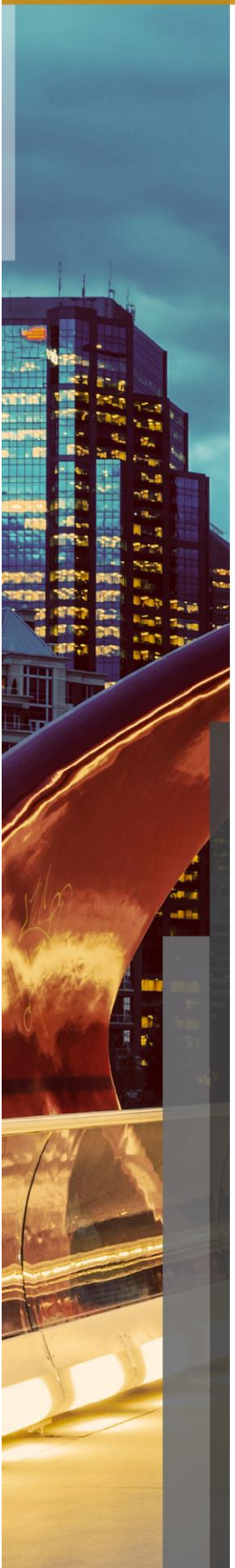

Rule against overcompensation in *Pierringer* settlements should be applied generously in favour of plaintiffs

By Paul Beke, Andrew Sunter and Robert Martz

On September 21, 2018, the Court of Appeal released its decision in *Canadian Natural Resources Limited v Wood Group Mustang*[i]. The Court provided important clarity on how proportionate-share settlement agreements, also know as *Pierringer* Agreements, impact damage awards.

Pierringer Agreements provide a plaintiff with an alternative to the difficult task of trying to settle with all of the defendants in a lawsuit at once. Instead, they allow them to settle with some defendants (Settling Defendants), who withdraw from the lawsuit and are indemnified by the plaintiff for any negligence found against them at trial. The plaintiff then proceeds to trial against the remaining defendants (Non-Settling Defendants) with its recovery limited to the Non-Settling Defendants' proportionate share of liability.

One of the critical features of *Pierringer* Agreements is that the plaintiff bears the financial risk. If they "under-recover" from the Settling Defendants, they cannot make up that shortfall from the Non-Settling Defendants. On the other hand, if the plaintiff "over-recovers" from the Settling Defendants (i.e., settles for more than the Settling Defendants' share of damages determined at trial) the plaintiff will not be allowed to keep the surplus, and the damages otherwise payable by the Non-Settling Defendants will be clawed-back by the amount of the surplus. In Alberta, the leading case on this issue was the Court of Appeal's decision in *Bedard v Amin*.[ii]

Decision Summary

In its recent appeal, Canadian Natural Resources Limited (Canadian Natural) asked, among other things, for the Court of Appeal to reconsider the *Bedard* overcompensation principle.

While the Court of Appeal declined to abandon *Bedard* altogether, it limited the reach of the overcompensation principle in two significant ways:

1. **A plaintiff isn't overcompensated before recovering all of its losses, even if found partly at fault**

The principle against overcompensation tries to deter parties from going ahead with litigation in order to secure a windfall (i.e., a damage award greater than the total loss suffered). The Court of Appeal found that no such windfall will occur until the plaintiff has been fully indemnified for all of its actual losses. The Court went on to determine that a finding of contributory negligence will not impact this analysis since the plaintiff has still suffered the loss even if it contributed to it.

The amount of the plaintiff's contributory negligence is therefore irrelevant to the overcompensation analysis. As the Court of Appeal said, *"[I]t would be ironic if the non-settling tortfeasor … was entitled to credit for the "over-settling" with the settling defendants, but the contributorily negligent tortfeasor … was not."*

The question of whether contributory negligence should be factored into the overcompensation analysis was unresolved in the jurisprudence. This decision provides important clarity on this issue.

2. **A plaintiff isn't overcompensated before recovering its full costs**

The Court also found that overcompensation will not arise until a plaintiff has been fully indemnified for the costs incurred in securing the settlement. As such, a plaintiff will be entitled to deduct its solicitor-client costs incurred in pursuing the Settling Defendants from the total settlement amounts paid by them to determine whether any overcompensation arises.

The Court of Appeal in *Bedard* had previously recognized that a plaintiff's litigation costs should be deducted from the total settlement amount before deciding whether it has been overcompensated. However, this recent decision provides important confirmation that the costs to be deducted are full solicitor-client costs, not party-and-party costs.

These two qualifications to the overcompensation principle set out in *Bedard* should limit the circumstances in which a claw-back situation will arise in *Pierringer* settlements. While some very favorable settlements might still result in overcompensation, with contributory negligence no longer being factored in and solicitor-client costs being deductible, we expect that claw-backs will become rare. While the Court of Appeal left the ultimate question of whether the overcompensation principle should apply at all in the *Pierringer* settlement context to the Supreme Court of Canada, this decision has resolved important aspects of the doctrine.

This Bulletin is intended as general information only and is not to be taken as legal advice. If you require additional information please contact the authors or any member of BD&P's Litigation Group.

---

[i] *Canadian Natural Resources Limited v Wood Group Mustang (Canada) Inc, formerly IMV Projects Inc, 2018 ABCA 305*. Jeff Sharpe, Andrew Sunter, and Robert Martz from BD&P represented Canadian Natural on this appeal

[ii] *Bedard v Amin, 2010 ABCA 3*