IN THE SUPREME COURT OF NOVA SCOTIA

Citation: Sable Offshore Energy Inc. v. Ameron International Corporation, 2010 NSSC 19

Date: 20100120
Docket: Hfx. No.220343
Registry: Halifax

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.**, and **Pengrowth Corporation; Exxonmobil Canada Properties** as operator of the **Sable Offshore Energy Project**

Plaintiffs

and

Ameron International Corporation; Ameron (UK) Limited; Ameron B.V.; Allcolour Paint Limited; Amercoat Canada; Rubyco Ltd.; Danroh Inc.; Serious Business Inc.; Barrier Limited; Parker Brothers Contracting Limited; RKO Steel Limited; Cherubini Metal Works Limited; Comstock Canada Ltd.; Adam Clark Company Ltd.; A.B. Mechanical Limited; A & G Crane Rentals Limited carrying on business as **A & G Crane Limited; A.M.L. Painting Limited; Argo Protective Coatings Incorporated; Allsteel Coating Limited; Mills Painting & Sandblasting Limited**

Defendants

and

Amec E & C Services Limited, successor to Agra Monenco Inc., in their own right, **Kellogg Brown & Root**, a division of Haliburton Group Canada Inc. and **Amec Black & McDonald** Limited operating as BMS Offshore, successor to BMS Offshore Limited, in their own right and/or collectively operating as BBA, a joint venture and **Technico Engineering Inc**., and **Atlas Testing Labs and Services (Nova Scotia) Ltd.**, and **Black & MacDonald Limited**

Third Parties

Judge: The Honourable Justice Suzanne M. Hood

Heard: October 29, 2009 in Halifax, Nova Scotia

Written Decision: January 20, 2010

Counsel: Robert G. Belliveau, Q.C., Christopher C. Robinson, Q.C. and Kevin Gibson for Sable Offshore Energy Inc.
John P. Merrick, Q.C. and Darlene A. Jamieson, Q.C. for the Ameron defendants
Terrence Teed, Q.C. and Michele Boudreau for the Amercoat defendants
Franco Tarulli for the onshore settling defendants
Philip M. Chapman for the offshore settling defendants
David Coles, Q.C. and D. Barry Kirkham for Zurich Insurance company Ltd., Commonwealth Insurance Company, American Home Insurance Company (under the authority of AIG Risk Management)

By the Court:

[1] The Settling Parties seek court approval of an Order implementing two Pierringer agreements. The non-settling defendants seek to add further paragraphs to the order.

[2] The plaintiffs have commenced three actions arising from paint failures on their offshore and onshore facilities. Two actions are with respect to a Builders' Risk Policy. The other action is a complex one (the "Sable paint action") involving many defendants and third parties. The plaintiffs have entered into Pierringer settlement agreements with some of the defendants and insurers. These parties seek to have the court approve an order giving effect to these settlements. The Builders' Risk Insurers have also settled with the plaintiffs, contingent on the Pierringer Settlement Agreement becoming effective. The remaining defendants seek to have additional terms added to the court order proposed by the Settling Parties.

[3] The Settling Parties are the plaintiffs and, in the case of the onshore facilities, the following defendants and third parties (the "onshore settling defendants"):

1149388 Nova Scotia Limited, formerly Mills Painting & Sandblasting Limited

A.B. Mechanical Limited

A & G Crane Rentals carrying on business as A & G Crane Limited

Allsteel Coatings Limited

A.M.L. Painting Limtied

Argo Protective Coatings Incorporated

Atlas Testing Labs and Services (Nova Scotia) Ltd.

Cherubini Metal Works Limited

Comstock Canada Ltd.

Lockerbie & Hole Eastern Inc., formerly Adam Clark Company Ltd.

RKO Steel Limited

Technico Engineering Inc.

Technico Inc.

The “Settling Parties” also include:

Parker Brothers Contracting Limited

Barrier Limited

the (“Offshore Settling Defendants”)

[4] There are two Pierringer Agreements: 1) one with the onshore settling defendants and insurers; 2) one with the offshore settling defendants and insurer. The remaining defendants would be Ameron International Corporation, Ameron B.V. (the "Ameron defendants") and Allcolour Paint Limited, Amercoat Canada, Rubyco Ltd., Danroh Inc. and Serious Business Inc. (the "Amercoat Defendants"), (all seven of which will be referred to as "the non-settling defendants").

[5] Counsel advised that this is the first Pierringer Agreement to come before the courts in Nova Scotia, although they have been dealt with fairly often in other provinces. It is therefore useful to outline at the outset what such an agreement is.

Pierringer Agreements

[6] The name for the agreements comes from an American case in Wisconsin in 1963. The agreements were described in *Amoco Canada Petroleum Co. v. Propak Systems* Ltd., 2001 ABCA 110 at para. 3. Fruman, J.A. said:

> **3** ... Such agreements permit some parties to withdraw from the litigation, leaving the remaining defendants responsible only for the loss they actually caused, with no joint liability. As the non-settling defendants are responsible only for their proportionate share of the loss, a Pierringer agreement can properly be characterized as a 'proportionate share settlement agreement'.

[7] In *Hudson Bay Mining & Smelting Co. v. Fluor Daniel Wright*, [1997] M.J. No. 398 (Q.B.), Hamilton, J. said in para. 26:

> 26 ... The key aspects of a Pierringer settlement are therefore:
>
> (a) segregation of the contracting defendant's liability;
>
> (b) satisfaction of the contracting defendant's liability to the credit of all parties to the litigation;
>
> (c) the plaintiff's ability to continue with the action against the remaining defendants;
>
> (d) the plaintiff's agreement that it will indemnify the contracting defendant for any contribution it pays to the other defendants and covenants to satisfy any judgment against the contracting defendant.

[8] In *Amoco*, *supra*, Fruman, J.A. said in para. 14:

> **14** ... Proportionate share settlement agreements therefore typically include the following elements:
>
> 1. The plaintiff receives a payment from the settling defendants in full satisfaction of the plaintiff's claim against them;

2. In return, the settling defendants receive from the plaintiff a promise to discontinue proceedings, effectively removing the settling defendants from the suit;

3. Subsequent amendments to the pleadings formally remove the settling defendants from the suit; and

4. The plaintiff then continues its suit against the non-settling defendants.

[9] She went on to say in paragraphs 15 and 16 that, because there are often claims for contribution and indemnity against the settling defendants by the non-settling defendants, an indemnity clause is included in the agreement. She said in para. 16 that this is a clause in which:

> **16** ... the plaintiff covenants to indemnify the settling defendants for any portion of the damages that a court may determine to be attributable to their fault and for which the non-settling defendants would otherwise be liable due to the principle of joint and several liability.

[10] In addition, the courts have approved an amendment to the plaintiffs' pleadings to clearly limit the plaintiffs' claims against the settling defendants. In *M.(J.) v. Bradley*, [2004] O.J. No. 2312, the court quoted from the amended statement of claim in para. 22:

> 22 ... *the Plaintiffs' recovery shall be limited to recovering the damages, costs and interest attributable to the Non-settling Defendants' several share of liability, or joint share of liability among them, proven against them at trial.*

[11] The court has authority to approve of such agreements pursuant to *Rules* 13, 15.01 and 37.10 (of the 1972 *Rules*) and the *Contributory Negligence Act*. Because the parties seek to have the *1972 Rules* continue to apply to this proceeding and all have agreed, this motion refers to the *1972 Rules*. Rule 13 provides for summary judgment, Rule 15.01 provides for amendments to pleadings and Rule 37.10 sets out the court's powers on a matter such as this

[12] Furthermore there are policy reasons for the approval of such agreements. As Cronk. J.A. said in *M.(J.) v. Bradley*, *supra,* at paras. 65 and 66:

> 65 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: see for example, *Sparling v. Southam Inc*. 1988, 66 O.R. (2d) 225 (Ont. H.C.), at 230, referred to with approval by the Supreme Court of Canada in *Loewen, Ondaatje, McCutcheon & Co. c. Sparling*, [1992] 3 S.C.R. 235 (S.C.C.) at para. 48; and *Ontario New Home Warranty Program v. Chevron Chemical Co.* (1999), 46 O.R. (2d) 130 (Ont. S.C.J.), at 147. Furthermore, the promotion of settlement is especially salutary in complex, costly, multi-party litigation. As observed in *Amoco* at p. 677:
>
> In these days of spiralling litigation costs, increasingly complex cases and scarce judicial resources, settlement is critical to the administration of justice.
>
> 66 The negotiated settlement between the appellants and the Settling Defendants, as recorded in the Agreements and reflected in the appellants' amended pleading,

> is in the public interest and the interests of all active parties to the litigation. The implementation of the Agreements, which necessitates an apportionment of liability at trial against the Settling Defendants, will result in the participation of fewer parties at trial and will shorten the duration of the trial. This, in turn, will reduce the legal costs of the parties and permit the efficient use of judicial and court resources. As well, and importantly, the implementation of the Agreements is in the interests of all the defendants to the action. The interests of the Settling Defendants are furthered by the release contained in the Agreements and the potential liability of the Non-Settling Defendants is significantly limited under the bargain made by the appellants.

[13] The non-settling defendants say there is potential prejudice to them because the settling defendants are no longer parties to the action. Because of this, they have proposed that twenty-six additional paragraphs be added to the draft order submitted by the plaintiffs and the settling defendants and that one paragraph be extensively amended.

[14] I conclude there is authority and good reason for the approval of Pierringer Agreements. The parties do not disagree with respect to the authority to approve such agreements nor with respect to the desirability of such agreements. They disagree greatly about the contents of the order approving the agreements in this case.

[15] The effect of Pierringer Agreements is two-fold with respect to the present parties to this action. Firstly, the non-settling defendants no longer have the

settling defendants working with them towards the shared objective of defeating the plaintiffs' claims. Secondly, the non-settling defendants do not have the shared objective with the plaintiffs of pursuing liability against the settling defendants. However, on the other hand, the non-settling defendants have the benefit of no longer having to identify the fault of a particular settling defendant. There is also risk to the plaintiffs in that, if they are unsuccessful against the non-settling defendants, they will receive nothing from them. Their only recovery then would be whatever settlement they have received from the Settling Parties. This amount has not been disclosed.

[16] In considering the issue of the terms of the order and the potential prejudice to the non-settling defendants, it must be remembered that, in other jurisdictions, the courts do not have the same Civil Procedure Rules as there are in Nova Scotia. This is so because the parties have all agreed to continue this action pursuant to the 1972 *Rules*. For that reason, the decisions in those jurisdictions must be carefully scrutinized for concerns which existed there which may be inapplicable in Nova Scotia.

The Pierringer Order

[17] The plaintiffs and Settling Parties have submitted a brief order containing seven clauses, after the preamble. As mentioned above, the non-settling defendants ask the court to add a substantial number of additional provisions and to amend one paragraph substantially.

[18] In *Amoco*, *supra*, Fruman, J.A. set out considerations for the Alberta courts in reviewing Pierringer Agreements. She said in para. 41:

> **41** In summary, in evaluating proportionate share settlement agreements:
>
> 1. A court must keep in mind the strong public policy reason which encourages settlement;
>
> 2. The fact that a non-settling defendant has restricted rights of third party disclosure under the Alberta Rules of Court does not justify refusing to give effect to a proportionate share settlement agreement;
>
> 3. A court need not approve a proportionate share settlement agreement containing contractual provisions that directly limit the procedural rights a non-settling defendant would otherwise have; and
>
> 4. A proportionate share settlement agreement should be disclosed to the non-settling party. To further reduce potential prejudice, the terms of the agreement, although not necessarily the amount of the settlement, should also be disclosed to the court.

[19] In Alberta, the Rules of Court limited third party disclosure. In Nova Scotia, under the 1972 *Rules*, this is not the case. Furthermore, there are no provisions in the settlement agreements which directly limit the procedural rights of the non-settling defendants. I have already addressed the policy reasons for approving such agreements. As well, the agreements have been disclosed to the non-settling defendants and to the court.

[20] The court must weigh the benefits of settlement against the potential for prejudice to the non-settling defendants. The court must weigh the possible inconvenience and cost to the settling defendants against the importance to the non-settling defendants of ensuring them a fair trial.

[21] The non-settling defendants submit that there must be no loss of control over evidence, such as documents, in the hands of the settling defendants. They also express concern with respect to their ongoing ability to discover employees of the settling defendants and have access to them at trial. They are also concerned about the experts retained by the settling defendants.

[22] On the other hand, the settling defendants say that the benefit to them of settling is lost, in large part, if they must continue with the same obligations they

would have if they were still parties. There are costs involved in continuing with the litigation, which was one of the factors for entering into a settlement agreement. If they must comply with everything the non-settling defendants want, the costs will continue, not end.

[23] Counsel for the offshore settling defendants say that the settlement agreements are commercial arrangements between the settling defendants and the plaintiffs and similar arrangements should not be forced upon them with the non-settling defendants.

[24] It is the very fact of the contractual relationships between the plaintiffs and the settling defendants which is of concern to the non-settling defendants because, of course, they are not a party to those agreements. The non-settling defendants have no ability to enforce the agreements and, for that reason, seek additional protections in the court order approving them.

[25] The Settling Parties also say that the prejudice of which the non-settling defendants speak must be more than potential prejudice. They refer to *Amoco*, *supra*, where, in the opening paragraph of that decision, Fruman, J.A., giving the judgment for the court, said in para. 1:

> 1. The question in this appeal is whether Alberta courts should permit some defendants in complex multi-party litigation to settle, even though the defendants who are left behind might encounter difficulties gathering pre-trial evidence to defend the lawsuit. The answer is yes.

[26] She elaborated on this in para. 24 after referring to *British Columbia Ferry Corp. v. T & N,* [1995] B.C.J. No. 2116 (C.A.). She said at para. 23:

> 23 The court concluded that the non-settling defendants would be prejudiced in establishing the fault of the third parties, and thus in maintaining their own defence, if they did not retain the benefit of full-pre-trial procedural rights against the settling parties: at 302. The decision is based on the proposition that it would be ‘manifestly wrong if a private accord between plaintiff and third party could work to deprive a defendant of the ability to establish an element of proof essential to a just resolution of the action’: at 302 (emphasis added).

In para. 24, Fruman, J.A. said:

> 24 The difficulty with the *B.C. Ferry* approach is its emphasis on the potential prejudice a non-settling party might suffer. Indeed, it si likely that a non-settling party will always be able to allege some possible disadvantage when it remains as the sole target for liability after other parties abandon the litigation. This is true whether a partial settlement occurs during the course of litigation or even before an action is launched.

[27] Even in that case, where there was limited third party discovery, the court concluded that the motions judge’s decision to approve the settlement should not be disturbed.

[28] I conclude that, in evaluating a Pierringer settlement agreement, the court should consider the following:

1. there are strong public policy reasons in favour of settlement (*Amoco*, para. 41);

2. potential prejudice to the non-settling defendants is not a sufficient reason to refuse the implementation of a settlement agreement;

3. the settlement agreement must not directly limit the non-settling defendants' procedural rights (*Amoco*, para. 41);

4. the terms of the agreement must be disclosed to the non-settling defendants and the court (*Amoco*, para. 41);

5. the court must balance the potential prejudice to the non-settling defendants against the cost and inconvenience to the settling defendants of preventing the loss of evidence which may be relevant at trial to determine the degree of fault of any person;

6. the order must not be inconsistent with the terms of the settlement agreement; if it is, it is in effect a refusal to approve the settlement;

7. the non-settling defendants are not entitled to procedural rights they would not have if there were no settlement.

8. the stage of the litigation.

Proposed Order of Non-settling Defendants

[29] Using these principles, I now turn to the specific provisions of the order proposed by the non-settling defendants.

> 1. By applying for and consenting to this Order, the Plaintiffs, Defendants and Third Parties acknowledge that the Rules under which this proceeding will be conducted shall be the Nova Scotia civil Procedure Rules (1972).

[30] The parties agree to continue this litigation according to the 1972 *Rules*. *Rule 92* of the new *Rules* provides for this in *Rule 92.02(1)*:

> **92.02(1)**: These Rules apply to all steps taken after January 1, 2009 in an action started before January 1, 2009, unless this Rule 92 provides or a judge orders otherwise.

[31] I agree to this because of the parties' agreement, because it is provided for in the new *Rules* and because of the nature of this motion: to approve Pierringer settlement agreements.

> 2. By applying for and consenting to this Order the Plaintiffs, Defendants and Third Parties acknowledge that this Court shall have the right and jurisdiction to apportion the degree, if any, of the fault of the Settling Defendants and Third Parties which caused or contributed to the loss and damages claimed by the Plaintiffs.

[32] The non-settling defendants say this is necessary to deal with the apportionment of liability of the settling defendants and the settling third parties. The plaintiffs and Settling Parties say it is unnecessary but do not object to its inclusion. I agree to its inclusion.

> 3. The Plaintiffs' claim against each of the non settling Defendants is limited to their respective several liability to plaintiffs and joint liability, if any, for the fault of any other non settling defendant.

[33] The non-settling defendants say this deals with the question of joint liability among the remaining defendants and preserves the right to raise the issue of that joint liability. The Settling Parties do not disagree as long as the word 'other' is omitted. The non-settling defendants do not object to that. I agree that this paragraph, as amended, is appropriate in the order.

> 4. Nothing herein determines whether any of the non settling defendants have joint liability to the plaintiffs for the fault of any other non settling defendant and each of the non settling defendants shall have the right to contest their liability for the fault of any other non settling defendant.

[34] The non-settling defendants say this paragraph is required to preserve the rights of the non-settling defendants *inter se*. The Settling Parties have no real objection. I agree that this paragraph can be added to the order.

> 5. Each of the non settling Defendants shall have the ability to claim that any joint liability of the Plaintiffs of any of the non settling Defendant s *(sic)* for any other non settling Defendant as a result of the insolvency or impecuniosity of any of the non settling Defendants should be reduced by a portion related to the fault of the settling Defendants and Third Parties.

[35] The non-settling defendants want this paragraph in the order to protect them if one or more of them become bankrupt, insolvent or otherwise impecunious and unable to pay its share of any joint liability found. They say it was not covered by the paragraph with respect to joint liability and would give them the right to contest this at trial.

[36] In the Ameron defendants' memorandum to the court, Mr. Merrick refers to *M (J.) v. Bradley*, *supra*, and says:

> 66. The non-settling defendant wanted the option of arguing at trial that his exposure to any shortfall in the plaintiff's recovery due to insolvency of another non-settling defendant should be reduced by a proportion related to the fault of the settling defendants.

[37] Counsel for the Settling Parties disagree with the inclusion of this paragraph. They say the issue of joint liability is covered in paragraph 3. Furthermore, they say the comment above from *M (J.) v. Bradley*, *supra*, is not applicable here. They said, in that case, the ability to apportion liability was a live issue but is not here.

[38] In *M (J.) v. Bradley*, *supra*, the court dealt with a submission about insolvency in the context of the apportionment argument. Cronk, J.A. had to consider whether a Pierringer settlement agreement was consistent with s. 1 *Negligence Act*, R.S.O. 1990 c. N-1 which is, in substance, to the same effect as s. 3(1) of the Nova Scotia *Contributory Negligence Act*. Cronk, J.A. said in paras. 56 and 57:

> 56 ...Kerr wishes to be free to take the position at trial that his exposure to any shortfall in the appellants' recovery of damages occasioned by the insolvency of another Non-Settling Defendant should be reduced by a proportion related to the fault of the Settling Defendants.
>
> 57 Assuming, without deciding, that this argument is available under Ontario law, Kerr will be unable to advance this submission at trial if the trial judge lacks the authority to determine the degree in which the Settling Defendants are at fault or negligent, if at all.

She continued in para. 58:

> 58 On the basis of all these factors, it is my view that the purpose of s. 1 of the Act is not undermined by the Agreements and no question of potential unfairness or prejudice to any of the parties will arise from the implementation of the part of the settlements that contemplates the apportionment of fault or neglect at trial to the Settling Defendants.

[39] It is paras. 57 and 58 which put that submission into context. Stating it otherwise: if the trial judge <u>can</u> apportion the degree of fault of the settling

defendants, Kerr could make that argument if it is available as an argument under Ontario Law. Since there is no question here but that the trial judge can determine the degree of fault of the settling defendants, the argument can at least be advanced. In my view, it is therefore unnecessary to add this paragraph to the order.

6. The claims of the Plaintiffs against the Settling Defendants in the action bearing Hfx. No. 220343 be and are hereby dismissed without costs.

7. The Crossclaims of the Defendants, Ameron International Corporation, Ameron B.V., Allcolour Paint Limited, Amercoat Canada, Rubyco Ltd., Danroh Inc. and Serious Business Inc. (the 'Non-Settling Defendants') against the Settling Defendants in the action bearing Hfx. No. 220343 be and are hereby dismissed without costs.

8. The Crossclaims of the Settling Defendants as defined in the Settlement Agreements against the Non-Settling Defendants be and are dismissed without costs.

9. The Third Party claims commenced by certain Settling Defendants against the Third Parties in Hfx. No. 220343 be and are hereby dismissed without costs.

10. The Crossclaims and/or Counterclaims by Atlas Testing Labs and Services (Nova Scotia) Ltd., Technico Inc. and the Settling Defendants against Ameron International Corporation, Ameron B.V., Allcolour Paint Limited, Amercoat Canada, Rubyco Ltd., Danroh Inc. and Serious Business Inc. are hereby dismissed without costs.

11. The Counterclaims by Technico Inc. and Atlas Testing Labs and Services (Nova Scotia) Ltd., Technico Inc. against the Settling Defendants are hereby dismissed without costs.

[40] There is no objection taken to paras. 6 to 11.

12. The Plaintiffs are hereby granted leave to file and serve an Amended Statement of Claim in the form attached as Exhibit 'D' to the Affidavit of Robert G. Belliveau, Q.C. sworn on September 30th, 2009, but without altering the allegations against one or more of the settling defendants contained in paragraphs 37, 48, 49, 50, 54, 55, 56, 63, 66(g) and (h), 69, 70, 71, 72, 73, 76 and 77 and provided the following clauses are added:

> The plaintiffs have entered into a proportionate share settlement agreement (commonly referred to as a Pierringer agreement) with certain onshore and offshore defendants (the 'settling defendants') with respect to the matters pled herein. The plaintiffs therefore admit and acknowledge that they have absorbed any fault of the settling defendants. The plaintiffs therefore claim damages, interest and costs from the remaining defendants, Ameron Inc., Ameron B.V., Allcolour Paint Limited, Amercoat Canada, Rubyco Ltd., Danroh Inc. and Serious Business Inc. (the 'non settling defendants') only, and only to the extent that the non-settling defendants are not or would not be entitled to indemnity or contribution for such damages, interest or costs from the settling defendants.
>
> Further, if any or all of the non-settling defendants are entitled to full or partial indemnity or contribution from the settling defendants, the Plaintiffs' claims against the non-settling defendants are extinguished to the extent of that indemnity. The plaintiffs therefore claim damages, interest and costs from the non-settling defendants only to the extent of the several liability of the non-settling defendants and joint liability, if any, for the fault of any other non settling defendant.

[41] The plaintiffs say they seek leave to amend their statement of claim to eliminate any reference to claims against the settling defendants. The propose to

amend the style of cause and to delete a number of paragraphs from the statement of claim. They also propose to amend other paragraphs to delete any reference to Barrier Limited and Parker Brothers Contracting Limited, to either as a defendant and to the applicators generally as defendants. In addition, they propose to add four paragraphs to the statement of claim as follows:

> 77B. The Plaintiffs expressly limit their claims against the Defendants for claims for damages, costs and interest attributable only to the Defendants' several share of liability to the Plaintiffs and joint liability to one another, if any, such that the Plaintiffs' recovery shall be limited to recovering the damages, costs and interest attributable to the Defendants' several share of liability, or joint share of liability among them, proven against the Defendants at trial.
>
> 77C. The Plaintiffs do not claim against the Applicators any sum which could be subject of an Order for payment by the Applicators to either the Defendants or Plaintiffs, including any amount for which the Applicators could be or are found by the Court to be liable to indemnify, or contribute to, the Defendants with respect to damages, costs or interest for which the Defendants are liable to the Plaintiffs.
>
> 77D. For greater certainly, the Plaintiffs shall have not (sic) claim directly or indirectly against the Applicators and the Plaintiffs shall limit their claims against the Defendants so as to exclude any crossclaim or third party claim made against or which could be made against the Applicators arising from the subject matter of this action.
>
> 77E. The Plaintiffs admit that the Court at any trial of this action has and shall have full authority to adjudicate upon the apportionment of liability, if any, among the Defendants and the Applicators.

[42] The Plaintiffs say that it is standard practice in a Pierringer order to make these types of amendments to the statement of claim. They also say the settlement agreements require it. The provision in both settlement agreements is as follows:

> 2. The Plaintiffs:
>
> ...
>
> (d) will remove the Plaintiffs' claims against the ... Settling Defendants from the Amended Statement of Claim; and

[43] In my view, this does not require that any reference to those parties must be removed from the statement of claim. Mr. Teed, for the Amercoat defendants, has proposed that, instead, the last paragraph of the statement of claim be amended. This, in my view, is reasonable to carry out the plaintiffs' obligations in the settlement agreements. That was the conclusion of J.M. Ross, J. in *Village on the Park (Re)*, 2009 ABQB 497. In para. 49, she said:

> 49. Upon review of the Pierringer Agreement and related Court Orders, I am satisfied that neither the Agreement nor the Orders stipulate that the names of Settling Parties must be removed from pleadings or excluded from amended pleadings in the action. They require only the dismissal of claims against the Settling Parties.

[44] Mr. Merrick, for the Ameron defendants, says the paragraphs alleging fault on the part of the settling defendants are admissions of fact and there are strict requirements from removing such amendments from pleadings. The settling defendants say there has been no admission of liability in the settlement agreements and the defences filed by them denied any fault on their parts. I do not agree that these paragraphs are admissions. They were, instead, allegations of the plaintiffs against the settling defendants, which claims have now been settled with no admission of liability.

[45] In any event, I do not agree that all the amendments the plaintiffs propose to make to the statement of claim are necessary.

[46] Retaining the reference to various settling defendants in paras. 11 to 24 explains who these parties are as does paragraph 48. This is, in my view, useful since they are still referred to in paras. 34 and 35. For a similar reason, I see no need to delete para. 36:

> 36. The above contracts for the Onshore Facilities are collectively referred to as the “Onshore Paintwork Contracts”.

[47] In order to explain the original cause of action, it is, in my view, necessary to retain para. 37 which is headed "Terms of Paintwork Contracts." Paras. 49, 50, 54, 55 and 56 refer to Barrier as well as the Ameron and Amercoat defendants with respect to alleged representations about the paint. This reference to Barrier should, in my view, be retained.

[48] Para. 63 sets out the duty of care the plaintiffs say was owed to them by the "Applicators," defined in para. 24. Subparagraphs (g) and (h) of para. 66 and para. 67 set out the paint failures alleged against the Applicators.

[49] Para. 69, 70 and 71 set out what the plaintiffs say was the negligence by Barrier. Paras. 76 and 77 set out the allegations of negligence against the Applicators, Barrier and Parker Bros.

[50] In my view, in order to give the trial judge a true picture of the claim as it originally was, it is necessary to retain these paragraphs as they are, while amending the statement of claim to remove the actual claims against the settling defendants, not the allegations which the plaintiffs say substantiate their claims.

[51] For the same reason, I do not find it necessary to remove the reference to the settling defendants as defendants in the other paragraphs which the plaintiffs seek to amend.

[52] Accordingly, I see no need to remove the settling defendants' names from the style of cause. This was not done in the cases cited to me. I note in particular the *Amoco* case in which the style of cause takes up the entire first page of the decision, although, as a result of the Pierringer settlement, only three defendants remained.

[53] As Mr. Teed pointed out, the claims against all defendants are set out in para. 78. The proposed amendment to that paragraph deletes any reference to breach of contract which is a claim against the settling defendants only. In my view, that change is a necessary one since there is no contractual claim against the Ameron defendants and the Amercoat defendants.

[54] Paragraph 78 says, in part:

> ... the Plaintiffs have suffered damages and will continue to suffer damages, and claim against the Defendants, and each of them, as follows: ...

[55] In my view, this is the paragraph which needs amendment to “remove the Plaintiffs’ claims” against the settling defendants in compliance with the Settlement Agreements. The remaining defendants, the non-settling defendants, are defined in para. 10 of the Statement of Claim as the “Ameron Suppliers.” All the other parties, the settling defendants, are defined in para. 24 as the “Applicators.” If para. 78 were amended to say “... claim against the Ameron Suppliers”, it would be clear that no claims are advanced against the Applicators, the settling defendants.

[56] This will necessitate a few wording changes to the paragraphs to be added, about which no one has any objection, that is, para. 77B, 77C, 77D, 77D and 77E. In any event, a few changes would have been necessitated to those paragraphs since the plaintiffs were proposing to eliminate any reference to the “Applicators” in the statement of claim, including the definition of “Applicators” in para. 24. Without some change to the new paragraphs, it would have been unclear to whom these paragraphs referred. In my view, that is further reason not to delete paragraphs from the statement of claim and reason not to amend the style of cause.

[57] In paras. 77B, 77C, 77D and 77E, the words “defendants” and “defendants’” should be replaced with the words “Ameron Suppliers” and “Ameron Suppliers’”, as the context requires.

[58] The other issue with respect to para. 12, is the submission by the Ameron Defendants that two paragraphs be added to the statement of claim. (These are quoted above.)

[59] It will be clear from the paragraphs which I have said should be retained that there were other parties to the litigation. Furthermore, the paragraphs added (77B, 77C, 77D and 77E) and the amendment to para. 78 referred to above, make it clear what claims remain against the Ameron Suppliers. If they are liable only for their several liability and joint liability *inter se*, there can be no claim for contribution and indemnity against the settling defendants. As Laskin, J.A. said in *Taylor v. Canada (Attorney General)*, [2009] O.J. No. 2490 at para. 20:

> 20 However, contribution rights arise only where a defendant is required to pay more than its proportionate share of a plaintiff’s damages. ...

[60] Accordingly, I conclude these additional paragraphs are in part duplicative of the paragraphs which the plaintiffs wish to add to the statement of claim. They

are therefore unnecessary because there can be no claim for contribution and indemnity.

Paragraphs 13 to 24

[61] These paragraphs, which the non-settling defendants propose to add to the order, are generally with respect to procedural rights. The general objection made by the settling defendants to these paragraphs is that they treat the settling defendants as if they are still parties.

[62] The non-settling defendants say that the courts must ensure that they have the same procedural rights they would have had if the settling defendants remained parties. They cite *Canadian Truck Stops Ltd. v. Imperial Oil*, 2006 ABQB 116 where the court said in para. 30:

> [30] In the result the agreement is approved. That, however, does not end the application. CTM says that the agreement needs to be amended to ensure that CTM will continue to have the same kind and quality of pre-trial discovery as it would have if Imperial remained an active participant in the action. I agree that CTM is entitled to that protection.

[63] They also refer to *Amoco*, *supra*, where Fruman, J.A. set out in para. 41 (quoted above) what the court should consider. However, in that case, Fruman, J.A. also emphasized the importance of settlement and said in para. 31:

> **31** ... It is difficult for any judge to definitively conclude that there is no potential for prejudice.

She continued in para. 34:

> **34** ... But a non-settling defendant can always assert some form of potential prejudice.

She noted in para. 48 that the settlement agreement

> **48** ... does not restrict the settling defendants from cooperating with [the non-settling defendant] ...

[64] One of the factors the court is to consider is how far advanced the action is and what document production, discovery, etc. have occurred. This action was commenced in April 2004 and document production has been a major preoccupation of the parties since. Discoveries have begun but are far from complete. Interrogatories have been issued. In many respects, this litigation is still in the early stages.

[65] I will now deal with each paragraph.

> 13. The non settling Defendants shall be entitled to administer interrogatories to each of the settling Defendants to the same extent as would be permitted under the 1972 Rules if the settling Defendants were remaining as parties adverse in interest to the non settling defendants.

[66] The *1972 Rules* allow this, so this paragraph is unnecessary.

> 14. The non settling Defendants shall be entitled to administer interrogatories to exiting and prior employees of the settling Defendants to the same extent as permitted under the 1972 Rules and settling Defendants shall use reasonable best efforts in order to facilitate such interrogatories.

[67] The non-settling defendants say this covers past and present employees of the settling defendants as if the settling defendants were still parties. They also say this gives them the same rights the plaintiffs have pursuant to the settlement agreements which, they say, is appropriate. The settling defendants oppose the requirement to use “best efforts” to facilitate the administration of interrogatories on past employees. They say this is an unjustified cost. Furthermore, they say it is something they would not have to do if they were still parties. They say the *1972 Rules* can be used to assist the non-settling defendants with this.

[68] *Rule 19.01(2)* provides:

> **19.01**. (2) A party may serve upon any person who is not a party, interrogatories to be answered by that person, or if that person is a body corporate, partnership or association, by an officer or agent thereof; and subject to rule 19.03, the person shall answer each interrogatory to the best of his personal knowledge and, if necessary, by adding any explanatory information, provided the party shall serve a copy of the interrogatories and answers upon any adverse party forthwith upon receipt of the same.

[69] This *Rule* would apply to past employees of the settling defendants even if they were still parties. Furthermore, the clause in the settlement agreements to which the non-settling defendants refer does not in fact mention Interrogatories. It refers to interviews and discovery examinations only.

[70] I therefore conclude that, because *Rule 19.01(2)* will apply, the non-settling defendants can use it as the plaintiffs would have to do. This paragraph is not to be added.

> 15. The non settling Defendants shall be entitled to discovery examination of a representative of each of the settling Defendants to the same extent as would be permitted under the 1972 Rules if the settling Defendants were remaining as parties adverse in interest to the non settling defendants.

[71] *Rule 18.01* will apply to this action. It provides:

> **18.01**. (1) Any person, who is within or without the jurisdiction, may without an order be orally examined on oath or affirmation by any party regarding any matter, not privileged, that is relevant to the subject matter of the proceeding.
>
> (3) The costs of examining more than one person, other than a party, shall, unless the court otherwise orders, be borne by the party examining.

[72] What the non-settling defendants seek is to continue to have the same rights of discovery of settling defendants as if they were still parties. Under the *1972 Rules*, there is no limit on the persons who can be discovered. Accordingly, there is no need for this paragraph. The non-settling defendants can discover an officer, director or manager of any corporation pursuant to the *1972 Rules*. Unlimited discovery of non-parties was not available in Alberta and that was the reason it had to be ordered in *Canadian Truck Stops Ltd.*, *supra*. The *1972 Rules* also address the costs of discovery examinations.

> 16. The non settling Defendants shall be entitled to use the discovery examination of a representative of a settling Defendant to the same extent as would be permitted under the 1972 Rules if the settling Defendant was remaining as a party adverse in interest to the non settling Defendants.

[73] *Rule 18.14* of the *1972 Rules* deals with the use of a discovery transcript as evidence at trial. It provides:

18.14. (1) At a trial or upon a hearing of an application, any part or all of a deposition, so far as admissible under the rules of evidence, may be used against any party who was present or represented at an examination for discovery, or who received due notice thereof, for any of the following purposes,

(a) to contradict or impeach the testimony of the deponent as a witness,

(b) where the deponent was a party , or an officer, director or manager of a party that is a corporation, partnership or association, for any purpose by an adverse party;

(c) where the deponent is dead, or is unable to attend or testify because of age, infirmity, sickness, or imprisonment, or is out of the jurisdiction, or his attendance cannot be secured by subpoena, or exceptional circumstances exist that make it desirable in the interest of justice to allow the deposition to be used, for any purpose by any party.

[74] The non-settling defendants want to be able to use the transcripts as if the settling defendants were still parties. If they do not have that right, they will be limited to using the transcript only as set out in *Rule 18.14(1)(a)* or *(c)*, not as set out in *(b)*. The plaintiffs say this should be an issue for trial not a blanket provision; however, if it is not part of the Pierringer Order, the settling defendants will not be parties at trial as *(b)* contemplates. In my view, this could limit the ability of the trial judge to grant greater rights to the non-settling defendants. For that reason, I agree that this paragraph should be added to the Order. It does not have costs consequences for the settling defendants and, therefore, it is not objectionable to treat the settling defendants as parties for this purpose.

> 17. The non settling Defendants shall be entitled to discovery of existing and prior employees of the settling Defendants to the same extent as permitted under the 1972 Rules and settling Defendants shall use reasonable best efforts in order to facilitate such discovery.

[75] The first part of this paragraph is covered by the *1972 Rules*, because the non-settling defendants may discover "any person" according to *Rule 18.01(1)*.

[76] The settlement agreements provide that, as between the plaintiffs and the settling defendants, the settling defendants:

> 12. The ... Settling Defendants:
>
> (a) will co-operate with the ongoing litigation by the Plaintiffs in the Sable Paint Action, including , without limiting the generality of the foregoing, by doing the following:
>
> (i) make current employees available for interview, examination for discovery, and trial upon request, the time for such witnesses being reimbursed by the Plaintiffs at the standard charge out daily or hourly rate then applicable for each such witness, as well as all reasonable out-of-pocket expenses, e.g. travel expenses;
>
> (ii) relay requests for witness interviews and examinations for discovery to former employees and, if a former employee agrees, facilitate on a best-efforts basis, such interviews and/or discovery examinations;

[77] The settling defendants object to the second part of this proposed paragraph. They say it continues to treat them as if they were still parties. They also say that if they were still parties, they would have no obligation to assist in the discovery of their former employees. The settling defendants made a commercial arrangement to settle this litigation and agreed, as part of that settlement, to use “best efforts” with respect to their former employees and to make current employees available. With respect to the latter, they made a financial arrangement with the plaintiffs for their costs of making current employees available.

[78] In my view, the costs of access by the non-settling defendants to current employees and the facilitation of access to past employees of the settling defendants is not one which the settling defendants should bear. There is no evidence that it would be impossible for the non-settling defendants to access either group. The mere possibility of this being prejudicial to them does not warrant the imposition of this burden on the settling defendants.

> 18. Nothing herein shall restrict the right of the non settling defendants to interview existing and prior employees of the settling Defendants.

[79] There is no “right” under the *1972 Rules* to interview anyone. Counsel for the non-settling defendant agrees the better word would be “ability.” Nothing in

the draft order or in the settlement agreements restricts the non-settling defendants' access to these people. I conclude this paragraph is unnecessary.

> 19. Non settling defendants shall have the right to call existing and prior employees of the settling defendants at trial to the same extent as permitted under the 1972 Rules and settling defendants shall use reasonable best efforts in order to facilitate the attendance of such witnesses. In the event such witnesses are called by the non settling Defendants, they shall be considered a hostile witness and the non settling Defendants shall be entitled to examine them by way of cross examination.

[80] At the hearing, it was agreed that the last sentence of this paragraph be deleted. It was agreed this should be left for submissions to, and decision of, the trial judge.

[81] The settling defendants say that, if they were still parties, they would not be required to do this and should not be so required if they are no longer parties. There is no impediment to the non-settling defendants subpoenaing these people under the *1972 Rules* or in the settlement agreements.

[82] The settling defendants have the same objection with respect to "best efforts" as they did with respect to that provision in paragraph 17.

[83] Again, with no evidence of possible prejudice to the non-settling defendants, I cannot conclude that, if subpoenaed for trial, the current employees of the settling defendants would not attend. Similarly, if former employees are to be subpoenaed, I fail to see why the settling defendants should be put to the expense of finding them. The settlement agreements do not limit the non-settling defendants' rights in this regard.

> 20. Each of the settling defendants shall remain under the same obligation for locating, preserving and producing documents as would be the requirement if the settling defendants were continuing as Defendants pursuant the 1972 Rules.

[84] The settlement agreements provide as follows with respect to document production:

> 12. The ... Settling Defendants:
>
> (a) will co-operate with the ongoing litigation by the Plaintiffs in the Sable Paint Action, including , without limiting the generality of the foregoing, by doing the following:
>
> (iii) upon request, provide all relevant documents to the Plaintiffs on a timely basis, the reasonable costs for personnel, equipment, and photocopying of documents at standard charge-out rates for such personnel, equipment and photocopying, as applicable, to be reimbursed by the Plaintiffs; and ...

[85] As between the Settling Parties, the obligation exists. Once the plaintiffs receive relevant documents, they have an obligation to provide them to the non-settling defendants. The settlement agreements do not limit document production. The only possible difficulty with that provision in the settlement agreements is the requirement that the settling defendants produce the documents "upon request" of the plaintiffs. That raises a problem if no request is made. In my view, this can be resolved by putting a provision in the order requiring the plaintiffs to request the relevant documents from the settling defendants on a timely basis.

[86] Because document production has been ongoing for a considerable period, I cannot conclude that there is any evidence of potential prejudice to the non-settling defendants if there is no requirement for ongoing production from the settling defendants. There must be a balance between the non-settling defendants procedural rights and the benefit to the settling defendants of having an end to the litigation, other than whatever obligations they have under the settlement agreements.

[87] I therefore conclude that putting an obligation on the plaintiffs to request relevant documents from the settling defendants is a proper balance of the two competing interests. This paragraph is unnecessary.

> 21. The non settling defendants shall be entitled to demand production of documents from the settling defendants as would be the case if the settling defendants were continuing as defendants pursuant to the 1972 Rules.

[88] I conclude that the addition to the order requiring the plaintiffs to ask for the documents also resolves this issue by balancing the competing interests.

> 22. Settling defendants shall make production to non settling defendants to the same extent as settling defendants have made or will make to the plaintiffs.

[89] I conclude the result should be as above (para. 21).

> 23. Reference to documents in this order includes all electronic data.

[90] Although not specifically defined in the *1972 Rules*, electronic documents have been considered to be part of the document production requirements. However, I see no harm in specifically referring to them. This paragraph can be added to the order.

> 24. Each settling Defendant shall use reasonable best efforts to instruct and ensure all experts or consultants retained by such Defendant shall preserve all evidence relevant to the issues in this proceeding.

> 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. Non settling defendants shall have the right to call at trial any experts retained by any of the settling Defendants. In the event such experts are called by the non settling defendants, they shall be considered a hostile witness and the non settling defendants shall be entitled to examine them by way of cross examination.

[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.

[93] *Paragraph 24* - There is merit to having the experts or consultants retain any evidence relevant to this action. They cannot be ordered to do so but this provision seems to me to be a reasonable compromise and of little cost or inconvenience to the settling defendants. This paragraph is not affected by issues of privilege.

[94] However, in my view, the request should only be that they retain the evidence until the final disposition of this action, not for an unlimited period as the present wording may suggest.

[95] As Mr. Chapman, counsel for the offshore settling defendants says, it may be onerous for experts to retain physical evidence such as paint samples. He proposed that such physical evidence itself be produced now. This is, in my view, a reasonable addition to the Order.

[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.

[101] *Paragraph 28* - The non-settling defendants agree that the second sentence of this paragraph should be deleted and this issue left for trial.

[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.

> 29. Non settling defendants shall be entitled to access to settling defendants facilities and equipment to the same extent as would be the case if the settling defendants were continuing as defendants pursuant to the 1972 Rules.

[103] No objection was taken to this paragraph. Whatever rights there would be pursuant to the *1972 Rules* would continue as though the settling defendants were still parties.

> 30. Nothing herein limits or restricts the non settling defendants from claiming against any insurer, including the insurers participating in the Settlement Agreements, for coverage.

[104] The non-settling defendants want this provision to preserve their ability to make this argument. They want to be sure they can still sue the insurer. They say one of their issues is whether a claim was paid under the All Risk Insurance. If so, they say any award against them would be a windfall to the plaintiffs. Their

second issue with respect to this coverage is whether they are insured under that policy. They point out that any such action would be subject to the usual defences.

[105] The settling defendants say there is nothing in the settlement agreements or elsewhere in this Order which says this argument cannot be made. The plaintiffs say that, if the non-settling defendants believe they are covered, they can make a claim.

[106] Barry Kirkham represents the property insurers who are not parties to this action. He says they do not want to be affected by an Order in this action. His other concern is the possibility that there might be an argument that this paragraph means that any limitation defences are gone.

[107] In my view, there would be no reason to think the settlement agreements with the settling defendants preclude the non-settling defendants from making the arguments they wish to make about insurance coverage. I therefore conclude it is unnecessary to add this paragraph to the Order.

> 31. Nothing in this order restricts or prevents the non settling defendants from seeking disclosure of the amount of the settlement including amounts

> recovered by plaintiffs from any and all insurers and any and all settling defendants.

[108] The non-settling defendants wish to have the ability to seek disclosure at a future time. The Settling Parties say there is nothing in the Settlement Agreements to prevent this. I agree that it is unnecessary to add this paragraph. Nothing prevents a future request of this nature.

> 32. Plaintiffs and settling defendants shall make full disclosure to non settling defendants of all agreements or understandings as to how they will assist each other in the continuation of the claim by the plaintiffs against the non settling defendants.

[109] The non-settling defendants say their concern is that there are other agreements among the Settling Parties. The Settling Parties confirmed in court that there are no other agreements. Accordingly, there is no need for this paragraph.

> 33. Any of plaintiffs, settling defendants or non settling defendants shall be at liberty to make application to this Court for such further orders as may be necessary in order to implement the Settlement Agreements without prejudice to the non settling defendants. By applying for and consenting to this Order the settling defendants hereby attorn to the jurisdiction of this Court for all such further orders.

[110] The non-settling defendants say that, because this is the first Pierringer Order in Nova Scotia, there should be provision for further recourse to the court, if the need arises.

[111] The Settling Parties oppose this wording as they say the court would have inherent jurisdiction in any event. They also say there should be no future ability to change the Settlement Agreements. In *Canadian Truck Stops*, *supra*, Kent, J. said in para. 30:

> [30]... This action is being case-managed by me. CTM may apply to seek whatever directions it says are appropriate to ensure that protection.

She contemplated an ongoing role in the litigation.

[112] I conclude that, if any question arises about the Settlement Agreements in future, the parties to them would have the ability to apply to the court. I therefore conclude this paragraph is unnecessary.

> 34. <u>The actions bearing Hfx. Nos. 205483 and 203176 be and are hereby dismissed without costs</u>.

[113] There is no objection to this paragraph.

SUMMARY AND CONCLUSION

[114] With the preceding changes to the draft Order submitted by the plaintiffs and settling defendants, the Settlement Agreements are approved.

[115] Most of the paragraphs of the original draft Order submitted by the plaintiffs and settling defendants were not objected to by the non-settling defendants. These are paragraphs 1 to 6 and 8 of their draft Order (paragraphs 6 to 11 and 34 of the draft Order submitted by the non-settling defendants). Some of the additions proposed by the non-settling defendants have been agreed to or, in some cases, not objected to. These are paragraphs 1 to 3 (with one small change), 4 and 29.

[116] I have concluded, for reasons set out above, that paragraphs 5, 13, 14, 15, 18 and 30 to 33 are unnecessary. I agree with the non-settling defendants that paragraphs 16 and 23 should be added. I concluded that paragraphs 17, 19 and 25 should not be added for reasons set out above.

[117] With respect, to paragraph 12, I do not agree with the proposal of the plaintiffs and settling defendants nor do I agree entirely with the proposal of the

non-settling defendants. I concluded that Mr. Teed's proposal was a good one. My changes to this paragraph are set out above.

[118] With respect to paragraphs 20, 21 and 22, the change to paragraph 20 makes paragraphs 21 and 22 unnecessary.

[119] The paragraphs with respect to experts were problematic. I concluded paragraphs 24 and 26 to 28 required amendment as explained above.

[120] In my view, these changes do not materially affect the settlement agreements.

COSTS

[121] The non-settling defendants have had some success but were largely unsuccessful. However, the plaintiffs and settling defendants were not entirely successful. I therefore conclude that each party should bear its own costs, since this is the first time Pierringer settlement agreements have been brought before a Nova Scotia Court for approval.

Hood, J.