COURT OF APPEAL FOR ONTARIO

CITATION: Gendron v. Doug C. Thompson Ltd. (Thompson Fuels), 2019 ONCA 293
DATE: 20190412
DOCKET: C64188 & C64191

Hourigan, Miller and Paciocco JJ.A.

C64188

BETWEEN

Wayne Allan Gendron

Plaintiff (Respondent)

and

Doug C. Thompson Ltd. operating as Thompson Fuels, Technical Standards and Safety Authority, and Les Reservoirs D'Acier de Granby Inc.

Defendants (Appellant / Respondent)

C64191

AND BETWEEN

Wayne Allan Gendron

Plaintiff (Appellant)

and

Doug C. Thompson Ltd. operating as Thompson Fuels, Technical Standards and Safety Authority, and Les Reservoirs D'Acier de Granby Inc.

Defendants (Respondents)

Albert Wallrap and Daniel Cook, for the appellant Thompson Fuels

Adam Grant and Michelle Legault, for the respondent Technical Standards and Safety Authority

Martin Forget and Eric J. de Man, for the respondent Wayne Allan Gendron

Heard: February 5, 2019

On appeal from the judgment of Justice Robert Charney of the Superior Court of Justice, dated July 17, 2017.

Hourigan J.A.:

I. Overview

[1] On December 18, 2008, Thompson Fuels delivered 700 litres of fuel oil to two oil tanks located in the basement of a home owned by Wayne Gendron. Almost immediately oil began to leak from one of the tanks. Mr. Gendron discovered the leak approximately one hour after the oil was delivered and spent the night collecting it in Tupperware containers. He thought he had collected all of the leaking oil. He was incorrect.

[2] Hundreds of litres of oil leaked and drained through a crack between the basement wall and the floor. From there, it drained under Mr. Gendron's house, where some of it remained and soaked into the soil. The rest of the oil made its way through a drainage system under the house and into the city's culvert, which carried it into nearby Sturgeon Lake.

[3] Over the next several months, a massive remediation project was undertaken as a consequence of the leak. Nearly $2 million was spent on

remediating both the contaminated land in the surrounding area and the damage to Sturgeon Lake. Mr. Gendron's house was demolished as part of the effort to remove contaminated soil.

[4] Mr. Gendron sued in negligence against Thompson Fuels, his fuel supplier and service technician, the Technical Standards and Safety Authority (the "TSSA"), which is the administrative authority responsible for regulation and enforcement of fuels in Ontario, and Les Reservoirs D'Acier de Granby Inc. ("Granby"), the manufacturer of the oil tanks.

[5] Granby settled with Mr. Gendron shortly after the trial began, signing a *Pierringer* agreement that, in return for Granby's settlement, released Granby from the action and removed the risk that co-defendants might have to pay Granby's share of damages if Granby could not do so. At the conclusion of a 27-day trial, the trial judge found that Thompson Fuels was negligent but that the TSSA was not. He also found that Mr. Gendron had been contributorily negligent and apportioned liability as follows: Mr. Gendron 60% at fault and Thompson Fuels 40% at fault. Thompson Fuels was ordered to pay Mr. Gendron $864,628 in damages and $465,000 in costs. Costs of the trial were also awarded to the TSSA in the amount of $150,000.

[6] In a post-trial ruling on several motions, the trial judge held that Thompson Fuels did not have a right of set-off against the amount paid by

Granby to Mr. Gendron under the *Pierringer* agreement. A second costs award arising out of the post-trial ruling was also made.

[7] Thompson Fuels and Mr. Gendron have initiated separate appeals. Thompson Fuels has appealed from the trial decision, the post-trial ruling, and the costs awards. Mr. Gendron and the TSSA are respondents to this appeal. Mr. Gendron has appealed from the trial decision only. Thompson Fuels and the TSSA are respondents to that appeal. Granby has taken no part in the appellate proceedings. The two appeals were heard together.

[8] These reasons explain why I would not substantively interfere with the decision of the trial judge. This was a complex case filled with complicated issues of liability, statutory interpretation, and damages. The trial judge provided thoughtful, detailed, and considered reasons supporting his judgment. They are a model of clarity and are substantively correct, except for a small adjustment I would make to the amount of damages awarded. I would otherwise dismiss both appeals.

II. Facts

[9] In 2000, a furnace supplied by an underground outdoor oil tank heated Mr. Gendron's home. In the summer of 2000, Mr. Gendron, with the assistance of two casual labourers, removed the underground storage tank. In November 2000, Mr. Gendron purchased two new Granby aboveground indoor tanks.

[10] Installation of oil tanks by a qualified oil burner technician ("OBT") was both the law and industry practice and standard in 2000. Only a person holding an OBT certificate was authorized to install aboveground oil tanks. Mr. Gendron did not have a qualified OBT install his oil tanks. Instead, he and a friend installed the tanks side-by-side in his basement even though they were not licenced to do so.

[11] The oil tanks were installed very close to the exterior wall of the basement, approximately one half inch or less at various points due to irregularities in the insulation. The sides of the two tanks were also very close together, approximately one inch apart. These conditions made proper inspection of the tanks virtually impossible.

[12] The two oil tanks were "twinned", meaning that they were joined by a two-inch transfer pipe that had a T connection leading to the furnace. One tank would be filled and the oil would flow from that tank through the transfer pipe to the other tank, so that an equal amount of oil would end up in both tanks. Mr. Gendron did not install a shut-off valve for each oil tank.

[13] In November 2001, Thompson Fuels became Mr. Gendron's fuel supplier. The back of the Customer Service Agreement signed by Mr. Gendron included terms excluding Thompson Fuels from liability for inspection and maintenance of the oil tanks and for injury or damage to any person or property

resulting from the existence, operation, or non-operation of any oil-burning installation at the property.

[14] On June 27, 2001, the Ontario government enacted *Fuel Oil*, O. Reg. 213/01 (the "Regulation"), which prohibited fuel oil distributors like Thompson Fuels from supplying fuel oil to a tank unless the distributor had inspected the furnace and fuel oil tanks and was satisfied that their installation and use complied with the Regulation. The Regulation further stipulated that if the state of repair, mode of operation, or operating environment of the oil tanks did not meet the requirements of the Regulation, this would constitute an "unacceptable condition". If the unacceptable condition posed an immediate hazard, the distributor would be obliged to immediately shut-off the system (referred to as "tagging-out") and cease supplying fuel oil to the tank. In absence of an immediate hazard, the tanks would have to be tagged out at the conclusion of a notice period not to exceed 90 days.

[15] In 2001, the TSSA standards required that at least once per year all fuel oil tanks had to be inspected for leaks. The TSSA later announced in 2002 that distributors would have to conduct a "basic inspection" by May 1, 2004, and a "comprehensive inspection" by May 1, 2007.

[16] On February 27, 2002, Thompson Fuels sent an OBT to Mr. Gendron's home to investigate a no-heat problem. That technician did not testify at trial.

His invoice indicated that he was there for three hours, but it did not specify that any inspection took place. At trial, Thompson Fuels claimed a comprehensive inspection was performed on this visit, but was unable to locate an inspection report for that date despite the requirement to retain such a report.

[17] Thompson Fuels conducted additional service calls at Mr. Gendron's home on October 25, 2006, January 22, 2007, February 19, 2007, and November 8, 2007. The invoices for those service calls all indicated that the last inspection occurred on February 27, 2002. Therefore, no inspections were conducted during those service calls. There was no evidence that testing for the presence of water in the tanks was ever performed by any of the Thompson Fuels OBTs who conducted the four service calls in 2006 and 2007.

[18] At approximately 4:15 p.m. on December 18, 2008, Thompson Fuels delivered 700 litres of fuel oil to Mr. Gendron's home. As mentioned above, shortly thereafter one of the tanks began to leak. Mr. Gendron arrived home from work about one hour after the oil was delivered and smelled oil coming from his basement. He went downstairs and observed oil on the basement floor. He examined the tanks to find the source of the leak, but could not find any holes. In order to better examine the leaking tank he cut a hole in the wall on the far side of the tank. He saw that oil was leaking, apparently coming from the end of the tank against the external insulated wall. However, he could not

see the hole because the end of the tank was tight against the insulation. Mr. Gendron collected the leaking oil and filled seven jerry cans of 25 litres each.

[19] The cause of the leak was internal corrosion, referred to as Microbiologically Influenced Corrosion ("MIC"), caused by the build-up of water and sludge inside the incident tank, which, combined with microbes, resulted in the production of sulphur and organic acids within the tank. These acids lead to corrosion from the inside, which resulted in perforation of the tank. The evidence showed that once corrosion begins it progresses at a rate of 2–10 mm per year. Mr. Gendron's leaking tank was only 2 mm thick, meaning that the perforation in the tank could possibly have taken one year or less.

[20] Some of the water in the tank was the result of condensation. Mr. Gendron did not keep his tank full, which would increase the amount of condensation that accumulated in the tanks. However, condensation was not the only source for the accumulation of water in the leaking tank. There was evidence that Mr. Gendron likely introduced water and microbes into the leaking tank when he filled the tanks with less expensive stove oil, either because the water and microbes were in the stove oil or because they were in the jerry cans he used to fill the tanks.

[21] Except for the small amount of oil on the basement floor (which he cleaned up with a rag), Mr. Gendron thought that he had succeeded in

collecting all of the oil in the tanks by the early morning hours of December 19, 2008. He went to sleep and called Thompson Fuels at approximately 3:00 p.m. that afternoon. There was evidence that it would have taken approximately 6 hours for the first 500 litres of fuel oil to leak from the tank. During the first hour, 110 litres would have leaked out. As a result, most of the oil likely leaked out while Mr. Gendron was attempting to manage the leak using Tupperware containers.

[22] When Mr. Gendron called Thompson Fuels, he did not call to report the leak, but to complain that Thompson Fuels had not delivered the full 700 litres of oil he had ordered. He believed that he had mopped up or collected all of the oil that had leaked from the tank, and this could not possibly have amounted to 700 litres. He was irate because he was being charged for 700 litres of furnace oil that he believed had not been delivered.

[23] Thompson Fuels immediately sent a service technician to Mr. Gendron's house to inspect the leak. The technician calculated that approximately 600 litres of fuel oil had leaked. He advised Mr. Gendron that he was required to report the spill to the Ministry of Environment (the "MOE") Spills Action Centre. Mr. Gendron did not do so. Thompson Fuels called the Spills Action Centre to report the leak at 4:22 p.m. and advised them that the house fronted on to Sturgeon Lake. The Spills Action Centre called Mr. Gendron at 4:37 p.m. to

ask about the leak. It told him that they would write a report to forward to the TSSA, but that they did not know when the TSSA would investigate.

[24] The report was sent to the TSSA technical desk and to the MOE. A fuel safety inspector first reviewed the report on December 22, 2008. After a visual inspection conducted the same day, the TSSA inspector estimated that approximately 450 litres of oil had leaked from the tank and had likely migrated through a gap where the concrete floor met the foundation wall. He looked around outside but did not see any oil and did not ask Mr. Gendron any questions about drainage on the property. Mr. Gendron did not inform him that there was a drainage pipe running around the foundation of the home that emptied into the city culvert.

[25] The TSSA inspector prepared a TSSA Order on December 24, 2008. The order required Mr. Gendron to obtain a professional assessment report "that delineates the full extent of all petroleum impacts to both soil and groundwater" within 120 days. The order did not explicitly require Mr. Gendron to perform remediation.

[26] Mr. Gendron reported the matter to his insurer on December 29, 2008. The insurer retained an independent adjuster and remediation contractor, DL Services ("DLS"). DLS noted that the furnace oil had entered the storm drain and culvert and from there entered Sturgeon Lake. On December 30, 2008,

DLS notified the MOE that oil had entered Sturgeon Lake. The MOE ordered Mr. Gendron to undertake remediation. DLS carried out the remediation until May 6, 2009, when Mr. Gendron's off-site insurance coverage was exhausted. The cost of the off-site remediation ultimately reached $1,833,848.85.

[27] DLS also carried out on-site remediation at Mr. Gendron's property. Based on the recommendation of a structural engineer that it would not be structurally sound to provide temporary support to Mr. Gendron's home during the excavation of contaminated soil under the basement floor, the home was demolished on May 12, 2009. A total of 1,558.49 tonnes of contaminated soil was removed. On-site remediation lasted until July 20, 2009.

[28] When Mr. Gendron's insurance coverage was exhausted, the MOE ordered the City of Kawartha Lakes ("the City") to complete the remediation. On June 15, 2010, the City used its powers under s. 100.1 of the *Environmental Protection Act,* R.S.O. 1990, c. E 19 (the "*EPA*") to order compensation from Mr. Gendron, the TSSA, and Thompson Fuels. The s. 100.1 order required them to pay $471,691.44 to the City for its costs and expenses incurred in cleaning up the leak.

[29] Mr. Gendron, the TSSA, and Thompson Fuels each appealed the order to the Environmental Review Tribunal ("ERT"). The appeals by the TSSA and Thompson Fuels were withdrawn following a settlement with the City, and only

the appeal by Mr. Gendron proceeded to hearing. On June 30, 2016, the ERT allowed Mr. Gendron's appeal in part and reduced the s. 100.1 order to $313,005.08.

[30] Mr. Gendron sued Thompson Fuels on July 15, 2009. The claim was amended on November 9, 2010 to add the TSSA and Granby as defendants. He sought $2 million in damages and alleged that each defendant had acted negligently. On November 7, 2016, the trial judge heard a motion by Mr. Gendron to amend his claim to add a claim for $313,005.08 for contribution and indemnity against the defendants in accordance with s. 100.1(6) of the *EPA*. That provision permits a party that is the subject of a s. 100.1 order to claim contribution and indemnity against another person who could properly have been subject to a s. 100.1 order. The motion was granted.

III. Decisions Below

(i) Trial Judgment

[31] The trial judge found that Thompson Fuels breached its duty of care by failing to perform a comprehensive inspection of Mr. Gendron's fuel oil tanks prior to May 1, 2007 and by failing to test the tanks for water during its service calls in 2006 and 2007. He also found that when Thompson Fuels performed its service calls in 2006 or 2007 it should have tagged-out Mr. Gendron's tanks because it was not possible to inspect the non-outlet end of the tanks, and this

constituted a non-immediate hazard that had to be corrected before Thompson Fuels could deliver fuel. The trial judge rejected Thompson Fuels' argument that the exclusion clauses in the Customer Services Agreement signed by Mr. Gendron exclude liability on its part.

[32] With respect to the TSSA's liability, the trial judge found that when the inspector conducted the inspection on December 22, 2008, he owed Mr. Gendron a *prima facie* duty of care to conduct the inspection with reasonable care. But the trial judge noted that he was provided no evidence of the standard of care required of a TSSA inspector. Therefore, he could not find that either the TSSA inspection or the subsequent delineation order fell below the standard of care. The trial judge also rejected Mr. Gendron's claim that the TSSA was negligent by breaching its duty under a Memorandum of Understanding between the TSSA and the MOE (the "MOU"), and by failing to advise Mr. Gendron to contact his insurer.

[33] As noted, Granby settled with Mr. Gendron shortly after the trial began. Nevertheless, since Thompson Fuels was only to be held liable for its proportionate share of the damages, the trial judge assessed Granby's share of liability. On the basis of the industry standards that existed in Canada when Granby manufactured Mr. Gendron's tanks in 1999, the trial judge found that Granby was not negligent in the manufacture of the leaking tank and did not, at that time, know of the risk of corrosion. With respect to whether Granby had

a duty to warn consumers about the risk of corrosion, the trial judge held that since Granby only sold to wholesalers, Granby would only have had a duty to warn fuel distributors and installers, which it did through education seminars and guidelines it published. He therefore dismissed the claim against Granby.

[34] With respect to contributory negligence, the trial judge accepted that Mr. Gendron was negligent by reason of the improper installation of the fuel oil tanks, failure to maintain the tanks by having them inspected annually, improper introduction of water into the tanks, and failure to promptly report the leak.

[35] On the issue of quantum of damages, the trial judge concluded that DLS had, by and large, acted reasonably and that its remediation actions were not unnecessary as the defendants claimed. There was one exception. DLS charged a 16% for administration and overhead amounts on all of their costs. The trial judge held that for work performed by DLS, as opposed to an independent contractor, this amounted to double billing. He therefore reduced the damages payable by Thompson Fuels to reflect the 16% administrative fee added to work performed by DLS. He rejected the argument that DLS could have surgically removed the contaminated soil under the basement floor instead of demolishing Mr. Gendron's home, but did reduce the amount claimed for the replacement cost to rebuild the home from $545,244.25 to $476,594.25.

[36] The trial judge accepted the argument that DLS failed to delineate fresh fuel oil from historical contamination or to properly delineate the extent of contamination when excavating the soil in and around the home. As a result, he found that an excessive amount of soil was excavated. Accordingly, he reduced the damages attributable to excavating, hauling, and disposing of this contaminated soil by 50%.

[37] With regard to Mr. Gendron's s. 100.1(6) *EPA* claim for contribution and indemnity, the trial judge rejected the argument that the claim was statute-barred. However, he concluded that Mr. Gendron could not bring a s. 100.1 claim for contribution and indemnity against Thompson Fuels because it was not an owner or person having control of the pollutant within the meaning of s. 100.1(1) of the *EPA*.

(ii) Post-Trial Ruling

[38] Following trial, the parties appeared before the trial judge to address three issues: (1) whether Thompson Fuels has a right of set-off so that its liability for damages would be reduced by the amount paid by Granby to Mr. Gendron pursuant to their partial settlement agreement; (2) Mr. Gendron's r. 59.06(1) motion to vary the judgment; and (3) Thompson Fuels' r. 59.06(1) motion to vary the judgment. Both r. 59.06(1) motions were dismissed.

[39] With regard to the set off argument, the trial judge found that the result was dictated by this court's decision in *Laudon v. Roberts*, 2009 ONCA 383, 249 O.A.C. 72, and held there was no right of set off because Mr. Gendron would not receive double recovery.

IV. Issues

[40] The issues raised in these appeals and my conclusion on each issue may be summarized as follows:

1. *Did the trial judge err in assessing Thompson Fuels' liability?*

   The trial judge made a series of factual findings and findings of mixed fact and law that were open to him on the evidence. His reasons on the issue of Thompson Fuels' liability evince a proper understanding of the principles of negligence, including causation. He also properly exercised his gatekeeper function in admitting expert evidence. Finally, the trial judge correctly concluded that Thompson Fuels could not avoid liability on the basis of its standard form contract.

2. *Did the trial judge err in assessing the TSSA's liability?*

   The trial judge was correct in concluding that the TSSA owed Mr. Gendron no private law duty of care, other than conducting an inspection with reasonable care. As the trial judge noted, neither Mr. Gendron nor Thompson Fuels tendered any expert evidence regarding the standard of care of a prudent TSSA inspector. In these circumstances, Mr. Gendron and Thompson Fuels failed to meet their onus to establish liability on the part of the TSSA.

3. *Did the trial judge err in finding Mr. Gendron contributorily negligent, or in assessing the extent of such negligence*?

   The trial judge properly found that Mr. Gendron failed to take the steps of a reasonably prudent homeowner in the circumstances. The evidence does not support Thompson Fuels' argument that the trial judge should

have found Mr. Gendron contributorily negligent for failing to disconnect a drain.

4. *Did the trial judge err in his apportionment of liability?*

   The trial judge carefully considered the comparative blameworthiness of the parties and concluded that the majority of the responsibility for the loss was Mr. Gendron's. The apportionment of damages is a very fact specific exercise, which is entitled to significant deference. There is no basis for appellate interference with the trial judge's apportionment of liability.

5. *Did the trial judge err in his assessment of damages?*

   The trial judge conducted a detailed analysis of the remediation costs both on and off of Mr. Gendron's property, mindful that damages should be awarded on the principle that best ensures that the environment is returned to its pre-contamination condition. The assessment of damages was correct, save for one adjustment. The trial judge erred in awarding damages to pay out a line of credit secured against the property. That was a betterment and cannot stand.

6. *Did the trial judge fail to provide adequate reasons?*

   The trial judge wrote 79 pages of reasons wherein he meticulously considered both the evidence and the legal issues at play. His reasons are logically coherent, thoughtful, and clearly stated. There is no merit in this submission.

7. *Did the trial judge err in failing to reduce the amount awarded against Thompson Fuels by the amount of the Granby settlement?*

   The trial judge correctly concluded that there was no double recovery until Mr. Gendron had been fully compensated for his loss. This decision is consistent with the policy objectives underlying *Pierringer* agreements.

8. *Did the trial judge err in dismissing the EPA, s. 100.1 claim for contribution and indemnity against Thompson Fuels?*

The trial judge properly rejected Mr. Gendron's argument that Thompson Fuels was the owner of the oil immediately before the leak or that it had charge, management or control of the oil immediately before the first discharge. Thus, a claim for contribution and indemnity under the *EPA* was unavailable.

9. *Did the trial judge err in his costs awards?*

   There is no basis for appellate interference with the trial judge's costs award. In his costs endorsement the trial judge properly rejected the arguments that are once again advanced on appeal.

V. Analysis

(1) Thompson Fuels' Liability

[41] Thompson Fuels takes issue with virtually every aspect of the trial judge's analysis of its liability. The grounds of appeal may be divided into two categories: (i) errors of fact or of mixed fact and law; and (ii) errors of law. These grounds of appeal are considered below.

(i) Errors of fact or of mixed fact and law

[42] Thompson Fuels submits that the trial judge erred in making two purely factual findings. The first was that Mr. Gendron did not move the tanks. The second was and that a comprehensive inspection of the tanks did not occur.

[43] The finding related to the movement of the tanks was fully supported by the evidence. The leaking tank was boxed in on four sides by the foundation wall, wood paneling wall, drywall, and the other tank. This tight configuration

is inconsistent with the movement of the tanks as Thompson Fuels alleges and anchors the trial judge's finding in the evidence.

[44] Thompson Fuels renews its submission from trial that a comprehensive inspection of the tanks was carried out when its OBT completed a "clean and service" at Mr. Gendron's house on February 27, 2002. This was another factual finding open to the trial judge on the evidence. The OBT did not testify and Thompson Fuels failed to maintain a record of the alleged comprehensive inspection, as it was required to do.

[45] Next, Thompson Fuels submits that given that Mr. Gendron stated that the fill pipe was always in the non-leaking tank, the water could not have entered it and caused the hole. Further, it argues that an OBT would test for water by removing the gauge and dipping for water and because the only fuel gauge was located on the non-leaking tank, the leaking tank would not have been tested.

[46] There is no merit to these submissions. The evidence established that there was water in both tanks. Although there was no fuel gauge on the leaking tank, there was an opening at the top of that tank that could have been used to test for water.

[47] Thompson Fuels further submits that the trial judge erred in finding that the industry standard applicable at the relevant time required water testing of

indoor tanks. Paul Thompson, Thompson Fuels' owner, and Perry German, one of Thompson Fuels' OBTS, both gave evidence tending to support the opposite conclusion.

[48] Notwithstanding the foregoing, there was evidence upon which the trial judge could conclude that water testing was the industry standard. It is clear that by the early 2000s the danger of water increasing the risk of internal corrosion was well known in the industry. Indeed, Granby's educational material from 2003-2004 described water as "the tank's #1 enemy". Another one of Thompson Fuels' OBTs, Geoff Richardson, testified that there was no difference between indoor tanks and outdoor tanks when testing for water, and that such tests were routine on deliveries and service calls. Thus, there is no basis to interfere with the trial judge's finding about the industry standard.

[49] Thompson Fuels also submits that the trial judge erred in finding that the oil tanks were installed too close to the exterior walls, as the *Installation Code for Oil-Burning Equipment* (the *Code*) applicable at the time of installation did not require any clearance for tanks from exterior walls. When a later version of the *Code* imposed new clearance requirements, the existing tanks were grandfathered in. Leaving aside the regulatory requirements, however, the trial judge correctly found that the leaking tank was boxed in and could not be inspected. That finding was supported by photographs in evidence, which

clearly show the tanks were too close to the wall, and by Mr. Gendron's testimony that he had to cut away drywall to view the source of the leak.

[50] With respect to the issue of shut-off valves, Thompson Fuels makes two submissions. First, it argues that at the time of installation of Mr. Gendron's tanks, there was no express requirement in the applicable *Code* for two shut-off valves for a twinned tank system. However, while the requirement may not have been express, the *Code* provided that a shut-off valve was to be installed in the fuel line as near as practicable to the exit from the supply tank. This implies that if there were two tanks, each tank would require a shut-off valve. Therefore, there was a sufficient evidentiary basis to support the trial judge's finding that the leaking tank required a shut-off valve.

[51] The second argument is that the trial judge erred in finding that the alleged non-compliance with the shut-off valve requirements caused or contributed to the oil leak where there was no evidence to support that finding. Further, Thompson Fuels argues that there was no evidence that a reasonable homeowner would know the potential function of a valve to stop oil flow between cross-connected tanks during a leak. However, the trial judge explicitly found that non-compliance with shut-off valve requirements did *not* cause the leak. He observed, nevertheless, that the non-compliance contributed to the extent of the damages, because it did not allow the non-incident tank to be shut off after the leak was discovered. That action would

have prevented the oil inside the non-incident tank from leaking through the twinned incident tank. The trial judge' finding that Mr. Gendron (or professionals, if they had been called in time) could have used the valve for this purpose is entitled to deference.

(ii) Legal Errors

[52] Thompson Fuels' first alleged legal error is that the trial judge failed to exercise his gatekeeper function with respect to the opinion evidence of Mr. Gendron's expert Robert Smith. However, there was no objection taken to Mr. Smith's qualifications at trial. In addition, there was nothing in his testimony that would reasonably require intervention by the trial judge, unlike the situation in *Bruff-Murphy v. Gunawardena*, 2017 ONCA 502, 138 OR (3d) 584 at paras. 63-67. Contrary to Thompson Fuels' position, the fact that Mr. Smith's opinion on whether a tank should be tagged out as a hazard was not accepted in another recent case is of limited relevance to the determination of the issues in the present case: *Bruff-Murphy* at paras. 30 to 32.

[53] Thompson Fuels next argues that the trial judge erred in failing to apply the "elements of negligence" and in not providing a proper causation analysis. Specifically, it submits that he did not explicitly assess the reasonableness of Thompson Fuels' actions. It further argues that a comprehensive inspection in

or around February 2002 would not have discovered any non-compliance that would have caused or contributed to the leak.

[54] I would not give effect to this ground of appeal. There was ample evidence to establish that Thompson Fuels frequently and flagrantly breached the Regulation and thereby breached the standard of care. Thompson Fuels delivered fuel oil on over 50 occasions when it was prohibited from doing so because there had been no comprehensive inspection. This is not merely "technical non-compliance", as it is argued. Nor is ignoring obvious violations and failing to tag out a tank in an unacceptable condition. Had Thompson Fuels conducted a comprehensive inspection in 2002 or at any point when the tanks should have been tagged out, it would have conducted a test for water. The trial judge found that, in the specific circumstances of this case, Thompson Fuels breached the standard of care by failing to test for water in either 2006 or 2007, because the water had accumulated over a lengthy period and would have been detected. It was the presence of water that ultimately caused the MIC. The trial judge's conclusion that these breaches caused the leak reveals no error.

[55] The final alleged legal error is the failure of the trial judge to apply the contractual exclusion clause in the customer service agreement signed by Mr. Gendron. The exclusion reads as follows:

> Thompson Fuels is not responsible for the inspection and/or maintenance of any fuel oil tank located on the premises.
>
> Thompson Fuels shall not be liable for any injury or damage to any person or property resulting from the existence and operation or non operation of any oil burning installation at your premises. Further Thompson Fuels shall not be liable for any damage caused by furnace failure while your residence is vacant nor for any special or consequential damages resulting from the failure to perform its obligations under this contract.

[56] The trial judge cited *Tercon Contractors Ltd. v. British Columbia (Transportation and Highways),* 2010 SCC 4, [2010] 1 SCR 69, at paras. 122-23, for the proper analytical approach to determining the enforceability of exclusion clauses:

> [122] The first issue, of course, is whether as a matter of interpretation the exclusion clause even *applies* to the circumstances established in evidence. This will depend on the Court's assessment of the intention of the parties as expressed in the contract. If the exclusion clause does not apply, there is obviously no need to proceed further with this analysis. If the exclusion clause applies, the second issue is whether the exclusion clause was unconscionable at the time the contract was made, "as might arise from situations of unequal bargaining power between the parties" (*Hunter*, at p. 462). This second issue has to do with contract formation, not breach.
>
> [123] If the exclusion clause is held to be valid and applicable, the Court may undertake a third enquiry, namely whether the Court should nevertheless refuse to enforce the valid exclusion clause because of the existence of an overriding public policy, proof of which lies on the party seeking to avoid

> enforcement of the clause, that outweighs the very strong public interest in the enforcement of contracts. [Emphasis in original.]

[57] The trial judge proceeded to apply the *Tercon* analytical framework. He first determined that the exclusion clause was not engaged in the circumstances of the case. The clause purported to exclude liability for Thompson Fuels' failure to perform obligations imposed by the contract, but the obligation to perform an inspection prior to May 1, 2007 was imposed by the Regulation.

[58] Further, analogizing to non-delegable duty cases, the trial judge held that under the third *Tercon* enquiry it would be contrary to public policy to allow a fuel distributor to use an exclusionary clause in a consumer contract to escape liability for failing to perform obligations imposed by law as a precondition to supplying fuel to that consumer. However, he noted that had the comprehensive inspection been carried out as required by law, the exclusion clause might have operated to exclude liability for Thompson Fuels' negligence in the performance of its contractual obligations.

[59] Thompson Fuels' argument on appeal is that the trial judge erred in finding that the comprehensive inspection was not completed. In addition, it submits that the exclusion clause was not contrary to public policy; rather, it was a legitimate effort to limit Thompson Fuels' liability as the *quid pro quo* for low-cost fuel delivery and "no heat" service. Further, the consequences of any

non-compliance with regulatory obligations are distinct from liability in a tort action. Thompson Fuels submits that it is permissible to contract out of liability for a civil action and that this case is a civil action, not a regulatory proceeding.

[60] For the reasons outlined above, I conclude that it was open to the trial judge to find that no comprehensive inspection had occurred. Accordingly, Thompson Fuels had failed to meet its regulatory obligation. That failure is the centrepiece of the case against Thompson Fuels. The trial judge correctly found that the exclusion clause does not expressly exclude liability for non-compliance under the Regulation. Exclusion clauses are to be strictly construed, and the burden is on the party relying on it to prove that it is applicable in a particular case: *Bow Valley Husky (Bermuda) Ltd. v. Saint John Shipbuilding Ltd.*, [1997] 3 S.C.R. 1210, at para. 28; *Braun Estate v. Zenair Ltd.*, [1998] O.J. No. 4841 (C.A.) at para. 10. There is nothing in the wording of the exclusion clause that references Thompson Fuels' regulatory obligations.

[61] In addition, I agree with the trial judge's analysis of the third *Tercon* enquiry. Thompson Fuels' argument that the exclusionary clause applies because this is a civil action and not a regulatory proceeding is without merit. The trial judge found civil liability on the part of Thomson Fuel on the basis of repeated regulatory violations. The trial judge was correct to conclude that it would be contrary to public policy to permit a fuel distributor to escape its legal

obligation to conduct a comprehensive inspection as a precondition for supplying fuel to a customer.

(2) TSSA Liability

[62] There were two specific allegations of negligence made against the TSSA at trial. The first was that it failed to conduct an immediate and proper inspection of the site on December 22, 2008. The second was that the delineation order of December 24, 2008 was not adequate to address the urgency of the situation. In addition, it was alleged that the TSSA breached a general duty of care to Mr. Gendron in the circumstances.

[63] Relying on *Ingles v. Tutkaluk Construction*, 2000 SCC 12, [2000] 1 SCR 298, the trial judge held that the TSSA inspector owed Mr. Gendron a *prima facie* duty of care to conduct his inspection with reasonable care. The trial judge noted that he was provided no evidence of the standard of care required of a TSSA inspector. Therefore, the trial judge concluded that he could not find that either the TSSA inspection or the subsequent delineation order issued on December 24, 2008 fell below the standard of care that would be expected of an ordinary, reasonable, and prudent inspector in the same circumstances.

[64] The trial judge also found that causation had not been proven, noting that even if the 120-day deadline specified in the delineation order was negligent, Mr. Gendron failed to prove that such negligence caused or

contributed to the damages because there was no evidence that a reasonable delineation order would have avoided or reduced the damages.

[65] The trial judge then considered whether the TSSA owed Mr. Gendron any further private law duty of care. Specifically, he analyzed whether the TSSA owed any such duty pursuant to its mandating statute, the *Technical Standards and Safety Act 2000,* S.O. 2000, c. 16, or the MOU.

[66] The trial judge found that the statutory role of the TSSA was the protection of public safety and the environment and that it was not geared to the protection of an individual property owner. Further, he found that the MOU did not impose on the TSSA a private law duty of care to Mr. Gendron, because it was an inter-agency agreement regarding their potentially overlapping responsibilities for the reporting, assessment, and management of oil spills. Finally, he found that the TSSA had no legal obligation to advise Mr. Gendron to call his insurer, as it owed him no duty of care in that regard.

[67] On appeal, Thompson Fuels and Mr. Gendron make essentially the same arguments they unsuccessfully asserted at trial. They submit that the trial judge erred by not finding that the TSSA breached its duty of care to Mr. Gendron and the public to reasonably inspect the property, monitor for any contamination escaping off site, issue an order for remediation as required,

and ensure that Mr. Gendron took reasonable steps to protect the environment. I would not give effect to any of these arguments.

[68] As noted above, there was no evidence tendered regarding the standard of care of a prudent TSSA inspector or the reasonable time period for compliance with an order. The failure to lead such evidence is fatal to the claims against the TSSA in this case. Therefore, the trial judge did not err in concluding that he could not find that the TSSA inspection or order fell below the standard of care.

[69] I likewise see no error in the trial judge's conclusion that neither the *Technical Standards and Safety Act* nor the MOU imposed any private law duty of care. Nothing in the wording of the legislation or the MOU is indicative of any private law duty of care. The act outlines general public obligations to promote and protect public safety and the environment. Likewise, the MOU is an operational document designed to ensure that the TSSA and MOE work cooperatively and effectively in carrying out their mandates.

(3) Contributory Negligence

[70] Both Mr. Gendron and Thompson Fuels submit that the trial judge erred in his analysis of contributory negligence. First, Mr. Gendron submits that given that Thompson Fuels did not raise any issue when servicing the tanks, it was reasonable for him to assume that their installation was compliant. I reject this

argument. Mr. Gendron chose to install the tanks on his own without professional assistance as was required by law. The responsibility for the inadequacies with the installation cannot completely be foisted on Thompson Fuels.

[71] Mr. Gendron also argues that the trial judge erred in finding that the use of jerry cans to fill the tanks with stove oil was negligent and fell below the standard of care of a reasonably prudent person. In my view, that finding was open to the trial judge on the evidence and was consistent with Mr. Gendron's general practice of finding ways of reducing costs without regard to the safety of his actions.

[72] The trial judge also found that Mr. Gendron was negligent in failing to have the tanks regularly inspected. On appeal, Mr. Gendron argues that, because OBTs from Thompson Fuels attended for service calls on five occasions, he did not need to arrange for additional inspections. I find no error in the trial judge's finding that a reasonable person in the particular circumstances of this case would have obtained more thorough inspections of the tanks.

[73] At trial, Thompson Fuels argued that Mr. Gendron was also negligent because he did not disconnect a "big O" drainage pipe that connected his house to the city culvert and did not bring it to the attention of any professional.

On appeal, Thompson Fuels submits that the trial judge erred in rejecting this argument. The trial judge noted that there was no evidence that the drainage pipe was illegal or contrary to municipal standards. He also found that a reasonable person in Mr. Gendron's position would not be expected to know that the big O drain should be immediately disconnected. These were findings open to the trial judge on the evidence and I see no basis to interfere with them.

[74] This leaves the issue of the trial judge's analysis of the mitigation efforts made by Mr. Gendron. This is a ground of appeal asserted both by Mr. Gendron and Thompson Fuels. The trial judge is criticised by Mr. Gendron for holding that he was contributorily negligent for failing to promptly report the leak. He submits that the trial judge failed to properly consider his efforts to mitigate the loss and his genuine belief that he was succeeding in collecting all of the leaking oil. Further, the trial judge is said to have erred in relying on ss. 92(1) and 2 of the *EPA* to find that Mr. Gendron was required to immediately report a leak to the Spills Action Centre, given that there was no evidence that he knew or ought to have known that the oil was escaping into the natural environment.

[75] In contrast, Thompson Fuels submits that the trial judge erred in failing to find that Mr. Gendron's 12-day delay in starting the remediation process was a breach of the standard of care, arguing that if Mr. Gendron had acted

reasonably and sought professional help right away, the leak would have been contained. Further, it submits that the trial judge erred by not addressing Mr. Gendron's failure to mitigate in breach of s. 93 of the *EPA*.

[76] I would not give effect to these arguments. Mr. Gendron's conduct in response to the spill was fully considered by the trial judge. He properly found that Mr. Gendron failed to take the steps of a reasonably prudent homeowner in the circumstances. This finding was amply supported by the evidence, including his failure to contact the Spills Action Centre or Thompson Fuels' 24/7 emergency hotline. This was not a minor occurrence. These were large-capacity tanks that were leaking oil. It was not the time for a do-it-yourself solution. Homeowners have an obligation to protect the environment and must act prudently and responsibly. Mr. Gendron did not. The trial judge did not err in so finding.

[77] It is difficult to understand the submission made by Thompson Fuels that the trial judge did not consider Mr. Gendron's delay in acting and his failure to mitigate. To the contrary, the trial judge accepted Thompson Fuel's submission, noting that "Mr. Gendron's delay in reporting the oil leak and obtaining professional help resulted in increased damages that could have been averted if he had reported the leak as soon as he discovered it, rather than trying to deal with it on his own." That is clearly a finding that Mr. Gendron failed to respond promptly or to mitigate and the trial judge would have been

mindful of that finding in apportioning liability. There is no merit in Thompson Fuels' argument to the contrary.

(4) Apportionment of Liability

[78] Thompson Fuels submits that the portion of liability assigned to Mr. Gendron by the trial judge was too low, given that he was involved in repeated patterns of negligent conduct. It argues that the 60% liability assigned to Mr. Gendron shows that the trial judge failed to properly weigh the totality of Mr. Gendron's blameworthy conduct. In addition, Thompson Fuels submits that there are strong policy reasons to attribute fault to homeowners who fail to take reasonable steps to protect the environment and public safety.

[79] Thompson Fuels argues that the decision in *Brown v. Davis & McCauley Fuels Ltd.*, 2010 ONSC 4674, is most analogous. There, the plaintiffs were found 90% contributorily negligent since they had discovered a slow leak but did not take any active measures to fix the leak or clean up the spill. Thompson Fuels submits that Mr. Gendron should be found wholly or at least 90% at fault.

[80] Mr. Gendron also appeals the apportionment of liability. He submits that substantially more fault should be attributed to Thompson Fuels because it failed to comply with its statutory obligations. He also argues that Thompson Fuels' reliance on *Brown* is misguided because he had responded promptly to the leak. Mr. Gendron relies on *Appleyard v. Earl* (2009), 90 C.L.R. (3d) 49,

where the service technician was held 70% liable and the homeowner 30% contributorily negligent. He submits that Thompson Fuels' liability should have been fixed at a minimum of 70%.

[81] This was another issue that was carefully considered by the trial judge. He concluded that Mr. Gendron's contribution was not a minor inadvertent lapse, but a series of actions that contributed to the leak and increased the damages. Mr. Gendron was found to be negligent in the installation of the oil tank, his failure to maintain the tank, and his failure to promptly report the leak. More significantly, the trial judge found that Mr. Gendron negligently introduced water into the incident tank.

[82] With respect to Thompson Fuels, the trial judge found that it was negligent in its failure to conduct the legally required comprehensive inspection. He found that Thompson Fuels shared with Mr. Gendron responsibility for the fact that there was only a single shut-off valve. Further, Thompson Fuels should have tagged-out the oil tank when it conducted its maintenance visits in 2006 and 2007, particularly because one end of the tank was not available for visual inspection. However, the trial judge went on to find that this was not a case in which the homeowner relied on the expertise of the distributor. He concluded that, "Mr. Gendron thought that he could handle things on his own and that he had matters 'under control'".

[83] I see no error in the trial judge's apportionment analysis. He considered the comparative blameworthiness of the parties and concluded that the majority of the responsibility for the loss lay with Mr. Gendron. That was a finding that is entitled to considerable deference: *Ingles v. Tutkaluk Construction Ltd.*, 2000 SCC 12, [2000] 1 S.C.R. 298, at para. 57; *Treaty Group Inc. v. Drake International Inc.*, 2007 ONCA 450, 86 O.R. (3d) 366, at para. 29. Although a body of accumulated case law can provide broad guidance about the appropriate range of contributory negligence in a given factual context, the apportionment of liability remains a highly fact-specific exercise that is not an exact science: *Snushall v. Fulsang* (2005), 78 O.R. (3d) 142 (C.A.), at para. 33; *Treaty Group Inc. v. Drake International Inc.* (2005), 15 B.L.R. (4th) 83 (Ont. S.C.), at para. 74. There is no basis for appellate interference with the trial judge's apportionment of liability.

(5) Damages

[84] Thompson Fuels submits that the evidence at trial indicated that there was pre-existing contamination on Mr. Gendron's property from the old underground oil tank, the public roadway area, and the lake, the latter being due to a spill from the nearby marina. However, according to Thompson Fuels, DLS cleaned up the property to the "non-detect" standard, not to background levels of contamination, as required.

[85] The trial judge conducted a detailed analysis of the remediation costs both on and off of Mr. Gendron's property. He did so mindful of the instruction from this court in *Midwest Properties Ltd. v. Thordarson*, 2015 ONCA 819, 128 OR (3d) 81, at para. 63 that damages should be awarded based on the principle that best ensures that the environment is returned to its pre-contamination condition. Trial judges should be careful not to award damages for remediating existing contamination. However, it is often difficult, if not impossible, to delineate between pre-existing and new contamination. Courts should not discourage proper remediation efforts.

[86] The trial judge did not find that there was any pre-existing contamination outside Mr. Gendron's property. He did find, however, that DLS had to quickly respond to an emergency situation that required immediate efforts to remediate the lake. He was not persuaded that DLS's ensuing efforts were unreasonable or not reasonably related to the leak from Mr. Gendron's house. The trial judge's findings do not reveal a palpable and overriding error

[87] By contrast, the trial judge found that there was evidence of excessive remediation on-site. For example, the evidence established that there was a reasonable possibility that oil from the old outdoor tank had contaminated the soil. DLS sampled soil near the house and at the outer excavation limits, but did not take samples in between. It did not prepare a forensic analysis to get a chemical "fingerprint" of the spill to ensure that it could identify the contaminant

by source. In addition, in its preliminary Assessment Report, DLS admitted that chemicals found at low levels at certain boreholes had not been attributed to the subject leak. Given this evidence, the trial judge appropriately reduced the damages attributable to excavating, hauling, and disposing of the contaminated soil by 50 percent.

[88] Thompson Fuels further submits that the rebuilding costs awarded for Mr. Gendron's home are unreasonable and result in betterment. Thompson Fuels argues that the original home was not compliant with the building code, while Mr. Gendron's new home is. It is submitted that the trial judge erred by not recognizing this as a betterment.

[89] The trial judge noted that Mr. Gendron adduced detailed evidence regarding the estimated cost of rebuilding the house as close as possible to its condition prior to the leak. Thompson Fuels called no contradictory evidence. In particular, there was no evidence regarding the value of complying with building code requirements or on whether it is more expensive to build a home that meets the building code requirements than one that does not. Thus, the trial judge did not err in finding that no betterment had been established on this basis.

[90] The second betterment issue relates to a line of credit that was secured against the home prior to the leak. As part of the estimate on the cost to replace

the home, a figure was included to payout an existing line of credit. The trial judge impliedly accepted this as an appropriate component of the rebuilding estimate. On appeal, Mr. Gendron justifies this amount on the grounds that the lender had the right to request repayment as a result of the demolition of the house, and did so. He argues therefore that this cost flows from the leak and is thereby compensable.

[91] I disagree. In calculating damages, the court was obliged to put Mr. Gendron in the position he would have been in but for the leak, less his contributory negligence. By compensating him for the repayment of the line of credit, the trial judge violated this controlling principle. As a consequence of awarding these damages, Mr. Gendron was placed in a better position than he was in before the leak. Prior to the leak he owned a home that was encumbered with a line of credit. As a result of the trial judge's decision, he now owns a home of essentially the same value that is not encumbered by a line of credit. This is an obvious betterment. The damages should be reduced to deduct the payment of the line of credit.

(6) Adequacy of Reasons

[92] Thompson Fuels submits that the trial judge's reasons are inadequate. Trial judges are required to provide reasons that inform the parties, the appellate court, and the public the result of the case and how the judge

reached his or her conclusion: *Dovbush v. Mouzitchka*, 2016 ONCA 381, 131 O.R. (3d) 474, at para. 22; *R. v. Sheppard*, 2002 SCC 26, [2002] 1 S.C.R. 869, at para. 24.

[93] It would appear, at least in this court, that inadequacy of reasons has become a boilerplate ground of appeal. When a legal or factual error is not readily apparent, often an allegation is made that the reasons are inadequate in order to add heft to what is otherwise a weak appeal. Minor omissions are seized upon as significant deficiencies in the judge's reasoning process. Appellants then argue that, try as they might, they just cannot understand what the judge was thinking or how he or she got to the result.

[94] This case represents perhaps the high water mark of this unfortunate trend. After a 27-day trial with multiple issues, the trial judge wrote 79 pages of reasons. The number of pages is not necessarily a reflection of an adequate decision. But in this case, the trial judge meticulously considered both the evidence and the legal issues at play. His reasons are logically coherent, thoughtful, and clearly stated.

[95] The specific complaints are entirely without merit. For example, the suggestion that trial judge did not consider Mr. Gendron's failure to mitigate is contradicted by the plain wording of his reasons. There is a difference between

being unable to understand a trial judge's reasons and being wilfully blind as to their meaning. This is an example of the latter.

[96] The other complaint is that Mr. Gendron's credibility and reliability were undermined at trial and the trial judge failed to provide adequate reasons because he did not expressly assess Mr. Gendron's credibility and reliability. A trial judge has the freedom to craft his or her reasons as he or she fits as long as they meet the practical imperatives mentioned above. This was not a trial were credibility played a significant role. The trial judge was not obliged to deal with every alleged inconsistency in Mr. Gendron's evidence. He was required to deal with the issues raised and make transparent and understandable findings. The trial judge did that and much more.

(7) *Pierringer* Agreement

[97] A *Pierringer* agreement is used in multi-party litigation when one or more defendants, but not all of them, wish to settle with the plaintiff. These agreements permit a settling defendant to be released from a lawsuit under certain specific terms, leaving the remaining non-settling defendants to continue in the proceeding. Under the terms of a *Pierringer* agreement, a plaintiff may only seek recovery from the non-settling defendants on a several liability basis instead of a joint and several liability basis. The practical result is that settling defendants are no longer involved in the litigation and the

remaining non-settling defendants are responsible only for the loss they actually caused.

[98] In the present case, Mr. Gendron settled with Granby shortly after the start of trial and the parties entered into a *Pierringer* agreement. The trial judge properly considered whether Granby was liable for any part of the loss. He dismissed the claim against Granby in its entirety. That ruling has not been appealed.

[99] Thompson Fuels submits that the trial judge erred by failing to reduce the amount awarded against it by the amount of the Granby settlement, or, alternatively, by failing to reduce the total damages by the settlement amount before applying the allocation of fault. It argues that Mr. Gendron will receive unfair compensation if he receives more than the damages awarded to him based upon the negligence of the defendants. According to Thompson Fuels, Mr. Gendron can only recover damages and interest in the total amount of $901,747, being 40% of total assessed damages, and any compensation above that amount is unfair.

[100] Mr. Gendron takes the position that double recovery does not occur until he receives compensation in excess of his total loss, being $2,161,570. Until he receives more than what he has lost, Mr. Gendron argues, he cannot be considered to have been unfairly compensated.

[101] In his ruling on post-trial motions, the trial judge noted that the application of the principle against double recovery is straightforward in cases in which no contributory negligence is attributed to the plaintiff. The trial judge considered a number of cases submitted by the parties, but none of them expressly considered the impact of a finding of contributory negligence on *Pierringer* agreements.

[102] The trial judge relied on this court's decision in *Laudon*. In that case, the plaintiff entered into a modified "Mary Carter" agreement that had many of the features of a typical *Pierringer* agreement. The plaintiff had been injured in a boating accident and reached a settlement agreement with one defendant in the amount of $365,000. At trial, the jury awarded total damages of $312,021. The plaintiff was found to be 11% liable, the settling defendant 50%, and the non-settling defendant 39%. Thus, the plaintiff was awarded a net judgment of $277,698 (89% of $312,021) and the judgment against the non-settling defendant was $121,688 (39% of $312,021). The trial judge refused to deduct the amount paid to the plaintiff by the settling defendant, and ordered the non-settling defendant to pay the full $121,688.

[103] This court allowed the appeal, finding that the trial judge had permitted double recovery. Critically for present purposes, the court deducted the settlement amount from the total damages award ($312,021), not the net damages award ($277,698): *Laudon*, at para. 55. However, the settlement

amount in that case was so high that the distinction between these two approaches did not need to be considered. Under either approach there would be double recovery.

[104] The trial judge considered himself bound by the methodology employed by this court in *Laudon*, which, in his words, "infers that the principle of avoiding double recovery is based on the damages caused by the defendant(s) without reference to the plaintiff's contributory negligence (if any)". He concluded his analysis by stating, "Provided a plaintiff does not recover more than the total loss caused by the defendant(s) (without reference to the plaintiff's contributory negligence) there is no double recovery." In the result, the trial judge declined to reduce the amount awarded at trial by the amount paid under the *Pierringer* agreement.

[105] Subsequent to the trial judge's decision, the Alberta Court of Appeal released *Canadian Natural Resources Ltd. v. Wood Group Mustang (Canada) Inc.*, 2018 ABCA 305, 76 Alta. L.R. (6th) 1. That case involved a buried 32 km emulsion pipeline. Despite the fact that the pipeline had a life expectancy of 30 years, it failed after about three months of operation. In the litigation that ensued the plaintiff sued multiple parties and entered into *Pierringer* agreements with two of the defendants. At trial, the settling defendants were held to be partially responsible for the damages and it turned out that in both cases the plaintiff settled for less than it would have been entitled to had it

proceeded to trial against those defendants. The trial judge awarded total damages of $45.425 million but found the plaintiff to be 50 percent contributorily negligent.

[106] On appeal, the Alberta Court of Appeal considered several issues related to the *Pierringer* agreements. Justice Slatter, writing for the majority, provided detailed reasons why the court declined to depart from its earlier decision in *Bedard v. Amin*, 2010 ABCA 3, 17 Alta LR (5th) 225, where it held that a settling plaintiff must account to a non-settling defendant for any recovery in excess of its actual damages.

[107] Justice Slatter then considered the question of whether, in determining if the settling plaintiff has been overcompensated, one measures the plaintiff's recovery against its total loss, or only against that portion of the loss that was not caused by its contributory negligence. His analysis of this issue was as follows:

> [149] The trial judge found that CNRL [the plaintiff] suffered damages of $45.425 million, but also found that CNRL was 50% contributorily negligent. As a result, CNRL was only able to recover one-half of its losses from the settling and non-settling defendants. CNRL argues that no issue of overcompensation under the *Pierringer* agreements arises until it has recovered all of its losses, including those for which it was contributorily negligent: *Gendron v Doug C. Thompson Ltd. (c.o.b. Thompson Fuels)*, 2017 ONSC 6856 (CanLII) at para. 45.

> [150] In principle, this argument has merit. CNRL's settlement with Shaw Pipe and Flint Field Services had as much to do with CNRL's responsibility for the damage, as it did with those defendants' responsibility. Any notional over settlement or under settlement with the settling defendants might relate to a miscalculation of CNRL's responsibility. If the notional over settlement was a result of an underestimation of CNRL's responsibility, that could not properly be characterized as any sort of double recovery. CNRL suffered the damage in question, and received compensation for that damage, but until it recovered 100% of its damages it would not be overcompensated so as to engage the rule in *Ratych v Bloomer.*
>
> [151] It would be ironic if the non-settling tortfeasor, IMV Projects, was entitled to credit for the "over settling" with the settling defendants, but the contributorily negligent tortfeasor, CNRL, was not. Likewise, if the plaintiff over settled against one defendant, but under settled against another, there would be no justification for giving the non-settling defendant any credit until the plaintiff was fully indemnified for its losses. *Sable Offshore* confirms that plaintiffs should be encouraged to settle multiparty claims, even if they are contributorily negligent. The settling but contributorily negligent plaintiff in a *Pierringer* arrangement should not have to give credit to the non-settling defendant until it is fully indemnified for its losses. [Emphasis in original.]

[108] I agree with and adopt that analysis. In addition, I would add the following. The terms of a settlement agreement typically reflect many factors, including an assessment of potential liability and of the legal costs associated with proceeding to trial. A settlement amount could also include elements that are more difficult to quantify. For example, in the commercial context, costs

associated with lost management time devoted to the trial or lost potential revenues if the plaintiff and the defendant contemplate a future business relationship may be significant factors. Thus, it is not always a simple matter to determine whether the plaintiff has been overcompensated by reason of a partial settlement. In any event, courts should encourage settlements and responsible plaintiffs who reach a settlement agreement should not be punished by reason of the fact that they appear to have reached a settlement for an amount greater than what the court ultimately awards.

[109] *Pierringer* agreements have their origin in American jurisprudence, specifically the decision of the Supreme Court of Wisconsin in *Pierringer v. Hoger*, 124 N.W.2d 106 (1963). It is helpful therefore to consider the U.S. case law.

[110] The states of Minnesota and North Dakota have formally followed the Supreme Court of Wisconsin's lead: *Shantz v. Richview, Inc.*, 311 N.W.2d 155 (Minn. 1980); *Bartels v. City of Williston*, 276 N.W.2d 113 (N.D. 1979). Similar arrangements have been sanctioned by other courts in the United States in specific circumstances: see e.g. *McDermott, Inc. v. AmClyde*, 511 U.S. 202 (1994) (in federal admiralty cases). Without attempting to provide a comprehensive account of U.S. jurisprudence in this area, a review of American jurisprudence on the issue of set-off is enlightening.

[111] The cases from these jurisdictions indicate that, although the liability of a non-settling defendant is limited to its proportionate share of fault, the non-settling defendant generally does not enjoy a further right of set-off against the amount of the settlement: *McDermott*, at p. 221; *Shantz*, at p. 156; *McDonough v. Van Eerden*, 650 F. Supp. 78, 81 (E.D. Wis. 1986). The courts specifically contemplate that a *Pierringer* agreement for more than the settling defendant's share of fault may result in a "windfall" for the plaintiff: *Rambaum v. Swisher*, 435 N.W.2d 19, 23 (Minn. 1989). That is not the law in Canada, but two of the policy considerations underlying this rule are instructive in this case.

[112] First, the American courts recognize the benefits in encouraging settlements and protecting the bargain the plaintiff and settling defendant have reached. In *Unigard Ins. Co. v. Ins. Co. of N. Am.*, 516 N.W.2d 762, 766 (Wis. Ct. App. 1994), the court observed that a settling defendant purchases an unspecified portion of the total liability, and takes the chance of paying too much or too little for its peace of mind. The First Circuit has commented that "*Pierringer* releases equitably distribute the risks of settlement among the parties", by imposing the risks on parties who bargained for those risks: *Austin v. Raymark Indus., Inc.*, 841 F.2d 1184, 1190-91 (1988). Several U.S. courts have accordingly considered it inequitable to allow the non-settling defendant to profit from the settlement agreement by obtaining a set-off: *Rambaum*, at p. 23; *Anunti v. Payette*, 268 N.W.2d 52, 56 (Minn. 1978). Courts have noted that

allowing set-off would discourage settlement not only for plaintiffs but also for non-settling defendants, who would stand to gain the benefits of settlements at the end of trial. As the *Rambaum* court noted, allowing set-off would mean that "settling parties could no longer settle piecemeal" such that "the *Pierringer* would be effectively dismantled": at p. 23.

[113] The second factor underlying the rule against set-off is that it is considered fair to the non-settling defendant. Depending on the apportionment of liability at trial, the *Pierringer* agreement may turn out to benefit the plaintiff or the settling defendant. But the non-settling defendant will always be required to pay the proportion of damages precisely commensurate to its own fault. As a result, it should be no concern to the non-settling defendant how much the plaintiff received from the settling defendant: *Shantz* at p. 156.

[114] Although the rule in Canada is different, Canadian courts have not been indifferent to these considerations. In *Ratych v. Bloomer*, [1990] 1 S.C.R. 940, for instance, the Supreme Court cautioned against double-recovery, but it allowed for insurance proceeds not to be set off on the principle that plaintiffs should not be deprived of bargained-for contractual benefits: at paras. 45, 53. In *Ashcroft v. Dhaliwal*, 2008 BCCA 352, 83 B.C.L.R. (4th) 279, at para. 28, the Court of Appeal for British Columbia noted the public interest in encouraging settlements but balanced it with the rule against double recovery. The *Bedard* court recognized "the element of unfairness" in a non-settling

defendant reaping the benefits of the settlement, but considered that the Canadian policy against double-recovery was fair in a broader sense because it allowed the plaintiff to be fully compensated: at para. 16. In light of similar considerations, the court held in *Canadian Natural Resources Ltd.* that "The rule against overcompensation should be applied generously in favour of the settling plaintiff, by accepting that there is in fact no overcompensation until the plaintiff is fully indemnified": at para. 148.

[115] I agree with the policy analysis described above about fairness to the non-settling defendant and encouragement of settlements. A *Pierringer* agreement is by its nature a contract to which the non-settling defendant is a stranger. Absent double compensation, a non-settling defendant should not be able to rely on the benefits of that agreement beyond the guarantee that it will not be required to pay more than its share of the liability. By taking this approach, a plaintiff who may have been contributorily negligent will be encouraged to attempt to settle.

[116] For the foregoing reasons, I would dismiss this ground of appeal.

(8) Contribution and Indemnity

[117] Mr. Gendron submits that the trial judge erred in not finding that Thompson Fuels was liable for its proportionate share of the $313,005.08 Mr. Gendron was ordered to pay pursuant to s. 100.1(1) of the *EPA*.

[118] Section 100.1 of the *EPA* gives a municipality the right to issue orders against the "the owner of the pollutant or the person having control of the pollutant" within the meaning of the *EPA*. The trial judge rejected Mr. Gendron's argument that Thompson Fuels was the "owner" of the oil immediately before the leak. In his view, pursuant to s. 19, Rule 5 of the *Sale of Goods Act*, RSO 1990, c S.1, Mr. Gendron became the "owner" of the oil upon delivery, rather than when payment for the oil was processed approximately five hours after delivery.

[119] Consequently, Gendron's s. 100.1 claim for contribution and indemnity could only succeed if Thompson Fuels had "the charge, management or control of a pollutant immediately before the first discharge". In the trial judge's view, the key phrase was "immediately before". He interpreted this phrase to mean that there can be no intervening act between "charge, management or control" and the discharge of the pollutant. In his view, Thompson Fuels lost control of the oil upon delivery, and therefore did not have control "immediately" before the first discharge. He therefore dismissed the claim for contribution and indemnity.

[120] I agree with the trial judge's analysis. He properly applied the provisions of s. 100.1 to the facts of this case. Thompson Fuels could not be the owner of the fuel or have control of the fuel once it had delivered the fuel to its customer.

(9) Costs

[121] Thompson Fuels seeks leave to appeal the award of costs against it. It submits that the trial judge failed to properly apply a reduction of costs for the allocation of fault, the impugned conduct of Mr. Gendron, and the partial settlement paid by Granby. The trial judge is also said to have erred by failing to consider the offers to settle before trial.

[122] Costs awards are entitled to considerable deference. Appellate courts will set aside a costs award on appeal only if the trial judge has made an error in principle or if the costs award is plainly wrong: *Hamilton v. Open Window Bakery Ltd.*, 2004 SCC 9, [2004] 1 S.C.R. 303, at para. 27.

[123] This is not a case warranting interference by this court. The trial judge specifically considered the apportionment of fault and the negligence of Mr. Gendron. He rejected the submission that Mr. Gendron's costs should be apportioned on the same percentage basis as his liability. This decision was well within the trial judge's discretion in fixing costs and there is no basis for appellant interference. I would also reject the submission that there should be a reduction in Mr. Gendron's costs as a consequence of the Granby settlement for the same reasons detailed above considering the impact of the *Pierringer* agreement.

[124] The trial judge found that Thompson Fuels came nowhere close to beating its offer to settle for a $300,000 contribution to a $650,000 total settlement amount. Therefore, he decided that rule 49.10 for adjustment of costs in light of settlement offers did not apply. Having made a woefully inadequate offer to settle, Thompson Fuels cannot seriously contend that the trial judge erred in not reducing costs as a consequence of the offer.

VI. Disposition

[125] For the foregoing reasons, I would dismiss the appeals save for a reduction in the damages equal to the amount paid in relation to Mr. Gendron's line of credit. As there has been divided success, I would not award costs for the appeals.

Released: APR 12 2019

I agree. J.A.

I agree. J.A.