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PIERRINGER AGREEMENT AMOUNTS SHALL REMAIN PRIVILEGED – SUPREME COURT OF CANADA

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

Ameron International Corporation ("Ameron") and five other companies (collectively called "Amercoat") provided Sable Offshore Energy Inc. ("Sable) with paint for several buildings. Sable brought forth three lawsuits alleging that the paint failed to prevent corrosion against Ameron, Amercoat and 12 other contractors who prepared surfaces and applied the paint; the claims were for negligence, negligent misrepresentation and breach of a collateral warranty. Sable entered into three Pierringer Agreements with some of the defendants, and Sable agreed to amend their statements of claims against the non-settling defendants to pursue them only for their share of liability. **Ameron and Amercoat failed to settle with Sable, and all terms of the Pierringer Agreements were disclosed to them, except the amounts agreed to. Ameron filed an application for disclosure of the settlement amounts, and Sable argued that the amounts were subject to settlement privilege.**

A Pierringer Agreement allows for a plaintiff's claim to be "extinguished" against those defendants with whom it settled; subsequently, the claims against the non-settling defendants continue. The settling defendants are assured that they are not subject to a contribution claim from the non-settling defendants, who are only accountable for their own share of liability at trial. In Canada, Pierringer Agreements provide additional protections for non-settling defendants, such as requiring that non-settling defendants be given access to the settling defendants' evidence

Abella J. held that settlement privilege promotes settlement, which is a class privilege. There is an overriding public interest in favor of settlement, as settlements promote the interests of litigants by avoiding lengthy trials and reducing the strain on overburdened provincial courts. Historically, settlement negotiations have been protected by the common rule that "without prejudice" communications are not admissible, as parties are more likely to settle if they know that their negotiations cannot be subsequently disclosed. The common law has developed to ensure that all communications that occur during settlement negotiations, *even if a settlement is not reached*, are covered by

settlement privilege; without such protection, litigants will be less likely to settle and the public interest in encouraging settlements will not be served. Ultimately, the negotiated amount is a vital component of the content of successful negotiations and is protected by settlement privilege; however, exceptions will be found "when the justice of the case requires it".

Exceptions to settlement privilege will occur when a defendant can show that, on balance, a competing public interest outweighs the public interest in encouraging settlement. Historically, these competing interests have included misrepresentation, fraud, undue influence and preventing a plaintiff from being overcompensated. **The non-settling defendants in this case argued that knowledge of the settlement amounts was necessary to conduct their litigation; Abella J. disagreed, citing that there was no tangible prejudice created by withholding the settlement amounts that would outweigh the public interest in settlement promotion.**

In this case, the non-settling defendants have received all of the non-financial terms of the Pierringer Agreements, including all of the relevant documents and other evidence that was in the settling defendants' possession. The defendants had been assured that they would not be held liable for more than their share of the damages and that the trial judge would be provided the amount settled for once liability had been determined to avoid plaintiff overcompensation. Although knowledge of the other defendants' settlement amounts might allow the defendants to revise their estimate of how much they want to invest in the case, Abella J. held that this element was not important enough to displace the public interest in promoting settlement; encouraging the first settlement in multi-party litigation is more worthy of protection than the speculative assumption that others will only settle if they are aware of the amount.