SUPREME COURT OF NOVA SCOTIA

Citation: Sable Offshore Energy Inc. v. Ameron International Corporation, 2010 NSSC 473

Date: 20101223
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, Exxon Mobil 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

v.

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

Defendants

D E C I S I O N

Judge: The Honourable Justice Suzanne M. Hood

Heard: December 13, 2010, in Halifax, Nova Scotia

Written Decision: January 31, 2011 *(Written release of oral decision of December 23, 2010)*

Counsel: **Christopher Robinson, Q.C.** and **Kevin Gibson** for the Plainfiffs, Sable Offshore Energy Inc. et al
John P. Merrick, Q.C., and **Darlene Jamieson, Q.C.** for the applicants, Ameron International Corportion and Ameron B.V.
Terrence Teed, Q.C. and **Tammy Manning** for the respondents, Allcolour Paint Limited, Amercoat Canada, Rubyco Inc., Danroh Inc. and Serious Business Inc.

INTRODUCTION

[1] A number of parties in the Sable Offshore litigation settled with the plaintiffs. A Pierringer Agreement was approved by the court without disclosing the amount of the settlement. The non-settling defendants now want the amount disclosed.

ISSUE

[2] Should the amount of the settlement be disclosed?

[3] For ease of reference in this decision, I will call Ameron International Corporation and Ameron B.V., represented by Mr. Merrick and Ms. Jamieson, and Allcolour Paint Limited, Amercoat Coat Canada, Rubyco Ltd., Danroh Inc. and Serious Business Inc., represented by Mr. Teed, the “non-settling defendants.”

[4] I will refer to the parties with whom the plaintiffs executed the Pierringer Agreement as the “settling defendants”. They are not parties to this action anymore and were not parties to this application.

[5] It is called an “application” because we are operating under the 1972 *Civil Procedure Rules* pursuant to the Pierringer Agreement.

ANALYSIS

[6] In the previous decision (2010 NSSC 19) and supplementary decision (2010 NSSC 155), in part under appeal, I granted an order approving a Pierringer Agreement. The decision on the appeal has now been rendered and the Pierringer Agreement was, in part, varied. However, that decision does not affect the matter before the court today.

[7] The non-settling defendants want to have the amount of the settlement disclosed. There are three basic policies and principles which are at issue:

1. full disclosure under *Rule 20* of the 1972 *Civil Procedure Rules;*

2. the privilege attaching to settlements; and

3. the public policy in favour of settlement.

1. Disclosure/Production

[8] The parties do not disagree with respect to the general effect of *Rule 20* with respect to disclosure and production. It provides as follows:20.02 The court may at any time, ...

> 20.02 The court may at any time,
>
> ...
>
> (b) order any party to make discovery, limited to certain documents or classes of documents only, or of documents related to matters specifically in the order;
>
> 20.06(1) The court may order the production, for inspection by any party or the court, of any document relating to any matter in question in a proceeding at such time, place and manner as it thinks just.
>
> 20.06(3) An order for the production of any document for inspection by a party ro the court shall not be made unless the court is of the opinion that the order is necessary for disposing fairly of the proceedings or for saving costs and is not injurious to the public interest.

[9] The principles with respect to production were set out in *Kairos Community Development Ltd. v. Nova Scotia (Attorney General)*, 2007 NSSC 330 decision as follows in paras. 12, 13 and 16:

> 12. *Rule 20.01(1)* uses the phrase 'relating to every matter in question in the proceeding'. That wording is repeated in *Rule 20.06(1)*. The court may order such documents to be produced in such 'manner as it thinks just.' The court must conclude that the order is needed to fairly deal with the action or to save the costs. It also must not be harmful to the public interest.
>
> 13. A broad and liberal interpretation has been placed upon the *Civil Procedure Rules*.
>
> 16. The onus is on the party seeking production to establish that it is relevant.
> ...

[10] The test under the old *Rules* was semblance of relevance. Paragraph 20 of *Kairos* states as follows:

> **20** ... The test for relevance is a broad one. As Davison, J. said in *Eastern Canadian Coal Gas Venture Limited v. Cape Breton Development Corp.* (1994), 137 N.S.R. (2d) 123 (S.C.), the documents must have a "semblance of relevance."

[11] The non-settling defendants say the amount of the settlement is relevant and the plaintiffs say it is not.

[12] The non-settling defendants say the amount is relevant to prevent double or over recovery by the plaintiffs. I agree that it is relevant to that issue, but in the cases cited the disclosure of the settlement amount came after trial and after damages had been determined.

[13] The non-settling defendants also say it is relevant now to assist them in pre-trial preparation, including determining if they wish to enter settlement negotiations and, if so, what they should offer.

[14] The plaintiffs say the amount of the settlement is not related to any live issue between these parties.

[15] In *Hudson Bay Mining and Smelting Co. v. Fluor Daniel Wright*, [1997] M.J. No. 398 (Q.B.), the issue of relevance was raised with respect to disclosure of a settlement agreement. Hamilton J. in that case concluded that the settlement agreement was a relevant document. In summary, he said that the pleadings put the conduct of the settling defendant in issue in the remaining action. He also said in para. 28:

28 ...

> (b) A settlement agreement with one defendant may be relevant to the issues raised by the pleadings for a remaining defendant. There is no way of knowing this until it is disclosed. It may impact on the damages claimed by a plaintiff. In other words, disclosure is necessary for the non-contracting defendant to know the claim to be answered and to be able to assess a plaintiff's course of conduct. It may impact on 'the strategy and line of cross-examination to be pursued and evidence to be lead ...' by the non-contracting defendant (using the words of Ferrier, J. In the *Pettey* case at p. 310).
>
> (c) The relevance test at this stage of proceedings is a low threshold test. ...

[16] Although his result on the privilege issue was, subsequently, in *B.C. Children's Hospital et al v. Air Products Canada Ltd.*, 2003 BCCA 177, said not to be correct, his decision with respect to relevance was not criticized.

[17] The semblance of relevancy threshold is also a low one in this instance. I conclude that the settlement is relevant according to that test. Although not relevant now to the issue of over recovery after trial, I conclude that the amount of the settlement is relevant at this stage of the litigation. It is relevant to assist in both pre-trial preparation and the decision with respect to the non-settling defendants' settlement position.

[18] That does not, however, end the matter. Relevant documents may not be required to be disclosed under certain circumstances. One of these is where the documents are subject to settlement privilege.

2. Settlement Privilege

[19] The parties do not disagree about the general principle of settlement privilege but with its implementation in cases where there are Pierringer agreements. There are exceptions to the rule that settlements are privileged and one of these is with respect to Pierringer agreements.

[20] In *Berta v. Armstrong*, 2007 NSSC 373, Smith, A.C.J. said in para.18:

> **18** It is well recognized in Canada that there are a number of exceptions to the doctrine of settlement privilege. In *Dos Santos (Committee of) v. Sun Life Assurance Co. Of Canada, supra,* the British Columbia Court of Appeal set out a general framework for exceptions to this form of privilege. At para. 17 of that decision Finch C.J.B.C. stated:
>
> > 17 In *Middelkamp, supra,* Chief Justice McEachern said there must be exceptions to the blanket privilege for settlement communications. Notably, he referred to ***the proper disposition of litigation*** (para.20). (Emphasis in original)

[21] In para. 19, she again quoted from *Dos Santos* as follows:

> **19** At para. 20 of that same decision he stated:
>
> > 20 To establish an exception in this case, the defendant must show that a competing public interest outweighs the public interest in encouraging settlement. ...

[22] As the court said in *Amoco Petroleum Co. v. Propak Systems Ltd.*, 2001 ABCA 110 in para. 14:

> [14] To the extent that a proportionate share settlement agreement completely removes the setting defendants from the suit, it is like a conventional settlement agreement that brings all outstanding issues between the settling parties to a conclusion. ...

[23] The court continued in para. 15 to discuss the claims for contribution and indemnity which are almost always present in multi-party litigation. To ensure there is no prejudice to the non-settling defendants, the settlement agreement must be put before the court unlike conventional settlement agreements which are subject to settlement privilege.

[24] The plaintiffs say this is the only reason why Pierringer agreements come before the court and the amount of the settlement is not relevant to that issue.

[25] The plaintiffs say that disclosing the amount of the settlement agreement would give the non-settling defendants an advantage. The non-settling defendants say that it is relevant for them to have this information and it does not give them an unfair advantage. They say it would be unfair for them not to have this information.

[26] The non-settling defendants say that knowing the amount of the settlement is akin to knowing the details of mitigation. However, there is no privilege attaching to mitigation details and the plaintiff has a duty to mitigate its damages.

[27] These are, in my view, important distinctions between the details of mitigation and the details of the settlement payment made.

[28] The non-settling defendants also say that there is a risk that the plaintiffs will be over-compensated. Smith, A.C.J. addressed this in *Berta, supra,* in para. 24:

> **24** In my view, the interests of justice require an exception to the general rule relating to settlement privilege in situations where the

> Plaintiff may be over-compensated in damages if production is not ordered.

[29] However, the facts in *Berta*, were very different from the facts in this case. The defendants in that case were seeking to learn the amount of the plaintiff's settlement from a motor vehicle accident which pre-dated the motor vehicle accident in the case at bar. The injuries claimed in both accidents were the same and, if the previous settlement were not disclosed, there was a risk of double or over-recovery of damages.

[30] In the case of Pierringer agreements, one of the terms of court approval is that the non-settling defendants, if found liable, pay only the proportion of damages attributable to their fault. There is no possibility of over-recovery. In fact, if the amount of the settlement with the settling defendants is, at trial, found to be deficient, there could be under-recovery by the plaintiff. That is a risk to the plaintiff of settlement. That is not a risk to the non-settling defendants.

3. Public Policy in Favour of Settlement

[31] In dealing with the issue of the public policy in favour of settlement, the Supreme Court of Canada in *Kelvin Energy Ltd. v. Lee*, [1992] 3 S.C.R. 235, at para. 48, quoted from *Sparling v. Southam Inc. (1988), 41 B.L.R. 22 (Ont. H.C.)* as follows:

> 48 ...
>
> In approaching this matter, I believe it should be observed at the outset that the Courts consistently favour the settlement of lawsuits in general. To put it another way, there is an overriding public interest in favour of settlement. *This policy promoted the interests of litigants generally by saving them the expense of trial of disputed issues, and it reduces the strain upon an already overburdened provincial Court system.* [Emphasis in S.C.C. decision].

[32] The parties do not dispute that this is the case. They dispute the effect disclosure or non-disclosure has on the policy in favour of settlement.

[33] The non-settling defendants say that it will discourage their efforts at settlement if they do not know the amount of the settlement made with the settling defendants.

[34] The plaintiffs, as I have said, believe this would give the non-settling defendants an unfair advantage. They say it would put them in a better position

than the settling defendants were in. They had to negotiate settlement without knowing what the non-settling defendants might ultimately do or, of course, what the result at trial might be if there is no settlement.

[35] The non-settling defendants say it would not make sense for everyone to go to the expense of a trial, when if they knew what amount was really at stake, they might settle.

[36] The plaintiffs say that allowing the non-settling defendants to know the amount paid by the settling defendants would, in future multi-party litigation, discourage any party from being the first to settle. They would know they would be giving an advantage to the remaining parties who would know the amount they paid to settle.

[37] I have already mentioned the decision in *Amoco*, *supra*. It is the leading case on Pierringer agreements. It sets out the usual contents of such agreements and guidelines for their approval. It was relied upon in my decision approving the Pierringer agreement in this case. The amount of the settlement was not disclosed in *Amoco*.

[38] Since *Amoco* was decided and set out the typical elements in Pierringer agreements, the issue of disclosure of the settlement amount has arisen in a number of cases.

[39] In *Bedard v. Imin*, 2010 ABCA 3 and in *Laudon v. Roberts*, 2009 ONCA 383, disclosure of the amount of the settlement was considered by the court. In each case, the court concluded the amount of the settlement was relevant to the overall obligation of the non-settling defendant to pay the damages awarded after trial.

[40] In *Bedard*, at para. 17 the court said:

> **17** ... We agree with the trial judge's analysis of the law and his conclusion that the amount of monies received under the *Pierringer* agreement should be credited to the damages awarded against the non-settling defendant.

[41] The Alberta Court of Appeal referred to the Ontario Court of Appeal decision in *Laudon.* In that case, the court dealt with a settlement pursuant to a *Mary Carter* agreement. The damage award at trial was less than the amount of the settlement. The court said in para. 55:

> **55** Clearly in this case the settlement monies received are on account of the same damage for which the plaintiff continued his proceeding against Sullivan, the non-contracting defendant. The plaintiff's total damages have been assessed by a jury at $312,000 which is less than the amount he received from Roberts the contracting defendant. To permit the plaintiff to recover any amount from Sullivan would result in double-recovery to the plaintiff. I am satisfied that the law in this country is well-settled. Double recovery, save in a few narrow exceptions which have no application to the facts here, is not permitted.

[42] There is no dispute that the disclosure of the settlement amount is to be made after trial.

[43] In my view, there is no issue with respect to the concern raised by the non-settling defendants of double recovery by, or more accurately over compensation of, the plaintiffs as a result of the trial. At trial, the plaintiffs will have to prove their damages and the court will apportion them between the non-settling and the settling defendants. However, that apportionment will affect only the non-settling defendants.

[44] If the non-settling defendants are found to have any liability for the plaintiffs'proven damages, they will only be required to pay the portion of those damages attributable to their share of liability. If the amount paid by the settling defendants exceeds the total damages then the non-settling defendants pay nothing.

If the amount paid by the settling defendants is greater than the apportionment would have required them to pay, the non-settling defendants benefit from not having to pay their full share. That was the risk the settling defendants took to be able to terminate their involvement in this litigation.

[45] If the settling defendants paid less than the decision at trial would have required to pay. That does not increase the amount the non-settling defendants must pay. That is a benefit to the settling defendants of their settlement and the risk the plaintiffs took in settling with them. The non-settling defendants are not prejudiced.

[46] There can be no over-compensation of the plaintiffs as a result of the trial decision by reason of any payment by the non-settling defendants.

[47] The non-settling defendants say, however, that if they settle with the plaintiffs without knowing what they have already received, they would risk paying too much. They submit that would dissuade them from settlement negotiations with the plaintiffs. They say it is unfair to them if the plaintiffs know

what was paid, but they do not. They argue that it is contrary to the public policy in favour settlement.

[48] The non-settling defendants also say they need to know the settlement amount so they can plan their pre-trial strategy. They refer to the concept of proportionality: How many experts should they retain? How many discoveries to conduct? They say that in any litigation there is always something more which could be done. Deciding what, is affected by the amount at stake.

[49] The non-settling defendants rely on both *Noonan v. Alpha-Vico*, 2010 ONSC 2720, and *Pikus-Pace v. Calgary Olympic Development Assn.*, 2008 ABQB 688 as support for the position that the amount of the settlement should be disclosed now. They say these are the only decisions which thoroughly canvass the subject.

[50] *Noonan* is a decision of a Master of the Ontario Supreme Court in Ottawa on a motion for, among other things, production of full details of a settlement agreement, including the amount paid. The settlement agreement in question was not a Pierringer agreement because the settling defendants were sued in a separate action and had settled before a motion for consolidation could be heard. There was

no third party proceeding in the action which was settled. The claims in the remaining action specifically prevented any claim for contribution and indemnity from any other party and excluded any claim for any portion of liability found against the settling defendants.

[51] In paras. 9 and 10, Master MacLeod said:

> **9** By thus limiting the claim in the products liability action, the plaintiffs exclude any claim against the defendants for the share of liability which is the responsibility of the defendants in the school board action. As recently affirmed by the Court of Appeal, the effect of such a pleading is also to prevent the defendants in the products liability action from claiming contribution or indemnity against the defendants in the school board action.
>
> **10** As a consequence neither the school board defendants nor the products liability defendants can cross claim or issue third party claims against each other. Despite this fact, if the products liability action continues to trial, the proportionate fault of the board and its employees will be a central issue. ...

[52] In essence, the issue before Master MacLeod was the same as if there was a *Pierringer* agreement with one exception. The remaining defendants had no opportunity to deal with the Settlement agreement in a court hearing as would have been the case had they have been sued in the same proceeding.

[53] As is the case here, the plaintiffs acknowledged that the amount of the settlement must eventually be made known. It was their position it should only be made known after trial when the damages had been determined. They asserted settlement privilege.

[54] In para. 29 Master MacLeod said:

> **29** The outcome of the settlement with the board, notwithstanding the fact the defendants were sued in two separate actions, is very similar to the result in a Pierringer agreement. ...

[55] He continued in para. 30:

> **30** ... In reality the products liability defendants are now in almost exactly the same position they would have been in had all defendants been joined in one action and a Pierringer agreement made with the school board. The court must now assess the degree of fault of a defendant that is no longer in the action without the active participation of that former defendant.

[56] He then says in para. 31:

> **31** In my view the case law dealing with proportional share settlement agreements such as Pierringer and Mary Carter agreements is of assistance. Artificial division of causes of action into separate proceedings should not affect the outcome. ...

[57] In discussing the issue of disclosure, Master MacLeod said in para. 45:

> **45** The question of disclosure may be dealt with on the basis of first principles. Disclosure and withholding of information in civil proceedings is based on two competing principles of relevance and privilege. Under the first principle, all relevant evidence and information must be disclosed. Under the second principle, relevant information that is subject to a recognized claim of privilege may be withheld. This is subject to the important caveat that you cannot claim privilege and then use the information as evidence.[16] In addition, the court must now consider proportionality as an important interpretive element of the rules.[17]

[58] In para. 46, he referred to the Court of Appeal decision in *Laudon*, *supra*:

> **46** Amounts received in partial settlement are relevant to the issues in dispute for several reasons. Firstly, defendants are entitled to know what losses and damages the plaintiffs are claiming and they are entitled to know what amounts have been recovered in mitigation of those losses. The relevance of all amounts received in mitigation was recently starkly illustrated by the decision of the Court of Appeal in *Laudon v. Roberts*.[18] In *Laudon* the plaintiff had entered into a Mary Carter agreement with one of the defendants in which regardless of the outcome at trial, that defendant would pay a fixed sum. At trial, the jury found the plaintiff's damages to be less than the settlement amount. The consequence of this according to the Court of Appeal was that the plaintiff had already more than recovered his damages so he was unable to recover any damages from the other defendants.

[59] In para. 48, Master MacLeod said:

> **48** The plaintiffs concede that he amounts received must be revealed eventually but they take the view this should only occur after the trial. *Laudon* is cited as authority for this proposition because the procedure adopted at trial as discussed in paragraph 11 indicates that 'the amount of the settlement ... was to remain undisclosed until the

> jury rendered its verdict'. There are sound reasons why the trier of facts should not be made privy to the amount of a partial until after the assessment of damages. Similarly the trier of fact will not be told about insurance policies. This is not the same question as whether or not the amounts must be disclosed to the opposing parties? The questions of discoverability and of what documents must be produced in the disclosure phase of litigation are not the same question as admissibility at trial. In my view amounts received in mitigation are discoverable and should be disclosed as soon as they can be ascertained.

[60] He then addressed the issue of strategy, saying in paras. 49 and 50:

> **49** Calculation is a central issue at trial but knowing the amount actually in dispute is also critical to litigation planning and strategy. In general a defendant is entitled to know what the actual amounts in dispute are so that informed decisions may be made about whether to defend or offer to settle and what procedures may or may not be justified.
>
> **50** The principle of proportionality makes the actual damages as opposed to the pleaded damages additionally relevant because if the parties do not know what amounts are really at stake it is difficult to make informed decisions including proportionality as a principle. ...

[61] In para. 53, Master MacLeod began to address the privilege issue. He said:

> **53** ... Privilege protects relevant confidential information under appropriate circumstances. Generally privilege trumps relevance if the importance of protecting the confidentiality interest outweighs the importance of compelling its production in order to ascertain the truth. ...

[62] He then concluded in para. 56 that although settlement privilege is attached to negotiations between the parties:

> **56** In my view settlement privilege does not extend to the executed settlement agreement. ...

[63] He then inspected the settlement agreement and concluded in para. 59:

> **59** In my view the minutes of settlement and the approval order are relevant and are not privileged in this action. They must therefore be disclosed to counsel for the defendants. ...

[64] He went on in para. 59 to put limits on the disclosure:

> **59** ... The copies provided to counsel for the defendants will be marked confidential by the plaintiffs and they are not to be disclosed to any non party to the litigation. The agreement and the order may be provided to the trial judge in a sealed envelope for the use of the court but unless the judge otherwise orders, the amounts paid in partial settlement will not be disclosed to the trier(s) of fact until after the court has assessed the plaintiffs' damages. This is consistent with the procedure adopted in *Pettey v. Avis Car Inc.*, *supra*.

[65] The second decision upon which the non-settling defendants rely is *Pikus-Pace*, *supra*. In that case there was a Pierringer agreement. McMahon, J. referred to *Amoco, supra*. He quoted from it in his earlier oral decision. He said in paras. 5 and 6:

5 An oral decision was delivered the following day in these terms:

> The issue on this application is whether the dollar amount of a Pierringer Settlement Agreement must be disclosed to the non-settling Defendants. That the Agreement itself must be disclosed to the non-settling Defendants and to the Court has been determined by the Alberta Court of Appeal decision in *Amoco* ... at para. 40.
>
> > A proportionate share settlement agreement should be disclosed to the non-settling party ... To ensure that the trial judge is aware of the circumstances under which the non-settling Defendant has operated, the terms of the agreement, although not necessarily the amount of the settlement, should also be disclosed to the Court.

6 The court then repeated itself at para. 41(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.

[66] He continued in paras. 7 through 10:

7 What is important for the purposes of this application is the clear distinction that the *Amoco* case makes between disclosure to the non-settling party and disclosure to the Court. The former is unrestricted in any way:

> A proportionate share settlement agreement should be disclosed to the non-settling party.

> **8** No qualification is made of any kind in either of that court's two statements of that principle.
>
> **9** As to disclosure to the Court, the requirement for disclosure carries a caveat that it need not necessarily include the amount of the settlement.
>
> **10** I do not believe that distinction to be an accident of drafting. It is repeated twice in unambiguous terms in both instances.

[67] He relied upon *Hudson Bay Mining and Smelting*, for the proposition that "no privilege attached to the concluded agreement." (para. 11)

[68] He also made the point at para. 13:

> **13** ... On the other hand, the quantum is relevant to the non-settling Defendants because it impacts upon their pre-trial settlement decisions.

[69] In para. 17, he referred to *Amoco*'s reliance on the passage from *Kelvin Energy* (quoted above) about the public policy favouring settlement. He then said in paras.17 through 19:

> **17** ... The Plaintiff here argues that disclosure of the quantum of the settlement will impede her prospect of a greater recovery when she attempts to negotiate settlement with her remaining Defendants. The Plaintiff does not wish to reveal her hand to the remaining Defendants regarding her assessment of the settling Defendants proportionate liability and their assessment of her damage

> claim. So it is said that requiring the Plaintiff to disclose the amount she receives from the settling Defendants will discourage settlement contrary, to public policy.
>
> **18** On the other hand, the non-settling Defendants make essentially the same argument - that unless they know what has been paid towards the Plaintiff's claim by others, they cannot fairly determine what they should offer and so settlement by them is discouraged. The settling Defendants have little interest in the issue as their risk is capped by the agreement. For a price, they have traded uncertainty for certainty.
>
> **19** I do not doubt that the amount paid by the settling Defendants is relevant information which will assist the non-settling Defendants in determining their pre-trial settling posture. The law is inclined towards full disclosure as well as the promotion of settlement prospects. Those twin objectives are best met by disclosure of the amount of the settlement as well as the fact of the settlement.

[70] He concluded in para. 21:

> **21** ... The parties cannot comply with the decision in **Amoco** by disclosing to non-settling Defendants only one of these agreements. Nor do I find any public policy reason why the agreement fixing quantum should not also be disclosed to the non-settling Defendants, though[t] not necessarily to the trial judge if the matter goes to trial.

[71] In response, the plaintiffs argued relevance, which I have addressed above. They also say there are policy reasons for not disclosing the amount of the settlement. They point out that the *Noonan* decision was a decision of a Master not a Judge (although, I note, not appealed) and the *Pikus-Pace* decision is from the

Queen's Bench in Alberta not from the Court of Appeal. They say the competing policy issue was not addressed in either.

[72] The plaintiffs say that the public policy in favour of settlement will be adversely affected if a non-settling defendant has access to the amount of settlement paid by a settling defendant. They say the settling defendants in this case settled without knowing what the result at trial might be. They took the risk that they might make a payment to the plaintiffs when, at trial, they might be found not to be liable or, if so, liable for a lesser sum than they had already paid. The plaintiffs say there would be a disincentive for defendants to settle in a multi-party action if those who did not settle, later had the benefit of knowing the amount paid in settlement.

[73] The plaintiffs rely on *Gnitrow Ltd. v. Cape plc,* [2000] 3 All E.R. 763 (C.A.). In that case Gnitrow had settled claims against it and then claimed contribution from Cape. The Court of Appeal in England concluded that the details of the settlement Gnitrow had made had to be disclosed to Cape. The court said in the penultimate paragraph:

> I would confine my conclusion upon the application of this procedure to present circumstances, that is, were a claimant has settled for a fixed sum a specific claim against him and seeks only an indemnity or contribution with respect to the sum paid by him. ...

The court continued, in the passage relied upon by the plaintiffs:

> ... Other situations will require separate consideration. The circumstances would be different, for example, if a claimant in an action for damages for personal injuries, where damages were at large, were to settle with one of two defendants. It could be a severe disincentive to negotiations generally if, by declining to negotiate, a party can routinely claim the advantage of knowing what other parties have agreed before condescending to negotiate for himself.

[74] That decision was cited in *British Columbia Children's Hospital, supra*, where the British Columbia Court of Appeal at length considered the issue of disclosure of settlement negotiations and concluded settlement agreements.

[75] In *B.C. Children's Hospital,* a number of companies and individuals had pled guilty to conspiracy to fix prices of gas products contrary to the *Competition Act* (R.S.C., 1985, c. C-34). A group of hospitals which had purchased gas products commenced action against them for the common law tort of conspiracy and the statutory tort created by the *Competition Act*. Some of the defendants settled. The non-settling defendants sought details of the settlement agreements. In Chambers, the motions Judge ordered court production of certain portions of the

settlement agreement. The non-settling defendants appealed seeking production of the entire agreement and, principally, the amount of the settlement.

[76] Hall J.A., writing for the majority, reviewed the history of decisions on the subject. In para. 7 he quoted from the decision of Hamilton J. in *Hudson Bay Mining and Smelting Co., supra*. He said:

> [7] It can be seen from the above passage that Hamilton J. drew a distinction between negotiations preceding settlement, (privileged), and the settlement documents itself, (not privileged). ...

He then said in para. 9:

> [9] ... The question here presented is whether the distinction drawn in *Hudson Bay* and *Belitchev*, *supra,* is supportable and should be adopted.

[77] He considered certain exceptions to the rule that settlements are privileged and continued in para. 21:

> [21] A decision in that type of situation does not however necessarily support the conclusion that in a case like this where a settlement agreement has been reached, it can successfully be contended that the settlement agreement arrived at, consequent upon without prejudice negotiations, should stand on a different footing from the contents of the negotiations themselves and be producible at the instance of a non-settling party in multi-party litigation. ...

[78] In para. 23, he referred to the decision of Lord Griffiths in *Rush and Tompkins Ltd. v. Greater London Council*, [1988] 3 All E.R. 737 (H.L.(E)), which decision was also quoted in *Gnitrow, supra*. He quoted from that decision as follows:

> [23] Lord Griffiths expressed his conclusion as follows, at p. 744:
>
> > I have come to the conclusion that the wiser course is to protect without prejudice communications between parties to litigation from production to other parties in the same litigation. In multi-party litigation it is not an infrequent experience that one party takes up an unreasonably intransigent attitude that makes it extremely difficult to settle with him. In such circumstances it would, I think, place a serious fetter on negotiations between other parties if they knew that everything that passed between them would ultimately have to be revealed to the one abdurate litigant. ...

[79] Hall J.A. also referred to an earlier decision of the British Columbia Court of Appeal in *Middlekamp v. Fraser Valley Real Estate Board*, 1992 CarswellBC 267 (C.A.). He said in para. 26:

> [26] While ***Middlekamp*** did not involve an actual settlement document but concerned pre-settlement negotiations, I am of the view that the reasoning in the case, adopting and approving the reasoning in the case of ***Rush & Tompkins Ltd.***, is generally supportive of the proposition that <u>all</u> documentation relating to

> negotiation and settlement in a situation like the present case, (multi-party litigation), is privileged from production to an applicant in the position of the appellant. (Emphasis in original)

[80] He considered *Gnitrow* and quoted the passage from it that I have quoted above. He then said in para. 30:

> [30] ... I consider that the ***Gnitrow*** case is distinguishable on its facts from the case at bar because a relevant and distinguishing circumstance there was a relationship between what the claimant had paid its employees and the amount it would be permitted to recover from the defendant. ...

[81] He then returned to the *Middelkamp* decision and said in para. 32:

> [32] I consider that the judgment of Chief Justice McEachern in ***Middelkamp***, speaking for himself and three other members of the Court, supports the proposition that all settlement documents should have a 'blanket' privilege from production. Locke J.A. did not necessarily endorse a blanket privilege but the tenor of his judgment endorses a near absolute denial of production of settlement documentation in order to promote what he perceived to be the public interest in the settlement of disputes. I consider both judgments militate against any order for production of the settlement agreement in the present case. ...

[82] He continued in para. 33:

> [33] The appellants here seek disclosure of the settlement agreement to enable them to ascertain the amount of the settlement between the respondents and the ALC defendants. That is the same sort of information, namely valuation of a claim or claims, sought by the co-defendant sub-contractor, Careys, in the ***Rush & Tompkins*** litigation. Lord Griffiths refused production of this information because, as he said at p. 744, it would be harmful to the conduct of settlement

> negotiations in multi-party litigation 'if solicitors thought that what was said and written between them would become common currency available to all other parties to the litigation.' As I observed, ***Rush & Tompkins*** was approved and relied upon very substantially in both of the judgments in ***Middelkamp***. I consider that ***Middelkamp*** accordingly is a binding authority that mandates the non-disclosure of the settlement agreement in this case because of privilege.

[83] He then said in para. 34:

> [34] ... I consider the agreement is shielded from production because of privilege.

[84] In my view, the decision in *B.C. Children's Hospital, supra,* sets the proper balance between disclosure and non-disclosure in circumstances such as these. In that case the court concluded that the public policy in favour of settlement was supported by the rule that settlement agreements retain their privilege. Hall J.A. in para. 28 quoted Chief Justice McEachern's decision in *Middelkamp* at page 282 as follows:

> ...Without such protection, the public interest in encouraging settlements will not be served. ...

4) Conclusion

[85] I conclude that the public interest in settlements is better furthered by protecting the settlement made by the settling defendants with the plaintiffs. If the privilege accorded to settlements is not so protected, there would be little incentive in the future in multi-party litigation for one party or a group of parties to be the first to settle. The settling defendants take the risk that they may ultimately, at trial, not be found to be liable or liable for less than they have already paid. But that is the same risk any party takes in settlements in two-party litigation. The difference in multi-party litigation, such as this, is that there may well be a trial where liability is determined and apportioned. Then both the plaintiff and the settling defendants will learn whether the cost-benefit analysis they performed before settling was reasonable or not.

[86] To decide otherwise would, in my view, undermine, if not extinguish, the possibility of settlement negotiations. No party or parties would want to be the first to settle knowing that the non-settling defendant or defendants would then have the benefit of knowing the amount of the settlement before continuing with the litigation or deciding to try to settle themselves.

[87] It is true that if a non-settling defendant later wishes to try to settle with a plaintiff it will be at a disadvantage *vis-a-vis* that plaintiff, because the plaintiff alone would know the amount of the settlement.

[88] Both the plaintiffs and the non-settling defendants face the prospect of many pre-trial procedures and a great deal of trial preparation and a lengthy trial. However, that is the position the settling defendants and the plaintiffs were in when they negotiated their settlement. There is still good reason for both the non-settling defendants and the plaintiffs to consider settling: certainty and potential cost savings are factors. It continues to be advantageous for the remaining parties to settle.

[89] Overall, I conclude that the disadvantage to the non-settling defendants of not knowing the amount of the settlement does not outweigh the benefit of encouraging settlement with some but not all defendants in multi-party litigation.

[90] Settlement privilege is abrogated in Pierringer agreements only insofar as it is necessary to ensure the terms of the settlement work no prejudice to the non-

settling defendants because of the existence of claims for contribution and indemnity. The court and the non-settling parties need only know at that stage the terms of the settlement which may affect claims by or against them by the settling defendants. There is a limit on the disclosure of the settlement.

[91] It would be unfair to have one party have the benefit of knowing the other's settlement details before deciding to try to settle. That would be a discouragement to settlement and contrary to the policy in favour of settlement.

[92] The application is dismissed.

Hood J.