Gendron v. Doug C. Thompson Ltd. (c.o.b. Thompson Fuels), [2017] O.J. No. 3717

Ontario Judgments

Ontario Superior Court of Justice

R. Charney J.

Heard: November 7, 14, 16-18, 22-25, 28-30,

December 1, 2, 5, 6, 9, 12-15,

2016; January 4-6, 26-27 and 31, 2017.

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Between Wayne Allan Gendron, Plaintiff, and Doug C. Thompson Ltd. operating as Thompson Fuels, Technical Standards and Safety Authority, and les Reservoirs d'Acier de Granby Inc., Defendants

(431 paras.)

Counsel

Martin Forget and Fahreen Kurji, for the Plaintiff.

Albert Wallrap, for the Defendant, Doug C. Thompson Ltd. Operating as Thompson Fuels.

Adam Grant and Miranda Serravalle for the Defendant, Technical Standards and Safety Authority.

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Introduction

1 The plaintiff, Mr. Wayne Gendron owned a house across the road from Sturgeon Lake, Ontario. The house was heated by an oil furnace supplied by two oil tanks in the basement of his home. At approximately 4:15 p.m. on December 18, 2008, Thompson Fuels delivered 700 litres of fuel oil to his home. The oil was delivered through a fill pipe located outside of the home.

2 Mr. Gendron arrived home from work about one hour later and smelled oil coming from his basement. He went downstairs and saw oil on the basement floor. Mr. Gendron examined the tanks to find the source of the leak, but the tanks were installed tight against the wall and he could not find any holes. He did see oil leaking from the end of the tank against the wall, and set about collecting the leaking oil in Tupperware containers. He continued to collect the leaking oil into the early morning hours, until the tanks were empty. Using these containers he gradually collected and filled 7 "jerry cans" of 25 litres each.

3 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. He went to sleep, and called Thompson Fuels later in the afternoon on December 19, 2008. He did not call to report a leak, but called 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 tanks, 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.

4 As events unfolded over the next few days, it became apparent that the oil leaked from one of the oil tanks (the tank with the leak is referred to as the "incident tank", the tank that did not leak is referred to as the "non-incident tank" or the "good tank") and found its way to a crack between the basement wall and the floor. Some of the oil remained under Mr. Gendron's house, but some of it made its way through a drainage system under his house into the city's culvert and from there into Sturgeon Lake.

5 Nearly $2 million was spent to remediate the oil that spilled into Sturgeon Lake, and Mr. Gendron's house was eventually demolished to remove the contaminated soil under the foundation.

6 Mr. Gendron claims that Thompson Fuels, which acted as both Mr. Gendron's fuel supplier and service technician, failed to properly inspect the oil tanks, which caused the spill and the damages.

7 Mr. Gendron claims that the Technical Standards and Safety Authority (TSSA), the administrative authority responsible for regulation and enforcement of fuels in Ontario, which was advised of the spill on December 19, 2018, failed to properly inspect the spill and failed to advise Mr. Gendron of the immediate need to respond to the emergency situation to avoid further environmental damage.

8 Finally, Mr. Gendron claims that the oil tank manufacturer, Les Reservoirs D'Acier de Granby Inc. (Granby), manufactured an oil tank that it knew was prone to internal rust that could result in premature failure and leaks, and failed to provide warnings or an instruction manual to the consumer.

9 Mr. Gendron alleges that each of these defendants was negligent and seeks damages against them. Each of the defendants denies liability, and argues that Mr. Gendron was primarily responsible for leak and ensuing damages,

and, in any event, that the cost of remediation was unreasonable and excessive and not reasonably foreseeable in the circumstances.

Facts

1) Oil Tank Installation

10 In order to understand why the oil tank leaked in 2008 we have to start in 2000, when Mr. Gendron's home, located at 93 Hazel St., Dunsford Ontario (93 Hazel) was heated by an oil furnace supplied by an underground oil storage tank located outside his home.

11 In the summer of 2000 Mr. Gendron, with the assistance of two casual labourers, removed the underground storage tank and discarded it.

12 In November 2000 Mr. Gendron purchased two new Granby above ground indoor tanks from a fuel supplier named British Empire Fuels. British Empire Fuels is not a party to this action. At that time British Empire Fuels supplied the oil to Mr. Gendron's oil tanks.

13 The tanks were both 910 litre (200 gallon) ULC-S602 certified 14 gauge (1.8 millimetre) steel above ground fuel oil tanks manufactured by Granby in 1999. This type of tank is referred to as a "side" or "end" outlet tank because the oil outlet is on one of the end sides of the tank about 2 inches from the bottom of the tank. This is in contrast to what is known as a "bottom outlet" tank where the outlet is located at the bottom of the tank. The ULC is the Underwriters' Laboratories of Canada and is an independent product safety testing and certification organization that develops safety standards for products including furnaces and oil tanks.

14 Installation of oil tanks by a qualified Oil Burner Technician (OBT) was both the law and the industry practice and standard in the year 2000. Pursuant to s. 29(2)9 of Ontario Regulation 348/96 (Certificates) enacted under the *Energy Act*, R.S.O. 1990, c. E.16, only a person holding an OBT certificate was authorized to install above-ground tanks.[1]

15 The installation of oil tanks was also governed by the National Standards of Canada "*Installation Code for Oil Burning Equipment*". The fifth edition of this code was published in 1991 and is referred to as "B139-M91". B139-M91 established the industry standards and was followed by qualified installers in the industry. B139 was prepared by the Canadian Standards Association and approved by the Standards Council of Canada. B139 established the minimum requirements for the installation of oil burning equipment including oil tanks.

16 The sixth edition of B139 was published by the National Standards of Canada in April 2000 (B139-00). B139-00 was formally adopted as part of the fuel oil regulations by the TSSA when new regulations were enacted on June 1, 2001.

17 Granby did not sell oil tanks directly to homeowners or to retailers like Home Depot because homeowners were not qualified to install oil tanks. Granby sold tanks only to wholesalers in the expectation that the wholesalers would sell the tanks to professional installers who would ensure that they were installed by a qualified OBT. Granby did not publish an installation manual until 2004.

18 The Granby oil tank was manufactured to the standards established by B139-M91 (see s.6.1.1.1 (i) of the fifth edition).

19 Both B139-M91 and B139-00 required that all oil tanks "be installed in accordance with the manufacturer's instructions and the appropriate ULC standard(s)" (at s.6.3.2). Granby did not provide "manufacturer's instructions" for its oil tanks at this time, and the expectation was that the tank would be installed buy a qualified OBT in accordance with standards set out in B139.

20 British Empire Fuels did not install the oil tanks, nor did Mr. Gendron have a qualified OBT install his oil tanks. His friend Andrew (who is not a party to this action) told Mr. Gendron that he could install the tanks even though he was not licenced to do so. The two tanks were installed side-by-side in the basement by Mr. Gendron and his friend Andrew.

21 I heard evidence from a number of experts with expertise in the regulatory standards applicable to fuel oil and fuel oil handling. As a general proposition, expert opinion evidence on domestic law is not admissible since domestic law is a matter for legal argument and legal analysis (Lederman, Bryant & Fuerst, *The Law of Evidence in Canada*, 4th ed. (LexisNexis Canada Inc., 2014) at para. 12.164). As lawyers with legal training we can all review the relevant statute and regulations for the purpose interpreting the legal requirements and obligations prescribed therein.

22 Sometimes, however, the subject matter of a regulation will include a technical component that is not comprehensible to persons without the relevant technical training. That is certainly the case with regard to a number of the regulatory standards at issue in this case. I advised counsel that I would consider the evidence of those experts in regulatory standards to the extent that their evidence could help me to understand the technical aspects of the regulations. I found some of their evidence to be quite helpful in this regard. Their evidence was also helpful in tracing and explaining the history of the relevant regulations, since regulatory standards evolved with new technology and as the industry gained experience, and implementation and enforcement were postponed on a number of occasions for practical reasons not necessarily apparent on the face of the regulation. At the end of the day, however, my legal interpretation of the regulations is based on the legal analysis and arguments of counsel rather than the opinions proffered by the technical experts.

23 The two oil tanks were "twinned" (joined by a two inch transfer pipe that had a T connection that led to the furnace). One tank would be filled and the oil would flow from the fill tank through the transfer pipe to the other tank, so that an equal amount of oil would end up in both tanks.

24 Mr. Gendron did not install a shut-off valve for each oil tank. There was only one shut-off valve installed near the furnace and beyond the transfer pipe joining the two tanks. This meant that if one tank failed and began to leak there was no way to shut off or isolate the leaking tank from the good tank, and the oil from the good tank would flow through the transfer pipe into the leaking tank and also escape.

25 The experts disagreed on whether the standards in force at the time required each tank to have its own shut-off valve as near as practicable to the tank. In other words, if there are two tanks, did the B139 require two shut-off valves?

26 I am satisfied based on the wording of B139-M91 and B139-00 that the requirement that each tank have its own shut-off valve close to the tank outlet was an industry standard in 2000 when the tanks were installed, and that the installation of the tanks did not comply with the industry standard in this regard.

27 Section 8.4.1 of B139-M91 and s.8.4.1 of B139-00 provided "A shut-off valve shall be installed in the fuel line... and as near as practicable to the exit from the supply tank". While the 1991 and 2000 versions of B139 did not provide an illustration of what was meant, the language remained unchanged in subsequent versions (see s. 8.4.1 of the 2006 edition). The 2006 version also included a diagram that demonstrated quite clearly that each tank was to have its own shut-of valve near the outlet from the tank. This requirement was also made explicit in the 1996 version of the *Canadian Oil Heating Manual*, 2nd ed., at p.11, published by the Canadian Oil Heat Association. The requirement of one shut-off valve for each oil tank was an important safety requirement. It meant that if one of the tanks leaked it could be shut off and isolated from the other tank.

28 While the illustration in the 2006 version is helpful, in my view the language in the earlier version: "as near as practicable to the exit from the supply tank" is clear and unambiguous even without the illustration. The shut-off valve installed by Mr. Gendron was near the furnace; it was not "as near as practicable to the exit from the supply

tank", and therefore did not conform to the requirements of B139 in the year 2000 (see: *Maddock v. McRobert Fuels Ltd*., *2009 CanLII 39489* (ON SC), at paras. 15-16)

29 In addition, the oil tanks were located too close (within 5 feet) to the furnace, contrary to s. 6.4.7 of the B139-00.

30 The tanks were installed very close to the exterior wall of the basement. The non-outlet end of each tank was tight against the insulated exterior wall, perhaps 1/2 inch or less at various points due to irregularities in the insulation. The sides of the two tanks were also very close together, approximately 1 inch apart. These conditions did not violate any written standards in force in 2000, but would make proper inspection of the tanks virtually impossible.

31 The tanks were installed on metal "cradles" or "saddles" of equal height, so that if the floor were level the tanks would also be level. This did not violate any written standard or industry practice when the tanks were installed in the year 2000. At that time there was no requirement that indoor tanks be level or slope toward the outlet or away from the outlet.[2]

32 There was no evidence that the installation of the tanks was ever inspected by British Empire Fuels, and I find that British Empire Fuels did not conduct any such inspection.

2) Thompson Fuels Becomes the Fuel Supplier

33 In 2001, Mr. Gendron contacted Thompson Fuels with the intention of switching fuel suppliers from British Empire Fuels to Thompson Fuels. Mr. Lynch, the sales representative for Thompson Fuels visited Mr. Gendron at 93 Hazel in November 2001 to have Mr. Gendron sign a contract for the supply of fuel oil. On November 2, 2001, Mr. Gendron signed a Customer Service Agreement with Thompson Fuels. The agreement correctly stated that the house had two 910-litre oil tanks that had been manufactured in 1999.

34 Mr. Gendron ordered "Automatic Delivery", which meant that Thompson Fuels would estimate the amount of fuel being used and automatically refill the tanks as needed without being called by the customer. Mr. Gendron did not order the "Furnace Protection Plan". The furnace protection plan provided an annual inspection and tune-up of the furnace and equipment, and the costs of labour and parts in the event that the furnace broke down. It cost approximately $265 per year.

35 Immediately above the line for the customer's signature the contract states "**TERMS AND CONDITIONS ON REVERSE**" The reverse side of the Customer Service Agreement sets out the terms and conditions of the agreement. It contains eight paragraphs.

36 The terms of the agreement relevant to this litigation were 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.

37 Mr. Lynch testified that he would have pointed out the fact that the terms and conditions were on the back of the contract, but he would not have reviewed the terms unless asked to do so by the customer. While only a photocopy of the front page of the Gendron contract could be found, I am satisfied on the basis of Mr. Thompson's evidence and Mr. Lynch's evidence that the reverse page of the Gendron contract was identical to the reverse page provided as an exhibit by Thompson Fuels, and contained the exclusionary clauses referred to above.

38 Mr. Lynch testified that his practice was to review the "Sales Kit" with potential customers. As a commissioned salesman it was in his interest to sell the Furnace Protection Plan to all customers. The Sales Kit explained that the Furnace Protection Plan provided an annual furnace tune-up and inspection and efficiency test as well as parts and labour and after-hours charges for the "21 most vital components of your furnace". The Sales Kit stated: "Included in your Protection Plan is an Annual Maintenance Tune-Up and Inspection so that you will always be in compliance with Ontario's new heating regulations".

39 The Sales Kit indicated that there were two options for the Furnace Protection Plan, the "Comprehensive Service and Parts Protection Plan" and the "Annual Maintenance Plan". Both options included a "TSSA oil tank inspection and report" and a "TSSA comprehensive system inspection and report".

40 Mr. Gendron did not remember reviewing these options with Mr. Lynch and testified that he did not think that these service options were reviewed. Given that the meeting with Mr. Lynch happened nearly fifteen years ago, I accept Mr. Lynch's evidence that his usual practice was to review the information in the Sales Kit with the customer because he wanted to sell the Furnace Protection Plan.

41 While neither Mr. Lynch nor Mr. Gendron had a specific recollection of this meeting, it is apparent from the agreement that Mr. Lynch did at least a cursory inspection of the equipment because the agreement identifies the make and approximate age of the furnace and the size and year of manufacture of the oil tanks.

42 Mr. Lynch was not a qualified OBT, although he did take a course in doing "basic inspections", a term we will come back to when we consider the legislative scheme and the TSSA inspection program. Mr. Lynch could not recall whether he had taken the basic inspection course before or after his November 2001 meeting with Mr. Gendron.

43 Mr. Lynch wrote into the agreement under "Comments": "customer building firewall", which recognized that the oil tanks were located too close (within 5 feet) to the furnace, contrary to s. 6.4.7 of the B139-00. A firewall was never built.

3) Fuel Delivery

44 Following the signing of the customer service agreement Thompson Fuels began supplying fuel to 93 Hazel in November 2001. The fill pipe was located outside the home, and so the fuel delivery person would not see the oil tanks when fuel was delivered.

45 While Mr. Gendron initially requested automatic delivery, he soon fell into financial difficulty and in 2004 agreed to pay Thompson Fuels in advance for a specified quantity of fuel oil as his tank approached empty. He rarely paid to fill the tank, and instead purchased just enough fuel oil to heat his house until he could afford to buy more.

46 Mr. Gendron also acknowledged that when he was short of money he would "occasionally" fill the oil tanks himself with jerry cans of "stove oil" purchased from a local First Nations Reserve. The stove oil was less expensive than the fuel oil purchased from Thompson Fuels.

4) Cause of the Oil Leak

47 There is no dispute among the experts that the immediate 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 results in the production of sulphur and organic acids within the tank. These acids lead to corrosion from the inside, which results in perforation of the tank.

48 Internal corrosion is more likely to develop in end-outlet tanks than in bottom-outlet tanks. Water can collect in

oil tanks as a result of condensation or the introduction of water contamination from other sources. Condensation is influenced by temperature fluctuations (a greater problem for outdoor tanks) and is exacerbated where homeowners do not keep their tank full. Water is heavier than oil, and will always settle at the bottom of the tank.

49 If water develops in an end-outlet tank it will accumulate below the outlet, which is usually 2 inches from the bottom.[3] While I heard a great deal about the slope of the tank, it is possible for water to accumulate in an end-outlet tank regardless of whether the tank is level, sloped toward the outlet end, or sloped toward the non-outlet end, since the water level may never rise above the outlet regardless of the slope. Sloping toward the outlet may limit the accumulation of water, but does not eliminate it since all of the water cannot drain from the tank.

50 Mr. Flynn suggested that if the water is deep enough and the tank is sloped toward the outlet end, the water will flow out the outlet, and even if not eliminated, the flow of water will decrease the likelihood of corrosion, because corrosion occurs when water is stagnant. Mr. Sparling's evidence was that while a slope to the outlet end could decrease the likelihood of corrosion, the slope of the tank was not a significant factor in the tank failure in this case. The utility of a slope to the outlet end depends on the depth of the water that accumulates. In this case, I accept the evidence of Mr. Sparling that the slope of the tank was not a significant factor in the failure of the incident tank and would not constitute an "unacceptable condition" as that term was defined by the regulations.

51 The corrosion occurs at the "tide-line" where the water meets the oil. Due to corrosion the tide-line leaves a visible line or mark along the inside of the tank. After the incident tank failed, the experts cut the tank open to determine where the corrosion occurred. The inside of the tank had pitting along the tide-line. The tide-line indicated that the incident tank was sloped toward the non-outlet end of the tank. There were two tide-lines indicating that the water had been in the tank for some time and that the volume of water increased over time.

52 The fact that the tide-line sloped toward the non-outlet end came as a surprise to the investigators because both tanks were installed on cradles or saddles of equal height, and when measured with a level from the outside by Mr. Flynn, the incident tank appeared level.

53 Thompson Fuels took the position that the fact that the tide-line showed a slope toward the non-outlet end of the tank, but that the tanks appeared level when measured by the investigator, Mr. Flynn, after the leak, indicated that at some time after their installation (and perhaps even after the incident) the tanks were moved by Mr. Gendron. Thompson Fuels took this position to suggest that the non-outlet end of the tanks (where the leak occurred) was not always tight against the outside wall, a point that becomes significant with the enactment of minimum clearance requirements in 2003.

54 Mr. Flynn, who prepared a spill investigation report and measured the level of the tanks after the spill, could not explain this discrepancy, but took the position that based on his examination of the tanks the tanks had not been moved. There were no marks on the bottom of the tanks to suggest that they had been moved or slid along the cradles, and once installed and even partly filled with oil they would be very heavy (at least 300 lbs. each) and difficult to move or slide on their cradles. Given the dimensions of the room where the tanks were located, Mr. Flynn did not see how they could be moved.

55 Mr. Gendron expressly denied moving the tanks after installation or after the leak.

56 Based on the evidence provided, I am satisfied that the tanks were never moved after installation in 2000. I accept that they were too heavy to slide, and that there was really no room to slide them. Since the tanks were twinned and connected with a 2-inch pipe, they would have had to be moved at the same time if moved before the leak. While the tanks were disconnected after the leak, I accept the evidence that they were not pushed closer to the wall after the leak. Accordingly, I conclude that the installation as found on the day of loss was the same as the installation that existed when Thompson Fuels first accepted Mr. Gendron as a customer.

57 This finding also means that Thompson Fuels could not have known that the incident tank was sloped toward

the non-outlet end when Thompson Fuels conducted its service calls. Measured from the outside the incident tank appeared level.

58 There is some debate as to how the water got into the incident tank. All experts agreed that at least some of the water was the result of condensation. Mr. Gendron did not keep his tank full, and all of the experts agreed that this would increase the amount of condensation that accumulated in the tanks.

59 I accept the evidence of Mr. Perovic and Mr. Sparling that condensation was not the only source for the accumulation of water in the incident tank. Mr. Sparling pointed out that the non-incident tank had much less water accumulation and much less corrosion than the incident tank. Mr. Perovic estimated that the incident tank contained approximately three times more water than the non-incident tank, and agreed that the non-incident tank was in relatively good shape. The tanks were twinned, and if condensation were the only source of water one would expect an equal amount of water and corrosion in both tanks. Mr. Sparling's and Mr. Perovic's evidence was that the incident tank could only have more water and corrosion if water and microbes were introduced from another source when filling the tanks.

60 The evidence indicates that Thompson Fuels could not have been the source of the water, because Thompson Fuels has strict monitoring for water contamination in its oil storage tanks.

61 I accept Mr. Perovic's and Mr. Sparling's evidence that Mr. Gendron likely introduced water and microbes into the incident tank, probably when he filled the tanks with less expensive stove oil purchased from the local First Nations Reserve, either because the water and microbes were in the oil or in the jerry cans he used to fill the tanks. I accept Mr. Perovic's evidence that the incident tank was the fill tank, and that the water in the fill tank did not flow through the transfer pipe into the non-incident tank because the transfer pipe was above the water line. As a result the non-incident tank had less water and less corrosion.

62 No other explanation was provided for the discrepancy in water levels between the two tanks, and there is evidence (such as that at p. 4 of Mr. Flynn's report and the statement recorded by Geoff Richardson when he visited 93 Hazel on December 30, 2008) that Mr. Gendron changed the fill and vent arrangement after the leak in order to have fuel oil delivered to the non-incident tank. Since this alteration occurred after the incident, the alteration itself has no effect on the issue of liability, but does explain how the incident tank accumulated more water and microbes than the non-incident tank.

63 While the MIC corrodes the steel tank wall, it does not corrode the paint on the outside of the tank. All of the experts agreed that the MIC had corroded through the steel wall of the tank creating a small hole (there was some dispute about the size of the hole, but I accept that it was larger than a pinhole and likely the size of two toothpicks), and for some time the only thing keeping the oil in the tank was the paint on the outside of the tank. When the tank was filled on December 18, 2008, the pressure from filling the tank finally caused the paint holding the oil to break, and the tank began to leak.

64 Once the corrosion begins, it is very rapid at the rate of 2 - 10 mm. per year. This tank was only 2 mm. thick, meaning that the perforation in the tank could have taken less than a year, although there is no way to calculate the rate at this time. According to Mr. Sparling, because the corrosion is so rapid and develops inside the tank, it is possible that an inspection of the outside wall of the tank would not see any external sign of corrosion (such as blistering or bulging paint) unless the inspection occurred within the year the tank actually failed (i.e. after December 2007). Given that the leak occurred on the end of the tank that was tight against the insulated exterior wall, inspection for signs of corrosion (such as blistering or bulging paint) was impossible.

5) The Regulatory Changes in 2001 and the TSSA Inspection Program

65 On June 27, 2001 the Ontario government enacted Ontario Regulation 213/01 (Fuel Oil) under the *Technical Standards and Safety Act, 2000*, S.O. 2000, c. 16 (TSSA). This regulation imposed on fuel oil distributors like

Thompson Fuels an obligation to inspect furnaces and fuel oil tanks before they could supply fuel oil to the tank. Section 7 of the Regulation provides:

> 7. (1) No distributor shall supply fuel oil to a container or tank system that is connected to an appliance or work unless the distributor is satisfied that the installation and use of the appliance or work comply with this Regulation and,
>
> (a) unless the distributor has inspected the appliance or work at least once within the previous 10 years; or
>
> (b) unless the distributor has inspected the appliance or work in accordance with a quality assurance inspection program.
>
> (2) A distributor shall prepare a report on each inspection made under subsection (1) and shall retain the report until the next inspection and report are completed.
>
> (3) An inspection shall be carried out by a person who is the holder of a certificate for that purpose.

66 Section 7(2) of the Regulation is significant in this case. As will be discussed in greater detail below (at paras. 87-95), Thompson Fuels was of the mistaken view that one of its OBT service technicians prepared an inspection report for 93 Hazel on February 27, 2002 in accordance with s. 7(2) of the Regulation. In fact, no such inspection report was ever prepared.

67 Section 19 of the Regulation imposed an obligation on homeowners to maintain the oil tank in safe operating condition. It provides:

> 19. No person shall operate or permit to be operated an appliance or tank system unless it is maintained in a safe operating condition and it complies with this Regulation.

68 Section 20 prohibits the fuel oil supplier from providing fuel oil if the furnace or oil tank does not comply with the regulations:

> 20. No person shall supply fuel oil to or use an appliance, container, equipment, tank system or other thing employed in the handling or use of fuel oil or used oil unless it complies with this Regulation.

69 Sections 7 and 20 were significant changes to the law and industry practice that had existed until that time. Since fuel oil suppliers deliver the fuel oil through a fill pipe located outside of the house many suppliers had no idea of the condition of the furnace or oil tank they were filling. Unless the supplier also provided a repair or maintenance service, they might never see the furnace and the oil tank.

70 Pursuant to s. 23 of the Regulation, a fuel deliverer who found, during delivery operations or during an inspection, that the condition of the tank constituted an immediate hazard was required to shut-off the system (referred to as "tagging-out") and immediately cease supplying fuel oil to the tank.

71 If the distributor discovered an unacceptable condition that was not an immediate hazard, s. 24 required the distributor to give the operator up to 90 days to fix the problem, and, if not fixed, shut it down. Section 24(1) provides:

> 24. (1) A distributor who is informed or who finds, during delivery operations or during an inspection, that an appliance or tank system is, in the opinion of the distributor, in an unacceptable condition but that an immediate hazard does not exist, shall,
>
> (a) give to the operator a description of the condition;

(b) promptly provide a notice to the operator indicating that the distributor will cease supplying fuel oil to the appliance or tank system if the condition is not corrected within the period of time specified in the notice;

(c) affix the notice under clause (b) to the appliance or tank system; and

(d) forward a copy of the notice to the designated administrative authority.

(2) The period of time set out in the notice under clause (1) (b) shall not exceed 90 days.

...

(5) A distributor who gives a notice under subsection (1) shall cease supplying fuel oil to the appliance or tank system if the unacceptable condition described in the notice is not corrected within the period of time specified in the notice.

72 Pursuant to s. 22(1) of the Regulation an "unacceptable condition" included:

(c) with respect to an appliance or work, that the conditions of the tank... is likely... to impair its safe operation, or does not conform to this Regulation, or

(d) with respect to equipment, that the condition of its state of repair, its mode of operation or its operating environment is likely to impair its safe operation or does not meet the requirements of this Regulation

73 Accordingly, if the condition, mode of operation or operating environment of the oil tanks did not meet the requirements of the regulation, the distributor would be obliged to tag-out the system as either an immediate or a non-immediate hazard.

6) Grandfathering Prior Installations

74 Ontario Regulation. 213/00 included a "grandfathering" provision to protect prior installations installed in compliance with the predecessor regulations. Section 1(3) provided:

(3) Unless otherwise specified in this Regulation or the code adoption document, equipment installed in accordance with the predecessor of this Regulation shall be deemed approved under this Regulation on the day this Regulation comes into force if the equipment complied with the predecessor regulation at the time that it was installed.

7) Annual Inspections

75 As indicated above, the sixth edition of B139 was published by the National Standards of Canada in April 2000 (B139-00). B139-00 was formally adopted as part of the Fuel Oil regulation by the TSSA on June 1, 2001. Sections 14.1 and 14.2.1 of B139-00 required that at least once per year all fuel oil tanks had to be inspected for leaks. B139-00 did not indicate who was responsible for this inspection, but, pursuant to s. 19 of the Regulation, the onus was on the "operator" (generally the homeowner) to ensure the proper maintenance and inspection of the fuel tank. Unfortunately, homeowners generally do not have a copy of B139-00 at their disposal and are unaware of this obligation unless advised by the fuel oil distributor.

76 Thompson Fuels did send out newsletters to its customers to advise them of this obligation. These newsletters were sent with the customer invoice. For example Thompson Fuels' newsletter for spring 2002 included a document entitled "IMPORTANT NOTICE" which advised homeowners of the recent "dramatic changes to Ontario's Fuel Safety Code, and reproduced the TSSA's January 2002 bulletin which stated:

Do you heat your home with fuel oil? If so, read this...

> **Homeowners are required to annually maintain their fuel oil appliances... by having a TSSA certified Oil Burner Technician service and clean their appliance.**
>
> **Homeowners are required to have their fuel oil appliance installations safety inspected by their fuel oil supplier.**
>
> **Fuel oil suppliers that find unsafe equipment are required to stop the delivery of fuel oil until the equipment is fixed**. [Emphasis in original]

77 The second page of the 2002 newsletter had a heading titled "What do I have to do now", and set out 3 options. The first two options applied to customers who were enrolled in Thompson Fuels' service plan or who had their oil furnace cleaned annually by Thompson. These customers were advised that the TSSA report would be performed as part of their regular service visit or annual cleaning. The third option was for customers like Mr. Gendron who had not agreed to one of the optional service plans. They were advised to "Contact our office to have the necessary TSSA inspections done" or "Have your preferred licenced heating contractor perform the necessary TSSA inspections and forward a copy to Thompson Fuels for filing to ensure an uninterrupted supply of fuel oil."

78 Mr. Gendron did neither, and as I will discuss below, no TSSA inspection was ever performed, but Thompson Fuels continued to deliver fuel until December 18, 2008 because a systems error incorrectly indicated that an inspection had been conducted on February 27, 2002.

79 Thompson Fuels customers were reminded about their obligation to have their fuel tanks checked and encouraged to call Thompson Fuels for "a complete inspection of your tank" in Thompson Fuels newsletters sent out in 2003, 2004 and 2005.

80 The 2004 newsletter warned the homeowners of oil tanks rusting from the inside. The 2004 newsletter stated:

> **TIP: Most Oil Tanks Rust From The Inside Out**.
>
> Always top your tank up at the end of the heating season to prevent water buildup created by summer condensation which can create rust on the inside of your tank.

8) Alternative Inspection Program

81 The TSSA, which was charged with enforcement of the new regulation, recognized that the requirement that all oil furnace installations be inspected by the fuel oil distributor prior to the delivery of fuel oil would be impossible to implement without some time to complete the inspections. Accordingly, on June 28, 2001 the TSSA issued a "Director's Variance to Regulations Requirements" stating that "the requirement for the distributor to inspect appliances under section 7(1) of the regulation shall become effective on May 1, 2002."

82 A TSSA Advisory dated September 1, 2001 reiterated that while the requirement to inspect appliance was delayed until May 1, 2002, the obligation on a distributor who discovers an unsafe installation to take definitive action under either s. 23 or s. 24 of the regulation was effective immediately.

83 Even the postponement of the s. 7 inspections until May 1, 2002 proved difficult for the industry to implement. Accordingly, in an Advisory dated March 21, 2002 the TSSA announced the establishment of an optional "Alternative Inspection Program". The Alternative Inspection Program granted the distributors a further postponement of the s. 7 inspection obligation. It permitted fuel oil distributors to conduct a "basic inspection" of all installations by May 1, 2004, and a "comprehensive inspection" of all installations by May 1, 2007.

84 The Advisory stated:

> d) A basic inspection must be completed of all installations by May 1, 2004.

e) Concurrently, effective May 1, 2002, a comprehensive inspection must be conducted on at least 20% of a distributor's client base per year. An appropriate certificate holder must conduct the comprehensive inspection.

...

g) A comprehensive inspection must be completed of all installations by May 1, 2007.

85 The TSSA also distributed an Inspection Checklist that was developed by the TSSA and fuel oil industry representatives. The Advisory stated: "the checklists are the minimum standards for conducting mandatory distributor inspections. Distributors are welcome to expand, reformat the checklists, and replace the TSSA logo with one of their own as long as the information remains complete."

86 While there was a basic checklist and a comprehensive checklist for the "appliance" (the furnace), there was only one checklist for the tanks. The checklist for the tank contains 18 questions, including the following three questions that are relevant to this case:

2. Does the tank appear to have been installed in accordance with the fuel oil code, the certification document and the manufacturer's instructions?

...

15. Is an approved shut-off valve installed?

...

18. Is the tank located at least 5 feet from the appliance or is the tank protected from the appliance by a fire rated wall.

9) Did Thompson Fuels Complete a Comprehensive Inspection before May 1, 2007?

87 Mr. Gendron takes the position that had his oil tank been properly inspected by Thompson Fuels it would not have met the three requirements in Questions 2, 15 and 18 and, pursuant to s. 24 of Ont. Reg. 213/01, Thompson Fuels was required to give him notice that he had up to 90 days to correct these errors or no fuel would be delivered.

88 Thompson Fuels contends that it completed the comprehensive inspection on February 27, 2002. Since the regulation required that the comprehensive inspection had to be done only once every ten years, this comprehensive inspection was sufficient for the period covering the oil leak in 2008.

89 On February 27, 2002, Mr. Gendron contacted Thompson Fuels to address a "no-heat" problem. Mr. Thompson sent one of his OBT service technicians, Mr. Robert Nicholson, to investigate.

90 The invoice prepared by Mr. Nicholson indicates that he was at 93 Hazel for 3 hours, and states that Mr. Nicholson replaced a nozzle, replaced and installed an oil filter and cleaned out the gaskets. The invoice indicates that he performed an efficiency test. There is no indication on the invoice that Mr. Nicholson inspected the oil tanks. The checklist for oil tank inspections created by the TSSA was not yet published on February 27, 2002 (it was published three weeks later on March 21, 2002). Since Mr. Nicholson did not testify there is no evidence that Mr. Nicholson inspected the oil tanks.

91 Thompson Fuels did call other service technicians employed by Thompson Fuels who testified that it is their practice to do a visual inspection of the oil tanks whenever they are called to do a service call on the furnace. This includes an inspection with a mirror to see parts of the tank (such as the bottom) that are not otherwise visible. These other employees could not, of course, know whether or to what extent Mr. Nicholson conducted an inspection on February 27, 2002.

92 I find that Mr. Nicholson either did not perform an inspection or did not perform a "comprehensive" inspection of the oil tanks when he attended 93 Hazel on February 27, 2002. It was clear on that date that the installation of the oil tanks did not comply with the requirements of B139-00 (or its predecessor B139-M91) and certain corrections were required. A comprehensive inspection would have discovered, recorded and reported these areas of non-compliance.

93 The evidence indicates that the shut-off valves were not properly installed in accordance with B139-00 or its predecessor B139-M91 (there was only one valve for the two tanks, and it was not located "as near as practicable" to the tank), the tanks were within five feet of the furnace (an issue identified by Mr. Lynch), and no firewall was ever built. These code violations would both qualify as "unacceptable conditions" as defined by s. 22(1) of Ont. Reg. 213/01, although not an immediate hazard as per s. 24(1). Any reasonable inspection of the tanks on February 27, 2002 would have revealed the absence of compliance and would have resulted in the system being tagged-out as a non-immediate hazard and would have prompted a further inspection to ensure compliance.

94 After the oil spill was reported to the TSSA in December 2008, Mr. Paul Thompson, the president of Thompson Fuels, was asked by the TSSA to provide all relevant documents relating to 93 Hazel. Mr. Thompson assumed that Thompson Fuels had an inspection report on file somewhere because the computer system indicated that the inspections were performed on February 27, 2002. He advised the TSSA that he could not locate the inspection report from that date. Mr. Thompson acknowledged in his evidence that this was a systems error because there was no inspection report on file. He stated: "Our system suggested that we had accomplished the inspection report requirement. That proved to be false."

95 Subsequent to the February 27, 2002 service call, Thompson Fuels service technicians attended 93 Hazel to perform service calls four more times before the oil leak in December 2008. These service calls were on October 25, 2006, January 22, 2007, February 19, 2007 and November 8, 2007. After each of these four service calls Mr. Gendron was provided with an invoice, and each invoice had printed in the top left corner the following notation printed by Thompson Fuels' computer system: "Last Inspection: 02-27-02". These invoices confirm that none of the subsequent service calls qualified as a comprehensive inspection; if they had the "Last Inspection" date would have been updated. In short, because of a systems error, Thompson Fuels proceeded on the assumption that it had completed a comprehensive inspection of the oil tanks at 93 Hazel on February 27, 2002, although no such inspection had in fact been completed on that date or on any subsequent date.

96 That being said, the code violations that existed in 2002 did not cause the oil leak that occurred in December 2008. With respect to the shut-off valves, the location of the shut-off valves did not cause the internal corrosion that led to the leak in the incident tank, nor would proper installation of the shut-off valves have prevented the corrosion. It is likely however, as I will explain later in these reasons, that the improper location of the shut-off valve contributed to the amount of oil that escaped and, therefore, the damages sustained. If the non-incident tank had its own shut-off valve near the outlet, Mr. Gendron (or Thompson Fuels if they had been called in time) could have shut off the valve when he discovered the leak and any oil remaining in the non-incident tank would not have transferred into the incident tank from where it leaked. Accordingly, the damages were, at least in part, caused by the failure to install a shut-off valve on each tank.

97 With respect to the lack of firewall, Mr. Lynch, on behalf of Thompson Fuels, had already brought the need for the firewall to the attention of Mr. Gendron in November 2001, and Mr. Gendron evidently undertook to construct a firewall. This is confirmed by the Service Agreement signed by Mr. Gendron in November 2001. The lack of a firewall did not in any way cause or contribute to the internal corrosion that led to the leak in the incident tank or cause any damages when the leak occurred. In addition, the five-foot clearance requirement in s. 6.4.7 of B139-00 was reduced to .6 metres ([tilde] 2 feet) in January 2003, at which point Mr. Gendron's furnace was in compliance with the regulation even without the firewall.

98 There is also evidence that the furnace was installed directly on 2"X8" wood, which was in violation of the relevant standards for the installation of furnaces. This issue was identified by a Thompson Fuels' OBT when he

examined the tank and furnace after the leak in December 2008. Assuming that the furnace was installed on 2"X8" wood when Mr. Nicholson inspected the furnace in 2002 (Mr. Gendron testified that he did not change the furnace or oil tank arrangements over the years), this arrangement would have been a non-immediate hazard that had to be corrected. It did not, however, in any way cause or contribute to the internal corrosion that led to the leak in the incident tank.

99 Accordingly, while Thompson Fuels did not conduct a comprehensive inspection on February 27, 2002, the failure to conduct the inspection on that date did not cause the oil leak. If Thompson Fuels had conducted a proper inspection on that date and notified Mr. Gendron pursuant to s. 24 of Ont. Reg. 213/01 that he had to install two shut-off valves, build a firewall between the furnace and the oil tanks, and remove the wood under the furnace, the incident tank would still have developed a leak in December 2008. The failure to conduct the comprehensive inspection did, however, cause or contribute to the damages caused by the leak because the non-incident tank could not be shut off and isolated from the incident tank when the leak occurred.

100 That, however, is not the end of Thompson Fuels responsibility, because the fact remains that Thompson Fuels was required by law to conduct a comprehensive inspection by May 1, 2007, and Thompson Fuels failed to do so, notwithstanding that they made four more service calls to 93 Hazel in 2006 and 2007.

101 Thompson Fuels failed to conduct the comprehensive inspection because of a systems error that led it to believe that it had conducted the comprehensive inspection in 2002. In the absence of a comprehensive inspection before May 1, 2007 Thompson Fuels was not permitted to deliver fuel to 93 Hazel after that date, but it did deliver fuel on December 18, 2008, and the delivery of fuel on that date was a direct cause of the oil leak.

102 Significantly, the evidence before me was that testing for water in indoor oil tanks was not the industry standard in 2002. It was not specifically referenced in the TSSA Inspection Checklist issued on March 21, 2002, the month after Mr. Nicholson's service call at 93 Hazel. Accordingly, Thompson Fuels' failure to test the tanks for water on February 27, 2002 did not fall below the legal or industry standard of care with respect to testing of indoor tanks in 2002. It is also unlikely that a test conducted in February 2002 would have found any significant amount of water in the tanks given that the tanks had been installed just over one year earlier in November of 2000.

103 This does not, however, end the analysis. The regulatory changes made after March 21, 2002 must also be considered.

10) Subsequent Regulatory Requirements -- post-May 21, 2002

104 On January 21, 2003 the TSSA issued a regulatory bulletin amending ss. 6.4.7 and 6.4.8 of B139-00 "in anticipation of the next edition of CSA-B139, Installation Code for Oil Burning Equipment".

105 These amendments, which were effective immediately, established minimum clearance requirements for oil tanks, adding the following provisions to B139-00:

6.4.9.1

Supply tanks shall be accessible after installation so that they can be inspected.

6.4.9.2

Single-wall, and double-wall supply tanks without interstitial monitoring shall be installed so that there is at least 450 mm (18 in) clearance along one side and one end of each tank.

6.4.9.3

The end or side of a supply tank shall be at least 50 mm (2 in) from a wall.

6.4.9.4

When two supply tanks are installed side-by-side, the space between the two tanks shall be at least 100 mm (4 in).

106 Mr. Gendron's twinned tanks did not comply with these new requirements. The non-outlet ends of each tank were less than 2 inches from the wall, the side-by-side walls of the tanks were less than 4 inches apart, and the incident tank had less then 18-inch clearance along the other side of the tank.

107 On November 8, 2005 the TSSA issued an Advisory setting out a "process to address the high number of 'unacceptable conditions' that pose minimal risk and that have been identified from fuel oil distributor inspections". The Advisory recognized that a high number of long standing "unacceptable conditions" had been identified during the inspection process, but that due to the limited supply of OBTs "there are challenges in correcting unacceptable conditions within the 90 day allowable time period." Accordingly, the TSSA permitted distributors to extend the 90-day allowable time period to correct these identified unacceptable conditions to 365 days, provided that the distributor applied for an extension and met other safety conditions. This process applied only to non-compliances that did not pose an immediate hazard in existing equipment installations.

108 A new version of B139 (the *Ontario Installation Code for Oil-Burning Equipment*) was published on October 18, 2006, and adopted by the TSSA effective March 1, 2007. This new version included several new provisions with regard to oil tanks. Sections 6.4.1 - 6.4.4 duplicated the clearance requirements introduced in the TSSA Advisory dated January 21, 2003 (see paras. 104-105 above).

109 Section 13.2 of the *Ontario Installation Code for Oil-Burning Equipment* required "the owner of the oil-burning equipment" to ensure "at least once per year":

(a) that the fuel oil tank was inspected for leaks (s. 13.2.2 (a))

(b) the slope of the tank and correct the slope if necessary (s.13.2.2(b))

(c) for metallic end outlet tanks, test for water at the bottom of the tank, where water is found remove the water (s.13.2.2.1)

110 This was the first time that a requirement to test for water at the bottom of the tank was established for indoor end-outlet tanks like the tank owned by Mr. Gendron. Seven months later, on October 11, 2007, the TSSA amended the *Ontario Installation Code for Oil-Burning Equipment* by revoking s. 13.2.2.1 as applied to indoor tanks,

and replacing it with a requirement to test only tanks installed outdoors for water:

> 13.2.2.1 Metallic end outlet tanks installed outdoors, test for water at the bottom of the tank. When water is found, remove the water.

111 Thus, the statutory requirement to test indoor tanks for water existed only between March 1, 2007 and October 11, 2007. There was no other statutory requirement to test for water. None of the Thompson Fuels service calls at 93 Hazel fell between those two dates.

112 In addition, the requirement to test for slope applied only to bottom-outlet tanks (s.6.4.7.2(c)). It did not apply to side-outlet tanks like Mr. Gendron's.

11) Minimum Clearance Requirements and the Service Calls in 2006 and 2007

113 As indicated above, Thompson Fuels conducted Service calls at 93 Hazel on October 25, 2006, January 22, 2007, February 19, 2007, and November 8, 2007. By this date the minimum clearance requirements for oil tanks as set out in the January 21, 2003 TSSA regulatory bulletin had been in place for over three years. The installation of Mr. Gendron's oil tanks did not meet these minimum clearance requirements (see para. 106, above).

114 Mr. Gendron argues that the OBT sent by Thompson Fuels to repair the furnace should have "tagged out" the furnace at any of these service calls. The issue with the shut-off valves referred to above (see paras. 26, 28 and 93) remained.

115 In addition, the OBT could not inspect the non-outlet ends of the tanks that were tight against the wall (which is where the leak developed in the incident tank), and could not inspect either of the side walls of the incident tank, one of which was too close to the twinned tank and the other too close to a wall that had been constructed by Mr. Gendron on the other side of the incident tank, likely sometime after the February 2002 inspection. This created an unsafe situation and a "non-immediate hazard" and the tank should have been tagged-out for this reason as well.

116 I have already dealt with the single shut-off valve for twinned tanks. With respect to the minimum clearance requirements, Thompson Fuels argues that the installation of the tanks was subject to the "grandfathering" or "legal non-conforming use" exception established under s.1(3) of Ont. Reg. 213/01 because the minimum clearance requirements were not in force when the tanks were installed. As such the tanks were deemed to be in compliance with the regulations and there was no requirement to tag out the tank or stop delivering fuel.

117 The experts called by each side disagreed on their interpretation of s.1(3) of Ont. Reg. 213/01. I did not find their analysis particularly helpful because this is primarily a legal issue. My analysis is however influenced by a publication prepared by the TSSA after the introduction of the 2001 regulation. The TSSA developed a mandatory training course for OBTs and published "The Oil Burner Technician Update Workshop Handbook" as a "companion document" to the regulations. The Handbook was intended to provide guidance to OBTs in the application of the new regulations in the field.

118 One of the issues dealt with by the Handbook was the "Application of Current Code to Existing Installations". The Handbook stated:

> Code requirements change in response to problems identified in the field or new technology and information. In some cases these changes mean that existing installations no longer comply with the current code...
>
> Appliances installed before that code change could remain in operation since they were "in accordance with the code at the time of installation" but any installations after the code changed had to comply with the new requirement...

> Unless the regulation or code specifically states that action must be taken to bring existing installation into compliance with new requirements, existing installations are considered to be in compliance.
>
> The terms "grandparented" and "legal non-conforming" are often used to describe these installations that do not comply with current requirements.
>
> ...
>
> Due diligence must be applied to any situation where it is found that the installation does not meet current requirements but is proven to have been installed in compliance with the requirements at the time of installation. The reason or intent of the change must be considered and the appropriate action taken to ensure that the installation is **safe**. (Emphasis in original)

119 The Handbook gives as an example the use of a chimney liner, which was not required until 1992. Even if a pre-1992 chimney qualified as a "legal non-conforming" use, the OBT would be required to carefully inspect the chimney for signs of deterioration, and, if problems were found that rendered the chimney unsafe, "the installation must be brought into compliance with current requirements."

120 The B139 for 2006 did not specifically state that action must be taken to bring existing fuel tank installations into compliance with the minimum clearance requirements of the new code. So long as the installation was safe there was no need to correct the installation or tag out the furnace.

121 On the other hand, the reason or intent of the minimum clearance requirements was to permit inspection of the surface of the tank for leaks or external signs of corrosion. The fact that the non-outlet ends were tight against the wall meant that it was impossible to inspect those sides of the tank to determine whether they were safe. I do not accept Thompson Fuels' argument that while visible signs of corrosion would qualify as a non-immediate hazard, keeping the signs of corrosion hidden from view is not a safety issue. I agree with the plaintiff that given the intent of the minimum clearance requirement, the tanks' proximity to the wall created an unsafe situation such that the "legal non-conforming use" exception no longer applied and an order should have been issued to bring the tanks into compliance with the 2003(and B139 2006) clearance requirements.

122 Thompson Fuels takes the position that it did not conduct an inspection after 2002 because Mr. Gendron never asked or contracted with them to conduct one. Regardless of whether Mr. Gendron requested or contracted with Thompson Fuels to inspect the oil tanks, Thompson Fuels, as the distributor, had a legal obligation to conduct a comprehensive inspection prior to May 2007. Without such an inspection Thompson Fuels was prohibited from delivering fuel to 93 Hazel. Thompson Fuels never performed a comprehensive inspection as required by the TSSA. Thompson Fuels failed to conduct a comprehensive inspection on February 2, 2002, and it failed to conduct a comprehensive inspection on any of the service calls in 2006 or 2007. If it had conducted a comprehensive inspection of the oil tanks in 2006 or 2007, it should have tagged-out the 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 to 93 Hazel.

123 The inability to visually inspect the non-outlet end of the tank in 2006 or 2007 may have contributed to the leak. As indicated above, signs of internal corrosion like blistering might be visible from the outside of the tank, although this may not be visible until shortly before the tank leaks. Had it been possible to visually inspect the non-outlet end of the tank when the service calls were conducted in 2006 or 2007, it is possible that there would have been evidence that the tank was corroding from the inside.

124 In any event, the best way to guard against internal corrosion is to test the tank for water, and drain the water from the tank if water is detected. Given the inability to visually inspect the non-outlet end of the tank, the testing for water was all the more important.

125 As indicated above, the legal requirement to test indoor tanks for water existed only between March 1, 2007 and October 11, 2007. Thompson Fuels conducted service calls at 93 Hazel on January 22, 2007, February 19,

2007 and November 8, 2007. At the time that these service calls were made, therefore, there was no regulatory requirement to test the tank for water.

126 While there was no regulatory requirement to test for water when Thompson Fuels conducted its service calls in 2006 and 2007, I find on the evidence that testing for water was the industry standard at that time.

127 Granby, the oil tank manufacturer, began to conduct seminars for the members of the fuel oil industry in 2003 and 2004 setting out the best practices for the installation, operation and maintenance of residential fuel tanks. These seminars, which were attended by Thompson Fuels OBTs, stated that all tanks had to be inspected once a year and that the "most important thing to do is to check for the presence of water in the tank. As we will see further, water is the tank's #1 enemy". The seminar advised that inspecting for water "is probably the most important part of the inspection. It is probably the most overlooked". The importance of testing for water was also set out in the Granby Installation and Maintenance Guideline published in January 2004.

128 The evidence of Mr. Geoff Richardson, an OBT service technician who made the service call to 93 Hazel on February 19, 2007 was that it is a "standard practice" to inspect for leaks and "dip" the tank for water whenever a service call is made. Dipping is a relatively simple procedure performed by the OBT removing the fuel gauge and inserting a tape into the tank that changes colour if it detects water. There is no evidence that dipping for water was ever performed by any of the OBTs who conducted the four service calls in 2006 or 2007. Given the evidence that the water had accumulated over a lengthy period of time, I find that a dipping test would have detected significant water accumulation in the incident tank had it been performed in 2006 or 2007. Mr. Richardson agreed that he would not be doing his job if he attended a service call and did not do an inspection of the oil tanks.

12) The Spill and Reporting the Spill

129 At approximately 4:15 p.m. on December 18, 2008, Thompson Fuels delivered 700 litres of fuel oil to 93 Hazel. The oil was delivered through a fill pipe located outside of the home.

130 Mr. Gendron arrived home from work about one hour later and smelled oil coming from his basement. He went downstairs and saw oil on the basement floor. Mr. Gendron examined the tanks to find the source of the leak, but he could not find any holes. In order to better examine the incident tank he had to cut a hole in the drywall wall on the far side of the incident tank. He did see that oil was leaking or drizzling, apparently coming from the end of the tank against the external insulated wall, but he could not see the hole because the end of the tank was tight against the insulation. He set about collecting the leaking oil in Tupperware containers, using the hole he had cut in the drywall to access the area under the incident tank. He continued to collect the leaking oil into the early morning hours of December 19 (perhaps as late as 5:00 a.m.), until the tanks were empty. Using these containers, he gradually collected and filled 7 "jerry cans" of 25 litres each.

131 Thus, according to this account the oil leaked or drizzled from the hole in the end of the tank for approximately 12 hours.

132 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. He went to sleep, and called Thompson Fuels at approximately 3:00 p.m. on Friday, December 19, 2008, nearly 24 hours after he first discovered the leak. He did not call to report a leak, but called to complain that Thompson Fuels was "ripping him off" because it had delivered only 150 litres of fuel oil and not the full 700 litres of oil he had ordered.

133 The office manager at Thompson Fuels confirmed that 700 litres had been delivered on December 18, 2008, and asked him why he thought he had only 150 litres. Mr. Gendron explained that he had been up all night catching fuel oil that was leaking from the tank and collecting it in Tupperware containers. When asked why he did not call the Thompson Fuels 24-hour emergency number as soon as he learned of the leak, he replied that he had it under

control. He was irate because he was being charged for 700 litres of furnace oil that he believed had not been delivered.

134 Thompson Fuels immediately sent its service technician, Brady Germyn, to 93 Hazel to inspect the spill. He made a note of his inspection the same day. Mr. Germyn arrived within approximately 30 minutes. He observed an oil stain on the concrete floor approximately ten to twelve feet long and four feet wide. There was no oil pooled on the floor -- just a stain. The tanks were empty above the outlet. Based on the information given by Mr. Gendron regarding the collection of dripping oil in the jerry cans, Mr. Germyn calculated that approximately 600 litres of fuel oil had leaked out. Mr. Germyn advised Mr. Gendron that Mr. Gendron was required to report the spill to the Ministry of Environment's Spills Action Centre. Mr. Gendron still did not believe that 700 litres had been delivered and rather than calling the Spills Action Centre, threatened to call the police to report that Thompson Fuels had not delivered the 700 litres he purchased.

135 Mr. Germyn returned to Thompson Fuels and advised Paul Thompson of the spill. Paul Thompson called the Spills Action Centre to report the spill at 4:22 p.m. and advised them that 93 Hazel fronted on to Sturgeon Lake.

136 The Spills Action Centre called Mr. Gendron at 4:37 p.m. to ask about the spill. Mr. Gendron told them that he was not concerned about the drinking water since it came from a drilled well, and he was convinced that the oil did not go into the ground. Mr. Gendron told the Spills Action Centre that the home was built on a 7 inch thick slab of concrete without drains or a sump pump. The Spills Action Centre advised Mr. Gendron that it would write up a report to forward to the TSSA, but did not know when the TSSA would "get over to investigate", and that "they will deal with it in their time".

137 Mr. Gendron was not instructed by the Spills Action Centre to take any action.

13) The TSSA

138 The Spills Action Centre sent a report to the TSSA technical desk and to the Ministry of the Environment. The TSSA technical desk closed at 4:30 p.m., and the report was sent after the TSSA was closed for the weekend. The TSSA also had an after-hours emergency number that could have been called by the Spills Action Centre, but was not.

139 A TSSA employee who happened to come into the office when it was closed picked up the Spills Action Centre's report on the afternoon of Sunday December 21, and emailed it to one of the fuel safety inspectors, Mr. Anthony Janes. Mr. Janes retrieved the email on the morning of Monday, December 22, 2008.

140 Mr. Janes immediately contacted Thompson Fuels and attempted to contact Mr. Gendron. When he did not receive an answer from Mr. Gendron, Mr. Janes went to 93 Hazel to inspect the property. Mr. Janes arrived at 93 Hazel at 11:16 a.m. Mr. Gendron was home. Mr. Gendron continued to insist that he had collected all of the oil that leaked from the tank and he believed 700 litres of oil had never been delivered.

141 Mr. Janes did a visual inspection. He estimated that approximately 450 litres of oil had leaked from the tank. He found no evidence that the oil went down the basement drain pipe. It appeared as though the oil had likely migrated through a gap where the concrete floor met the foundation wall.

142 Mr. Janes testified that he went outside but could not see or smell any oil. He noted that the source of the leak was approximately 87 feet from the lake. Mr. Janes went to the road to see the lake, and could see no evidence of oil at the lake or the culvert that emptied into the lake. He did not walk down to the shoreline and did not look inside the culvert. It was difficult to see, however, because the area was covered with snow and ice. He proceeded on the premise that the oil remained on site. Mr. Janes did not ask Mr. Gendron any questions about drainage on the property, and Mr. Gendron did not inform Mr. Janes that there was a "big O" drainage pipe running around the foundation of the property that emptied into the city culvert.

143 Mr. Janes remained on the property for 1-2 hours. Before leaving the site he called Cathy Curlew, a Provincial Officer at the Ministry of Environment, and asked her if she wanted to investigate. She advised him that she would wait to see his report.

144 Mr. Janes' notes confirm that he advised Mr. Gendron that he would issue an "Order for Remediation within 120 days". There was some dispute whether Mr. Janes issued something called a "verbal order" to Mr. Gendron on December 22, 2008. Based on Mr. Janes' testimony and his notes I find that while Mr. Janes did advise Mr. Gendron that he would issue an Order for Remediation, such advice cannot fairly be described as a "verbal order". In fact, as I will discuss below, the TSSA never issued an order for remediation.

145 Mr. Janes testified that he recalled telling Mr. Gendron to contact his insurance company about the oil leak when he inspected the tank on December 22, 2008, and that such advice is his standard practice when dealing with homeowners. Mr. Janes testified that December 22, 2008 was the only day that he attended the property.

146 Mr. Gendron remembered Mr. Janes telling him to contact his insurer, but took the position that he was not advised to do so until December 29, 2008, and he contacted his insurer promptly on that date. While Mr. Gendron thought that it was Mr. Janes who told him to contact his insurance company on December 29, 2008, he indicated that if Mr. Janes did not visit the property on that date it must have been someone else from the TSSA.

147 This is not a dispute that I have to resolve. In my view the TSSA had no private law duty to advise Mr. Gendron to contact his insurance company. While it is no doubt good practice to provide such advice, the resolution of this factual dispute is not relevant to the legal analysis that I have to undertake. I note that there is no written record of such advice being given on December 22, 2008 or on any other date.

14) The TSSA Order

148 On December 24, 2008 Mr. Janes prepared the TSSA Order, which was sent to Mr. Gendron by express post registered mail on that date. I found both the Order and the accompanying correspondence confused and confusing.

149 The cover letter states:

> Please find enclosed Inspectors Master File Number FS INC... regarding a reported oil leak at 93 Hazel... on December 18, 2008.
>
> It is a requirement of the Technical Standards and Safety Act (Section 17)... where it appears that... leak... has occurred because of the use storage or handling of fuel oil, in the province of Ontario, shall be inspected.
>
> The inspection will generate an invoice as TSSA operate as a not for profit regulatory authority operating on a cost recovery basis. Submission of the invoice to your insurer is standard practice.

150 This letter does not provide Mr. Gendron with any information other than that he will receive an invoice for the inspection that had already occurred on December 18, 2008, and that a copy of that invoice should be forwarded to his insurer. The letter purports to enclose the "Inspectors Master File Number FS INC", but does not explain what that is, or indicate that a copy of something called an order is enclosed, and does not advise Mr. Gendron to forward a copy of the order to his insurer. The invoice referred to in that letter was sent in a separate letter on January 5, 2009.

151 Mr. Janes testified that the December 24, 2008 letter was a template letter. It is, to say the least, peculiar that TSSA would send a cover letter with its order advising Mr. Gendron that he will be receiving an invoice in the future but making no reference to the fact that a TSSA order is attached or advising what action he must take in response to the attached order.

152 The attached Order is equally baffling.

153 The order is entitled "Fuel Safety Inspection Report". It states:

> When an inspector's order is issued, time limits for compliance reflects the severity of the violation.

154 The compliance date is April 24, 2009, or 120 days from the date the order was issued.

155 The order makes no reference to remediation. The order sets out five subparagraphs from a) to e). Subparagraphs b) to e) have what can only be described as a square "tick" box beside each letter. None of the boxes are ticked, and Mr. Janes testified that he did not know why the boxes were there, and he was not told to check off the boxes. It was his understanding that all five subparagraphs applied in each order. The subparagraphs required the owner of the oil tank to:

> *i*. forthwith notify the director in the event of a fire or explosion and remove any potential for fire or explosion hazard
>
> *ii*. provide all information to the Director or an inspector, as required
>
> *iii*. cease the use of and empty products from any leaking part of the storage tank system
>
> *iv*. repair, replace, remove all defective... storage tank systems or equipment, and
>
> *v*. do everything practical to comply with the "Environmental Management Protocol for operating Fuel Handling Facilities in Ontario".

156 The second paragraph required Mr. Gendron to "provide an assessment report, from a Professional Engineer or Geoscientist that delineates the full extent of all petroleum impacts to both soil and groundwater". The assessment report must meet the criteria as set out in the "Environmental Management Protocol for operating Fuel Handling Facilities in Ontario".

157 The term "remediation" is not found anywhere in the order. There is nothing in the order that required Mr. Gendron to restore the environment. On its face, the order merely 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 (by April 24, 2009).

158 If "time limits for compliance reflects the severity of the violation", the TSSA's 120 days to delineate suggests that it did not consider the violation to be particularly severe. Mr. Janes testified that the usual time limit is 90 days, but an additional 30 days was provided because the leak occurred at the end of December and the TSSA recognized that the remediation could not be completed before the spring thaw.

159 Mr. Janes appeared completely oblivious to the fact that his order did not in fact order the remediation of the oil spill or the restoration of the environment. He testified that the order he prepared was the only type of order issued by the TSSA in response to fuel spills. He testified that there was no distinction between a delineation order and a remediation order.

160 The TSSA argues that paragraph e) of the order specifically required Mr. Gendron to comply with the "Environmental Management Protocol for operating Fuel Handling Facilities in Ontario", and the protocol "speaks to the requirement to remediate the site". I make three points in response to this.

161 First, Mr. Gendron would obviously have no idea what is contained in the Environmental Management Protocol unless the order set out the requirement in clear terms. Orders must set out with some precision the action required or prohibited, and not just referentially incorporate a 17-page technical document.

162 Second, the Environmental Management Protocol itself distinguishes between delineation and remediation and does not use those words interchangeably.

163 Third, the Environmental Management Protocol provides that a Fuel Safety Program inspector of the TSSA **may** require an environmental remediation "if immediate corrective action is deemed necessary based on the site conditions". The protocol notes that immediate corrective action is necessary to eliminate "the potential for off-site migration of a petroleum product and related contaminants". A reasonable person in Mr. Gendron's position receiving the TSSA order would have no way of knowing whether the TSSA inspector deemed immediate corrective action to be necessary in his situation unless it was specifically set out in the order. Accordingly, I find that while it was certainly open to Mr. Janes to order environmental remediation in this case, he did not do so.

15) Consequence of Mr. Gendron's Delay in Reporting Spill

164 As indicated above, Mr. Gendron discovered the oil leak at around 5:00 p.m. on December 18, 2008, but did not report the leak to anyone until he called Thompson Fuels at approximately 3:00 p.m. on the afternoon of Friday, December 19, 2008. Thompson Fuels argues that Mr. Gendron did not successfully collect all of the oil that leaked from the tank after he discovered the leak. Thompson Fuels argues that if Mr. Gendron had reported the leak as soon as he discovered it, much of the oil that leaked from the tank could have been stopped, and immediate measures taken to prevent the oil that did leak out from migrating to the lake. If Mr. Gendron had called Thompson Fuels' 24/7 emergency phone line, Thompson Fuels would have responded within 30 minutes and the leak plugged or the tanks pumped out. Thompson Fuels argues that Mr. Gendron's delay in reporting the leak resulted in much more damage than if Mr. Gendron had reported the leak promptly.

165 Mr. Gendron argues that since he mopped up all of the oil on the floor and collected all of the leaking oil in Tupperware containers, his delay in reporting the leak did not make any difference to the consequent damages.

166 Thompson Fuels' position is based on the premise that a substantial amount of oil remained in the tank when Mr. Gendron discovered the leak at around 5:00 p.m. Mr. Gendron's position is based on the premise that approximately 500 to 600 litres of oil leaked out of the tank in the first hour of the leak, and the remaining 150 or so litres leaked out over the remaining 12 hours that he collected drips from the underside of the incident tank.

167 Thompson Fuels relies on the expert evidence of Mr. Robert Sparling, a Forensic Materials Engineer with over 15 years of industry experience. He was qualified as an expert in material behaviour and tank failure. Mr. Sparling attempted to calculate the amount of fuel oil that would be lost over time from the tank. This is a tricky business because it requires several assumptions about the amount of fuel in the tank, and the time that the fuel oil stopped leaking from the tank. The more fuel in the tank the higher the pressure and the faster the leak rate will be. As the oil leaks out the pressure is reduced and the leak rate slows. Mr. Sparling assumed that the tank had 700 litres of fuel oil at approximately 4:19 p.m. when it was filled by Thompson Fuels, and was empty at about 5:00 a.m., the approximate time that Mr. Gendron reported the leak stopped. Based on this information he calculated the "effective size" of the hole in the tank to be approximately 3.38 mm. in diameter.[4]

168 Mr. Flynn conducted a "Destructive Tank Examination" (the tank was cut open to observe the inside) at Rochon Engineering facilities. He testified that the hole was "large", but did not provide any measurement, other than to state that it was larger than a pinhole. Mr. Flynn testified that the oil would have come out "relatively quickly", but did not provide any time period, other than to agree that it could have leaked out over "several hours" as described by Mr. Gendron.

169 I accept Mr. Sparling's evidence that it was not possible to accurately measure the hole after the leak because the tank was fragile and the hole size likely increased (and other holes created) when the tank was being transported to the laboratory and cut open for inspection. In addition, the hole size could increase as the oil leaked out, or could become blocked with debris and sludge which would decrease the flow rate. That is why Mr. Sparling

calculated an "effective" hole size. At the end of the day the hole size is not central to his analysis; whatever the hole size we know that it took approximately 12 hours for 700 litres of fuel oil to leak from the tank. The focus of Mr. Sparling's analysis is the leak rate.

170 According to Mr. Sparling's calculations, if the fuel oil leaked out over a 12-hour period it would take approximately 6 hours for the first 500 litres of fuel oil to leak from the tank. Only 110 litres would leak out in the first hour, and double that in the first two hours.

171 Mr. Sparling's calculations would explain why Mr. Gendron did not see a large pool of oil on the basement floor when he discovered the leak soon after 5:00 p.m. The pool he saw was not consistent with 500-600 litres of fuel oil leaking out because by that time only approximately 100 litres of fuel oil had leaked out. This would also explain why the oil stain observed by Brady Germyn when he attended on site the next day was much larger than the stain observed by Mr. Gendron when he discovered the leak.

172 While I appreciate that there are a number of variables associated with the rate at which the oil leaked out of the tank, I accept Mr. Sparling's evidence that the tanks could not lose 500-600 litres of fuel oil in the first hour and then continue to leak the remaining 100-150 litres over the next 11 hours. Based on this evidence, I find that only approximately 100 litres of oil had leaked out when Mr. Gendron discovered the leak when he arrived home at around 5:00 p.m. and, notwithstanding his efforts to collect the oil in Tupperware containers, he did not catch all of the oil that leaked out after that.

173 Based on this finding, I accept Thompson Fuels' position 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.

174 This finding also relates to my earlier finding regarding the absence of the shut-off valve for each tank. If each tank had been fitted with a shut-off valve as required by the Regulation, Mr. Gendron could have shut-off the good tank when he discovered the leak and prevented the oil in the good tank (perhaps as much as 250 litres) from escaping.

16) Off-site Remediation

175 As indicated above Mr. Gendron reported the matter to his insurer on December 29, 2008. The insurer retained an independent adjuster and remediation contractor, DL Services (DLS), and both attended on site on December 30, 2008. DLS noted that the furnace oil from 93 Hazel had entered the storm drain and culvert and from there entered Sturgeon Lake. The extent of the impacted area was not known. On December 30, 2008 at 4:41 p.m. DLS notified the Ministry of the Environment (MOE) that oil had entered Sturgeon Lake.

176 TSSA is responsible for managing fuel spills that remain on the site of the property where the spill occurred. Once it is determined that the oil has left the property and there is a likelihood of off-site adverse effect, the protocol between the TSSA and the MOE is that the MOE will take over as the "regulatory lead".

177 In this case the evidence is that the weather became unseasonably warm between December 24 and 29, 2008. It even rained on December 27, 2008. It is likely that this warm weather and rain contributed to the oil that had escaped from the oil tank into the weeping tiles situated at the base of the concrete footings along the perimeter of the house to further migrate into the storm sewer and from there discharge into Sturgeon Lake. Accordingly, it is likely that the oil remained on site when Mr. Janes of the TSSA did his inspection on December 22, 2008, but made its way into the lake before DLS was retained on December 30, 2008.

178 In response to the notification by DLS that the oil was in Sturgeon Lake, Ms. Cathy Curlew, a Provincial Officer with the MOE, attended the site on the evening of December 30, 2008. Ms. Curlew noted that it was dark by the time she arrived but there were strong odours of petroleum hydrocarbons (fuel oil) along the shoreline of Sturgeon

Lake and in the basement of 93 Hazel. DLS was on site and was trying to contain the oil with containment booms along a section of the shoreline and absorbent material (this material absorbs oil but not water), but the water was covered in ice, making containment and absorption difficult. In Ms. Curlew's view, it was in the public interest that the pollutant spilled into the natural environment be removed "to the extent practicable" to protect human health and restore the natural environment, and she issued a Provincial Order to Mr. Gendron pursuant to her authority under s. 157.1 of the *Environmental Protection Act*, *R.S.O. 1990, c. E.19*.

179 This Order required Mr. Gendron to immediately "do everything practicable to prevent, eliminate and ameliorate the adverse effects caused by the discharge of the furnace oil" and "restore the natural environment...to the extent practicable".

180 The Order required Mr. Gendron, by January 7, 2009, to submit a report to the MOE "outlining the extent of the spill, details of the clean up efforts to restore the natural environment and specific action taken to comply with the Order."

181 Finally, Mr. Gendron was ordered to immediately "engage the services of a contractor/consultant...experienced in the clean up of furnace oil in a residential setting, who has appropriate qualifications and abilities to undertake the requirements of work ordered".

182 DLS was retained as the consultant and as the contractor. At the time it had remediated 680 spills including several remediation projects on behalf of the MOE, including the contamination of lake water. By December 31, 2008 DLS had placed absorbent pads in the culverts that discharged into the lake. A vacuum truck was on site on January 1, 2009 and pumped out the four catch basins that appeared impacted. It also began to skim the concentrated areas along the shoreline.

183 The assessment and analysis took place over the first few days, with extensive resources on site. DLS determined that some of the oil had entered the perforated Big O drainage pipe running around the foundation of 93 Hazel, migrated in the drainage pipe into two catch basins on the street and from there entered the culverts draining into Sturgeon Lake. The culverts were plugged with absorbent pads to ensure that the oil could not escape into the lake. On January 4, 2009 DLS excavated and disconnected the Big O drain to prevent further migration of oil into the lake.

184 DLS sent its Emergency Response Trailer on December 30, 2008 and began to recover and treat lake water. A Mobile Treatment Unit (MTU) was deployed on January 2, 2009 and it also began to treat impacted surface water. On January 2 and 3, 2009, DLS collected surface water samples along the shoreline to establish the extent of the contamination and to determine the location of the secondary containment boom, which was installed on January 4, 2009. A second MTU was sent on January 6, 2009. By January 23, 2009, a third MTU was involved in removing contaminated water from the catch basins and shoreline. This third MTU and associated equipment remained on site until March 2009. The lake was frozen, and the ice was 12 inches thick. DLS began to cut chunks of fuel-impacted ice, which was then melted in tanks and treated to remove the oil before being returned to the lake.

185 DLS continued with the recovery and processing of the contaminated surface water from Sturgeon Lake, and began to assess and excavate the contaminated material in the concrete basement floor of 93 Hazel. By March 2009 DLS processed approximately 28,000 litres of melted ice, and recovered and processed approximately 109,786 litres of oil-impacted water from the lake.

186 DLS provided the MOE with detailed reports from January 12, 2009 until April 28, 2009. Costs mounted. Remediation was complicated by the frozen lake and soil conditions and the City's delay in providing the necessary permit to close the road. The permit to partially close the road was provided on January 19, 2009, but the permit did not permit the complete closure of the road due to concerns about emergency vehicles.

187 Ms. Curlew from the MOE attended the site 3 days a week for the first few weeks. She attended the site on January 16, 2009. She testified that during that attendance she was concerned that there were insufficient

resources being put into the remediation. She therefore drafted a further order to Mr. Gendron dated January 19, 2009. This order required the completion of an "action plan" by January 23, 2009 "detailing proposed work for cleaning and removing all spilled furnace oil from the soil, roadway, storm sewers, culverts, shoreline, lake and any other impacted areas of the natural environment". It also required Mr. Gendron to "continue to do everything practicable to remove all free product from the lake in a timely manner. Including but not limited to vacuuming the surface water, skimming and treating surface water and breaking up and melting down ice that contains free product." Finally, the order required the preparation of "a contingency plan to implement when mild weather conditions cause a melt in the area...to ensure additional pollutants...do not enter the lake and free product still present in the lake does not extend beyond the containment area".

188 DLS created its action plan on January 23, 009 and prepared the contingency plan on January 30, 2009. There were a significant number of persons involved in the decision-making and oversight of the necessary remediation. The MOE reviewed these reports and raised no issues or concerns. In an email to DLS dated April 9, 2009, Ms. Curlew reviewed the activities of DLS following a site visit on April 8, 2009, and stated that MOE "did not have any concerns at the time regarding the work that DLS was doing".

189 Approximately 300 meters of the shoreline of Sturgeon Lake had been impacted by the furnace oil. Shoreline remediation was initiated by DLS during the first week of April 2009 (when it was made possible by spring thaw) and continued until May 6, 2009.

190 As the remediation continued, costs mounted, and the cost of the off-site remediation ultimately reached $1,833,848.85.

191 DLS continued with off-site remediation until May 6, 2009, when Mr. Gendron's off-site insurance coverage was exhausted. Responsibility for the remediation of the lake and shoreline passed to the City of Kawartha Lakes (the City), which retained Golder Associates to assume responsibility for off-site remediation with the City.

17) On-site Remediation

192 In addition to the off-site remediation, DLS was responsible for the on-site remediation of 93 Hazel. DLS conducted a variety of tests at 93 Hazel by constructing test pits and boreholes in January and February to test the soil and gravel under the concrete floor. Soil and groundwater samples were submitted for laboratory analysis. Petroleum hydrocarbon (fuel oil) impact was found beneath the concrete slab floor at several locations. A total of 73.34 tonnes of contaminated soil and gravel was removed from under the basement floor and disposed of by March, 2009.

193 Based on the recommendation of a structural engineer that it would not be structurally sound or feasible to provide temporary support to 93 Hazel during the excavation of the contaminated soil under the basement floor, a demolition permit was applied for on March 31, 2009. The Demolition Permit was granted by the City of Kawartha Lakes on May 6, 2009, and the home was demolished on May 12, 2009. The soil under 93 Hazel was excavated to a depth of 5 feet and disposed of at a disposal site.

194 The plaintiff adduced evidence that the estimated cost of rebuilding his home with a home of similar kind and quality is $545,244.25.

195 Following the demolition of the home DLS excavated the soil in the vicinity of the former dwelling from May 21 to June 10, 2009. The soil was excavated to bedrock (from 1.1 meters to 5.5 meters below grade) until no further visible evidence of petroleum hydrocarbon impact was observed. A total of 1,558.49 tonnes of contaminated soil was removed and disposed of at a disposal site.

196 DLS continued with the on-site remediation until July 20, 2009.

Analysis

1) Liability
Thompson Fuels

197 Courts have consistently held that fuel oil suppliers and OBT technicians owe a duty of care to persons to whom fuel is supplied or persons whose furnaces/oil tanks are inspected and maintained: see *Appleyard v. Earl (Earl's Heating)*, *2009 CanLII 45307* (ON SC) at para. 33; *Thornhill v. Highland Fuels*, *2014 ONSC 3018* (CanLII), at para. 38; *Maddock*; *Bingley v. Morrison Fuels*, *2009 ONCA 319* (CanLII); and *Brown v. Davis &McCauley Fuels Ltd*. *2010 ONSC 4674* at para. 25. Thompson Fuels had a dual role as both the fuel supplier and the technician servicing the unit. It owed a duty of care to the plaintiff in both roles.

198 I have already reviewed the relevant regulatory regime applicable to Thompson Fuels' role as a fuel distributer and made several findings of where Thompson Fuels met or failed to meet its statutory duties in this regard.

199 I accept that standard of care can be derived from the applicable regulatory requirements as well as standard industry practices at the relevant time. The regulatory requirements establish the minimum level of care. It is possible that industry practice imposes a higher duty in certain circumstances. The regulatory standards established by the TSSA, the National Standards of Canada's "*Installation Code for Oil Burning Equipment*" (B139-M91 and B-139-00 as applicable at the relevant time) as well the 2006 version of B139 (the *Ontario Installation Code for Oil-Burning Equipment*) are based on industry standards and are promulgated in consultation with members of the industry. These regulatory standards are responsive to technological changes in the industry and industry experience. These standards reflect safety and environmental concerns and are intended to protect a specific class of persons -- the same concerns that inform common law tort duty. Industry members undergo training to ensure that they are up to date with respect to these requirements. In my opinion these regulatory standards are intended to codify the minimum standard of care to be taken by installers, suppliers and technicians and a breach of these standards is a breach of the duty of care: see *Davis &McCauley Fuels Ltd.*, at paras. 30-34.

200 Thompson Fuels, as the distributor, had a legal obligation to conduct a comprehensive inspection prior to May 2007 or it was prohibited from delivering fuel to 93 Hazel. As indicated above at para. 95, I find that Thompson Fuels never performed a comprehensive inspection at 93 Hazel as required by the regulations. Thompson Fuels failed to conduct a comprehensive inspection when its technician attended 93 Hazel on February 2, 2002, and it failed to conduct a comprehensive inspection on any of the four service calls in 2006 or 2007, including the final service call on November 8, 2007, just one year before the leak.

201 Thompson Fuels failed to conduct the comprehensive inspection because of a systems error that led it to believe that it had conducted the comprehensive inspection in 2002. In the absence of a comprehensive inspection before May 1, 2007, Thompson Fuels was not permitted to deliver fuel to 93 Hazel after that date, but it did deliver fuel on December 18, 2008, and the delivery of fuel on that date was a direct cause of the oil leak. I find that Thompson Fuels breached its duty of care by failing to perform a comprehensive inspection prior to May 1, 2007. This failure fell below the applicable standard of care and was a contributing factor to the oil leak in December 2008.

202 As indicated above, testing for water in indoor oil tanks was not the industry standard in 2002. It was not specifically referenced in the TSSA Inspection Checklist issued in March 2002, and the Granby seminars did not begin until 2003. Accordingly, Thompson Fuels' failure to test the tanks for water on February 27, 2002 did not fall below the legal or industry standard of care with respect to testing of indoor tanks in 2002. It is also unlikely that a test conducted in February 2002 would have found any significant amount of water in the tanks given that the tanks had been installed just over one year earlier in November of 2000.

203 None of the Thompson Fuels service calls at 93 Hazel fell between March 1, 2007 and October 11, 2007 when

the regulatory requirement to test for water applied. However, as indicated above at paragraphs 126-128, I find on the evidence that it was the industry standard to test for water when Thompson Fuels conducted its 4 service calls in 2006 and 2007.

204 Dipping is a relatively simple procedure performed by the OBT removing the fuel gauge and inserting a tape into the tank that changes colour if it detects water. There is no evidence that dipping for water was ever performed by any of the OBTs who conducted the four service calls in 2006 or 2007, although given the evidence that the water had accumulated over a lengthy period of time, I find that such a test would have detected significant water accumulation in the incident tank had it been performed in those years, and the failure to dip for water was a proximate cause of the damage.

205 Testing for water was all the more important given the fact that the tank did not meet the minimum clearance requirements established in 2003. The non-outlet end of the tank could not be visually inspected because it was tight against the wall. I find that the failure to dip the tank for water in these circumstances in 2006 and 2007 was a breach of Thompson Fuels' duty of care and fell below the industry standard of care even though this test was not required by regulation.

206 My finding in this regard is context specific; I am not dealing with a situation where the fuel oil supplier has conducted a comprehensive inspection as required by the regulation and the tank otherwise meets the clearance requirements and can therefore be visually inspected. In addition, the evidence in this case indicates that the manufacture of oil tanks has changed markedly since the year 2000, such that the risk of internal corrosion may be significantly reduced.

207 The minimum clearance requirements for oil tanks was set out in the January 21, 2003 TSSA regulatory bulletin. As indicated above, the installation of Mr. Gendron's oil tanks did not meet these minimum clearance requirements. When Thompson Fuels performed its service calls to 93 Hazel in 2006 or 2007 it should have tagged-out the 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 to 93 Hazel. The failure to tag-out the tanks in 2006 or 2007 was a proximate cause of the damage.

208 In summary, Thompson Fuels' failure to conduct a comprehensive inspection as required by law, and tag-out the tanks for failure to meet the clearance requirements or at least test for water in circumstances in which a visual inspection was impossible, and its delivery of oil on December 18, 2008 in the absence of ever conducting a comprehensive inspection, were all breaches of its duty of care that fell below the applicable standard of care. These breaches were direct causes of the oil leak on December 18, 2008.

Customer Service Agreement

209 Thompson Fuels takes the position that the terms of the Customer Service Agreement exclude any liability on its part. For ease of reference, those terms, which were on the reverse of the agreement signed by Mr. Gendron, were 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.

210 Thompson Fuels argues that this clause excluding liability was part of the contract between the parties. The contract was only two pages long, and there was a bolded sentence above the signature line advising that the

terms and conditions were on the reverse side. Mr. Gendron had plenty of opportunity to sign the Agreement. He signed it in his own residence. There was no rush or pressure. Mr. Gendron was given the opportunity to purchase a Furnace Protection Plan and expressly declined to do so. He knew that Thompson Fuels would not be conducting annual inspections of the furnace because he did not want to pay for them. Thompson Fuels argues that Mr. Gendron had proper notice of the terms and conditions of the contract and any failure to read the entire contract or clarify its terms was his own.

211 Mr. Gendron argues that the Customer Service Agreement does not absolve Thompson Fuels of its liability.

212 As indicated above, Mr. Lynch acknowledged that while he would have pointed out the fact that the terms and conditions were on the back of the contract, he would not have reviewed the terms unless asked to do so by the customer. The plaintiff relies on the recent Ontario Court of Appeal decision in *Singh v. Trump*, *2016 ONCA 747*, which dealt with the application of exclusionary clauses in written contracts. In that case the specific clause at issue was an "entire agreement" clause that advised purchasers that they could only rely on the agreements expressed in writing and that there were no representations being made as to projected income from rental units. The Court of Appeal found that the entire agreement clause was not enforceable in that case because it was "well hidden within the agreement" of almost 17 pages in length (at para. 117). There was nothing to distinguish it from the other 49 articles and subclauses in the agreement, and the sales representative acknowledged that she did not review the clause with the plaintiffs.

213 Mr. Gendron takes the position that the failure of Mr. Lynch to bring the exclusion clause to Mr. Gendron's attention precludes the application of the clause in this case.

214 In my view the Court of Appeal's analysis in *Singh v. Trump* is helpful, but I focus on a different part of the case than does the plaintiff.

215 In *Tercon Contractors Ltd v. British Colombia (Transportation and Highways)*, *2010 SCC 4* (CanLII), Binnie J. (dissenting but supported by a unanimous court on this point) set out the following analytic approach to be used in deciding whether to enforce exclusion clauses, at paras. 122-23:

> 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*, *[1989] 1 S.C.R. 426* at p. 462). This second issue has to do with contract formation, not breach.
>
> 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.

216 The first point is whether, as a matter of interpretation, the exclusion clause even applies in the circumstances established in the evidence.

217 The first paragraph of the exclusion clause provides: "Thompson Fuels is not responsible for the inspection and/or maintenance of any fuel oil tank located on the premises". While this might have been true as a matter of contract, it was not true as a matter of law because, as we have seen, Ont. Reg. 213/01 (Fuel Oil) under the *TSSA* imposed on fuel oil distributors like Thompson Fuels an obligation to inspect furnaces and fuel oil tanks before the distributor could supply fuel oil to the tank. Notwithstanding the exclusionary clause in the contract, Thompson Fuels had a legal obligation to inspect the oil tank prior to May 1, 2007. Thompson Fuels cannot avoid or evade this legal requirement by signing a contract with its customers.

218 The second paragraph contains two clauses. The first clause of the second paragraph provides:

> 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.

219 This clause purports to exclude liability caused by the "existence" of the oil burning installation. I am not sure what that is intended to mean. Such a clause would be meaningless to Mr. Gendron, even if he had read it. It does not refer to Thompson's failure to perform any obligation. The clause is arguably limited by the next clause, which refers only to the failure to perform contractual obligations.

220 The second clause of the second paragraph provides:

> 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.

221 Again, Thompson's obligation to perform a comprehensive inspection of the oil tank was not an obligation "under this contract", but an obligation imposed by the regulation. In my opinion this clause does not, by its terms, apply to damages resulting from the failure to perform its obligations under the regulation. The reference to damage "while the residence is vacant" is not relevant to the facts of this case.

222 Nowhere does the second paragraph make express reference to an exclusion of liability for failure to perform any obligation imposed by regulation. As a matter of interpretation the exclusionary clauses do not appear to apply to Thompson Fuels' failure to comply with regulatory requirements, and in particular its failure to perform a comprehensive inspection prior to May 1, 2007.

223 If I am wrong with regard to the interpretation of the exclusionary clauses, I would go to the third enquiry in *Tercon Contractors, "*namely whether the Court should nevertheless refuse to enforce the valid exclusion clause because of the existence of an overriding public policy". In *Singh v. Trump* the Ontario Court of Appeal stated, at para. 129:

> In my view, it would be unconscionable and would shock the conscience to allow a party to use an entire agreement or other exculpatory clause to escape liability for misrepresentations made in breach of the OSC's terms for granting an exemption from the *Securities Act* requirements. The entire agreement and other exculpatory clauses would operate to negate a negligent misrepresentation claim and the misrepresentation itself was only possible in this case because Talon evaded protective requirements under the *Securities Act* by obtaining the exemption and then breaching that exemption.

224 In this case, it would be unconscionable and contrary to public policy to allow a fuel distributor to use an exclusionary clause in a consumer contract to escape liability for failure to perform the comprehensive inspection required under the *TSSA* regulations as a condition to supplying fuel to that consumer. The exclusion clause would operate to negate the distributor's legal duty to perform the inspection. In the absence of a comprehensive inspection before May 1, 2007, Thompson Fuels was not permitted to deliver fuel to 93 Hazel after that date. This had nothing to do with the contract signed by Mr. Gendron. Thompson Fuels should not be able to evade the protective requirements of the *TSSA* regulations by signing a contract with the consumer.

225 I find support for this conclusion in the non-delegable duty cases. For example, in *Lewis (Guardian ad litem of) v. British Columbia*, *[1997] 3 S.C.R. 1145*, 1997 CanLII 304, the Supreme Court of Canada found that the relevant legislation imposed a non-delegable duty on the Ministry of Transportation and Highways to ensure that maintenance work on the highways was performed with reasonable care. Public policy prevented the Ministry from escaping responsibility by delegating the duty to a third party. The Court stated, at para. 17:

> It is clear that a party upon whom the law has imposed a strict statutory duty to do a positive act cannot escape liability simply by delegating the work to an independent contractor. Rather a defendant subject to such a duty will always remain personally liable for the acts or omissions of the contractor to whom it assigned the work... This must follow because an absolute statutory duty requires the performance of a positive obligation that is imposed on a particular entity which will always remain responsible for the performance of that duty.

226 Arguing by analogy, the *TSSA* regulation imposes a strict statutory duty on fuel distributors to conduct a comprehensive inspection of all customers' oil tanks. If a fuel distributor cannot escape liability by delegating such a statutory duty, surely it cannot escape liability simply by purporting to contract out of the statutory duty or exclude liability for its failure to perform that duty.

227 As I review Thompson Fuels' submissions on the exclusion of liability, they appear to be premised on its position that Thompson Fuels did conduct the mandatory comprehensive inspection on February 27, 2002, a position that I have rejected. If this premise were correct, Thompson Fuels would have met its regulatory obligations, and, arguably, any subsequent inspection or lack of inspection would be governed by the Customer Service Contract and the fact that Mr. Gendron expressly declined to purchase an annual inspection plan from Thompson Fuels when one was offered and explained to him. Had Thompson Fuels performed the comprehensive inspection required by law, it may be that the exclusion clause would have operated to exclude liability for negligence in relation to its performance of its contractual duties. That would be a question of freedom of contract rather than public policy.

TSSA

228 The plaintiff argues that TSSA breached its duty of care by failing to adequately ensure that the response to the oil spill was prompt and adequate. He argues that TSSA had a "lackadaisical" response to the spill despite knowing its severity and potential for significant environmental damage, and that this response fell below the standard of care required of a regulatory agency tasked with responding to environmental oil spills.

229 The plaintiff further argues that the TSSA failed to meet its obligations under a memorandum of understanding signed with the MOE, in which the TSSA was to act as the "lead agency" for all petroleum based environmental occurrences resulting from a spill or leak. Pursuant to the memorandum of understanding, the TSSA would continue as the lead agency where contaminants remained on site or where off-site migration was limited to municipally owned properties such as roadways. Responsibility would transfer to the MOE if the contaminants migrated off-site. The plaintiff argues that the TSSA failed to adequately take the lead. While the oil spill was reported to the Spills Action Centre on the afternoon of Friday, December 19, 2008, the TSSA did not respond to the report until Monday December 22, 2008.

230 The plaintiff argues that when Mr. Janes of the TSSA did attend on December 22, 2008, he failed to impress on Mr. Gendron any sense of urgency and two days later issued an order to delineate (but not restore) within 120 days.

231 Thompson Fuels argues that the TSSA failed to properly investigate the incident and location and nature of the contamination. The TSSA failed to promptly order Mr. Gendron to remediate, and instead issued a confusing order to delineate within 120 days. Thompson argues that the TSSA inspector was negligent for failing to ask Mr. Gendron whether there was any drainage system below the ground in the basement floor and whether there were any drainage lines to the lake. In addition, he should have checked the catch basins for any contamination and advised the MOE of the reasonable likelihood of contamination into the surface or groundwater. Finally, Thompson Fuels argues that the TSSA should have ensured that Mr. Gendron understood that he had a duty to promptly clean the contamination.

232 TSSA argues that it had no involvement with the tanks until after the fuel oil leak was reported to the Spills Action Centre on December 19, 2008. There is no suggestion that TSSA was in any way responsible for causing

the fuel oil leak, nor did it have any obligation to clean up Mr. Gendron's property. The TSSA takes the position that it is a public regulatory agency acting in the public interest and had no private law duty of care to Mr. Gendron when it conducted its inspection and issued its order requiring 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.

Application of The Cooper/Anns Test

233 To determine whether a public authority owes a private law duty of care to an individual the court applies what the Ontario Court of Appeal has referred to as the two-part "Cooper/Anns test" (*Eliopoulos Estate v. Ontario (Minister of Health and Long-Term Care)* (2006), 82 OR (3d) 321, *2006 CanLII 37121* (ON CA), at para. 9, quoting *Cooper v. Hobart*, *2001 SCC 79* (CanLII) at paras. 30-31):

> (1) was the harm that occurred the reasonably foreseeable consequence of the defendant's act? and (2) are there reasons, notwithstanding the proximity between the parties established in the first part of this test, that tort liability should not be recognized here? The proximity analysis involved at the first stage of the Anns test focuses on factors arising from the relationship between the plaintiff and the defendant. These factors include questions of policy, in the broad sense of that word. If foreseeability and proximity are established at the first stage, a prima facie duty of care arises. At the second stage of the Anns test, the question still remains whether there are residual policy considerations outside the relationship of the parties that may negative the imposition of a duty of care. . .

234 In *Eliopoulos* the Ontario Court of Appeal explained (at para. 10) that the first issue is whether there is sufficient proximity between the public authority and the plaintiff to justify finding that a private law duty of care exists. The Court of Appeal stated, at para. 11:

> According to *Cooper*... proximity is determined by "looking at expectations, representations, reliance, and the property or other interests involved" to "evaluate the closeness of the relationship between the plaintiff and the defendant" and by asking "whether it is just and fair having regard to that relationship to impose a duty of care in law upon the defendant".

235 The first question is "whether the case falls within or is analogous to one of the categories of cases in which the courts have recognized a duty of care". The Court of Appeal explained, at para. 12:

> The case must fit within or be analogous to a category having a degree of analytic precision comparable to the examples listed in Cooper, namely, an act that foreseeably causes physical harm to the plaintiff or the plaintiff's property; nervous shock; a negligent misstatement; misfeasance in public office; breach of a recognized duty to warn; failure by a municipality to inspect housing developments without undue negligence; or failure to execute a policy of road maintenance in a non-negligent manner.

236 As I understand Mr. Gendron's and Thomson Fuels' position, there are essentially two allegations of negligence made against the TSSA. The first is that the TSSA failed to conduct an immediate and proper inspection of the site when Mr. Janes arrived on December 22, 2008. The second is that the delineation order of December 24, 2008 was not adequate to address the urgency of the situation. While these were advanced as two separate arguments, they are, in my view, two sides of the "failure to inspect without undue negligence" category of cases. That is because the failure to inspect cases deal with both the inspection and the power of inspectors to order compliance if the building does not pass the inspection.

237 I will first consider the allegations under the heading "TSSA Inspection", and will then consider whether, apart from the inspection process, TSSA owed Mr. Gendron any private law duty of care.

The TSSA Inspection

238 The duty of a public authority to conduct a proper inspection was considered by the Supreme Court of Canada in *Ingles v. Tutkaluk Construction Ltd*., *2000 SCC 12* (CanLII). .

239 In *Ingles* the Supreme Court of Canada confirmed that when a public actor makes a policy decision to conduct an inspection, it may owe a duty of care to any person reasonably within its contemplation as someone to be injured by a breach of its duty.

240 Relying on the earlier case of *Kamloops v. Nielsen*, *[1984] 2 S.C.R. 2*, *1984 CanLII 21* (SCC), the Supreme Court distinguished between two types of legislation as follows, at para. 17:

> (1) statutes conferring powers to interfere with the rights of individuals in which case an action in respect of damage caused by the exercise of such powers will generally not lie except in the case where the local authority has done what the legislature authorized but has done it negligently;
>
> (2) statutes conferring powers but leaving the scale on which they are to be exercised to the discretion of the local authority. Here there will be an option to the local authority whether or not to do the thing authorized but, if it elects to do it and does it negligently, then the policy decision having been made, there is a duty at the operational level to use due care in giving effect to it.

241 The Supreme Court explained that inspection schemes fall within the second type of legislation. The Court stated, at para. 18:

> It is clear, however, that once a government agency makes a policy decision to inspect, in certain circumstances, it owes a duty of care to all who may be injured by the negligent implementation of that policy...

242 The Supreme Court affirmed that once an inspection has occurred a traditional negligence analysis is applied, at para. 20:

> Once it is determined that an inspection has occurred at the operational level, and thus that the public actor owes a duty of care to all who might be injured by a negligent inspection, a traditional negligence analysis will be applied. To avoid liability, the government agency must exercise the standard of care in its inspection that would be expected of an ordinary, reasonable and prudent person in the same circumstances... While the municipal inspector will not be expected to discover every latent defect in a project, or every derogation from the building code standards, it will be liable for those defects that it could reasonably be expected to have detected and to have ordered remedied;

243 Accordingly, when Mr. Janes conducted the inspection on behalf of the TSSA he owed Mr. Gendron a *prima facie* duty of care to conduct the inspection with reasonable care. The plaintiff must show that the inspector did not exercise the standard of care that would be expected of an ordinary, reasonable and prudent inspector in the same circumstance.

244 The Supreme Court makes clear in *Ingles* that the municipality's duty in this context includes not only the duty to inspect, but also the duty to order a remedy when the building fails the inspection. In other words the duty to inspect includes the duty to enforce. The Court stated, at para. 23:

> The legislative scheme is designed to ensure that uniform standards of construction safety are imposed and enforced by the municipalities. Sections 5 and 6 of the Act require that building plans and specifications be inspected before a permit is issued to ensure that they conform with the building code. Sections 8 to 11 set out the powers of the inspector to ensure that all work that is being completed conforms with the permit and, as a result, with the building code. Inspectors are given a broad range of powers to enforce the safety standards set out in the code, from ordering tests at the owners' expense, to ordering that all work cease in

> general. Section 9 grants inspectors the power to order builders not to cover work pending inspection, or to uncover work when there is reason to believe that any part of the building has not been constructed in compliance with the Act. The purpose of the building inspection scheme is clear from these provisions: to protect the health and safety of the public by enforcing safety standards for all construction projects. The province has made the policy decision that the municipalities appoint inspectors who will inspect construction projects and enforce the provisions of the Act. Therefore, municipalities owe a duty of care to all who it is reasonable to conclude might be injured by the negligent exercise of their inspection powers. [Emphasis added]

245 In the municipal inspection cases "the city can only be held liable for those defects which the municipal inspector could reasonably be expected to have detected and had the power to have remedied" (*Ingles*, at para. 41, emphasis added*)*.

246 TSSA Inspectors are authorized to conduct an inspection under s.17 of the *Technical Standards and Safety Act, 2000*, which provides:

> An inspector may conduct an inspection and may, as part of that inspection, enter and inspect at any reasonable time the lands and premises where any of the things, parts of things or classes of things to which this Act, the regulations or a Minister's order apply are used, operated, installed, made, manufactured, repaired, renovated or offered for sale for the purpose of,
>
> (a) ensuring compliance with this Act, the regulations or a Minister's order;
>
> (b) ensuring that an authorization holder remains entitled to the authorization; or
>
> (c) determining whether a hazardous condition exists

247 Following an inspection under s. 17 of the *TSSA*, the inspector may issue an order pursuant to s.21 of the Act, which provides:

> 21 (1) If an inspector finds that any provision of this Act, the regulations or a Minister's order is being contravened, or that a thing under this Act is unsafe or is not being operated or used in accordance with the authorization relating to it, the inspector may,
>
> (a) serve the person he or she believes to be the contravener or that person's supervisor or employer, or both, with an order in writing directing compliance with the provision or authorization and may require that the terms of the order be carried out forthwith or within such other time specified in the order; or
>
> (b) seal any thing to which this Act or the regulations apply where there is or may be a demonstrable threat to public safety, whether or not the thing is subject to an authorization.
>
> (2) An inspector who has reason to believe that there is a contravention of this Act, the regulations or a Minister's order that does not present an immediate hazard may serve the contravener or a person who has authority to correct the contravention with a written order directing that the correction be carried out within the time specified in the order.

248 The legislation is not designed to require the TSSA to provide the sort of full-scale professional assessment report "that delineates the full extent of all petroleum impacts to both soil and groundwater", such as Mr. Gendron was required to obtain from DLS. This kind of inspection requires digging test pits or drilling boreholes into the concrete under the basement. Section 17 simply requires a determination of whether a hazardous condition exists, a much more modest obligation. If a hazard does exist, the TSSA is obliged to inform the MOE pursuant to s. 92(4) of the *Environmental Protection Act*.

249 The TSSA takes the position that given the limited purpose of the inspection the TSSA met the standard of reasonableness in this case. The plaintiff told the Spills Action Centre that he was not concerned about the drinking

water since it came from a drilled well, and he was convinced that the oil did not go into the ground. Mr. Gendron told the Spills Action Centre that the home was built on a 7-inch thick slab of concrete without drains or a sump pump, and that he had captured most of the oil that had escaped and mopped up the rest with rags. On the basis of the information provided by Mr. Gendron, the TSSA acted reasonably by conducting a visual inspection of the property on December 22, 2008.

250 At the time that the TSSA inspected the property, there was no evidence of any contamination in the lake. Given the information provided by Mr. Gendron, the weather conditions (the area was covered with snow and ice) and the limited purpose of the TSSA inspection, the TSSA could not be expected to have discovered the drainage system under 93 Hazel. Recall that the weather became unseasonably warm between December 24 and 29, 2008. It even rained on December 27, 2008. Since the thaw did not occur until December 24, 2008, it is likely that none of the oil had migrated off the property when Mr. Janes conducted his inspection on December 22, 2008. I heard no evidence to suggest that the oil migrated off the property prior to the December 24, 2008 thaw.

251 The determination of whether the TSSA has met the standard of care required in the circumstances is a question of fact. The plaintiff has provided no evidence of the standard of care required of the TSSA. No one on behalf of the plaintiff testified that a more thorough visual inspection on December 22, 2008 would reasonably be expected to have detected oil off-site.

252 Mr. Janes did not ask Mr. Gendron whether there was a drainage system under 93 Hazel because Mr. Gendron had already informed the Spills Action Centre that there were no drains in the basement. Mr. Janes conducted a visual inspection of the site, he was not in a position to excavate test pits or drill bore holes into the concrete floor in the basement to investigate further. The evidence of Mr. McClintock of DLS was that the only way to locate the Big O drainage system was to excavate because it is made of plastic. DLS determined that the perforated Big O drainage was the source of oil in the lake by working backward from its observation of oil on the lake on December 30, 2008.

253 In *Ingles*, the Supreme Court of Canada agreed with the trial judge that the inspector was negligent because even though the inspector was not able to test the underpinnings, he had the power to order the property owner to call in an engineer to conduct the proper tests (at para. 46).

254 In this case Mr. Janes had the power to order Mr. Gendron to call in an engineer to conduct the proper tests, and that is what he did. The TSSA order expressly required Mr. Gendron to "provide an assessment report, from a Professional Engineer or Geoscientist that delineates the full extent of all petroleum impacts to both soil and groundwater".

255 Mr. Janes testified that the order he prepared was the only type of order issued by the TSSA in response to fuel spills.

256 Based on the evidence, I cannot find that either the TSSA inspection or order issued fell below the standard of care that would be expected of an ordinary, reasonable and prudent inspector in the same circumstance. I am also of the view that the visual inspection on December 22, 2008 was intended to be the first step in the inspection process, and that the delineation order of December 24, 2008, which required the retention of a Professional Engineer or Geoscientist to conduct a full delineation, qualifies as an appropriate second step in the inspection process.

257 The evidence is that the standard TSSA inspection order required delineation within 90 days rather than the 120 day period given to Mr. Gendron. As events unfolded, it would have made no difference if the delineation order had been for the standard 90 days instead of 120 days. Indeed, it would have made no difference if the order required delineation within 60 days or even 30 days. In order to prevent the oil migrating to the lake, an order issued on December 22 would have had to require delineation within four or five days. I heard no evidence that a five-day deadline was reasonable or even possible in these circumstances. Even if the 120-day deadline was considered negligent, I heard no evidence as to what time period a reasonable regulatory agency in the position of the TSSA

should have ordered in the circumstances and on the basis of the information available to Mr. Janes when he conducted the initial inspection.

258 Accordingly, even if the 120-day deadline was negligent, the plaintiff has failed to prove that such negligence caused or contributed to the damages because there is no evidence that a reasonable delineation order would have avoided or reduced the damages. In any event, the TSSA order was almost immediately eclipsed by the s. 157.1 *Environmental Protection Act* order issued by the MOE on December 30, 2008.

259 While the remediation order issued by Ms. Curlew of the MOE under s. 157.1 of the *Environmental Protection Act* on December 30, 2008 was a more proactive order, Ms. Curlew was presented with a different situation and considerably more information when she arrived on site on December 30, 2008. By that time the oil had migrated off-site and the situation was the responsibility of the MOE rather than the TSSA. Provincial officers under Part XV of the *Environmental Protection Act* have different powers and responsibilities than TSSA inspectors under s. 21 of the *Technical Standards and Safety Act, 2000*, and, therefore, evidence of what Ms. Curlew ordered on December 30, 2008 is not evidence of the standard of care required of the TSSA on December 22, 2008.

260 Although I have found that the plaintiff has not proven that the TSSA inspection fell below the standard of care required in the circumstances that presented on December 22, 2008, I am not suggesting that the TSSA was a model of efficiency or clarity. As indicated above, the template letter accompanying the December 24, 2008 order was confusing and unhelpful. The standard form used to set out the terms of the order was baffling even to the inspector charged with filling it out. The inspector did not know the difference between a remediation order and a delineation order. These are all matters that should be addressed by the TSSA if they have not already done so in the nine years since the order was issued. My focus in these reasons has been on the substance of the order rather than with its form. The inspection undertaken and the delineation order made by the TSSA were not negligent based on the information and resources available to Mr. Janes on December 22, 2008.

TSSA's Statutory Duties

261 As indicated above, I am of the view that most of the plaintiff's allegations of negligence fall under the category of "failure to inspect".

262 The plaintiff makes a number of other allegations, such as the TSSA's alleged "breach of its duty under the Memorandum of Understanding" with the MOE, and its alleged failure to advise Mr. Gendron to contact his insurer. These alleged breaches of duty are not analogous to any of the recognized categories of cases in which the courts have recognized a duty of care. Accordingly, I will consider the next question of whether proximity can be made out on the basis of the TSSA's statutory or regulatory duties.

263 The TSSA is an administrative authority established by the *Technical Standards and Safety Act, 2000*, and is responsible for regulation and enforcement of fuels in Ontario. Section 1 of the *TSSA* provides that "the purpose of this Act is to enhance public safety in Ontario by providing for the efficient and flexible administration of technical standards with respect to the matters referred to in section 2", which include "fuels".

264 The powers of the TSSA are set out in the *Technical Standards and Safety Act* and its regulations. Section 3.6 of that Act sets out the statutory objects of the TSSA:

> The following are the objects of the Corporation:
>
> 1. To promote and undertake activities which enhance public safety in relation to the matters assigned to the Corporation under this Act and the regulations.
> 2. To undertake public safety services in relation to the matters assigned to the Corporation under this Act and the regulations, including training, certification, licensing, registration, audit, quality assurance, inspection, investigation and enforcement.

3. To promote and undertake activities which encourage the harmonization of technical safety standards and compliance practices.
4. To inform, educate and work with industry, government and the public in relation to the matters assigned to the Corporation under this Act and the regulations.
5. To encourage industry to enhance safety in a responsible manner in relation to the matters assigned to the Corporation under this Act and the regulations.
6. To promote and undertake additional activities in accordance with the memorandum of understanding under section 3.15.
7. To carry out any additional objects the Minister may by order specify.

265 As indicated above, the relevant legislation imposes no duty on the TSSA to provide a full-scale professional assessment report that delineates the full extent of all petroleum impacts to both soil and groundwater, nor does it impose any duty on the TSSA to conduct any environmental clean-up or remediation. Remediation remains the responsibility of the property owner.

266 Part X of the *Environmental Protection Act* (ss. 91-123) contains specific provisions relating to the responsibility for the remediation of oil spills into the natural environment. Section 93 of that Act provides:

> 93 (1) The owner of a pollutant and the person having control of a pollutant that is spilled and that causes or is likely to cause an adverse effect shall forthwith do everything practicable to prevent, eliminate and ameliorate the adverse effect and to restore the natural environment.
>
> (2) The duty imposed by subsection (1) comes into force in respect of each of the owner of the pollutant and the person having control of the pollutant immediately when the owner or person, as the case may be, knows or ought to know that the pollutant is spilled and is causing or is likely to cause an adverse effect.

267 In addition, Part XV of the *Environmental Protection Act* sets out the powers of provincial officers appointed under that Act to conduct inspections and issue orders to any person that the provincial officer reasonably believes is contravening the Act or orders to take preventative measures to prevent or reduce the risk of discharge of a contaminant into the natural environment. In this case, it will be recalled that Ms. Curlew was the Provincial Officer with the MOE who attended the site.

268 Apart from the duty of care that arises out of the inspection, neither the plaintiff nor Thompson Fuels have pointed to any particular provision of the legislation to support their position that the TSSA has a private law duty of care in this case. Mr. Gendron relies primarily on the Memorandum of Understanding between the TSSA and the MOE outlining their respective roles as lead agency for managing on-site and off-site spills. In my view the Memorandum of Understanding does not support the plaintiff's position on this issue. The Memorandum is an agreement between two government agencies with respect to their potentially overlapping responsibilities for the reporting, assessment and management of oil spills. The Memorandum does not create any powers or responsibilities additional to those in the *Technical Standards and Safety Act, 2002* or the *Environmental Protection Act*. There is nothing in the agreement that would impose on the TSSA a private law duty of care to the plaintiff if the duty were not already set out in the relevant provisions of the *Technical Standards and Safety Act, 2002*.

269 In my view the statutory provisions relating to the TSSA, particularly the objects listed in s. 3.6 of the *Technical Standards and Safety Act, 2002*, are clearly intended to establish general public law duties to promote and protect public safety and the environment. Apart from the inspection power, the requisite proximity between the plaintiff and the TSSA is not established by the legislative framework. These public law duties do not give rise to a private law duty sufficient to ground an action in negligence. The TSSA had no legal obligation to advise Mr. Gendron to call his insurer, and they owe him no duty of care in that regard. It is arguable that Mr. Janes could have been more helpful to Mr. Gendron and provided him with more specific guidance or instruction in this situation, but that is not the TSSA's statutory mandate.

270 In *Eliopoulos*, Sharpe J.A. considers the Supreme Court of Canada cases of *Cooper v. Hobart*, *2001 SCC 79* (CanLII) and *Edwards v. Law Society of Upper Canada*, *2001 SCC 80* (CanLII). I adopt his analysis (at paras. 18-20), which I find directly applicable to the legislative scheme at issue in this case:

> The decisions of the Supreme Court of Canada in *Cooper* and *Edwards* are particularly instructive. Both cases centred on claims by a specific class of individuals who alleged that they had suffered loss as a result of the failure of a public authority to exercise its supervisory and investigatory powers. *Cooper* involved a claim by investors who suffered losses at the hands of a mortgage broker. The plaintiffs alleged that the British Columbia Registrar of Mortgage Brokers owed them a private law duty to suspend a mortgage broker's licence or to notify investors if a mortgage broker was under investigation. In *Edwards*, the plaintiffs suffered losses at the hands of a lawyer who allegedly used his trust account improperly. The plaintiffs alleged that the Law Society of Upper Canada, which had knowledge of the manner in which the lawyer operated his trust account, owed them a private law duty to ensure that the lawyer's trust account was operated according to the regulations or to warn the plaintiffs that it had abandoned its investigation.
>
> In both *Cooper* and *Edwards*, the statements of claim were struck because the public authority owed no private law duty of care to the plaintiffs. In both cases, after reviewing the statutory powers and duties of the defendant, the Supreme Court concluded that any duty was owed to the public as a whole rather than to individual investors or clients who interacted with the brokers or lawyers regulated by the legislation. In *Cooper*, the Supreme Court concluded, at para. 49:
>
> > Even though to some degree the provisions of the Act serve to protect the interests of investors, the overall scheme of the Act mandates that the Registrar's duty of care is not owed to investors exclusively but to the public as a whole.
>
> Similarly in *Edwards*, the Supreme Court found, at para. 14:
>
> > The Law Society Act is geared for the protection of clients and thereby the public as a whole, it does not mean that the Law Society owes a private law duty of care to a member of the public who deposits money into a solicitor's trust account. Decisions made by the Law Society require the exercise of legislatively delegated discretion and involve pursuing a myriad of objectives consistent with public rather than private law duties.
>
> As I see it, the proximity argument in this case is significantly weaker than in either *Cooper* or *Edwards*. Those cases pertained to narrow classes of individuals whose specific interests were vulnerable to the very agents the public authorities were mandated to supervise, yet no duty of care was found. This case is concerned with a general risk faced by all members of the public and a public authority mandated to promote and protect the health of everyone located in its jurisdiction...

271 In the present case, the statutory role of the TSSA is not geared to the protection of the property owner where the spill occurred. Its statutory mandate is the protection of public safety and the environment. Whether the TSSA performs its public function effectively or not does not establish a private law duty to the property owner where the spill occurs.

272 On this basis I dismiss the argument that the TSSA was negligent with respect to Mr. Gendron, and dismiss the claim against the TSSA.

Granby

273 The oil tank manufacturer, Granby, is a defendant in this claim. Mr. Gendron alleged that Granby manufactured an oil tank that it knew was prone to internal rust that could result in premature failure and leaks, and failed to provide warnings or an instruction manual to the consumer. Each of the other defendants has brought a crossclaim against Granby for contribution and indemnity. Soon after the trial began however, Mr. Gendron and Granby reached a settlement agreement.

274 I was advised by the parties that the settlement agreement is what is referred to as a Pierringer Agreement as that term has been defined by the Supreme Court of Canada in *Sable Offshore Energy v. Ameron International Corp*., *2013 SCC 37* (CanLII). The non-settling defendants have been given assurances that they will not be held liable for more than their share of damages and are severally, and not jointly, liable with the settling defendant. As in *Sable Offshore Energy*, the plaintiff has agreed that at the end of the trial, once liability has been determined, the amount of the settlement will be disclosed to me and, 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.

275 I reference the Pierrenger Agreement because it has resulted in a shift in Mr. Gendron's position. While he initially claimed that Granby was negligent, he now takes the position that any risk of premature failure of the tank was the product of improper installation and maintenance. The tank met the ULC S602 standard in force at the time, and the MIC that caused the internal corrosion was not related to any manufacturer's defect.

276 Mr. Gendron argues that the "duty to warn" only arises when the manufacturer has knowledge or ought to have knowledge of a latent risk in the product. In this case, the evidence of Mr. Legault, Granby's Director of Operations, was that Granby only became aware of issues with 14 gauge end-outlet tanks in 2000, when it noticed an increase in warranty claims from end users. As a result, Granby conducted an investigation and found that the increased rate of internal corrosion was caused by improper sloping of the tank (away from the outlet) and the presence of water.

277 By the end of 2001, Granby added warning stickers to its tanks directing installers to tilt the tank toward the outlet and to follow the newly created installation guidelines on its website. In 2003, Granby included the installation manual with the tanks as required by the ULC standard established that year. Granby sold only to wholesalers and relied on them to ensure that tanks were installed by professional installers. Mr. Legault estimated that the incidence of premature failure as a result of internal corrosion in indoor 14-gauge end-outlet tanks was less than 1 per cent, although the consequences of oil tank failure could be very serious.

278 Granby did not issue a recall of existing tanks because the problem was one of improper installation and maintenance and not a manufacturer's defect.

279 In 2003, Granby began to provide seminars to OBTs about the dangers of improper installation and maintenance and emphasized the importance of checking for water. Thompson Fuels employees attended these seminars.

280 The president and general manager of Granby wrote to the Underwriters' Laboratories of Canada in September of 2000 highlighting Granby's concerns in relation to standards for steel thickness in oil tanks, and recommending that all oil tanks be supplied in 12-gauge (which is 2.3 mm. thick, or 25 per cent thicker than the 1.8 mm. thick 14-gauge) steel only. The ULC responded that these suggestions would be forwarded to the Committee on Stationary Steel Storage Containers for Flammable Liquids for review and discussion at the next meting. In 2006 the ULC standards were changed to require single wall oil tanks to be 12-gauge steel, but end-outlet tanks are still permitted. There was no requirement to remove existing 14-gauge tanks.

281 Granby discontinued the manufacture of 14-gauge end outlet tanks in early 2002. The evidence in this case is that Granby was the industry leader in Canada on this issue and lost market share to manufacturers who continued to sell 14-gauge end-outlet tanks, which were marginally less expensive. In 2007, Granby introduced double-bottom tanks to reduce the risk of leaks even further.

282 The tanks installed by Mr. Gendron were manufactured in 1999 and installed in November 2000, before Granby had affixed a warning label and developed an installation guide.

283 Accordingly, the plaintiff now argues that Granby did not know of the danger of internal corrosion in its tanks

until after the tanks were manufactured, sold and installed, and there is therefore no basis upon which the Court can find that Granby as a manufacturer breached its duty of care to Mr. Gendron.

284 Thompson Fuels argues that by 1999 Granby knew that end-outlet tanks were inherently dangerous because their sale was prohibited in the United States in 1996. Accordingly, Granby should have provided warning stickers and/or maintenance manuals in 1999. Thompson takes the position that the industry standard in Canada was negligent.

285 The TSSA has taken no position with respect to the liability of Granby.

286 Judging Granby on the basis of the industry standards that existed in Canada when it manufactured the tanks in 1999, I find that Granby was not negligent in the manufacture of the tank and did not, at that time, know of the risk of corrosion associated with the improper installation of indoor 14-gauge end-outlet tanks. The incident tank was a ULC-S602 certified tank, and therefore met the industry standard at that time. The industry standard for installation at that time was to install the tank on metal "cradles" or "saddles" of equal height, so that if the floor were level the tanks would also be level. There was no basis in 1999 to warn installers to slope the tank toward the outlet.

287 Thompson Fuels has provided no authority for its proposition that a Canadian manufacture that meets Canadian industry standards can be found liable for negligence for failing to meet American industry standards, nor have they provided any authority that an industry standard can itself be negligent.

288 Certainly by 2000 Granby was aware that there were concerns regarding 14-gauge end-outlet tanks, but Granby appears to have been ahead of the curve with regard to this issue.

289 Both the manufacturer and the distributor may have a duty to warn about risks and dangers not known to the ordinary consumer. A higher standard of care applies to manufacturers, since manufacturers have detailed knowledge of their own products (*Walford v. Jacuzzi Canada Ltd.*, *2007 ONCA 729* (CanLII), at paras. 29-30, per Feldman J.A., and para. 84 and cases cited at notes 1 and 2, per Rouleau J.A. dissenting but not on this point).

290 Since Granby sold to wholesalers, it does not know which consumers installed Granby tanks; this information would be known only by installers or fuel distributors. If, after 2000, there arose a duty on Granby to warn about tanks manufactured prior to 2000, it would have to be a duty on Granby to warn the fuel distributors and installers who had direct contact with consumers. Granby accomplished these warnings with its education seminars beginning in 2003 and its Installation and Maintenance Guidelines published in 2004. The seminars were attended by Thompson Fuels OBTs. There is no evidence that these seminars were inadequate for their purpose. Accordingly, if, after 2000, there was a duty on Granby to warn about the risk of corrosion, I find that Granby did meet that standard of care.

291 If a duty to warn consumers about tanks manufactured prior to 2000 arose post-2000, such duty would fall on the installer or the fuel distributor. In fairness to Thompson Fuels, it did warn its customers of this danger. For example, the 2004 Thompson Fuels newsletter warned homeowners of oil tanks rusting from the inside, and Thompson Fuels frequently urged its customers to purchase a complete inspection for their tank. There is no evidence that Thompson Fuels' conduct in this regard fell below the industry standard of care.

292 On this basis I dismiss the claim against Granby.

2) Contributory Negligence

293 Thompson Fuels and the TSSA argue that Mr. Gendron was solely or primarily responsible for the loss. They rely on the following conduct in this regard:

(i) Improper installation of the tank.

(ii) Failure to maintain the tank by having annual inspections.

(iii) Improperly introducing water into the incident tank

(iv) Failure to promptly report the leak.

(v) Improperly extending the Big O drainage to the catch basin, allowing for a direct connection to the lake

(i) Improper installation of the tank.

294 Pursuant to the regulations only a person holding an OBT certificate was authorized to install an above-ground tank. The evidence is clear that the plaintiff failed to have the tanks installed by a licensed OBT or to have it inspected before they were first used (the first use pre-dates his contract with Thompson Fuels). As a result the shut-off valves were not properly installed in accordance with B139-00 or its predecessor B139-M91 and the improper location of the shut-off valve contributed to the amount of oil that escaped (as much as 250 litres might have been saved if the shut-off valve had been in the correct location) and was therefor one cause of the damages. Failing to have the oil tanks properly installed by a qualified OBT was negligent on Mr. Gendron's part.

295 Improper installation of a tank -- and in particular failure to have installed a proper shut-off valve -- was held to be contributory negligence in *Maddock*, at para. 24.

(ii) Failure to maintain the tank by having annual inspections.

296 Mr. Gendron declined to follow the recommendations of Thompson Fuels to purchase a furnace protection plan or to maintain and inspect the tank on an annual basis. Section 19 of Ont. Reg. 213/01 (Fuel Oil) imposed an obligation on homeowners to maintain the oil tank in safe operating condition. Tanks had to be inspected each year and this was the responsibility of the homeowner. Mr. Gendron took no steps to ensure that the tanks were regularly inspected, and this fell below the standard of care expected of a homeowner and was negligent on his part.

297 Failure of a homeowner to properly maintain a tank and have it inspected was held to be contributory negligence in *Davis &McCauley Fuels Ltd.*, at paras. 16-17.

(iii) Improperly introducing water into the incident tank.

298 The evidence indicates that somehow water was introduced into the incident tank, and this led to its premature failure. I accept the evidence that the different levels of water found in the incident and non-incident tank indicate that condensation was not the only source of water in the incident tank.

299 The evidence indicates that Thompson Fuels could not have been the source of the water, because Thompson Fuels has strict monitoring for water contamination in its oil storage tanks.

300 I accept evidence that Mr. Gendron likely introduced water and microbes into the incident tank, probably when he filled the tanks with less expensive stove oil purchased from third parties, either because the water and microbes were in the oil or in the jerry cans he used to fill the tanks. I agree that the use of jerry cans to fill a home furnace oil tank with stove oil was negligent and fell below the standard of care of a reasonably prudent person. Such conduct by Mr. Gendron would not be reasonably foreseeable to the manufacturer of the tank or to Thompson Fuels.

(iv) Failure to promptly report the leak.

301 Mr. Gendron knew about but failed to call Thompson Fuels' 24/7 emergency hotline as soon as he discovered the leak. If Mr. Gendron had called the emergency phone line, Thompson Fuels would have responded within 30 minutes and the leak plugged or the tanks pumped out. This would have greatly reduced the quantity of oil that

escaped and reduced the damages. Instead, Mr. Gendron thought he had things "under control", and waited nearly 24 hours after discovering the leak before reporting it. Even then he phoned to complain about the quantity of fuel he thought had been delivered rather than to report a leak.

302 I find that an ordinary reasonable and prudent person in the same circumstances would know to immediately report a fuel oil leak so that it can be dealt with by professionals. That is common sense. In addition, ss. 92(1) and (2) of the *Environmental Protection Act* require the homeowner to immediately report an oil leak to the Spills Action Centre.

303 A reasonable and prudent person would have called for professional assistance immediately. The plaintiff certainly had plenty of time to call Thompson Fuels or some other authority while he was trying to catch the leak in a Tupperware container. I agree that Mr. Gendron was negligent in not doing so promptly.

304 Failure of the homeowner to promptly report a fuel oil leak was held to be contributory negligence in *Davis &McCauley Fuels Ltd.*, at paras. 16-17.

(v) Improperly extending the Big O drainage to the catch basin, allowing for a direct connection to the lake.

305 Thompson Fuels argues that the extension of the Big O drainage pipe without a permit was negligent. The evidence is that this was the path by which the contaminant reached the lake after the thaw and rainfall between December 24 and December 28, 2008.

306 I heard no evidence that the Big O drainage pipe required a permit or was not legal under the municipal laws in force when it was built. In the absence of any evidence that the construction of the Big O drainage pipe was illegal or contrary to municipal standards I cannot give effect to this allegation of negligence.

307 Similarly I do not accept Thompson Fuels allegation that Mr. Gendron was negligent in not immediately disconnecting the Big O drainage pipe. While DLS knew to do this on January 4, 2008 (5 days after they arrived on site), DLS is a professional environmental remediation company staffed by engineers. DLS discovered the Big O drainage pipe only after the oil had migrated to the lake. In my view a reasonable person in Mr. Gendron's position would not know to immediately disconnect a drainage pipe, and it is not a standard of care I am prepared to infer in this case.

3) Apportionment of Fault

308 Section 3 of the *Negligence Act*, R.S.O. 1990, c. N.1. reads as follows:

> In any action for damages that is founded upon the fault or negligence of the defendant if fault or negligence is found on the part of the plaintiff that contributed to the damages, the court shall apportion the damages in proportion to the degree of fault or negligence found against the parties respectively.

309 In the present case Thompson Fuels is the only defendant found to be negligent. I have also found contributory negligence on the part of the plaintiff, Mr. Gendron. The next issue is to apportion fault between them.

310 In my view, the majority of the responsibility for the loss lies with the plaintiff homeowner. His contribution was not a minor inadvertent lapse, but a series of actions that contributed to the leak and increased the damages. He was negligent in the installation of the oil tank, the failure to maintain the tank, and the failure to promptly report the leak. And, significantly, the plaintiff negligently introduced water into the incident tank; a circumstance that that could not have been foreseen by Thompson Fuels, which took precautions to ensure that it had strict monitoring for water contamination in the oil that it delivered to Mr. Gendron.

311 Thompson Fuels was negligent in its failure to conduct the legally required comprehensive inspection. It

shares with Mr. Gendron responsibility for the single shut-off valve. It should have tagged-out the oil tank when it conducted its maintenance visits in 2006 and 2007, and it should have tested for water, particularly when one end of the tank was not available for visual inspection.

312 That being said, this is not a case in which the homeowner relied on the expertise of the distributor. From his installation of the oil tank, to his decision not to purchase a furnace maintenance package, to his personally filling the tank with stove oil, to his delayed reporting of the leak, Mr. Gendron thought that he could handle things on his own and that he had matters "under control". He did not, and in my view this results in his being responsible for the majority of the damages.

313 In my opinion the appropriate apportionment is to find Mr. Gendron 60% at fault and Thompson Fuels 40% at fault.

4) Damages

314 The defendants challenge the amount of damages claimed by the plaintiff on four grounds:

i. the off-site remediation was improper and excessive and cost far more than it should have;

ii. the demolition of the house was unnecessary;

iii. the estimated cost of replacing the house is excessive; and

iv. the cost of excavating the soil in the vicinity of 93 Hazel was excessive because it was unrelated to the 2008 oil spill.

i) *Was the Cost of the Off-site Remediation Reasonable?*

315 As indicated above, the cost of the off-site remediation ultimately reached $1,833,848.85. All of the costs of the remediation were documented by invoices. There is no dispute that the money was actually spent on remediation.

316 I am not going to catalogue all of the activities undertaken by DLS to respond to the MOE orders and complete the remediation. These activities are at issue to the extent that the defendants take the position that many of the costs incurred were unreasonable or unnecessary in the circumstances. The defence experts take the position that DLS' remediation methods were improper and excessive and that the remediation could have been accomplished at a fraction of the cost that was actually charged. They take the position that many of the measures undertaken were ineffective and the costs were inflated.

317 Thompson Fuels submits that the remediation costs should be in the range of $100,000 - $200,000 if the contamination was addressed before the oil migrated off 93 Hazel, and no more than $500,000 if the contamination reached the lake.

318 Thompson Fuels argues that the remediation of Sturgeon Lake could have been avoided altogether if Mr. Gendron had not extended the Big O drainage from the perimeter of his home to the nearby catch basin, or alternatively, if he had disconnected the Big O drainage pipe promptly upon discovery of the leak. They also point a finger at the TSSA, whose inspector failed to ask any questions about the home's drainage system when he conducted his inspection on December 19, 2008. Disconnecting the Big O drainage from the catch basin prior to the December 24-29, 2008 thaw could have prevented the oil from migrating into the lake.

319 There is no question that the costs of remediation would have been substantially reduced if the oil had not reached Sturgeon Lake. But it did and, once there, had to be remediated. In my view, the question of what the remediation would have cost if the oil had never reached Sturgeon Lake goes to the issue of foreseeability and the issue of contributory negligence, rather than the issue of damages. Given the proximity of Mr. Gendron's house to

the lake, the possibility that an oil leak would migrate to the lake was reasonably foreseeable, and I have already considered the issue of contributory negligence.

320 Thompson Fuels called two experts with respect to damages, Mr. Matthew Allan and Mr. Paul Hubley. Mr Allan was qualified as an expert in environmental remediation and Mr. Hubley as an expert in geology, hydro-geology, site assessment and site remediation. They testified that while it was reasonable for DLS to use one MTU to extract lake water for treatment, it was not reasonable to use three such units. They took the position that the use of containment booms, absorbent booms and bubblers (all of which were used by DLS) would have been sufficient to contain and absorb the fuel oil at much lower cost. Both experts took issue with the amount of time and labour expended to extract, melt and treat contaminated ice from the lake.

321 Messrs. Allan and Hubley testified that DLS failed to properly remediate the source of the oil and focused instead on the lakefront. In their opinion, failure to remediate the source of the oil just permitted the contaminants to continue to migrate to the lake and rendered the downstream work ineffective. In their view, the failure of DLS to address the actual source of the spill meant that the remediation process was unnecessarily lengthened and futile work was performed.

322 Messrs. Allan and Hubley also testified that DLS failed to properly delineate the contaminants on site, and that the testing indicates that some of the contaminants were not from the oil tank leak at issue. DLS did not obtain a "chemical signature" from the sample taken at the incident tank. Accordingly, DLS ended up remediating historical environmental contaminants that were unrelated to the oil leak.

323 Finally, Allan and Hubley testified that, based on the extent of the contaminants in the soil under 93 Hazel, DLS could have surgically removed the contaminated soil under the basement floor instead of demolishing the home. I will return to this question later in these reasons.

324 In addition, Allan and Hubley opined that the excavation of the entire property at 93 Hazel was unreasonable because there was no contamination identified to the rear of the home and in the backyard, and therefore, no reason to excavate the soil and send it to a contaminated soil site.

325 In addition, DLS charged a high percentage (16%) for administration and overhead amounts on all of their costs, including the services provided by themselves (internal fees) instead of only disbursements (subcontractor fees). Since most of the costs were incurred by DLS directly rather than by subcontractors, Thompson Fuels argues that this fee amounts to double billing for the same services. This position is supported by the expert evidence of Allan and Hubley, as well as the evidence of Mr. Frank DiMaria, an expert in environmental remediation retained by the plaintiff's insurer to provide an "environmental peer review" of the work conducted by DLS. In his report dated April 30, 2009, Mr. DiMaria stated:

> The general administrative and overhead fee (16%) that is being applied by DLS on all fees and disbursements, appears to be excessive, especially given the volume of work being conducted by DLS and the total project cost estimated by DLS...In addition, this fee should only be applied to subcontractor and disbursements, unless other agreements to the contrary have been established between FMIC [the insurer] and DLS.

326 Mr. DiMaria confirmed this evidence in his testimony in court.

327 Mr. McClintock, who was in charge of the remediation services of DLS and testified as their representative, simply responded that he did not consider this 16% administrative fee on DLS internal services to be double billing. He provided no explanation or rationale to support his position on this question.

328 Thompson Fuels takes the position that the MOE order required Mr. Gendron to "do everything practicable", but that DLS performed the remediation to a higher standard: one of perfection, rather than to return to the pre-existing conditions.

329 Finally, Thompson Fuels argues that Mr. Gendron should have hired an objective and qualified consultant to oversee DLS and ensure that DLS kept costs within reason. The absence of an independent consultant gave DLS "carte blanche to spend increased money and potentially over remediate".

330 Counsel for Mr. Gendron responds that the reports prepared by Allan and Hubley are not balanced. These reports point out only the criticisms of DLS, while on cross-examination they each acknowledged that many of the actions taken by DLS were appropriate in the circumstances. This is a valid observation and undermines their appearance of neutrality. Notwithstanding this fault, I did rule that Allan and Hubley were both independent experts who were qualified to give expert evidence in this case. In my view, both of these witnesses passed the threshold requirement of impartiality discussed in *White Burgess Langille Inman v. Abbott and Haliburton Co*., *2015 SCC 23* (CanLII) at para. 49. Accordingly, any apparent lack of balance goes to weight and not admissibility. On this basis, I am prepared to assess the validity of their criticisms on their merits, taking into account that on cross-examination they acknowledged that many of the efforts of DLS were appropriate in the circumstances.

331 My major concern with respect to the testimony of Allan and Hubley is their premise that after DLS was retained there was ongoing migration of oil from 93 Hazel to the lake, and that any work that did not prevent the migration was, in effect, wasted time and money. Mr. Hubley went so far as to state that as long as there was oil under the basement he would not consider DLS's efforts to be remediation. He stated that if DLS was not removing the source (the oil under the basement) it was just preserving the status quo, not remediating. Since DLS did not remove the oil under the basement in January or February, all other activities were essentially discounted or ignored.

332 I reject the premise upon which this opinion is based. When the oil leaked from the tank, some of the oil (perhaps most of it) flowed north along the Big O drain and made its way to the lake. Some of the oil flowed south, forming the inverted cone of contaminant under the basement floor. While we know from sample testing that some of the oil was under the basement floor, it is not possible to know how much was there. The testing showed a high concentration of oil, but cannot show volume. The concentration of oil is based on the testing of very small samples. The oil under the floor was mixed with the gravel, soil and water.

333 The initial source of the oil was the incident tank. The incident tank was empty within twelve hours. It is unlikely that the oil that flowed south and remained under the basement floor was ever the source of the oil in the lake. Indeed, Mr. Hubley acknowledged that the oil under the basement floor was only a potential source of oil to the lake. On January 4, 2009, DLS excavated and disconnected the Big O drain to prevent further migration of oil into the lake. They pumped out the four catch basins and removed contaminated water. DLS dug an interception trench as a contingency. Accordingly, it is incorrect to suggest that the failure to remediate the oil under the house until April meant that the source of oil to the lake remained and all work being done to remediate the lake after the first two weeks of January was a waste of time and money.

334 The oil was already in the lake when DLS arrived on site on December 30, 2008, and it is likely that most, if not all, of the oil that was going to get into the lake was already there as a result of the heavy rains a few days before. I accept the evidence of Mr. McClintock that by disconnecting the Big O drain on January 4, 2009, DLS effectively stopped any more oil from 93 Hazel migrating to the lake.

335 It is clear that when DLS arrived on site there was an emergency situation that required immediate efforts to remediate the lake. The lake was the number one priority, and DLS acted accordingly. The remediation efforts were prolonged by the fact that much of the lake was frozen. DLS expanded recovery locations with additional skimming devices and the application of absorbent pads within the primary containment area as the weather warmed in March and shoreline ice began to break up. I find that the final shoreline cleanup could not be completed until spring thaw.

336 In addition, Hubley based much of his analysis on the premise that DLS should have been able to remove all of the "free product" in the lake by the end of February, 2009, and that any work at the lake after that date does not

qualify as "remediation". He testified that while cutting the ice and melting it was reasonable in the first couple of weeks in January, it was not, in his opinion, efficient by the beginning of February. In my view Mr. Hubley's deadlines are arbitrary cut-off dates unsupported by any real evidence or analysis. He could not, based on the document review he conducted, provide an informed opinion on how long the remediation of the lake should have taken.

337 With regard to the use of three MTUs, both Hubley and Allan took the position that the value of the MTU operations on the lake was not demonstrated by analytical results or other information. At the time they prepared their reports on April 4, 2013 and September 5, 2014 respectively, neither had been provided with the analytical results of the MTUs, so this criticism was a fair one. They were, however, provided with the MTU results on October 2, 2014 - more than two years before the trial of this action commenced. They had plenty of time to file a revised or supplementary report to review and provide their respective opinions with respect to these results, but did not do so. In these circumstances they were not permitted to comment on these results in their testimony since their opinions with respect to the results were not in their reports (*Rules of Civil Procedure*, *R.R.O. 1990, Reg. 194*, at r. 53.03(3)).

338 Mr. Allan's evidence was that DLS never should have cut and melted the ice, that washing it would have been sufficient. He was not aware that Ms. Curlew's order of January 19, 2009 required Mr. Gendron to "continue to do everything practicable to remove all free product from the lake in a timely manner. Including but not limited to... breaking up and melting down ice that contains free product." I cannot fault DLS for taking remediation measures specifically ordered by MOE.

339 Another consideration in the context of this dispute over costs is that Mr. Gendron's own insurer, Farmer's Mutual, was overseeing the activities of DLS and was concerned that expenses would exceed liability limits. Insurers are financially motivated to keep payments as low as reasonably possible. Farmer's Mutual has an interest in not overpaying for remediation services given that, at the time of payment, it has no certainty that it will be able to successfully claim contribution and indemnity from any third parties. Accordingly, DLS did not have a "carte blanche" to charge whatever it wanted. In making this observation I recognize that the fact that a plaintiff's own insurer has agreed to pay for a claimed item is not determinative of the defendant's liability for the amount claimed. As long as the costs were reasonably incurred and reasonably related to remediating the damages caused or contributed to by the defendant, the court should not parse the invoices with the benefit of hindsight and decide whether DLS could have made do with one MTU rather than three.

340 As a matter of public policy, full restoration costs are consistent with the principles of the *Environment Protection Act* identified by the Ontario Court of Appeal in *Midwest Properties Ltd. v. Thordarson*, *2015 ONCA 819* (CanLII). In that case, the Court noted that damages should be awarded on the principle that best ensures that that the environment is returned to its pre-contamination condition. Public policy would prefer that DLS and the plaintiff err on the side of action when doing "everything practicable...to restore the natural environment" as required by s. 93(1) of the Act. Following the advice of the Ministry of the Environment DLS increased the number of persons working at the lakefront and increased the amount of lake water being treated by the MTUs. In the absence of evidence that the MTUs contributed nothing to the remediation efforts I am not prepared to conclude that their use was not reasonable or "practicable" within the meaning of the Act. The evidence confirms that DLS kept the MOE updated with frequent progress reports and MOE staff took the position that DLS was taking reasonable steps to remove the fuel oil that had made its way to the lake.

341 Thompson Fuels relies on the decision of this court in the case of *Thornhill*, which also dealt with a fuel oil leak. In that case the trial judge found that the defendant fuel distributor did not breach its standard of care and there was no causal connection between the actions of the defendant and the injuries to the plaintiff. The trial judge went on to consider the issue of damages "for the sake of completeness" and agreed with the defendant fuel provider that some of the costs of remediation were excessive. The remediation in that case was also conducted by DLS. In that case D.L. Edwards J. made the following general observation regarding the obligation to remediate, at para. 156:

> [T]he *EPA* creates a statutory obligation to remediate, in the circumstances of this case and in the absence of evidence of prior spills, to a non-detect basis. Further, aside from the *EPA*, I find that it is a fundamental aspect of negligence law that the plaintiffs are entitled to be placed in the position that they were prior to the injury... In the absence of any evidence of prior spills, the appropriate level of remediation is non-detect. The plaintiffs are entitled to have the oil removed from their property, not partly removed.

342 That being said, the trial judge indicated that he would have reduced the level of damages for the following reasons:

i. DLS' delay in commencing the excavation in that case increased the overall costs of remediation by 10% (at para. 184);

ii. DLS excavated more than necessary and the cost of excavation should be reduced by 59.7% (at para. 191);

iii. As the amount of soil that DLS excavated on the exterior should be reduced by 59.7% the amount of soil dumped and the dumping fee must be reduced by the same percentage. (at paras. 201-202); and

iv. The appropriate cost for assessment and remediation of the site by DLS was $525,000 and not the $1,034,532 charged by DLS (at paras. 219-224).

343 It appears that these reductions were based on the findings that proper mitigation of damages (commencing the excavation sooner) would have resulted in lower costs and that some of the costs of excavation were not reasonably related to remediating the damages caused by the oil leak. Mitigation of damages and causation remain relevant legal principles in the context of environmental torts.

344 Given the weather conditions both before and after DLS was retained, I am not persuaded on the evidence of this case that DLS' remediation activities at the lake were unnecessary or not reasonably related to the fuel oil spill originating at 93 Hazel, or that DLS could have started or completed the remediation activities sooner than it did. I find that the final shoreline cleanup could not be completed until spring thaw. Accordingly, with the exception set out below, I find that the entire costs of the off-site remediation should be included in the calculation of damages.

345 The one exception is the addition of the 16% administrative fee added to the work performed by DLS, as opposed to the fees of subcontractors and disbursements. While I am not prepared to reduce the percentage charged (while 16% is on the high side, the evidence was that there is a range of administrative fees charged by contractors), I accept the evidence of Mr. DiMaria (corroborated Messrs. Allan and Hubley) that the administrative fee should not have been added to the work performed by DLS, and that such an additional charge amounted to double billing by DLS. Mr. DiMaria's evidence on this point is more persuasive than Mr. McClintock's feeble response. It appears to me that this charge was excessive and so far removed from customary business practices that it cannot qualify as an expense that was reasonably incurred by the plaintiff.

346 Hence, I find that the defendant is not liable to pay the 16% administrative fee added to work performed by DLS and damages are reduced accordingly. The defendant must, however, pay the 16% administrative fee added to the third party fees of subcontractors. Unfortunately, none of the experts attempted to isolate, itemize and estimate these specific fees, and the parties have not made submissions with regard to what the total value of these fees might be. The parties are therefore directed to calculate these fees on the basis of the distinction made by Mr. DiMaria and reduce the damages award accordingly. If they cannot agree as to what the total deduction should be, I may be spoken to.

ii) Demolition of the House

347 The next issue is whether DLS could have surgically removed the contaminated soil under the basement floor instead of demolishing the home at 93 Hazel.

348 Gendron takes the position that the recommendation to demolish 93 Hazel was not made by DLS, but by First Dimension Engineering (First Dimension), a structural engineering firm retained by DLS to determine the feasibility of supporting 93 Hazel in order to remediate the contaminated soil below basement grade. First Dimension attended the home on January 13, 2009 to conduct a preliminary structural evaluation of the framing components of the dwelling, and on February 25, 2009 to meet with DLS to review the issue.

349 First Dimension provided its report on March 30, 2009, and in that report recommended the demolition of 93 Hazel.

350 The report by First Dimension states that it was "informed by the DLS Group that the contaminated soil below the entire basement concrete slab on grade must be removed to approximately 5'0" below the slab level".

351 The report concludes that, based on the unconventional location of structural supports within the basement:

> [W]e have established that it would not be structurally sound or feasible to provide temporary support to the structure during the proposed excavation. Due to the number of structural components within the basement area, temporarily supporting the components would prove to be unsafe. We recommend demolishing the insured dwelling including the foundation walls and the footings prior to moving ahead with the proposed excavation below the basement slab on grade.

352 A demolition permit was applied for on March 31, 2009. The Demolition Permit was granted by the City of Kawartha Lakes on May 6, 2009, and the home was demolished on May 12, 2009.

353 There is no question that First Dimension recommended the demolition of 93 Hazel. The point made by Hubley and Allan was that First Dimension made this recommendation on the basis of the information given to it by DLS, and DLS gave First Dimension incorrect or misleading information. The First Dimension recommendation is based on the premise (provided by DLS) that the contaminated soil beneath the basement slab had to be removed to a depth of 5 feet below slab level.

354 According to Hubley, the laboratory results of soil samples taken from under the basement floor indicate that the contamination did not cover the entire footprint of the house. Approximately one half the area had contamination at the top level (the first 12 inches), and the area of contamination significantly reduced as one went deeper into the soil, creating an inverted cone centred around the point of origin. The second layer (12 to 24 inches) did not reach the outer walls of the home. At 4 to 5 feet only two samples identified fuel oil. Hubley's evidence on this point is confirmed by the laboratory results of the soil samples tested underneath the basement floor. Only 9 of the 22 interior bore holes showed the presence of fuel oil. In other words there was no evidence of fuel oil in over half the basement, but DLS decided to excavate the entire basement.

355 Accordingly, I accept the evidence that there was no need to remove all of the soil beneath the basement slab to a depth of 5 feet. DLS could have removed only the cone of contamination, which had a much smaller footprint.

356 According to Hubley, DLS relied on a sampling taken at 5 feet down at the point source (the excavation pit where the tanks had been located) and assumed that the entire basement had to be excavated to that depth. 13 of the 22 boreholes drilled by DLS showed no evidence of fuel oil contamination, though some showed contamination from other hydrocarbons.

357 The structural engineer consulted by DLS advised that the entire floor could not be safely excavated to a depth of 5 feet, and the house would have to be demolished. Thompson's position is that the structural engineer was not asked whether the house could be underpinned and safely excavated if only the cone of contamination were excavated.

358 While there is merit in Allan and Hubley's assertion that First Dimension was given inaccurate information by

DLS, neither Allan nor Hubley were qualified as experts in structural engineering. Accordingly, while they can testify that DLS provided First Dimension with an inaccurate premise, they cannot take the next step and provide an opinion on whether, given more accurate information about the "cone of contamination" under the basement floor, 93 Hazel could have been successfully underpinned in light of the unconventional location of structural supports within the basement. Such an opinion can only be given by a witness with expertise in structural engineering. Indeed, given the importance of this issue to the defendants, I draw an adverse inference from their failure to call a structural engineer to give an opinion on this issue.

359 Accordingly, I am left with the fact that Mr. Gendron's house was demolished as a result of the fuel oil spill, and the demolition was recommended by a structural engineer. There is no evidence from a structural engineer that the remediation could have been completed without demolishing the home. In my opinion, therefore, the demolition of 93 Hazel was reasonably related to the fuel oil spill, and the cost of demolition and rebuilding was a reasonable expense in the circumstances.

iii) Estimated Cost of Replacing the House

360 The plaintiff is seeking $545,244.25 as the estimated replacement cost to rebuild his residence at 93 Hazel. The defendant takes the position that the house at 93 Hazel had an appraised market value of $175,000, and damages should be limited to the market value, not to the replacement cost. In the alternative, the defendants argue that the replacement cost proposed by the plaintiff is inflated and does not account for several improvements to the old house that are incorporated in the plaintiff's estimate. The defendants argue that the replacement cost should be reduced to take into account depreciation and betterment.

361 The residence that was demolished was 4,800 square feet. The plaintiff introduced evidence that the estimated cost of replacing the dwelling with a new construction of similar kind and quality, bearing in mind the finishes and parts of the former dwelling left unfinished or in disrepair, would be $476,244.35. The remaining $68,650 represents adjustments negotiated between Mr. Gendron and his insurer to take into account finishes such as wood cabinets and a stone fireplace that were in the demolished home but not included in the original estimate.

362 While a finding of causation equates to responsibility for the entire injury, a defendant is not required to put the plaintiff in a better position than his or her original one. Major J. explained this principle in *Athey v. Leonati*, *[1996] 3 S.C.R. 458*, at para. 32:

> The essential purpose and most basic principle of tort law is that the plaintiff must be placed in the position he or she would have been in absent the defendant's negligence (the "original position"). However, the plaintiff is not to be placed in a position better than his or her original one. It is therefore necessary not only to determine the plaintiff's position after the tort but also to assess what "original position" would have been. It is the difference between these positions, the "original position" and the "injured position", which is the plaintiff's loss. [Emphasis in original]

363 The photographs of the home at 93 Hazel show that it had fallen into a serious state of disrepair before the oil leak. Much of the drywall was unfinished, the backyard looked like a junkyard and tiles were missing from the kitchen floor.

364 The plaintiff argues that the principle of "betterment" is not strictly applied when the property that is destroyed is a dwelling. It is often impossible to rebuild or repair a home without putting it in better condition than it was before the damage because a home cannot be built with old and worn materials. For example, the home may not have originally been built to the standards of the applicable building code, but, if the home must be demolished and rebuilt, the plaintiff must have it rebuilt to code. The plaintiff should not be forced to cover these additional costs that, but for the negligence of the defendant, he would not have incurred.

365 The principle that betterment is not applied strictly to a dwelling was discussed by the British Columbia Court

of Appeal in *Nan v. Black Pine Manufacturing Ltd.*, 1991 CanLII 1144 (BC CA), at p. 5:

> The result of the application of these principles, in most cases involving the tortious loss of or damage to property, will be that replacement costs will at least be the starting point for the assessment of damages. Whether or not the damages based on such costs should then be adjusted, either for pre-loss depreciation or post-reinstatement betterment, will depend on what is reasonable in the circumstances...
>
> For example, a review of the cases might suggest that where the property in question had a predominantly commercial nature, or was clearly held for investment purposes, such considerations should be taken into account...
>
> As noted above it must, in all cases, depend on what is reasonable, both to the plaintiff and to the defendant tortfeasor. What then is reasonable in the case where a family home has been destroyed through the negligence of a third party? Even assuming that the evidence in this case had established a "betterment" of $32,000 to the respondent, by reason of the full reinstatement of his home, could it be said that it would be reasonable to reduce his damages by that amount, leaving him and his family to finance that portion of the reinstatement on their own? I think not.

366 *Nan* was recently cited with approval on this point by the Ontario Court of Appeal in *Jarbeau v McLean*, 2017 ONCA 115 (CanLII), at para 56. The approach in *Nan* has also been followed in a number of other recent cases; see *Galan v. Finch (Finch's Heating)*, [2015] O.J. No. 2275 (Ont. S.C.) at paras. 82-85;[5] *Yi v. Varadi*, 2013 ABQB 201 (CanLII); and *Laichkwiltach Enterprises Ltd. v. F/V Pacific Faith (Ship)*, 2009 BCCA 157 (CanLII), at para. 36

367 In *James Street Hardware & Furniture Co v Spizziri* 1987 CanLII 4172 (ON CA), the Ontario Court of Appeal espoused the general principle that the amount by which the plaintiff's property is improved should be deducted from the award, but the plaintiff should also be compensated to the extent the plaintiff has had to put out money prematurely to obtain that betterment. The Court held that the process should be responsive to the particular facts of the case, noting that the mere substituting of new for old may well not involve any increase in the value of the property as a whole in many cases. In cases of doubt the onus is on the defendant to prove the value of an alleged improvement.

368 The plaintiff relied on the evidence of Mr. Shawn Barrett of ChemDry, a company specializing in insurance restoration and cleaning services. He indicated that the estimate took into account that the existing structure was partially finished in many areas, and he did his best to reflect this in his estimate by not offering full finished value or by adjusting line item costs. He indicated that his estimate did take into account factors such as missing drywall on walls and ceilings, missing paneling and unpainted surfaces. He did not calculate a price for flooring in those areas that had no flooring. He based his calculation on standard finishes. He acknowledged on cross-examination that he did not account for depreciation or age of the item. He was asked to provide replacement cost, and replacement is based on new finishings. There were several rooms that were unfinished and the estimate did not provide a cost for finishing unfinished rooms. His estimate was based on a very detailed analysis, and his total estimate was $476,594.25 to rebuild the home as close as possible to the existing home.

369 The defendants did not call any contrary evidence with respect to replacement cost of 93 Hazel, and I am satisfied that Mr. Barrett's estimate is a reasonable estimate in the circumstances of this case. Based on the analysis in *James Street Hardware* and *Nan*, I am satisfied that the plaintiff has proven that the replacement value of 93 Hazel is $476,594.25. The defendant has not met its onus of proving that any part of this estimate qualifies as "betterment".

370 The defendant takes the position that the foundation of the home did not comply with the building code, but the estimate was for a home that met the building code. Based on the decisions in *James Street Hardware* and *Nan*, I do not accept the proposition that a reduction should be made for betterment with regard to building code compliance. The defendant has not led any evidence to prove the value of building code compliance, or that it is more expensive to build a home that complies with the building code than one that does not. The defendant has not led any evidence that it would be less expensive to retain and store used appliances like the oven and microwave,

or remove, store and re-install finishes such as skylights and kitchen cabinets, than to purchase and install new ones. The defendant has led no evidence that the "components comprising the Gendron home and its contents... have a lifespan requiring replacement every 10 to 20 years."

371 The plaintiff also relies on his own testimony regarding his estimated costs of features that he claims would increase the cost of replacing the home by an additional $68,650. This estimate included items such as $25,000 for two new fireplaces, more than double the estimate prepared by Mr. Barrett of ChemDry, and $20,000 for kitchen cabinetry, again more than double the estimate prepared by Mr. Barrett. These were estimates only -- there is no evidence that these amounts were ever actually spent in the rebuilding of the house.

372 I prefer the evidence and estimates of Mr. Barrett given that he had no financial interest in the outcome of the case, and his analysis is more detailed. In addition, Mr. Barrett was called as a witness by Mr. Gendron, but at no time did Mr. Gendron ask Mr. Barrett to review or comment on Mr. Gendron's proposed additions. If Mr. Gendron is going to ask the court to prefer his higher estimates to those of Mr. Barrett's, Mr. Barrett should have been given an opportunity to consider and comment on the differences.

373 Accordingly, I find that damages for the estimated replacement cost to rebuild the plaintiff's residence at 93 Hazel are $476,594.25.

iv) Soil Excavation at 93 Hazel

374 Following the demolition of the home DLS excavated the soil in the vicinity of the former dwelling from May 21 to June 10, 2009. The soils were excavated to bedrock (from 1.1 meters below grade at the northwest extent of the property to 5.5 meters below grade at the southeast). The excavation went to the edge of Hazel Street on the northwest, to the edge of the property line with 91 Hazel St. to the northeast, approached the property line on the southeast and extended beyond the property line on to 95 Hazel St. to the southwest. On June 9 and 10, 2009, confirmatory soil samples were collected from the sidewalls of the excavation. Eight of these samples were tested for the presence of petroleum hydrocarbons. The laboratory tests confirmed that no further visible evidence of petroleum hydrocarbon impact was observed. A total of 1,558.49 tonnes of contaminated soil was removed and disposed of at a disposal site. The total cost for excavating, hauling and disposing of the contaminated soil was $91,851.76 plus $4,592.59 H.S.T.

375 Allan and Hubley testified that insufficient effort was made to delineate fresh fuel oil from historical contamination when excavating the soil in and around the home. It is possible to differentiate fuel oil from other contaminants, and to differentiate historic fuel spills from fresh spills. It is their position that some of the contaminants on the property likely related to the underground storage tank that was removed in 2000. They point to the laboratory results provided by DLS which document the existence of contaminants such as gasoline and heavy oil that are unrelated to fuel oil throughout the property. Their point is not that DLS was wrong to remediate the soil that was impacted with historic contamination, but that DLS should have delineated the contaminants on-site to ensure that third parties are not asked to pay for remediation that is unrelated to the 2008 fuel spill.

376 More importantly, DLS sampled soil near the house and at the final excavation limits, but there are no reported samples in between, so it is difficult to determine whether remediation to the final excavation limit was even necessary. Mr. Allan testified that this was not the industry standard for field assessment. DLS should have done a forensic analysis to get a chemical "fingerprint" of the spill to ensure that it could identify the contaminant by source, and this was not done.

377 Recall that in the summer of 2000 Mr. Gendron removed the underground storage tank and discarded it. Although Mr. Gendron testified that he inspected the tank and the surrounding area and found no evidence of a leak or oil escape, I put no weight on Mr. Gendron's claim in this regard. We know from this case that outdoor tanks are more likely to corrode and leak than indoor tanks. The evidence in this case is that 95 per cent of premature perforation in oil tanks occurs in tanks installed outside. We also know that oil can escape through a very small

hole. I reject the proposition that a cursory inspection undertaken by an untrained person like Mr. Gendron before he disposed of the old tank would have revealed the presence of small holes or leaks. Nor did Mr. Gendron perform any sort of soil analysis that would permit him to discern whether there was any fuel oil in the soil surrounding the old tank. Accordingly, it is entirely possible that at least some of the oil detected on the property in 2008 came from that old underground storage tank.

378 Mr. McClintock, who was the environmental engineer responsible for the oversight of DLS' remediation measures, testified that DLS did not remediate anything that was not related to the fuel oil. While there were other contaminants that were co-mingled with the fresh fuel oil spill (such as contaminants attributable to road bed construction materials at the north/north-west/north-east extent of the property), it is impossible to remediate co-mingled contaminants without removing both. He stated that DLS only remediated where fuel oil was detected. He acknowledged, however, that DLS did not distinguish between historic contaminant and fresh contaminant when it performed the remediation. He testified that it was not within DLS' "mandate" to conduct a forensic analysis to determine the origin of contaminants found on the property. He also agreed DLS recommended that the soil be excavated even though 13 of the 22 interior boreholes did not contain traces of fuel oil.

379 This failure to determine the source of contaminants detected is confirmed in DLS' Preliminary Assessment Report dated March 11, 2009, which stated:

> Low levels of PHC's were detected in analyzed soil samples collected from three (3) boreholes drilled on the subject property as well as boreholes drilled along the north side of Hazel Street... The said detections have not been positively attributed to the subject spill. [Emphasis added]

380 Based on the evidence presented in this case, I am persuaded that Allan and Hubley are correct on this point, and that the plaintiff has failed to prove that all of the soil excavated at 93 Hazel was contaminated or that such contamination was related to the 2008 fuel oil leak. The diagrams that were produced as evidence show the location and test results of interior boreholes. These diagrams do not support the contention that there was contaminated soil beyond the immediate vicinity or footprint of the home. While soil was sampled under the house and at the final excavation limits, there are no reported samples to confirm the presence of fuel oil contaminated soil between those two points. I cannot, on the evidence provided, determine how DLS established the outside boundary of the excavation (apart from the fact that the excavation on the northwest had to end at the edge of Hazel Street).

381 The defendants cannot be held responsible for the excavation of non-contaminated soil or soil that was contaminated as a result of a pre-existing oil spill. The onus is on the plaintiff to prove that the soil excavated outside the footprint of the house was contaminated and that such contamination was related to the 2008 fuel oil leak and not the result of another leak or spill. In my view, the plaintiff has failed to provide evidence that confirms that the area of contamination approached the final excavation line or that positively attributes any contaminants in the soil beyond the footprint of the house and the area between the Big O drain and the culvert to the 2008 oil leak.

382 Accordingly, the damages attributable to excavating, hauling and disposing of the contaminated soil should be reduced by 50%.

5) Contribution and Indemnity Under s. 100.1(6) of the *Environmental Protection Act*

383 At the outset of this trial on November 7, 2016, I allowed the plaintiff's motion to amend his Statement of Claim to add a claim for $313,005.08 for contribution and indemnity against the defendants in accordance with s. 100.1(1) and (6) of the *Environmental Protection Act* (see *Gendron v Doug G. Thompson Ltd. (Thompson Fuels)*, *2016 ONSC 7056*(CanLII)). The *EPA* provides that the right to contribution and indemnification for municipal orders to pay costs or expenses incurred by the municipality "may be enforced by action in a court of competent jurisdiction" (s. 99.1(7)).

384 The amendment related to a decision of the Environmental Review Tribunal (ERT) dated June 30, 2016. That decision ordered Mr. Gendron to pay some of the City of Kawartha Lake's costs and expenses in relation to the leak of furnace oil from the plaintiff's home. The City

385 The plaintiff was permitted to amend his Statement of Claim and the defendant was granted leave to amend its Statement of Defence in order to respond to any amendments, including any limitation period defences. I indicated that I would decide on the limitation period defence as part of my decision in this trial.

386 At the conclusion of the trial the plaintiff confirmed that he is no longer seeking contribution and indemnity against the TSSA. Accordingly, Mr. Gendron seeks contribution and indemnity with respect to the municipal order only as against Thompson Fuels.

(i) Background to EPA Claim

387 When the plaintiff's off-site insurance coverage was exhausted the MOE ordered the City (as flow through property owner) to complete the remediation. The City hired Golder and Associates (Golder) to complete the remediation. The City then used its powers under s. 100.1 of the *EPA* to order compensation for the clean up from the plaintiff (Gendron) and two of the defendants to this claim (TSSA and Thompson Fuels) on June 15, 2010.

388 Section 100.1(1) of the *EPA* provides:

> 100.1 (1) If a pollutant is spilled, a municipality may issue an order requiring the owner of the pollutant or the person having control of the pollutant to pay to the municipality any reasonable costs or expenses incurred by the municipality, or a local board of the municipality within the meaning of the Municipal Affairs Act, to prevent, eliminate or ameliorate any adverse effects or to restore the natural environment.

389 The s. 100.1 orders required the orderees to pay $471,691.44 to the City for its costs and expenses incurred in cleaning up the spill. On July 29 and 30, 2010, Gendron, TSSA and Thompson Fuels each filed a notice of appeal with the ERT regarding this order. The appeals by TSSA and Thompson Fuels were withdrawn following a settlement with the City, and only the appeal by Gendron remained extant.

390 In parallel to the appeal before the ERT, both Gendron and the City brought separate civil proceedings relating to the spill. The civil proceedings were consolidated upon consent.

391 The City's civil proceeding sought similar relief to that sought in the s. 100.1 orders being appealed to the ERT and included Gendron as a defendant. To prevent duplication of proceedings, the ERT adjourned the proceedings before it several times to allow the civil claims to move forward. On September 24, 2015, the City undertook not to pursue the civil action if the ERT proceeded to a hearing. On October 9, 2015 the ERT ordered the hearing to proceed. On December 1, 2015, Gendron filed a motion with the ERT to adjourn the ERT hearing until after the conclusion of the civil actions. That motion was dismissed on January 8, 2016.

392 The proceedings before the ERT were protracted and considered various preliminary issues regarding the scope of the hearing. Prior to the hearing before the ERT, the City reached a tentative settlement of the civil claim with all of the defendants in the City's action, but not Gendron.

393 Gendron's appeal of the s. 100.1 order was finally heard in February 2016, with written submissions in March and April 2016.

394 On June 30, 2016 the ERT allowed Gendron's appeal in part and reduced the s. 100.1 order to $313,005.08. This amount was calculated by the ERT on the basis of 19 invoices from Golder that were reviewed in some detail in the ERT decision.

395 Section 100.1(6) of the *EPA* permits a party that is the subject of a s. 100.1 order to claim contribution and indemnity against another person who may be subject to a s. 100.1 order. Section 100.1(6) applies by reference with the necessary modifications the contribution and indemnity provisions in s. 99.1 (5) to (8) of the *EPA* to orders issued by a municipality under s. 100.1(1). Section 99.1(6) provides:

> Contribution and indemnity
>
> (6) Where the Director is entitled to issue an order to two or more persons under subsection (1) in respect of costs or expenses, as between themselves, in the absence of an express or implied contract, each of those persons is liable to make contribution to and indemnify the other in accordance with the following principles:
>
> 1. Where the Director is entitled to issue an order to two or more persons under subsection (1) in respect of costs or expenses and one or more of them caused or contributed to the costs or expenses by fault or negligence, such one or more of them shall make contribution to and indemnify
>
> i. where one person is found at fault or negligent, any other person to whom the Director is entitled to issue an order under subsection (1), and
>
> ii. where two or more persons are found at fault or negligent, each other and any other person to whom the Director is entitled to issue an order under subsection (1) in the degree in which each of such two or more persons caused or contributed to the costs or expenses by fault or negligence.
>
> 2. For the purpose of subparagraph 1 ii, if it is not practicable to determine the respective degrees in which the fault or negligence of two or more persons to whom the Director is entitled to issue an order under subsection (1) caused or contributed to the costs or expenses, such two or more persons shall be deemed to be equally at fault or negligent.
>
> 3. Where no person to whom the Director is entitled to issue an order under subsection (1) caused or contributed to the costs or expenses by fault or negligence, each of the persons to whom the Director is entitled to issue an order under subsection (1) is liable to make contribution to and indemnify each other in such degree as is determined to be just and equitable in the circumstances.

396 Section 99.1(7) provides that "The right to contribution or indemnification under subsection (6) may be enforced by action in a court of competent jurisdiction".

397 In the proceeding before the ERT, Gendron sought to claim contribution and indemnity for its liability under the s. 100.1 order against the defendants to the civil action. In a decision dated March 10, 2016, the ERT decided that a claim for contribution and indemnity could not proceed before the ERT and had to be enforced in a civil action in court. The ERT explained it decision at paras. 45, 58 and 61:

> ...s. 100.1 contemplates scenarios where there can be some perceived unfairness, in that a pollutant owner who is not at fault or is less at fault than others can be subject to a joint and several order to pay costs of a clean-up. However, subsequent recourse can be pursued by those subject to a s. 100.1 order via civil proceedings, which may involve the common law as well as s. 99.1(5) to (8) of the EPA because of s. 100.1(6). In that forum, degrees of fault or negligence can be taken into account in allocating final financial liability according to what is just and equitable in the circumstances (see s. 99.1(6))
>
> ...
>
> Applying the specific words of s. 99.1(7) with the necessary modifications referred to in s. 100.1(6), the Tribunal finds that it does not have the jurisdiction to carry out the contribution and indemnification role set out in s. 99.1(7). ... Presumably, if the Legislature had also wished to substitute "Tribunal" for "court" and "Tribunal proceeding" for "action", it would have done so explicitly. It would have also added contribution and indemnification matters to the list of considerations under s. 100.1(15).

> ...
>
> To summarize, the court is the body referred to in s. 99.1(7) and the Tribunal finds that the Legislature intended the court to exclusively resolve contribution and indemnification issues arising from both s. 99.1 and 100.1. The "necessary modifications" set out in s. 100.1(6) are not expansive enough to replace court actions with Tribunal proceedings. An innocent owner or controller of a pollutant may initially be liable to pay for municipal costs under s. 100.1 but ultimately be reimbursed by those with a greater degree of fault or negligence in a civil action before the courts (which could involve s. 100.1 and common law causes of action as well). Having regard to the specific wording of s. 99.1(7) and for reasons analogous to those set out in a different context in *Straza*, the Tribunal finds that it should not attempt to usurp the role of the civil courts in that endeavor. The Tribunal is confined to its specific mandate under the EPA and is not given the legislated mandate to conduct trials of actions to enforce a right to contribution or indemnification...

398 In the case before me the claim for contribution and indemnity with respect to the ERT's June 30, 2016 *EPA* Order is based on s. 100.1 of the *EPA*, and is not based on common law. As indicated above, the ERT Order was based on 19 invoices from the remediation firm (Golder) retained by the City. No one from Golder testified before me and the 19 invoices were not made exhibits in this trial. Accordingly, if Thompson Fuels is responsible for any portion of those payments it is only by virtue of s. 100.1(6) of the *EPA*.

399 As I interpret the statutory scheme under ss. 99.1 and 100.1 of the *EPA* as expounded by the ERT in its decision of March 10, 2016, the role of the "court of competent jurisdiction" under s. 99.1(7) is to allocate "the degree in which each of such two or more persons caused or contributed to the costs or expenses by fault or negligence". The ERT is responsible for determining the reasonableness of those costs or expenses, and the ERT's decision in that regard is subject to appeal to the Divisional Court, as the plaintiff has done in this case. It is not the role of this Court to reassess the quantum or reasonableness of such costs or expenses. That task was undertaken by the ERT, and I have no authority to judicially review the ERT's decision in that regard. The only function of this Court is to allocate the degree of fault or negligence as between/among owners of the pollutant or persons having control of the pollutant as defined by the *EPA*.

400 The ERT indicated (at para. 60) that if an orderee commences a civil proceeding under s. 99.1(7) and s. 100.1(6) of the *EPA* that proceeding "would be subject to the typical civil limitations periods" rather than the 15 day limitation period under s. 100.1(7) of the *EPA*.

401 Thompson Fuels first position is that the amendment to the Statement of Claim was made outside the two year limitation period established by ss. 4 and 18 of the *Limitations Act, 2002*, S.O. 2002, c.24, Sched. B (*Limitations Act*).

402 Thompson Fuels second position is that it cannot be liable for contribution and indemnity under s. 100.1 because that provision gives the 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 plaintiff can only bring a s.100.1 claim for contribution and indemnity against another owner or person having control of the pollutant. Thompson Fuels argue that it was neither an owner of the pollutant nor the person having control of the pollutant within the meaning of s. 100.1(1) of the *EPA*.

403 I will address each of these issues in turn.

(ii) Limitation Period

404 The defendants argue that pursuant to s. 18 of the *Limitations Act* dealing with claims for contribution and indemnity, the two-year limitation period in s. 4 of the *Limitations Act* began to run on June 15, 2010 when the City issued its s. 100.1 order against Gendron. Therefore, the plaintiff's amendment in November 2016 was made well outside the two year limitation period.

405 Section 18 of the *Limitations Act* provides:

> 18 (1) For the purposes of subsection 5 (2) and section 15, in the case of a claim by one alleged wrongdoer against another for contribution and indemnity, the day on which the first alleged wrongdoer was served with the claim in respect of which contribution and indemnity is sought shall be deemed to be the day the act or omission on which that alleged wrongdoer's claim is based took place.
>
> (2) Subsection (1) applies whether the right to contribution and indemnity arises in respect of a tort or otherwise.

406 I agree with Thompson's position that the limitation period began to run on June 15, 2010, pursuant to s. 18 of the *Limitations Act*. At that point Mr. Gendron knew that he had a potential claim against Thompson Fuels for contribution and indemnity for the s.100.1 order made by the City. I do not accept the plaintiff's argument that the limitation period did not begin to run until the ETR process had run its course. Section 18 specifically provides that the limitation period begins to run "the day on which the first alleged wrongdoer was served with the claim in respect of which contribution and indemnity is sought", and there is no dispute that Mr. Gendron was served with the City's order on June 15, 2010.

407 Mr. Gendron argues that, even if the limitation period began to run in June 2010, he commenced this action against Thompson Fuels on July 15, 2009 (Court file #184/09). Since the claim for contribution and indemnity arises out of the same facts, it is merely the particularization of the damages arising from the same factual matrix already pled in the Statement of Claim. It therefore falls within the same cause of action, and is not a separate claim.

408 In addition, the plaintiff's Statement of Defence dated March 3, 2011 and filed in the City's civil action (Court file #0165/10) included a crossclaim for full contribution and indemnity against the other defendants, including Thompson Fuels, to that action. Arguably, the November 2016 amendment was just a particularization of the claim already advanced in that Statement of Defence. If that is correct then the plaintiff would meet the limitation period which began to run on June 15, 2010.

409 Court file #184/09 and #0165/10 were transferred to Lindsay and consolidated by Court Order dated December 10, 2010. They were reassigned Court file #073/11 and #072/11 respectively. The City settled with Thompson Fuels, but there was no settlement with Mr. Gendron, whose claim for contribution and indemnity against Thompson Fuels remains outstanding.

410 At the beginning of these proceedings on November 16, 2016, counsel for the City advised that she had instructions not to proceed with the City's action and to be excused from participation in the Gendron action. This was done without prejudice to any of the parties to the City's action bringing motions to deal with costs arising from that action or any other outstanding motions in relation to that action.

411 In my view Mr. Gendron's claim for contribution and indemnity against Thompson Fuels arising out of the City's claim for repayment of its remediation expenses was properly pled in Gendron's Statement of Defence in March 31, 2011, within the two-year limitation period set out in s. 18 of the *Limitations Act*. The claim advanced in this case -- contribution and indemnity with respect to the City's order under s. 100.1 of the *EPA* -- arises from the precise factual situation pled in that action. The City's action did not proceed because the City's entitlement to repayment was determined in another forum, namely the ETR. As indicated above, however, s. 99.1(7) of the *EPA* requires that Gendron's claim for contribution and indemnity proceed in court even though his obligation to compensate the City was decided by the ETR. Thompson Fuels has, however, been on notice that Gendron would be claiming contribution and indemnity with respect to his obligations under the municipal order since March 2011.

412 In this regard I am adopting the functional approach to pleading set out by Lauwers J. (as he then was) in *Ivany v. Financiere Telco. Inc.*, *2011 ONSC 2785* (CanLII), at paras. 26-37 and find that the Plaintiffs' claim for contribution and indemnity does not arise from a new factual matrix.

413 It would be an overly technical approach to the term "cause of action" to conclude that Mr. Gendron may proceed with his claim for contribution and indemnity against Thompson Fuels as part of Court File #72/11, but cannot proceed with the identical claim against the identical party arising from identical facts in Court File #73/11, even though the two cases were ordered to be heard together.

(iii) Owner or Person Having Control of the Pollutant

414 Plaintiffs may bring concurrent actions for contribution and indemnity under both s. 100.1 of the *EPA* and the common law. The advantage to proceeding under the *EPA* is that the plaintiff does not have to prove damages but can rely on the ERT's decision regarding the quantum or reasonableness of costs or expenses. The disadvantage is that the persons against whom contribution and indemnity may be claimed under the *EPA* are limited by the definitions of "owner" and "person having control" of the pollutant. If the action is brought under the common law, the plaintiff must prove the damages as it would in any common law action, but is not limited to "owners" and "persons having control of the pollutant".

415 The terms "owner" and "person having control of the pollutant" are defined in s. 91(1) of the *EPA*:

> "owner of the pollutant" means the owner of the pollutant immediately before the first discharge of the pollutant, whether into the natural environment or not, in a quantity or with a quality abnormal at the location where the discharge occurs, and "owner of a pollutant" has a corresponding meaning;
>
> "person having control of a pollutant" means the person and the person's employee or agent, if any, having the charge, management or control of a pollutant immediately before the first discharge of the pollutant, whether into the natural environment or not, in a quantity or with a quality abnormal at the location where the discharge occurs, and "person having control of the pollutant" has a corresponding meaning;

416 Since s. 99.1(6) of the *EPA* applies only "Where the Director is entitled to issue an order to two or more persons under subsection (1) in respect of costs or expenses", a claim for contribution and indemnity under s. 99.1(6) and (7) of the *EPA* (in contrast to a claim at common law) can only be made against another person that could be liable under s. 99.1(1), in other words "the owner of the pollutant or the person having control of the pollutant". In order to bring Thompson Fuels under the liability provisions of s. 99.1, therefore, the plaintiff must establish on a balance of probabilities that the defendant was the owner or had control of the pollutants "*immediately* before the first discharge of the pollutant" ((emphasis in original, *Gagnon & Associates Inc. v. Genier et. al*., *2014 ONSC 3019* (CanLII) at para. 24).

417 The plaintiff argues that Thompson Fuels was the "owner" of the pollutant because Mr. Gendron did not become the "owner" until the payment for the fuel was actually processed at 9:21 p.m. on December 18, 2008. Since the fuel escaped immediately after the delivery at approximately 4:15 p.m., Thompson Fuels was still the owner at the moment of the spill.

418 In the alternative, the plaintiff argues that Thompson Fuels continued to be in control of the pollutant since the leak occurred almost immediately following the delivery. He argues that the term "control" must be interpreted consistently with the overall objective of the *EPA*, which is the protection of the environment, and that Thompson Fuels was acting contrary to s.7 of *O.Reg. 213/01* by delivering fuel even though it had not completed a comprehensive inspection to confirm that the oil tank was safe.

419 Thompson Fuels argues that it no longer had ownership or control once the oil left the delivery truck and entered into Mr. Gendron's fill pipe. It argues that examining the statutory definition in the context of the provision as a whole, it is clear that the objective of the particular section is directed to the homeowner or property owner (i.e. landlord) because that is the person in the best position to prevent or ameliorate the adverse effects. In contrast, the fuel distributor has no authority to enter the home or private property (other than to fill the tank) and therefore cannot take measures to prevent or ameliorate the oil leak.

420 When I heard the motion to amend the Statement of Claim on November 7, 2016, the plaintiff acknowledged that he was the sole owner of the pollutant (see para. 38 of that decision). He now appears to have resiled from that position. Whether he may be permitted to do so at this stage in the proceedings, I reject his argument that he did not become the owner of the oil until the payment was processed. No authority was provided to support this proposition. In my view, when payment is made in accordance with agreed terms, ownership passes with delivery. Whatever rights a vendor may have upon default of payment, unless the contract of sale specifies otherwise, ownership passes on delivery even if payment is processed by the vendor sometime thereafter, see: *Sale of Goods Act*, *R.S.O. 1990, c. S.1, s. 19*, Rule 5 (Rules for ascertaining intention). In this case repossession by the vendor is impossible; the oil that is delivered to the tank immediately mixes with whatever oil was already in the tank. The expectation of the parties is that ownership is transferred on delivery and the purchaser of oil may begin using the oil to heat his home just as soon as it is delivered, regardless of when payment is processed by the vendor.

421 The real issue is whether Thompson Fuels had "the charge, management or control of a pollutant immediately before the first discharge". This case turns on the interpretation of the words "immediately before". The statutory language is very precise in this regard, and imposes liability for contribution and indemnity under ss. 99.1 and 100.1 of the *EPA* much more narrowly than the common law doctrine of contribution and indemnity in negligence claims.

422 I understand the phrase "immediately before" to incorporate a requirement that there be no intervening act between "charge, management or control" and the discharge of the pollutant. In this case, Thompson Fuels had "charge, management and control" of the oil while it was being delivered, but did not have charge management and control once the oil was in the oil tank. In this regard, it does not matter whether the leak in the tank began immediately after the delivery or many days after the delivery, either way Thompson Fuels lost control of the oil upon delivery, and therefore cannot be said to have had control "immediately" before the first discharge. Once the fuel was delivered to the tank, only Mr. Gendron had "charge, management or control" immediately before the first discharge.

423 Based on this analysis, the plaintiff's claim for contribution and indemnity under s. 101.1(6) of the *EPA* is dismissed.

Conclusion

424 Judgment is granted in favour of the plaintiff against Thompson Fuels, with liability apportioned as follows: Mr. Gendron 60%, Thompson Fuels 40%.

425 The claims against TSSA and Granby and all crossclaims against TSSA and Granby are dismissed.

426 The damages claimed are reduced by the total amount of the 16% administrative fees added by DLS to work performed by DLS. The parties are directed to calculate these fees on the basis of the distinction made by Mr. DiMaria and reduce the damages award accordingly. If they cannot agree as to what the total deduction should be, I may be spoken to.

427 The damages claimed for the replacement value of the house are reduced to $476,244.35

428 The damages claimed for excavating, hauling and disposing of the contaminated soil are reduced by 50% to $45,925.88 plus $2296.30 H.S.T.

429 The plaintiff's claim for contribution and indemnity against Thompson Fuels under s. 100.1(6) of the *EPA* is dismissed.

430 I will leave to counsel to calculate the final figure for the judgment on the basis of the formula set out above and any set-off resulting from the Pierringer Agreement. If they cannot agree on the final figure, I may be spoken to.

431 If the parties cannot agree on costs within 30 days of the release of this decision, I will receive written submissions on costs. Submissions are to be a maximum of 3 pages, not including costs outline and any offers to settle. I leave to counsel to determine in the light of offers to settle the order of costs submissions. The responding party will have 20 days to respond.

R. CHARNEY J.

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1 The 1996 regulation was revoked and replaced by a new regulation in 2001. The 2001 regulation also required that domestic oil tanks be installed by a qualified OBT: *Technical Standards and Safety Act*,2000,*O. Reg. 215/01*, Fuel Industry Certificates, s. 39(2) 9 and *O. Reg. 213/01* (Fuel Oil), at s.4(9). Pursuant to this regulation homeowners are permitted to install an "appliance" (the definition of which includes the furnace, but not the oil tank) under an exemption in s. 55(1) of *O. Reg. 215/01*, provided the appliance is inspected and approved by a qualified OBT prior to activation. This exemption does not apply to the oil tank, only to the furnace.

2 Section 10.3.5 required tanks installed as part of a central distribution system be sloped away from the outlet, but the experts agreed that this provision did not apply to the tank at 93 Hazel since it was not part of a central oil distribution system as defined by B-139.

3 If water develops in a bottom-outlet tank the water will drain through the outlet.

4 His initial calculation of 3.38 mm. was based on the assumption that the leak stopped at approximately 8:00 a.m. He agreed on questioning that the hole would be somewhat larger if the leaked stopped at 5:00 a.m.

5 A search for the suggested neutral citation of this case, *2015 ONSC 2455*, on CanLII calls up the decision in *Ravenda Homes Ltd. v. 1372708 Ontario Inc*. It appears that *Ravenda Homes* was actually decided in 2016, but the wrong year was attached to the citation, so it has overridden *Galen* when searched on CanLII. *Galen* can only be accessed on Quicklaw.
