Supreme Court of Canada Settles the Issue as to Whether Quantum in Pierringer Agreements Must be Disclosed

A Commentary on *Sable Offshore Energy Inc. v. Ameron International*

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In *Sable Offshore Energy Inc. v. Ameron International*, 2013 SCC 37, released June 21, 2013, the Supreme Court of Canada settled a long standing issue as to whether or not a settling defendant in a Pierringer Agreement is required to disclose the quantum of the settlement to the non-settling parties. Case law had been split on this issue.

In *Sable*, the Supreme Court of Canada held that then benefits of settlement privilege outweighed and interest the non-settling defendants might have in knowing the quantum of the settlement.

In particular, the court stated:

> [18] Since the negotiated amount is a key component of the "content of successful negotiations", reflecting the admissions, offers, and compromises made in the course of negotiations, it too is protected by the privilege. I am aware that some earlier jurisprudence did not extend the privilege to the concluded agreement (see Amoco Canada Petroleum Co. v. Propak Systems Ltd., 2001 ABCA 110, 281 A.R. 185, at para. 40, citing Hudson Bay Mining and Smelting Co. v. Wright (1997), 120 Man. R. (2d) 214 (Q.B.)), but in my respectful view, it is better to adopt an approach that more robustly promotes settlement by including its content.
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> [25] The non-settling defendants have in fact received all the non-financial terms of the Pierringer Agreements. They have access to all the relevant documents and other evidence that was in the settling defendants' possession. They also have the assurance that they will not be held liable for more than their share of damages. Moreover, Sable agreed that at the end of the trial, once liability had been determined, it would disclose to the trial judge the amounts it settled for. As a result, should the non-settling defendants establish a right to set-off in this case, their liability for damages will be adjusted downwards if necessary to avoid overcompensating the plaintiff.
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> [26] As for any concern that the non-settling defendants will be required to pay more than their share of damages, it is inherent in Pierringer Agreements that non-settling defendants can only be held liable for their share of the damages and are severally, and not jointly, liable with the settling defendants.

> [27] It is therefore not clear to me how knowledge of the settlement amounts materially affects the ability of the non-settling defendants to know and present their case. The defendants remain fully aware of the claims they must defend themselves against and of the overall amount that Sable is seeking. It is true that knowing the settlement amounts might allow the defendants to revise their estimate of how much they want to invest in the case, but this, it seems to me, does not rise to a sufficient level of importance to displace the public interest in promoting settlements.

In short, the law now is that settling defendants do not have to disclose the quantum of the settlement to the non-settling defendants, but do have to disclose it to the trial judge at the end of trial.

By implication, it appears that the non-settling defendants are entitled to the non-financial terms of the settlement and all relevant documents and other evidence in the possession of the settling defendants.