-client privilege aims to protect a relationship (namely, the confidential relationship between a lawyer and a client).

...

> 34 The purpose of the litigation privilege, I repeat, is to create a "zone of privacy" in relation to pending or apprehended litigation. Once the litigation has ended, the privilege to which it gave rise has lost its specific and concrete purpose — and therefore its justification. But to borrow a phrase, the litigation is not over until it is over: It cannot be said to have "terminated", in any meaningful sense of that term, where litigants or related parties remain locked in what is essentially the same legal combat.
>
> 37 Thus, the principle "once privileged, always privileged", so vital to the solicitor-client privilege, is foreign to the litigation privilege. The litigation privilege, unlike the solicitor-client privilege, is neither absolute in scope nor permanent in duration.
>
> 38 As mentioned earlier, however, the privilege may retain its purpose — and, therefore, its effect — where the litigation that gave rise to the privilege has ended, but related litigation remains pending or may reasonably be apprehended. In this regard, I agree with Pelletier J.A. regarding "the possibility of defining . . . litigation more broadly than the particular proceeding which gave rise to the claim" (para. 89); see *Ed Miller Sales & Rentals Ltd. v. Caterpillar Tractor Co.* (1988), 90 A.R. 323 (C.A.).
>
> 39 At a minimum, it seems to me, this enlarged definition of "litigation" includes separate proceedings that involve the same or related parties and arise from the same or a related cause of action (or "juridical source"). Proceedings that raise issues common to the initial action and share its essential purpose would in my view qualify as well.

[50] Ameron says that **Blank, supra**, categorically determines the issue of litigation privilege. Once the action is terminated, as it has against the settling defendants, litigation privilege ends.

[51] However, Sable cites the very same paragraphs from **Blank, supra**, for the authority that, although the settling defendants are formally removed as parties, the non-settling defendants will continue to attempt to displace their own liability by affixing liability to the settling defendants, thereby, bringing the matters in issue within the "enlarged definition of" litigation referred to in **Blank, supra** (¶ 39). It

says we should find that the expert evidence is still subject to litigation privilege. It argues that the litigation is “not over”.

[52] Sable and Ameron submit that there is sufficient information before this Court, from the record, to allow us to determine the issue.

[53] With respect, I disagree. Not only is there insufficient evidence before us to allow us to make the determination; there was neither evidence nor submissions before the Chambers judge which would have allowed her to make the determination.

[54] The existence of litigation privilege requires an evidentiary basis for its determination. **Blank, supra**, provides that litigation privilege may retain its purpose even where the litigation giving rise to the privilege has ended. The Supreme Court does not purport to set out a fixed number of categories where that litigation privilege may be retained. It provides, however, a non-exhaustive list of examples of situations where the privilege may retain its purpose:

1. related litigation may be ongoing or may reasonably be apprehended;

2. separate proceedings that involve the same or related parties and arise from the same or related cause of action; and

3. proceedings that raise issues common to the initial action and would share its essential purpose. **Blank, supra**, ¶ 38-39.

Whether the litigation privilege retains its purpose depends on the facts and circumstances of the case in which the privilege is being considered. The Chambers judge, here, made no findings of fact with respect to the expert evidence, for good reason: she was not asked to do so.

[55] This is not a case where we can determine the issue on an assessment of the evidence or the record. For example:

> there is no evidence to indicate that there is any expert evidence whatsoever, let alone evidence that is relevant to the issues that remain in the proceeding;

> if such expert evidence exists, there is no indication that anyone is asserting a privilege over it (other than the bold assertion by Parker Brothers without identifying the evidence for which privilege is asserted ¶ 34 above);
>
> there is no affidavit or other evidence before this Court, or the court below, that addresses any of the issues referred to in **Blank, supra**, i.e., related litigation, anticipated litigation, proceedings raising common issues, etc.;
>
> there is no ruling by a Chambers judge on the issue - normally a prerequisite for this Court to consider on appeal; and,
>
> finally, but not insignificantly, none of the settling defendants appeared on this appeal to make representations or submissions on the issue.

[56] Until a claim for privilege is made there is no issue for determination. The parties to this appeal addressed the very same issue in paragraph 15 of the Order which addresses the procedure to be followed if "a claim of privilege is asserted" in relation to any physical evidence (para. 15(b)). The parties obviously turned their minds to the issue of privilege as it related to the physical evidence, and required, as a pre-condition to invoking the provisions of the Order, that privilege be asserted. Similarly, until that privilege is asserted with respect to the expert evidence, the issue is not enjoined.

[57] The Chambers judge was approving the form of order giving effect to the settlement agreement. The Order must not directly limit the non-settling defendants procedural rights (**AMOCO Petroleum Co. v. ProPac Systems Ltd.**, **supra**). In determining the expert evidence was privileged, and, thereby, limiting access to any expert evidence to factual matters only, the Chambers judge, essentially, short circuited the right of the remaining parties to make argument on the privilege issue. It was not necessary to decide the issue of litigation privilege in approving the settlement agreements. There was no motion before her and the decision was made without proper evidence or submissions on the issue.

[58] I point out that the Chambers judge was led down this path by all counsel. Based on the representations from all counsel, the Chambers judge thought she was maintaining the *status quo* as it existed prior to the settlement. There was nothing before her to suggest that the expert witnesses' evidence, whatever it may be, was not subject to litigation privilege or that privilege was in any way affected by the dismissal of the actions. However, to allow the decision to stand would result in an injustice. The consequence of the Order would be to deprive Ameron of the opportunity to argue the evidence is not privileged.

[59] I am in no way commenting on the substantive issue of whether the expert witness evidence is subject to litigation privilege. All that is being decided is that the remaining parties to the litigation will have an opportunity to argue the privilege issue, with a proper record, should it arise.

[60] I would, therefore, allow the appeal, in part, and set aside the Chambers judge's determination that the experts' evidence be limited to factual matters. To the extent there is any privilege asserted, that issue will be left to the determination of the court below.

Remedy

[61] I would amend the provisions of the Order granted by Justice Hood by removing paragraphs 16, 17 and 18 and replacing them with the following:

> 16. Nothing herein shall restrict the non-settling defendants from discovering, interviewing or calling at trial experts retained by the settling defendants. In the event a claim of privilege is asserted in relation to any evidence of the experts and the plaintiffs or non-settling defendants wish to challenge the claim of privilege asserted, the issue will be determined on application to this Honourable Court.

[62] I have not made any comment with respect to the preservation of the experts' reports, if any. In my view, the provisions of paragraph 15 of the Order are broad enough to encompass any written reports, drafts, notes, etc. If the parties have any dispute with respect to this issue, it may be addressed before the court below. However, in light of my conclusions on this appeal, it should not be an issue.

Conclusion

[63] I would grant leave to appeal, allow the appeal in part, and replace the impugned paragraphs of the Order with the above. I would not award costs to any party on this appeal.

[64] I will now turn to address the issues in the cross-appeal.

The Cross-Appeal

2. Whether the Chambers judge erred in ordering that the allegations against settling defendants remain in the amended statement of claim and be shaded

[65] During the appeal hearing in this matter, this issue was referred to as "a tempest in a teapot". I agree. Sable argues that the Chambers judge's decision leaves alive all of the allegations against the settling defendants which are noted by shading in the amended statement of claim.

[66] Sable argues that "It does not know" what the amended pleading means. With respect, the amended pleading means exactly what the Order says; Sable is no longer making those allegations against the settling defendants.

[67] The Order provides in paragraph 11 as follows:

> 11. The Plaintiffs are hereby granted leave to file and serve an amended Statement of Claim in the form attached to this Order.

[68] The Statement of Claim attached to the Order contains a provision which provides:

> The Plaintiffs are no longer making or relying upon any wording or allegations which are shaded in this amended Statement of Claim.

[69] It is very clear that for the purposes of the plaintiff's claim, as against the settling defendants, the allegations are no longer being made or relied upon by Sable.

[70] The pleadings as they stand are simply a record of the initial allegations and positions of the plaintiff.

[71] The original allegations remain in the pleadings for that very purpose, for a record of the allegations having been made. The Chambers judge left open for another day whether allegations, as originally made, amount to some form of admission in the ongoing litigation between the plaintiff and non-settling defendants. At ¶ 5 of her supplementary decision she says:

> [5] In paragraph 44 of the original decision, I concluded that certain paragraphs of the Statement of Claim were not admissions. After receiving further submissions, I conclude that full argument on this issue should be left for a later time. Accordingly, a paragraph should be added to the Order, as proposed by Mr. Merrick:
>
> > Nothing herein shall restrict or prevent the non-settling Defendants from alleging that the shaded portions in the attached Statement of Claim constitute admissions ...

[72] The decision and order appealed from does not violate any principle of law and is not patently unjust. It was an appropriate exercise of the Chambers judge's discretion and I would not interfere with it.

[73] I would grant leave to appeal on the cross-appeal and dismiss the cross-appeal, without costs to any party.

Conclusion

[74] The appeal is allowed in part, the cross-appeal is dismissed. There shall be no costs to any party.

Farrar, J.A.

Concurred in:
Hamilton, J.A.
Fichaud, J.A.