CITATION: *Snodden v. Upper Canada Fuel & Burner and Gourlie,* 2024 ONSC 5244
COURT FILE NO.: CV 19-1664
DATE: 20240927

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:	)
	)
	)
Roger Snodden	) Martin Forget, for Roger Snodden
	)
Plaintiff	)
-and-	)
	)
2568832 Ontario Inc. O/A Upper Canada Fuel & Burner and Norman Gourlie	) Karyn Shapiro, for Upper Canada
	)
	)
	) Norman Gourlie, not appearing.
Defendants	)
	)
	)
	) **HEARD:** Nov. 27, 2023 – Dec. 8, 2023.

S.J. WOODLEY J.

REASONS FOR JUDGMENT

OVERVIEW

1. On Friday June 1, 2018, Gloria Snodden noticed a strong smell of oil in the rural home she shared with her spouse the plaintiff Roger Snodden. Since Mr. Snodden was golfing, Mrs. Snodden asked their daughter, Dori Harper, to attend and investigate.

2. Ms. Harper attended the home at approximately 5:30 p.m., ventured to the basement, and noted a puddle of oil on the basement floor the size of an exercise ball. Ms. Harper telephoned Mr. Snodden's "furnace guy" and certified oil burner technician (OBT): the defendant, Norman Gourlie. Ms. Harper reported the oil leak in the basement of the home to Mr. Gourlie and requested that he attend. Mr. Gourlie informed Ms. Harper that he would attend later that evening as soon as he could secure a ride to the property.

3. Mr. Snodden arrived home at 6 p.m., went to the basement, and observed a small puddle of oil on the basement floor. Mr. Snodden also telephoned Mr. Gourlie who informed Mr. Snodden that he was at another job and would attend the following morning, being Saturday June 2, 2018.

4. In response to this information, Mr. Snodden did not contact any other party to seek assistance or to report the oil leak.

5. Despite his assurances, Mr. Gourlie did not attend Mr. Snodden's residence at any time during the morning of Saturday June 2, 2018.

6. On Saturday June 2, 2018, Ms. Harper suggested that Mr. Snodden call someone else for assistance.

7. Mr. Snodden did not follow Ms. Harper's advice and did not call anyone else to seek assistance or to report the leak.

8. Mr. Gourlie did not attend Mr. Snodden's residence at any time on Saturday June 2, 2018.

9. In the meantime, fuel oil continued to leak at the Snodden residence.

10. On Sunday June 3, 2018, at 8 a.m., Mrs. Snodden took matters into her own hands and called the defendant Upper Canada to report the leak and seek assistance.

11. In response to Mrs. Snodden's report, Upper Canada Fuel & Burner ("Upper Canada") immediately deployed technicians to identify and contain the source of the oil leak, to report the leak to the appropriate government authority, and to advise Mr. Snodden to report the leak to his insurer.

12. Clean up and remediation of the oil leak (the "oil escape event") commenced as soon as Upper Canada was informed of the event.

13. When clean up and remediation was completed, the damages incurred relating to the oil escape event totaled $339,577.79.

14. The within action was commenced by Mr. Snodden against Upper Canada and Mr. Gourlie. Mr. Snodden seeks damages caused by the oil leak.1

15. In response to the within action, Upper Canada commenced a crossclaim against Mr. Gourlie and alleged contributory negligence against Mr. Snodden.

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1 Although not relevant to determination of the issues, the claim is more precisely a subrogated claim for damages brought by the insurance company for the plaintiff to recover monies paid out due to damages incurred arising from the oil leak/oil escape event.

16. Mr. Gourlie did not defend the action, did not provide any evidence in the proceeding, and did not attend the trial. Mr. Gourlie was noted in default in August of 2021.

FACTS

Evidence Relating to the Oil Escape Event

Roger Snodden, Dori Harper, and Brent Perrin

17. On June 1, 2018, Mr. Snodden and his spouse lived at 7880 Concession 6, Uxbridge, Ontario, in a home where they had resided for approximately 39 years.

18. The home was an older farmhouse that was heated by an oil furnace, supplied by an oil tank located in the unfinished basement of the home. There was also a hot water heater located in the basement. For the entirety of the time that Mr. Snodden owned the home it was heated by fuel oil.

19. Mr. Snodden referred to the defendant Norman Gourlie as his "furnace guy". Mr. Gourlie was a certified oil burner technician (OBT1) who maintained Mr. Snodden's heating oil system. According to Mr. Snodden's daughter, the previous "furnace guy" was Mr. Gourlie's father.

20. In May of 2006, a comprehensive inspection of Mr. Snodden's oil system (furnace, hot water heater, and oil tank) was completed.

21. Following completion of the comprehensive inspection, two Inspection Reports were signed by the technician who completed the inspection (Fuel Oil Distributor Inspections Aboveground Tanks Inside *and* Fuel Oil Distributor Inspections Appliances – Comprehensive) which are pre-printed forms issued by the Canadian Oil Heat Association.

22. With respect to the May 2006 inspection report for Mr. Snodden's prior oil tank, the technician handprinted in the pre-printed comment section: "See No Immediate Hazard Report". However, the "No Immediate Hazard Report" was not provided to the court.

23. On October 30, 2006, Mr. Snodden's then supplier, Petro-Partners, issued an invoice for the installation of a new 2006 DTE 450 litre tank ("the DTE tank") inside Mr. Snodden's basement. The invoice contained a pre-printed message at the bottom as follows: "Petro Partners recommends replacing any oil tank 20+ years old and/or not UL/ULC approved and all underground lines".

24. Pursuant to the regulations in effect at the time the DTE tank was installed, the installer (Petro-Partners) was required to make certain that the equipment was operating in a safe manner, as required by the manufacturer in the installation instructions, and as required by the 2006 *Code*, and that all safety devices were functioning properly.

25. On the date of the install of the DTE tank, a visual inspection was completed by the installer. The results were recorded on the pre-printed invoice dated October 30, 2006 notes that the

tank was a 450-litre 2006 tank, installed inside, not enclosed, not leaking, not rusted, and not having underground lines.

26. The DTE tank was vented through two vent pipes attached to the top of the DTE tank that traversed from the DTE tank in the basement to the outside area of Mr. Snodden's home. One pipe was used to vent air/gas from the DTE tank. The second vent pipe was used to fill the DTE tank from the outside to avoid the oil delivery driver having to attend inside the basement.

27. Prior to and at the time of installation, the vent pipes situated at Mr. Snodden's property were non-compliant and constituted a non-immediate hazard.

28. Following the installation of the DTE tank on October 30, 2006, Petro-Partners continued to deliver fuel to Mr. Snodden's residence without interruption.

29. Sometime in 2015, Upper Canada purchased Petro-Partner's book of business, which included Mr. Snodden's account.

30. Upper Canada completed its first oil delivery to Mr. Snodden's home on December 1, 2015.

31. On the date of this first delivery, being December 1, 2015, Upper Canada possessed *two* comprehensive inspection reports referenced above both dated in May 2006. The first comprehensive inspection report related to Mr. Snodden's furnace/hot water heater. The second comprehensive inspection report related to Mr. Snodden's (prior) 25-year-old oil tank. According to the regulations in effect at the time, comprehension inspection reports were required to remain in the customer's file until replaced, so that the fuel distributor always had the most recent report in their file.

32. On the date of this first delivery, Upper Canada also was in possession of the October 30, 2006, installation invoice for the DTE tank as issued by Petro Partners that included thereon the findings from the "Oil Tank Visual Inspection"

33. From December 1, 2015, to April 8, 2016, Upper Canada completed six deliveries of oil to Mr. Snodden's DTE oil tank.

34. On April 8, 2016, Upper Canada wrote to Mr. Snodden as follows:

> Thank you for allowing Upper Canada Fuel and Burner the opportunity to look after your home heating requirements.
>
> This letter is to advise you that our records indicate that your Comprehensive Inspection, which was completed May 15, 2006, on your appliances (furnace and/or hot water tank) and/or your oil tank, will be expiring.
>
> Please contact you furnace maintenance company and advise them that you require an updated comprehensive inspection completed on your appliances (furnace and/or hot water tank) and/or your oil tank prior to June 30, 2016. If you do not have a regular maintenance company our service department has qualified

> technicians available to complete this inspection. They can be reached at 905-723-3742 and they would be more than happy to schedule this inspection for you.
>
> Please advise us and forward a copy of the documentation to us when completed to avoid any interruption in your furnace oil deliveries. Your attention to this matter would be appreciated. If you have any questions or concerns, please contact our office at 705-742-8815 or toll free 800-461-6412.

35. In response to Upper Canada's April 8, 2016, request, Mr. Snodden retained his "furnace guy" Mr. Gourlie to complete the required updated inspections. Mr. Gourlie attended at Mr. Snodden's residence on July 29, 2016, and completed the updated Comprehension Inspection Reports for Mr. Snodden's furnace/hot water tank *and* for Mr. Snodden's DTE oil tank.

36. The July 29, 2016, Comprehensive Inspection Report as completed and signed by Mr. Gourlie for Mr. Snodden's DTE tank did not record any issues with the tank or violations within the system.

37. Upon completion, the updated Comprehension Inspection Reports were provided to Upper Canada who logged them into their system replacing the May 2006 Reports and generated an invoice also dated July 29, 2016, noting "TSSA Comprehensive Inspection – Replace" was completed by "outside company".

38. In the fall of 2017, Mr. Gourlie re-attended at Mr. Snodden's home to complete the annual service and maintenance of Mr. Snodden's heating system, including his oil tank.

39. On December 28, 2017, Mr. Snodden contacted Upper Canada to report that he was out of fuel and/or had no heat. In response to the out of fuel/no heat call, Upper Canada dispatched Len Judges, an OBT2 associated with Upper Canada. Mr. Judges attended Mr. Snodden's residence on December 28, 2017, thawed out "frozen line 2 HW under crawl space", replaced a "cell relay", and primed and started the furnace reinstating heat to Mr. Snodden's home.

40. Upper Canada issued an invoice dated December 28, 2017, which noted the steps taken to reinstate heat. The invoice included completion of the pre-printed section titled "Oil Tank Visual Inspection" noting that it was 450 litres in size, 11 years old, located inside, not enclosed, not leaking, not rusted, and not having underground lines.

41. Interestingly, unlike Petro-Partners' older pre-printed October 30, 2006 invoice, Upper Canada's invoice did *not* reference replacing any oil tanks that were 20+ years old. Instead, it contained the following warning:

> You should call Upper Canada Fuel or your home insurance company immediately regarding any repair, replacement, or damage to your oil tank or piping. Please note that Upper Canada …are not responsible for any damages that may be caused as a result of a leak or spill from your tank or piping. It is your responsibility to ensure that your oil tank and piping are properly maintained and regularly inspected for possible damage in order to avoid the expensive consequences of an oil leak on your property.

42. Following December 28, 2017, Upper Canada delivered fuel without incident to the Snodden home on January 10, 2018, February 1, 2018, February 16, 2018, March 6, 2018, March 22, 2018, April 9, 2018, and May 4, 2018.

43. On Friday June 1, 2018, in the afternoon, Mrs. Snodden (for the first time) noticed a strong smell of oil in the home and requested her daughter, Ms. Harper attend as Mr. Snodden was away golfing. Ms. Harper arrived at approximately 5:30 pm, noted the smell of oil in the home, and descended into the basement (remaining on the last few stairs). Ms. Harper testified that she observed what appeared to be a small puddle of oil on the southeast corner of the basement floor, the size of an exercise ball. Ms. Harper did not recall seeing any water on the floor, but given the season, thought there were probably patches.

44. Ms. Harper returned upstairs and telephoned Mr. Gourlie at approximately 6:30 pm. Ms. Harper advised Mr. Gourlie that she was at her parents' house, that there was a strong smell of oil, and that there was a small puddle on the basement floor. Ms. Harper requested Mr. Gourlie to attend the home. Mr. Gourlie agreed to attend later that evening as he needed to contact his friend who acted as his driver. However, he reassured Ms. Harper that he was coming to the Snodden home that night. As Ms. Harper hung up the phone, her father, Mr. Snodden, arrived home.

45. Ms. Harper advised her father of the situation and her conversation with Mr. Gourlie.

46. Ms. Harper testified that, as both of her parents were upset by the smell and presence of the oil, she remained until 8 p.m. waiting for Mr. Gourlie to arrive. He did not arrive.

47. After Ms. Harper left, Mr. Snodden went downstairs and observed oil on the basement floor. Mr. Snodden testified that, prior to June 1, 2018, he had not smelled oil nor seen oil on the floor. He could not recall when he was last in the basement but estimated that it would have been sometime that week.

48. Mr. Snodden testified that on June 1, 2018, he swept the oil towards the sump hole for about 20 minutes and then returned upstairs and telephoned Mr. Gourlie. Mr. Gourlie advised that he was at another job and would not come until the next morning. Mr. Snodden stated that Mr. Gourlie was aware of the "oil leak" but did not provide him with any instructions, nor did he recommend that he call another technician.

49. Based on his conversation with Mr. Gourlie, Mr. Snodden expected Mr. Gourlie to attend the next morning, Saturday June 2, 2018.

50. On the morning of Saturday June 2, 2018, Mr. Snodden returned to the basement and noted that the situation "seemed to have worsened". Mr. Snodden also shut off the valve to the oil tank as he "assumed the leak was probably in the oil line between the oil tank and the furnace or the hot water heater, so he shut it off" and spent approximately 15 to 20 minutes placing absorbent pads in his basement to absorb the oil.

51. Mr. Snodden waited all day Saturday for Mr. Gourlie to arrive, but Mr. Gourlie did not arrive or telephone.

52. Despite Mr. Gourlie's failure to attend, Mr. Snodden took *no* steps to contact Upper Canada, his insurance company, or any other fuel technician. In the meantime, heating oil continued to leak into the basement of the home. With the assistance of the sump pump, the oil was released to the outside sump pit onto the grass and into the earth.

Shaun Bell and Don Hurst

53. On Sunday June 3, 2018, at 8:03 a.m., Mrs. Snodden telephoned Upper Canada to report the oil leak. The call was answered by Upper Canada's after-hours answering service who immediately sent an email to Upper Canada (8:04 a.m.) reporting the identity of the caller, the oil leak, and the address of the property. The email was received by an office employee named Shaun Bell who responded on an urgent basis.

54. Mr. Bell testified that on June 3, 2018, at 8:04 a.m., he received an email from Upper Canada's after-hours reporting centre saying that there was an "oil leak" at the Snodden residence. Mr. Bell confirmed that the call centre had contacted Upper Canada's on-call service oil technician Len Judges. Mr. Bell then contacted Don Hurst, a further OBT with 40 years of experience, to assist "because it was an oil spill in the basement".

55. Mr. Bell arranged to meet Mr. Hurst and then contacted Mr. Snodden to obtain further information. Mr. Bell advised Mr. Snodden that Upper Canada had a technician (Mr. Judges) on route. Mr. Snodden advised that the oil leak started on Friday, and he called his furnace guy who didn't come. Mr. Snodden further advised that he put a powder substance down on the floor and swept some of the product into his sump pump. He had been discharging the oil onto his lawn as it had been leaking all weekend.

56. Mr. Bell then contacted Brent Perrin, Upper Canada's President, to relay the information from Mr. Snodden and to advise that Mr. Judges was en route to the Snodden home. Mr. Perrin directed Mr. Bell to attend on site to assist, take notes, take photographs, and to call Mr. Snodden to tell him to stop using the sump pump.

57. On June 3, 2018, at approximately 9:15 a.m., Mr. Bell met Mr. Hurst at their Oshawa office to gather materials, including absorbent pads, brooms, shovels, and two 205 litre plastic drums for assistance with the clean up.

58. At approximately 10:30 a.m., Mr. Bell and Mr. Hurst arrived at Mr. Snodden's home. Upon arrival, they noticed that Mr. Judges was already on site and working to control the spill. (Mr. Judges was deceased at the date of trial). Mr. Judges had already contacted the TSSA (Technical Standard and Safety Authority) to report the spill. (The TSSA representative attended June 4, 2018 and issued the standard orders to remediate the site).

59. Upon arrival, Mr. Bell met Mr. Snodden and directed him to contact his insurance agent as the oil leak was a "serious environmental issue". Mr. Snodden called his insurance adjuster (Greg Madill) who promptly arrived on scene at approximately eleven a.m.

60. While outside the home, Mr. Bell, Mr. Hurst, and Mr. Judges viewed the sump pump discharge and noted that an area of the lawn had received oil impacts. Mr. Perrin instructed

Mr. Bell to place a tarp over the oil impacted area of the lawn to contain the spread as rain was in the forecast.

61. Mr. Bell testified that when he entered the Snodden home he could smell oil and observed absorbent pads spread over the basement floor that appeared "muddy" looking. Someone had placed a pan underneath the DTE tank to stop further oil from escaping onto the floor.

62. Mr. Bell testified that upon arrival there was a lot of oil on the basement floor, the oil was very messy and hard to contain, and that the oil leak was a "significant incident".

63. Mr. Hurst testified that upon arrival he observed oil covering the basement floor that had traversed four (4) inches up the wall and absorbed into the brick. Mr. Hurst stated that there was too much oil to walk safely on the basement floor despite Mr. Judges having already laid down absorbent pads. Mr. Hurst noticed that a tray had been placed under the oil tank and the oil dripping into the tray at a "pretty good" rate like a "bit of a stream or a fast drip" from the oil tank.

64. Mr. Hurst testified that his priority was to stop the leak and pump the oil of out of tank which he did through the gauge hole. He stated that the tank was approximately half full before he began pumping and it took approximately 30 to 40 minutes to empty the tank into the plastic 205 litre barrel that he had brought for this purpose to the site.

65. Meanwhile, Mr. Bell and Mr. Judges spread further absorbent pads on the basement floor and built a "diaper" around the sump pump hole to ensure no further oil escaped into the sump pump. Mr. Bell testified that they spent several hours moving the pads around to attempt to absorb all liquids from the basement floor.

66. As instructed by Mr. Perrin prior to his attendance, Mr. Bell took notes of the events and his observations while at the Snodden home, and upon his return to the office compiled a memo.

67. After Mr. Hurst had pumped out the DTE tank, he spread further absorbent material, assisted with the clean up, and then went outside. Outside Mr. Hurst observed that there was a big spot on the grass where the sump pump had pumped out the oil. He and Mr. Bell tarped the area in an attempt to prevent any rain from spreading the oil.

68. Mr. Judges completed the standard required Canadian Oil Heating Association (COHA) form declaring the DTE tank to be an "immediate hazard". This form was signed by Mr. Snodden. The immediate hazard report noted the following: "Found oil tank leaking 3 days – pumped tank & sump pump – put down odor gone & speedy dry – not responsible".

69. Mr. Hurst returned the following day, June 4, 2018, and pumped the oil from the 205-litre barrel into an oil truck. He prepared an invoice that noted thereon a "visual inspection" of the DTE tank that specified that the tank was "rusted and leaking". The invoice noted "after hrs call tank leak – customer & daughter said leaking since 6/1/18…customer called his service guy Friday June 1/18 did not show – we got call June 3/18 8:30 am.

70. Mr. Hurst testified that he did not check the bottom of the DTE tank as he was "not going to kneel in oil" but acknowledged that an OTB using a flashlight could view the bottom of the

tank and that the oil truck driver who received the oil noted that there was both oil and "sludge" pumped out of the DTE tank.

Evidence Relating to the *Codes, Regulations,* and Standard of Care

Brent Perrin (President of Upper Canada)

71. Brent Perrin is the President of Upper Canada Fuel & Burner, a position that he has held for the past 22 years.

72. Mr. Perrin's responsibilities as the President of Upper Canada include managing the operational side of the business.

73. Upper Canada delivers fuel, furnace oil and propane to Oshawa, Peterborough, Napanee, and Kingston. Upper Canada also offers plans for service and maintenance to their customers which makes up approximately 10% of their overall business.

74. In 2018, Upper Canada had approximately 65 employees. The Oshawa office which provided fuel delivery to Mr. Snodden had approximately 15 employees: three OBTs, eight to nine drivers, and three to four administrative assistants. The OBTs working out of Oshawa were Mr. Hurst, Mr. Judges, and a man named Josh.

75. Mr. Snodden first became a customer of Upper Canada in 2015, when Upper Canada purchased the assets of Frew Petroleum. At that time, Upper Canada assumed 1500 new fuel heating customers.

76. Upper Canada utilized the same software as Frew and all accounts were moved over electronically. The electronic files had the billing address, service history, and history of fuel order delivery. Frew also utilized paper files which typically included credit applications, invoices for service, and comprehensive inspections.

77. When Upper Canada took over Frew, there was a concern that Frew's comprehensive inspections were not up to date. In response, Upper Canada did a complete audit of all home heat customers and created a database of those customers with proper comprehensive inspections on file versus those without. The database was used to prioritize the accounts as they had 1000 new accounts that did not have complete comprehensive inspections on file.

78. Upper Canada was aware that it would take 200 to 250 days to complete all comprehensive inspections and for this reason they prioritized their customers in terms of their needs.

79. If there was an immediate hazard Upper Canada stopped delivering oil until the customer had a proper comprehensive inspection report showing that the hazard had been repaired, replaced, or corrected. Clients with old or unsafe equipment were dealt with first. Upper Canada's goal was to ensure that comprehensive inspection reports would be in place for all clients within one year of assuming the business.

80. In Mr. Snodden's case, Upper Canada had *two* Comprehensive Inspection Reports dated May 2006, one for his oil tank and one for his furnace/hot water tank. The reports were kept

in Mr. Snodden's paper file. The Comprehensive Inspection Report relating to the oil tank noted that the tank in use at that time (May 2006) was over 25 years old, not in good condition, and was not non-combustible and/or stable but did *not* pose "an immediate hazard". Upper Canada also had a copy of an invoice that recorded the installation of a new 2006 DTE oil tank and piping for Mr. Snodden which was installed on October 30, 2006. This invoice recorded that an Oil Tank Visual Inspection was completed on installation and recorded that the tank was new, not leaking, and not rusted.

81. As part of their business Upper Canada offers maintenance plans to its customers, including an annual inspection. However, Mr. Snodden did not retain Upper Canada for maintenance and instead relied upon his own OBT, who was Mr. Gourlie.

82. Upper Canada made its first oil delivery to Mr. Snodden on December 1, 2015. On that date, Upper Canada had the two Comprehensive Inspection Reports for Mr. Snodden's heating system both dated May 2006, and they had the October 30, 2006, installation invoice recording the installation of the new DTE oil tank at Mr. Snodden's residence that recorded that the Oil Tank Visual Inspection had been completed on install.

83. Comprehensive inspections are valid for 10 years. Since Mr. Snodden's comprehensive inspections were dated in May of 2006, they were set to expire in May of 2016. As such, on April 8, 2016, Upper Canada wrote to Mr. Snodden to inform him that Upper Canada required an updated comprehensive inspection of his heating system "to avoid any interruption" in his furnace oil deliveries.

84. In response to the letter sent by Upper Canada on April 8, 2016, Mr. Snodden obtained two updated Comprehensive Inspection Reports completed by Mr. Gourlie on July 29, 2016. The reports were received by Upper Canada on July 29, 2016.

85. Upon receiving the updated Comprehensive Inspection Reports, Mr. Perrin testified that Upper Canada verified Mr. Gourlie's credentials as an OBT through the TSSA website. Once Mr. Gourlie was verified, Upper Canada attached the updated Comprehensive Inspection Reports to his file, and issued an electronic invoice dated July 29, 2016, to create electronic tracking. The electronic invoice noted "TSSA COMPREHENSIVE INSPECTION Replace…completed outside company".

86. In accordance with the prevailing regulations, Mr. Snodden's (updated) Comprehensive Inspection Reports for his oil tank, furnace, and hot water heater were valid for a further 10 years.

87. When questioned about the manufacturer's instructions relative to the DTE oil tank, Mr. Perrin testified that Upper Canada had never sold DTE tanks and was not in possession of the manufacturer's guidelines until provided with a copy at discovery. He also testified that he had previously personally attempted to obtain a copy of the guidelines but could not. He noted that they were not available online and were only provided to purchasers of DTE tanks.

88. Upper Canada *never* added bactericide to any fuel but did add a product called Therma Clean (advertised on all invoices) which is an additive that coats the inside of the tank to help prevent corrosion.

89. Therma Clean increases the cost of fuel by three cents per litre and in 2018 approximately 20% of Upper Canada's customers used Therma Clean. However, Mr. Snodden *never* purchased the product.

90. While Upper Canada was responsible for Mr. Snodden's oil delivery, Upper Canada did not provide *any* service or maintenance to Mr. Snodden's heating equipment or system except on one occasion on December 28, 2017. On this occasion, Mr. Snodden called Upper Canada as he had no heat and believed his oil tank was empty.

91. Regarding whether it was Upper Canada's practice to test tanks for water by "dipping" a measuring tape with special paste affixed on the end which would show if water was in the tank in December of 2017, Mr. Perrin testified that external outside tanks were automatically dipped for water. However, the dipping of inside tanks was left to the discretion of the OBT providing service and maintenance.

92. Regarding Upper Canada's response to oil spills, Mr. Perrin testified that Upper Canada's policy is to respond as quickly as possible. If a call comes in regarding a leaking tank, small or large, everything stops, and everyone makes the leak the priority because they never know the extent of the damage until they get on site to assess. They want to minimize the damage to the environment.

93. Mr. Perrin agreed that the regulations in effect in December of 2015 prohibited the delivery of fuel unless the fuel distributor is satisfied that the tank is in proper working condition.

94. Mr. Perrin also agreed that s. 7 of the prevailing regulations (O Reg 213/01) states that "no distributor shall supply fuel oil to a container or tank system that is connected to an appliance unless the distributor is satisfied that the installation of the appliance complies with the regulations, is in proper working condition, and unless a distributor has inspected the appliance at least once within the previous 10 years (known as the 10-year comprehensive inspection)."

95. Mr. Perrin disagreed that all comprehensive inspections must be performed by the distributor (i.e., Upper Canada) and could not be completed by an independent OBT (i.e., Mr. Gourlie).

96. Mr. Perrin testified that it was acceptable for a distributor to allow an owner to obtain the required comprehensive inspection report provided that the OBT completing the inspection is properly certified. In such a case, compliance with the Regulation was met. Mr. Perrin testified that there is no breach of the O Reg 213/01, or the industry standard, if a third-party OBT completes a comprehensive inspection for a distributor provided the OBT is properly certified. Mr. Perrin testified that he is personally aware of this fact through his extensive experience with TSSA audits.

97. Mr. Perrin agreed that the regulations in effect at the time that Upper Canada delivered fuel oil to Mr. Snodden contain a provision that obligates a supplier and/or technician to "tag out" appliances or systems in certain circumstances based on "non-immediate" or "immediate"

hazards. However, Mr. Perrin specifically noted that delivery truck drivers are *not* trained to "tag out" appliances. This responsibility falls to OBTs.[2]

98. Mr. Perrin testified that when a hazard is identified, the item is tagged and the OBT writes up a non-immediate or immediate hazard notification which the owner is required to sign and then the appliance is tagged. Non-immediate hazards have a 90-day period to become compliant before delivery is interrupted. Immediate hazards require an immediate ceasing of delivery and possible disablement of the appliances.

99. Mr. Perrin agreed that a rusting oil tank would be a non-immediate hazard depending on the severity of the corrosion.

100. Mr. Perrin agreed that, since the early 2000s, internal corrosion inside metallic tanks was a big issue in the industry. This issue resulted in an amendment to the *Code* and *Regulations* to ensure proper inspection. Mr. Perrin also agreed that, since the early 2000s, it was known in the industry was that water would collect inside tanks at the bottom, and eventually corrode the tanks, leading to risk of failure of the tanks. He attended seminars regarding these tanks and the appropriate precautions.

101. Mr. Perrin agreed that Upper Canada was not aware that DTE's manufacturer installation instructions (dated October 1, 2001) applicable to Mr. Snodden's tank recommended that tanks be dipped or that biocides be added to the fuel. Upper Canada was never provided a copy of the DTE manufacturer installation instructions from Mr. Snodden or any other person.

102. Mr. Perrin testified that Upper Canada completed its due diligence relating to the delivery of Mr. Snodden's fuel oil when Upper Canada received the updated comprehensive inspection reports dated July 29, 2016. Mr. Perrin testified that comprehensive inspection reports are valid for a further 10 years, and that the obligation for inspection, service, and maintenance of Mr. Snodden's heating system fell to Mr. Snodden pursuant to the provisions of the *Code,* and *not* to Upper Canada.

103. Mr. Perrin testified that Upper Canada informed and reminded their customers of their ongoing obligation to obtain annual service and maintenance of their systems through the printed warnings that appeared on each customer's invoices and statements.

104. With respect to Mr. Judge's attendance at Mr. Snodden's residence on December 28, 2017, Mr. Perrin testified that the attendance was *not* to complete an inspection but to get the appliances up and running.

105. Mr. Perrin testified that had Upper Canada been advised of the oil leak at the Snodden home on Friday evening on June 1, 2018, Upper Canada would have responded immediately,

2 I agree that fuel oil delivery truck drivers, who are not "OBTs" or "contractors" as defined by the Regime, are not authorized to "tag out" appliances.

would have reported the oil leak to the Spills Action Centre, and would have contained the leak.

106. Mr. Perrin opined that, had Upper Canada been called on June 1, 2018, the TSSA would have completed their investigation on Monday June 4, 2018, and Upper Canada could have installed a new oil tank on Tuesday June 5, 2018. Any damages suffered would have been minimal.

107. Mr. Perrin stated that he could not understand why Mr. Snodden did not call Upper Canada on Friday night when Mr. Gourlie failed to show up. Mr. Perrin testified that "you don't wait 12 hours – the homeowner should make more phone calls". Mr. Perrin testified that Mr. Snodden made some bad judgment calls that made the situation "a lot worse".

108. Mr. Perrin opined that while it was reasonable for Mr. Snodden to call his OBT, it was not reasonable to wait 12 hours and longer for the OBT to show up.

Evidence of the Plaintiff's Experts

Michael Flynn (Rule 53), and Glenn Moreau (Participant Expert)

109. Michael Flynn is a professional mechanical engineer, the co-author of the 2015 *B139 Series 15 Installation Code for Oil Burning Equipment* (*Oil Heat Code*), and the co-author of the 2021 *Code and Regulations (Technical Standards and Safety Act, 2000, Fuel Oil,* O Reg 213/01). He has participated in ongoing *Code* revisions and updates. He is the owner of Michael Flynn & Associates Limited (MFAL) and possesses particular and highly specialized knowledge of the various *Codes, Regulations,* and standards of practice in the fuel heating industry.

110. Glenn Moreau is a former HVAC technician, a qualified OBT, and the former longtime owner and operator of a heating company. Mr. Moreau joined MFAL in 2014 as an investigator and has since investigated hundreds of oil spill events and provided assessments of the standard of care applicable to OBTs, distributors, and owners.

111. MFAL was retained by the plaintiff's insurance adjuster, Glenn Madill, on June 5, 2018, to investigate the origin and cause of the oil spill event. Upon being retained, Mr. Moreau attended at the Snodden property, spoke to the plaintiff and the insurance adjusters, took photographs, had the DTE tank delivered to MFAL's laboratory, and thereafter co-authored a report with Michael Flynn dated October 8, 2018. The report was addressed to Mr. Madill, titled "Oil Escape Investigation – Preliminary Report" which was filed as an exhibit at trial: Exhibit 1, Tab 13.

112. Before reviewing the evidence of Mr. Flynn and Mr. Moreau, I provide the following proviso: while Mr. Flynn and Mr. Moreau are eminently qualified and possess specialized expert knowledge of the applicable regime including the *Codes*, *Regulations*, *Handbooks*, *Manufacturer's Instructions*, and the standards of care that arise therefrom, care must be taken in considering their opinions in the present case for the following reasons:

i. the MFAL report prepared for the plaintiff's insurer which was filed at trial, refers extensively to the wrong version of the *Code,* cites revoked sections of the *Code,* and cites the wrong version of the DTE manufacturer's instructions -- in support of the opinions contained therein.

ii. the MFAL report was written in October of 2018 and was *not* corrected at anytime in writing prior to, or during, the 2023 trial in breach of the experts' duty to the Court.

iii. Mr. Flynn intended to testify as a participant expert. However, after objection, he executed a Rule 53 Acknowledgment of Expert's Duty. Following a *voir dire,* he was qualified as a Rule 53 expert. The October 2018 report was entered into evidence as an exhibit and Mr. Flynn was directed to provide evidence compliant with Rule 53, which prohibits an expert from testifying on any issue unless the substance of his testimony on that issue is set out in his report, a supplementary report, or a responding supplementary report. Mr. Flynn did not file a supplementary or responding supplementary report and proceeded to testify outside the scope of his written opinion extensively referring to an entirely different *Code* (primarily correcting the errors in the report) while continuing to reference revoked provisions of the *Code* and inapplicable manufacturer's instructions.

iv. Mr. Moreau (also) testified outside the scope of his written opinion and (also) extensively referred to an entirely different *Code* (primarily correcting the errors in the report). While Mr. Moreau was not bound by the same rules that apply to Mr. Flynn as a Rule 53 expert, the fact that the October 2018 report was not corrected in writing prior to the November/December 2023 trial and was partially corrected "on the fly" during testimony raises serious concerns.

v. Although the errors in the 2018 written MFAL report may be unintentional, they primarily favour the plaintiff's position. As Mr. Flynn is a co-author of the 2015 version of the *Code*, it seems unlikely that he was unaware of which version of the *Code* (2006 or 2015) and which version of the DTE manufacturer's instructions (2001 or 2007) applied to each allegation of breach contained in their report.

vi. Mr. Moreau and Mr. Flynn were *retained* by the plaintiff's insurance adjuster. While this fact does not preclude unbiased independent testimony, akin to Justice Donahue's assessment in *Brown v. Davis and McCully,* I find that their opinions verged "upon a counsel of perfection" and they exhibited "partisanship" by discounting, excusing, and ignoring any and all culpability of the plaintiff Mr. Snodden.

113. For these reasons, while I accept that Mr. Moreau and Mr. Flynn are eminently knowledgeable and qualified, I have treated their evidence and opinions with care, and caution.

Glenn Moreau (Participant Expert)

114. Mr. Moreau was qualified as a participant expert to provide expert opinion evidence on the area of servicing and maintaining fuel oil appliance, including tanks, the standard of care of an OBT, and any breach of the Code that arises therefrom.

115. Mr. Moreau testified that 90% of all oil escapes he has investigated were caused by issues relating to internal corrosion of the bottom of metallic tanks. Mr. Moreau confirmed Mr. Perrin's evidence that, in the late 1990s and 2000s, companies such as Granby would host seminars to educate OBTs and to broadcast the message that, if there was water in a tank, get it out.

116. Mr. Moreau testified that, when he owned his fuel company the "dip test" was part of the regular service. He never encountered a situation where he couldn't dip a tank due to clearance as dipping could be completed using a flexible measuring tape. Mr. Moreau testified that the dip test took less than five minutes with minimal cost. Mr. Moreau testified that it was standard industry practice to "dip" metallic oil tanks for water, and if water was found, to remove the water.

117. Mr. Moreau testified that the reasonable and prudent practice of an OBT when completing service or maintenance was to complete a visual inspection of the oil tank beginning with an inspection of the bottom of the tank. If there were blisters, then the tank would be "tagged" as an immediate hazard and removed.

118. Mr. Moreau stated that he would inspect the bottom of every tank he inspected with a flashlight or a trouble light to look for blisters. If a blister was found the tank would be "tagged immediately for removal" as "you can't save a tank that is blistering".

119. With respect to the DTE tank that was installed at Mr. Snodden's home Mr. Moreau estimated that it would have an expected lifespan of 10 years, but on cross-examination admitted that "there is no regulation stating that the life expectancy of a tank is 10 years".

120. Mr. Moreau testified that if he was the OBT that completed the comprehensive inspection in July of 2016 he would have gotten rid of the tank "just because they're problematic. Even if I can't find the blisters – I want the tank gone. I'm not signing my name on it".

121. Mr. Moreau testified that he could "guarantee" that if the tank had been dipped in 2016 the OBT would have "found water". He stated that he is not sure if the blistering would have started but he is sure there would have been water inside the tank.

122. Mr. Moreau testified that based on his experience, knowledge, and training, that in the fall of 2017 there would have been evidence of damage to the tank detectable by the OBT upon inspection. He stated, "in my experience there would be evidence that we got troubles coming".

123. Mr. Moreau testified that in his experience in the fall of 2017 the OBT would have seen blisters starting and the tank should have been tagged and removed. He stated that he doesn't know the precise day a blister would form, but "can guarantee they generally give you at least a year".

124. Mr. Moreau testified that if an OBT was "changing the relay" (as Mr. Judges did on December 28, 2016), he "didn't imagine any obligation to do anything". Notwithstanding that there was no obligation, he said that it would be reasonable "for all the time it takes, just to bend over and take a look".

125. With respect to the fill/vent pipes located on the outside of the home, Mr. Moreau testified that the pipes were an "obvious *Code* violation" that constitute a "non-immediate hazard" because the vent pipe was too close to a window and there was no access to the piping under the deck. The pipes should have been "tagged" as a non-immediate hazard.

126. As for the addition of biocides, Mr. Moreau testified that when he operated his own company, he would add some when they delivered fuel. He also testified that biocide additive is *not* required by the *Code.*

127. During cross-examination, Mr. Moreau testified that if there is water inside a tank, corrosion has begun, but dipping the tank doesn't tell you anything specifically about the integrity of the tank. He also testified that most fuel oil tank failures caused by internal corrosion due to water are outdoor tanks.

128. Mr. Moreau testified that, until blisters form on the outside of a tank, an OBT would have no way of knowing that a tank is suffering from microbial influence corrosion ("MIC") or internal corrosion.

129. Mr. Moreau testified that external corrosion (rust) has *nothing* to do with MIC or internal corrosion.

130. Mr. Moreau has "no knowledge" as to when blisters formed on Mr. Snodden's tank but "is certain" that they would have been there in December of 2017.

<u>Michael Flynn (Rule 53 Expert)</u>

Origin and Cause of the Oil Spill and MIC

131. Mr. Flynn was qualified to provide opinion evidence relating to: the origin and cause of the oil leak/spill; the issue of MIC generally and specifically as it applies to this case but *not* to the specific rate of corrosion; compliance with *Codes* and *Regulations* relating to the regulating proper supply, service, and maintenance of heating appliances (noting that the court will determine the appropriate applicable interpretation); and the standard of care applicable to a service supplier as mandated by the *Codes* and *Regulations.*

132. Mr. Flynn testified that Mr. Snodden's DTE end-wall tank was susceptible to MIC because over time water develops in the tank and becomes trapped on the bottom. A boundary level is created where the oil and water meet, allowing microbes to develop. As there is no natural

way to dispel the water, unless the water is removed, the tank will develop MIC which causes bacteria inside the tank to attack the tank.

133. Mr. Flynn testified that corrosion and tank failure begins with the MIC burrowing a conical hole inside the tank which will continue until the tank is perforated. The initial hole starts with a pinhole and as the MIC process continues it will continue auguring the pinhole. Mr. Flynn noted that it would have taken a "prolonged period of time" for the hole in Mr. Snodden's oil tank to develop and that the loss occurred was due to a MIC attack.

134. Mr. Flynn noted that the photographs taken by Mr. Moreau in Mr. Flynn's laboratory depict a hole in the bottom of the DTE oil tank with rust and pitting running along the bottom of the tank, which is typical of a MIC attack.

135. Mr. Flynn opined that the first blister that appeared on the tank would have been located where the large hole was situated. The hole would have started as a pinhole that progressed and continued over a prolonged period until it develops into a hole. Mr. Flynn stated that in his opinion water had never been removed from the tank and was always present, and as a result the MIC developed first appearing as blistering on the outside of the tank, progressing to a pinhole and eventually becoming a hole.

136. Mr. Flynn testified that the condition of the underside of the tank as depicted by the photographs taken on June 5, 2018, "would have existed in the fall of 2017" when the tank was serviced by Mr. Gourlie. Mr. Flynn noted that "the OBT failed to carry out the required inspections, service, and maintenance. The oil escape event occurred as a direct result. Had Mr. Gourlie checked the bottom of the tank or checked the tank for water, the oil escape event would likely have been prevented".

137. Mr. Flynn noted that with each successive delivery of oil, the likelihood that the blister on the underside of the tank would burst increases, as the addition of the oil to the tank causes static pressure on the tank. However, the failure did not occur suddenly. It started with a pinhole blister. With the development of MIC, the hole widened, and the sphere kept getting bigger and bigger like a balloon. Eventually, the adhesion or bond strength of the exterior paint failed and the oil escaped.

138. Mr. Flynn opined that the cause of loss in Mr. Snodden's case was MIC failure.

Compliance with the *Code* and *Regulations*

139. Mr. Flynn reviewed the various sections of the *Code* and *Regulations* and the Installation Instructions for Mr. Snodden's DTE tank relevant to determination of compliance with the *Code* and *Regulations.*

140. With respect to the regulations that applied to the supplier Upper Canada, Mr. Flynn testified that O Reg 213/01 effective July 21, 2002, required that whenever there is a change in fuel supplier or service provider, or a new client, a comprehensive inspection was required. No distributor shall supply fuel oil to a container that is connected to an appliance *unless* the distributor is satisfied that the installation and use of the appliance or work complies with the regulation and unless the distributor has inspected the appliance or work at least once in the

previous 10 years. The only exception is if the distributor has inspected the appliance or work with a quality assurance inspection program (i.e., a comprehensive inspection).

141. Mr. Flynn testified that pursuant to s. 20 of O Reg 213/01, Upper Canada was required to complete a comprehensive inspection (completed by Mr. Gourlie on July 29, 2016) and should *not* have supplied fuel oil to Mr. Snodden or permitted use unless it completed the comprehensive inspection. Mr. Flynn opined that Upper Canada's supply of oil in contravention of this regulation was a breach.

142. Mr. Flynn further opined that Upper Canada and/or the OBT were required to inspect and maintain Mr. Snodden's oil tank in accordance with DTE's recommendations and installation instructions and that failure to do so constituted a further breach.

143. With respect to DTE's recommendations and installation instructions (2001), Mr. Flynn testified that the instructions required: the testing/inspection and removal of water from the tank; the addition of bactericides to the fuel at the time of delivery; and the regular examination of the exterior surface with deterioration of the coating to be restored by touch up or repainting at the owner's discretion, without obliterating the affixed signage.

144. Mr. Flynn opined that Upper Canada and/or the OBT's failure to comply with DTE's instructions constituted further breaches of the *Code*.

145. Mr. Flynn opined that there were two additional non-immediate *Code* breaches that were readily apparent. First, the top oil tank connections were not "fuel-oil-tight". Connections must be "fuel-oil-tight" to ensure that they can't leak. As oil could be seen around the top connectors, this indicates a breach of the *Code.*

146. Second, the exterior vent pipes were required to be positioned a certain distance from the operable window (and were not so positioned) and were required to be a certain height (and were not). These breaches were readily apparent as non-immediate hazards that were not "tagged out" or remedied.

Standard of Care

147. Mr. Flynn opined that the fuel supplier was required to know and follow the manufacturer's instructions for the care and maintenance of the DTE tank and that the standard of care required: Testing for water in the tank, and if found, removing the water; Sloping the tank; and the addition of biocide at the time of each filling.

148. Mr. Flynn opined that had Upper Canada added biocide at the time of each filling, MIC development within the tank could likely have been controlled. This could have prevented the potential premature failure of the tank.

149. Mr. Flynn testified that when an OBT conducts a visual inspection, the standard of care requires the OBT to take a light and mirror and go under the tank and examine it. They are not to rub the blisters as this would risk breakage and an immediate oil escape.

150. Mr. Flynn opined that the comprehensive inspection completed by Mr. Gourlie on July 29, 2016 was not Code compliant:

> First, the vent pipe location was a breach of the Code as the vent was too close to the window and the pipes were hidden under the deck.
>
> Second, the oil tank was installed level and should have been sloped.
>
> Third, the tank should have been "dip" tested for water. Water would have been found, and the tank should have been condemned.
>
> Fourth, had he completed a visual inspection of the underside of the tank, it would have revealed blistering and been deemed an immediate hazard.

151. Mr. Flynn opined that the service and maintenance completed by Mr. Gourlie in the fall of 2017 was also not *Code*-compliant for the same reasons related to the 2016 inspection.

152. Mr. Flynn opined that the service by Mr. Judges in December of 2017 was not *Code*-compliant for the same reasons.

153. Mr. Flynn opined that Upper Canada failed in its duty in failing to provide, recommend, or arrange for the addition of biocide upon fuel delivery on the basis that the manufacturer's instructions were not followed and should have been.

154. As for Mr. Snodden's response to the discovery of the spill, Mr. Flynn opined that Mr. Snodden was an older gentleman and three days – Friday to Sunday – is "actually a pretty good response, it's a reasonable response. It could've been faster, but it, once the oil hits the ground and it flows where it flows, in that case flowed into the sump pit and out into the yard but that was easy to deal with, the harder issue was the oil under the foundation".

155. During cross-examination, Mr. Flynn advised:

> The 2006 *Code* only required indoor tanks to be tested for water from March 2007 to October 2007 at which time the requirement was *revoked* and was not re-instated until April of 2016.
>
> The 2001 DTE installation instructions were *not* certified by UL or any government agency.
>
> The 2001 DTE installation instructions were not readily accessible unless you bought a tank. There is no evidence that Mr. Snodden received a copy of the 2001 DTE installation instructions in 2006.
>
> He should have corrected his written expert report prior to trial but did not.
>
> His written expert report is in error when he states that it was a violation of the *Code* for the DTE tank not to be installed on a slope as neither the 2006 *Code* nor

the applicable 2001 DTE installation instructions require or recommend that the tank be installed on a slope.

He agreed that when his report was authored, the section requiring dipping for water for indoor tanks had been revoked – yet he left reference to the revoked section in his report.

There was an obligation imposed on Mr. Snodden to ensure that his equipment was safe and maintained regularly (on an annual basis) and if Mr. Snodden failed to so act, he breached the *Code* and *Regulations* thereunder.

Evidence Relating to Remediation and Damages

Greg Madill, Insurance Adjuster

156. Mr. Madill was the insurance adjuster assigned to Mr. Snodden's claim and has worked as an adjuster for the past 42 years. Mr. Madill has "extensive experience" dealing with oil leak claims, remediation consultants and contractors, and regularly deals with orders issued under the TSSA and the Ministry of the Environment.

157. Mr. Madill testified that based on his estimates there was approximately 100 litres of oil spilled in the basement and this was a "significant spill".

158. Mr. Madill was informed of the oil spill on June 3, 2018, and immediately attended at Mr. Snodden's residence.

159. On June 5, 2018, Mr. Madill received an order from the TSSA requiring Mr. Snodden's property to be remediated. In response, Mr. Madill hired all necessary and qualified personnel to complete the remediation including remediation experts, Pario Environmental and iTech, who he attested are the "best environmental clean-up company in the province of Ontario".

160. Mr. Madill provided oversight to the remediation contractors and reviewed and reconciled all invoices to timecards and dockets on an ongoing basis.

161. Mr. Madill testified that the work completed, and the funds expended, were reasonable and necessary in response to this claim. Mr. Madill recommended that all invoices be paid by the insurer who accepted his recommendations in this regard.

Vilija Mercer and Mark Samis

162. Vilija Mercer and Mark Samis of Pario Environmental attended to testify about the remediation as participant experts.

163. At the date of the remediation, Ms. Mercer and Mr. Samis were employed by Pario Environmental, an expert remediation company. Ms. Mercer was the on-site project manager for the remediation of Mr. Snodden's property and Mr. Samis provided Ms. Mercer with off-site mentorship and guidance. Both Ms. Mercer and Mr. Samis presented as extremely

qualified and competent, with impressive resumes, education, and extensive work experience.

164. Ms. Mercer first attended Mr. Snodden's residence on June 6, 2018, and worked tirelessly thereafter until remediation was complete. At the conclusion of the remediation, Ms. Mercer co-authored a remediation report with Mr. Samis, summarizing the process. This report was delivered to the TSSA, the insurers, and Mr. Snodden, and it was filed as an exhibit at trial.

165. Ms. Mercer described the remediation process in a clear and understandable manner. She advised that 33.96 tonnes of impacted soils and 6,500 litres of impacted oily solids were removed from interior and exterior excavations between June 6, 2018, and August 29, 2018, and transported off site by iTech to an approved disposal site.

166. Ms. Mercer advised that the analytical data collected at the conclusion of the remediation supported the conclusion that the fuel-oil-related PHC impacts, resulting from the oil spill event discovered on June 3, 2018, were remediated to pre-existing conditions, where practicable, as required by the *Environmental Protection Act,* R.S.0. 1990, c. E.19.

167. Mr. Samis also proved to be exceptionally knowledgeable and experienced. Mr. Samis provided his evidence in a straightforward and comprehensible manner that fully corroborated Ms. Mercer's testimony.

Paul Hubley

168. The final remediation expert was Mr. Hubley, a geoscientist called by the defendant Upper Canada. Mr. Hubley was also eminently qualified to testify as a remediation expert.

169. Mr. Hubley opined that Pario utilized too many underpinnings, took too few and/or too many samples, and over-remediated the property.

ISSUES

170. The issues to be determined are liability, causation, and damages.

171. More particularly, the issues are as follows:

1. What was the origin and cause of the heating oil leak/oil escape event?

2. What is the standard of care that each defendant is required to meet as an OBT and/or as a fuel supplier?

3. Did either or both defendants breach the standard of care, and if so, did the breach cause or contribute to the heating oil leak/oil escape event?

4. Is the plaintiff Mr. Snodden contributorily negligent?

5. What is the proper apportionment of damages between Upper Canada and/or Mr. Gourlie and/or Mr. Snodden?

6. What is the quantum of damages owed?

APPLICABLE LAW

Negligence

172. To be successful in an action in negligence, a plaintiff must demonstrate each of the following elements:

    a. That the defendant owed the plaintiff a duty of care.

    b. That the defendant's conduct breached the standard of care.

    c. That the plaintiff sustained damages.

    d. That the damage was caused, in fact and in law, by the defendant's breach.

Duty of Care

173. Fuel oil suppliers and OBT technicians owe a duty of care to persons to whom fuel is supplied and/or to persons whose furnaces, oil tanks, and hot water heaters they inspect, service, and maintain. See *Gendron v. Thompson Fuels*, 2017 ONSC 4009, 12 C.E.L.R. (4th) 237 , at para. 197, aff'd 2019 ONCA 293, 24 C.E.L.R. (4th) 179; *Heyworth v. Doyle Plumbing Heating and Cooling*, 2022 ONSC 677, 21 C.C.L.I. (6th) 58, at para. 58,aff'd 2023 ONCA 754, 37 C.C.L.I. (6th) 177; *Donleavy v. Ultramar Ltd.*, 2017 ONSC 7438 at para. 53*; Appleyard v. Earl (Earl's Heating),* 2009 ONSC 45307, 90 C.L.R. (3d) 49 at para. 33; *Thornhill v. Highland Fuels*, 2014 ONSC 3018, at para. 38; *Bingley v. Morrison Fuels*, 2009 ONCA 319, 95 O.R. (3d) 191 ; and *Brown v. Davis &McCauley Fuels Ltd.* 2010 ONSC 4674, at para. 25, aff'd 2012 ONSC 6567 (Div. Ct).

174. In the present case, both defendants owed a duty of care to the plaintiff.

175. The defendant Mr. Gourlie owed a duty of care as the OBT who performed the comprehensive inspection of the DTE tank on July 29, 2016, as the OBT who performed the annual service and maintenance of the plaintiff's heating oil system in the fall of 2017, and as the OBT who was called to attend in response to the oil spill event on June 1, 2018.

176. The defendant Upper Canada owed a duty of care as the fuel supplier for the plaintiff commencing December 1, 2015, as the employer of the OBT (Mr. Judges) who attended the Snodden residence on December 28, 2017, for an "out of oil" call, and as the fuel supplier/OBTs called to attend in response to the oil spill event on June 3, 2018.

Standard of Care

177. The test to establish the standard of care is undisputed and is as described by the Supreme Court of Canada in *Ryan v. Victoria (City),* [1999] 1 S.C.R. 201, at para. 28 as:

> Conduct is negligent if it creates an objectively unreasonable risk of harm. To avoid liability, a person must exercise the standard of care that would be expected of an ordinary, reasonable, and prudent person in the same circumstances. The measure of what is reasonable depends on the facts of each case, including the likelihood of a known or foreseeable harm, the gravity of that harm, and the burden or cost which would be incurred to prevent the injury. In addition, one may look to external indicators of reasonable conduct, such as custom, industry practice, and statutory or regulatory standards.

178. A breach or violation of legislation is not a basis for finding liability in negligence. Conversely, mere compliance with legislation does not, in itself, preclude a finding of liability in negligence.

179. The fact that a statute prescribes or prohibits certain activities may constitute evidence of reasonable conduct depending on the situation, but it does not extinguish the underlying obligation of reasonableness.

180. A statutory breach does not automatically give rise to civil liability, it is merely some evidence of negligence. Similarly, mere compliance with a statute does not preclude a finding of civil liability.

181. Statutory standards, however, can be highly relevant to the assessment of reasonable conduct and may render reasonable an act or omission that would otherwise appear to be negligent.

182. Courts are required to consider the legislative framework in which people and companies must operate, while recognizing that there remains an underlying obligation of reasonable care that is not always discharged by complying with statutory duties: see *Ryan,* at para 29.

183. During the period relevant to the issues that arose in this action, oil fired equipment and the delivery of oil were regulated by the TSSA.

184. It is settled law and not disputed by either party that the standard of care applicable to fuel oil suppliers and OBTs is based on the provisions of O Reg 213/01 under the *Technical Standards and Safety Act, 2000*,which incorporates the Canadian Standards Association's *Ontario Installation Code for Oil Burning Equipment B139-06 and B-139.2-15* (the "2006 Code" and the "2015 Code"). Collectively, this is referred to as the "Regime".

185. The regulatory standards 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 *Gendron v. Thompson Fuels,* at para. 199 (aff'd 2019 ONCA 293) and *Brown v. Davis &McCauley Fuels Ltd.,* at para. 25.

186. In *Gendron v. Thompson Fuels,* Charney J. eloquently described the standard of care for fuel oil suppliers and OBTs as follows:

> I accept that standard of care can be derived from the applicable regulatory requirements and consideration of the 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… 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 the installers, suppliers and technicians and the breach of these standards is a breach of the duty of care: see *Gendron v. Thompson Fuels*, 2017 ONSC 4009 (CanLII) at para 199 (aff'd 2019 ONCA 293).

Applicable Legislative Standards

The *Regulation*

187. The general requirement for compliance is set out at s. 3 of O Reg 213/01 *:*

> (1) Every person engaged in an activity, use of equipment, process, or procedure to which the Act and this Regulation apply shall comply with the Act and this Regulation.
>
> (2) For the purpose of ss. (1), the reference to activity, use of equipment, process or procedure includes, but is not limited to design, installation, alteration, repair, service, removal, purging, activation, storage, handling, modification, and use of equipment.

188. Section 7 of O. Reg. 213/01requires fuel oil distributors to ensure fuel oil systems are inspected before supplying fuel oil to the tank and 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 ss. (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.

189. Section 19 of O Reg 213/01imposes 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.

190. Section 20 of O Reg 213/01 prohibits the fuel oil supplier from providing fuel oil if the furnace or oil tank does not comply with the regulation*:*

> 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.

191. Section 23 of O Reg 213/01provides that a fuel supplier who finds, during delivery operations or during an inspection, that the condition of the tank constitutes an immediate hazard, is required to shut-off the system (referred to as "tagging-out") and immediately cease supplying fuel oil to the tank.

192. Section 24 of O Reg 213/01provides that a fuel supplier 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 fuel oil supplier, in an unacceptable condition but that an immediate hazard does not exist, shall provide the operator with a description of the condition and promptly provide notice to the operator indicating that the distributor will cease supplying fuel oil to the appliance or tank system if the condition is not correct within the period of time specified in the notice.

193. Section 22(1) of the O Reg 213/01 provides that an "unacceptable condition" means:

> With respect to an appliance, container, or work, that it is being used for a purpose other than that for which it was approved,
>
> With respect to an appliance or work, that a device, attachment, alteration, or deterioration of it is likely to impair its safe operation,
>
> 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.

The *Codes*

B-139-06 Code for Oil-Burning Equipment (2006 Code)

194. The 2006 *Code* was published on October 18, 2006, and adopted by the TSSA effective March 1, 2007. It is the 2006 *Code* that is applicable to the installation of Mr. Snodden's DTE tank and to the servicing and maintenance of his system prior to implementation of the 2015 *Code*.

195. Pursuant to s. 3.1.4 of the 2006 *Code*, Mr. Snodden's 2006 DTE oil tank was required to be installed on a firm, *level,* non-combustible floor. Mr. Flynn's opinion that the DTE tank should have been installed on a slope, and should have been noted by Mr. Gourlie on July 29, 2016, as a breach, is incorrect. It was based on the wrong version of the *Code* (2015) and is rejected by me. There was no breach relating to the slope of the tank, by any party, as there was no requirement to retroactively slope the DTE tank following implementation of the 2015 *Code*.

196. Pursuant to s. 4.3.2 of the 2006 *Code,* before leaving a new installation, "*the installer is required instruct the user (owner)* in the safe and correct operation and *maintenance requirements* of the appliance and are *required to ensure that the manufacturer's instructions* supplied with the new appliance …*are left with the user (owner)*" and s. 4.3.3 requires that "the manufacturer's instructions… *shall be conspicuously posted near the appliance*" (Emphasis added).

197. Pursuant to s. 13.2.1 of the 2006 *Code,* the owner of the oil-burning equipment was required to ensure that the equipment is maintained at least once per year. This section noted that maintenance should also be in accordance with the manufacturer's instructions.

198. When the 2006 *Code* was adopted by the TSSA, s. 13.2.2.1 required metallic end outlet tanks to be tested for water at the bottom of the tank. Where water was found, the water was required to be removed. However, this section was revoked on October 11, 2007, and was only in effect from March 2007 to October 11, 2007, until it was reinstated by the 2015 *Code*, effective in April of 2016.

The B-139.2-15 Code for Oil-Burning Equipment (2015 Code)

199. Section 6.4.7.2 of the 2015 *Code* (which does *not* apply to the installation of Mr. Snodden's tank) requires certain tanks to be installed on a slope. For clarity, there was no requirement that Mr. Snodden's tank be installed on a slope and no resultant breach relating to the slope of the tank.

200. In s. 12 of the 2015 *Code*, "Maintenance", provides as follows:

Oil-burning equipment shall be inspected and maintained in accordance with the manufacturer's recommendations and to at least the minimum requirements in accordance with Annex L.

201. Annex L "Maintenance – Residential installations" under L.1 "Regular maintenance" provides:

> The owner or operator of the oil-burning equipment shall ensure, at least once per year, that it is maintained in accordance with Clauses L.1.2 to L.5.
>
> Note: Maintenance should also be in accordance with the manufacturer's instructions.

202. The requirement to test indoor tanks for water as part of the annual regular maintenance was added to the 2015 *Code* effective July 1, 2016, at Annex L.1.3 as follows:

> Except for bottom outlet tanks installed in accordance with Clause 6.4.5 of CSA B139.2, tanks shall be tested for water at the bottom of the tank. Where found, the water shall be removed.

Grandfathering Prior Installations

203. There is no provision in either the 2006 *Code* or the 2015 *Code* that requires existing fuel tank installations to be brought into compliance with the minimum requirements of a new subsequent Code if they were installed in compliance with predecessor regulations.

204. Section (1) 3 of O Reg 213/01 provides:

> 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.

205. Accordingly, appliances installed before a change in the *Code* can remain in operation provided that they were *Code* compliant at the time of installation. However, any installations after *Code* changes must comply with the new requirements.

206. Provided that the installation is safe, there is no *Code* or regulatory requirement that an existing installation that complies with the *Code* in place at the time it was installed be "tagged out" or brought into compliance with the new *Code* requirements.

Causation

207. In a negligence action the plaintiff must prove, on a balance of probabilities, that the breach of the standard of care is casually connected to the injuries or losses in question. In all but exceptional cases, the test for causation is the "but for" test: see *Thornhill v. Highlands,* at para. 96.

208. The fact that a defendant breached a standard of care, and that the plaintiff suffered a loss, does not by itself lead to a finding of liability on the part of the defendant. The question is whether the breach caused the plaintiff damage in fact and in law or whether it is too remote to warrant recovery.

209. Causation is assessed using the "but for" test. That is, the plaintiff must show on a balance of probabilities that "but for" the defendant's negligent act, the injury would not have occurred.

210. As noted by the Supreme Court of Canada, inherent in the phrase "but for" is the requirement that the defendant's negligence was necessary to bring about the injury. In other words, the injury would not have occurred without the defendant's negligence: see *Ediger v. Johnston,* 2013 SCC 18, [2013] 2 S.C.R. 98 at para. 28.

211. The "but for" test applies even where a defendant's negligence is not the sole cause of the injury. In the case of negligent omission, which is alleged in the present case, the application of the "but for" test requires the trier of fact "to attend to the fact situation as it existed in reality the moment before the defendant's breach of the standard of care, and then to imagine that the defendant took the action the standard of care obliged [it] to take, in order to determine whether in doing so it would have prevented or reduced the injury". The "but for" causation question is whether, if the defendant had discharged its duty, and had not been negligent, the fuel oil release would have been prevented: see *Donleavy v. Ultramar Ltd.*, 2019 ONCA 687, at para. 73.

Contributory negligence

212. While contributory negligence does not depend on a duty of care, it does depend on foreseeability. Just as actionable negligence requires the foreseeability to harm others, so contributory negligence requires the foreseeability of harm to oneself. A person is guilty of contributory negligence if they ought reasonably to have foreseen that, if they did not act as a reasonable, prudent person , they might be hurt themself; and in their reckonings they must consider the possibility of others being careless: see *Bow Valley Jusky (Bermuda) Ltd. V. Saint John Shipbuilding Ltd.,* [1997] 3 S.C.R. 1210..

213. In *Snushall v. Fulsang,* 78 O.R. (3d) 142 (Ont. Ca.), the Ontario Court of Appeal at para. 27, explained the distinction between a defendant's liability and contributory negligence in a motor vehicle accident where a plaintiff did not wear a seatbelt as follows:

The legal significance of this distinction is that the defendant whose negligence results in the accident has breached the general tort duty to take care to avoid endangering others, whereas by not wearing a seatbelt a person does not commit a tort but fails to protect himself from the torts of others.

214. The reasonableness of a plaintiff's conduct and the foreseeability of harm to oneself has been considered in numerous oil spill cases.

<u>Failure to Promptly Report a Spill</u>

215. Not surprisingly, failure to promptly report a fuel oil spill as soon as it is discovered has been held to constitute contributory negligence.

216. In *Brown v. Davis & McCauley Fuels Ltd.,* Donahue J. found the homeowner 90% responsible for repeatedly choosing to ignore the evidence of a steady leak described as "a potent sign of the pending disaster". In apportioning fault to the plaintiff Donahue J. stated "there was disaster ahead. But Mr. Brown was in the driver's seat, the defendant merely the look-out…"

217. In *Gendron v. Thompson Fuels,* Charney J. found the plaintiff to be 60% contributorily negligent after waiting nearly 24 hours after discovering the leak to report it to Thompson Fuels, which acted as both his fuel supplier and service technician. Charney J. noted that "Mr. Gendron's delay in reporting the 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". The evidence was that had Mr. Gendron called the emergency phone line, Thompson Fuels would have responded within 30 minutes and the leak would have been plugged or the tanks pumped out. This would have greatly reduced the quantity of oil that escaped and reduced the damages.

218. In finding the plaintiff liable for his failure to promptly report the leak, Charney J. stated as follows:

> 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, s. 91(1) and 91(2) of the *Environmental Protection Act* requires the homeowner to immediately report an oil leak to the Spills Action Centre.
>
> 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 Tupperware containers. I agree that Mr. Gendron was negligent in not doing so promptly.

219. In addition to any obligation of reasonableness to promptly report a spill imposed by case law, in the present case sections 92(1) and 92(2) of the *Environmental Protection Act*, R.S.O. 1990, c. E.19, required that Mr. Snodden, as the person having control of the pollutant, *immediately* notify the Ministry and the local municipality/regional of the fact that the spill occurred, the circumstances of the spill, and the action that he has taken or intends to take with respect to the spill. Mr. Snodden took no such action.

Failure to Properly Maintain a Heating System

220. As noted in the section summarizing the *Regulations* and *Codes*, homeowners have a responsibility to maintain their heating system in safe operating condition and to ensure that their systems are annually serviced and maintained.

221. The *Code* places the responsibility of informing homeowners of their annual maintenance obligations upon installers at the time of installation. However, failure to comply due to a lack of knowledge/notice does not relieve regulatory responsibility.

222. In the present case, Mr. Snodden testified that he retained Mr. Gourlie to provide service and maintenance on an annual basis and therefore complied with the regulatory service and maintenance obligations.

Damages

223. Part X of the *Environmental Protection Act* outlines the duty to mitigate and restore:

> 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 nature of the environment.

224. In *Thornhill v. Highland Fuels*, at para. 156, Edwards J. held:

> I find that the 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 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. Remediating the property to Table 2 levels does not put the plaintiffs 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.

225. Charney J. noted in *Gendron v. Thompson Fuels* as follows:

> As a matter of public policy, full restoration costs are consistent with the principles of the *Environmental Protection Act* identified by the Ontario Court of Appeal in *Midwest Properties v. Thordarson,* 2015 ONCA 819. In that case the court noted that damages should be awarded on the principle that best ensures that the environment is returned to its pre-contamination condition. Public police 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.

226. Where there is no evidence of a prior spill, as in the present case, the law is now settled that the plaintiff is entitled to have the property remediated to non-detect.

ANALYSIS AND DETERMINATION OF THE ISSUES

Issue #1: What was the Origin and Cause of the Heating Oil Leak/Oil Escape Event?

227. While I have applied great care and caution to the opinions provided to the Court by Mr. Flynn, there is no dispute that he possesses specialized and highly relevant knowledge regarding the origin and cause of metallic tank failure.

228. Mr. Flynn's evidence regarding the susceptibility of metallic tanks to microbial influenced corrosion (MIC) attack, the efforts to educate the heating oil community on the dangers of water collecting and being trapped within metallic tanks, and details of the seminars conducted by Granby and others to address the issue was fully corroborated by Mr. Perrin.

229. While there was some dispute between the plaintiff and the defendant as to the standard of care that applied to OBTs dealing with the issue of water, there was no dispute that, at the time that Mr. Snodden purchased his 2006 DTE metallic tank, the tank was susceptible to water and MIC attack, and that precautions were necessary to prevent premature failure of the tank.

230. Having considered the evidence of Mr. Flynn, Mr. Moreau, and Mr. Perrin, including the photographs taken of the DTE tank after failure, and the documented efforts of the heating oil community to address the issue through the Regime, Handbooks, and Instructions, I have no doubt that in the present case the cause of the oil escape was, as opined by Mr. Flynn, caused by a corrosion hole located on the bottom of the tank consistent with MIC.

231. As explained by Mr. Flynn, following the introduction of water and bacteria into the tank, the MIC began auguring into the tank which slowly over time developed into a tiny, needle-sized pin hole that perforated through the tank shell. The MIC continued to slowly auger, expanding the hole. Static pressure caused by the presence of oil in the tank pushed against the exterior coating which *at some point*[3] created a ballooning blister which at some point failed, allowing the oil to escape, and causing the tank to fail.

Issue #2: What is the standard of care that each defendant is required to meet as OBTs and fuel suppliers?

232. The standard of care applicable to the defendants as OBTs and fuel suppliers is as determined by Charney J. in *Gendron Fuels* at para. 199, which I endorse and fully adopt.

233. The standard of care in the present case applicable to the defendants as OBTs and fuel suppliers is derived from the regulatory "Regime" as well as standard industry practices in place at the relevant time.

234. Regulatory requirements codify the minimum standard of care to be taken by OBTs and suppliers and a breach of a regulatory requirement is a breach of the standard of care.

235. Additionally, standard industry practise may impose a standard of care that imposes a higher duty of care in certain circumstances. If a standard industry practice is determined to form part of the standard of care, a breach of the standard industry practice is a breach of the duty of care.

Issue #3: Did either or both defendants breach the standard of care?

Was Testing Tanks for Water Part of the Standard of Care?

236. The plaintiff alleges that it was standard industry practise to test for water and to remove water if found. As the requirement to test for water was only mandated by the 2006 *Code* from March 2007 to October 2007, at which time it was revoked and not reintroduced until the 2015 *Code*, if testing for water was a standard industry practice, it would impose a higher duty of care upon OBTs.

237. In *Gendron v. Thompson Fuels*, Charney J. considered the issue and held that although "there was no regulatory requirement to test for water … in 2006 and 2007, I find on the evidence that testing for water was the industry standard at that time".

238. The question remains whether testing for water continued as an industry standard following 2007 until reinstatement by the 2015 *Code*.

3 Mr. Flynn was not qualified to provide evidence regarding the specific timing of the MIC failure. While I accept his evidence as to the origin and cause of the tank failure, I specifically reject his opinion relating to the timing of the blistering.

239. Mr. Perrin, Mr. Moreau, and Mr. Flynn all agreed that everyone in the industry knew metallic tanks collected water, and knew water caused internal corrosion and caused premature tank failure. Mr. Moreau and Mr. Flynn testified that, as there was no way to know if water was inside a tank unless it was "dipped", the standard industry practice was to "dip" a tank for water whenever a service call was made.

240. Mr. Perrin testified that although Upper Canada OBTs were required to "dip" outdoor tanks for water (as per the *Code*), the dipping of indoor tanks was left to the discretion of the individual OBTs and not a standard industry practice at Upper Canada.

241. Further evidence was provided regarding the various attempts to ameliorate the effect of water collection, including using sloping tanks, adding biocides, coating tanks, or adjusting the position of tank outlets. However, these attempts did not solve the issue; they simply prolonged the life of the tank. Water continued to collect in metallic tanks and there continued to be no way to determine if a tank had water unless it was dipped. As a result of the continuing issues, the 2015 *Code* reinstated testing indoor tanks for water as a minimum regulatory requirement. It is my view that the reinstatement of testing for water as a minimum regulatory requirement clearly establishes that water in tanks continued to be recognized as a serious issue between 2007 and reinstatement.

242. Based on the foregoing, I accept the testimony of Mr. Moreau and Mr. Flynn regarding testing for water and find that at all relevant periods testing for water was the industry standard and/or the regulatory standard and formed part of the standard of care applicable to OBTs. As such, any failure by an OBT to test a tank for water when maintaining or servicing a tank constituted a breach of the duty of care.

Did Mr. Gourlie Breach the Standard by Failing to Test for Water?

243. Mr. Gourlie completed a comprehensive inspection of Mr. Snodden's DTE tank on July 29, 2016, and completed servicing and maintenance of the system in the fall of 2017. There was no indication that Mr. Gourlie tested the DTE tank for water as part of his inspection or the service and maintenance.

244. As Mr. Gourlie did not provide any evidence, I am required to reach a conclusion based on reasonable inferences to determine whether Mr. Gourlie tested Mr. Snodden's tank for water in July of 2016 or in the fall of 2017.

245. The evidence that supports the conclusion that Mr. Gourlie did *not* test Mr. Snodden's DTE tank for water in July of 2016 or in the fall of 2017, is as follows:

    a. Metallic tanks begin collecting water upon installation and had no ability to dispel water without assistance.

    b. If the DTE tank was tested for water in 2016, water would have been found.

    c. The condition of the DTE tank in June of 2018 evidenced that water had been present in the tank for a lengthy period and certainly since July of 2016.

d. The evidence established that Mr. Gourlie was *not* a diligent OBT in that he failed to respond to Mr. Snodden's report of an oil leak inside his basement which omission constituted an *egregious* dereliction of his duties as an OBT.

246. Based on the whole of the evidence, I find that it is reasonable to infer that Mr. Gourlie did *not* test Mr. Snodden's DTE tank for water either on July 29, 2016, or in the fall of 2017, and by these omissions breached the standard of care which directly caused or contributed to the failure of the tank due to the presence of water in the tank leading to a MIC attack which resulted in the oil spill event on June 1, 2018.

Did Mr. Judges Breach the Standard by Failing to Test for Water?

247. Mr. Judges attended the Snodden residence on two occasions: on December 28, 2017, in response to an "out of oil" call, and on June 3, 2018, in response to Mrs. Snodden's report of an oil leak in the basement of the home.

248. Based on the findings related to Mr. Gourlie, there is no question that Mr. Judges did *not* test Mr. Snodden's DTE tank for water when he attended on December 28, 2017.

249. The question arises, however, as to whether Mr. Judges was *required* to test the tank for water at his December 28, 2017 attendance.

250. The evidence established that on December 28, 2017, Mr. Judges attended Mr. Snodden's address for a "no heat/out of oil call" and determined that the oil tank had fuel. He investigated and identified the source of the "no heat" problem as a frozen hot water heater fuel line located in the crawl space of the basement and a non-functioning cell relay to the furnace. The documentary evidence established that Mr. Judges repaired the "no heat" problem by thawing the hot water line and replacing the cell relay to furnace, and in so doing returned Mr. Snodden's heating system to working order.

251. Mr. Moreau specifically testified that Mr. Judges had "no obligation" to complete *any* inspection during the December 28, 2017, attendance.

252. Despite the evidence of the expert for the plaintiff that there was *no* obligation upon Mr. Judges to complete *any* inspection, Mr. Judges completed a visual inspection of the oil tank (which does *not* require testing for water) and noted the results on Upper Canada's invoice.

253. In the circumstances and based on the evidence I find that Mr. Judges was under *no* obligation to test for water during his attendance at the Snodden residence on December 28, 2017, and any failure to test for water did *not* constitute a breach of the standard of care.

Did Mr. Judges Breach the Standard by Failing to Inspect the Bottom of the DTE Tank During his Visual Inspection of the Tank on December 28, 2017?

254. The plaintiff alleges that Mr. Judges breached the standard of care on December 28, 2017, when he conducted the visual inspection of the DTE tank by failing to inspect the bottom of the tank for evidence of corrosion and blistering.

255. Inherent in this allegation is the assumption that OTBs were required to inspect the bottom of an oil tank when conducting a visual inspection.

256. Considering the evidence relating to the premature failure of metallic tanks caused by water, and the efforts made to combat this issue, I accept that part of the standard of care of an OBT conducting a visual inspection is the requirement to inspect the bottom of the tank for evidence of corrosion and blistering.

257. Mr. Moreau testified that although there was no obligation for Mr. Judges to complete *any* inspection on December 28, 2017, it would be "reasonable in the circumstances for all the time it takes, just to bend over and take a look the bottom of the tank". Mr. Moreau opined that had Mr. Judges checked the bottom of the tank there would have been evidence of blisters.

258. Mr. Flynn testified that had Mr. Judges completed a proper visual inspection of the underside of the tank it would have revealed blistering and should have been deemed an immediate hazard.

259. Both experts ask the court to *assume* that on December 28, 2017, Mr. Judges did *not* inspect the underside of the tank *and* that blistering would have been evident on December 28, 2017.

260. Having considered the evidence, I find both assumptions to be based on pure speculation and not grounded in evidence. As such, I do not accept either assumption.

261. With respect to the assumption that Mr. Judges did *not* conduct a visual inspection of the bottom of the tank in breach of his duty of care, the *only* evidence before the court regarding Mr. Judges' reputation as an OBT is that he was competent and conscientious. Mr. Judges' first attendance at the Snodden residence was on December 28, 2017, during the Christmas holiday break. Mr. Judges investigated the issue (no heat), identified the issue (frozen hot water line and broken furnace cell relay), repaired the issue and reinstated heat to the home.

262. Additionally, although there was *no* obligation to so act, he completed a visual inspection of Mr. Snodden's oil tank. Mr. Judges' second and final attendance at the Snodden residence was on June 3, 2018, when he responded on an emergent basis to Mrs. Snodden's early morning report of the oil leak. Mr. Judges attended at the Snodden property immediately, was the first technician to arrive, and to all accounts worked tirelessly throughout the day to contain and mitigate the oil spill. Mr. Judges did not provide evidence at trial because he was deceased. However, the fact that he was not able to speak for himself does not mean that his prior actions cannot speak for him. I reject the suggestion that Mr. Judges did not conduct a proper visual inspection of the tank on December 18, 2017, and find that there is no evidence that would logically support such an assumption.

263. With respect to the second assumption, that there would have been evidence of blistering on the bottom of the tank on December 28, 2017, neither Mr. Moreau nor Mr. Flynn are metallurgists, and neither are qualified to provide an opinion as to the specific rate of corrosion of the DTE tank. No metallurgist testified and no metallurgic testing or other testing of any kind was conducted on Mr. Snodden's DTE tank following delivery to MFAL's laboratory. No scientific studies or industry reports were introduced into evidence

to support the opinion that "blistering would have been visible on the bottom of the tank on December 28, 2017". No scientific evidence was provided to support the opinion. When opinions are not based in credible and reliable fact-based evidence, they amount to pure speculation or conjecture.

264. For the foregoing reasons, I reject the proposition that Mr. Judges committed a breach of the standard of care on December 28, 2018.

Did Mr. Gourlie Breach the Standard by Failing to "Tag Out" the Vent Pipes?

265. I accept the plaintiff's submission that Mr. Gourlie breached the standard of care when he conducted the July 29, 2016, comprehensive inspection by failing to "tag out" the vent pipes as a "non-immediate hazard" pursuant to the *Regulations* as being non-compliant with the *Code and* by failing to provide notice of the "non-immediate hazard" to the distributor Upper Canada. However, I reject the submission that the "tag out" of a "non-immediate hazard" would automatically trigger an inspection of the heating system. The *Regulation* requires that the "non-immediate hazard" be "corrected" within the time specified in the notice, it does not require a total inspection of the heating system. If the "non-immediate hazard" is not "corrected" within the time specified (not to exceed 90 days) the distributor is required to cease fuel supply and the owner (operator) is prohibited from using the system. Although failure to correct would likely trigger an inspection of the system, it is speculative to assume the vent pipes would not have been corrected if tagged out. Therefore, while I find that the failure to "tag out" the vent-pipes to be a breach of the standard of care, I do *not* find that the breach caused or contributed to the loss.

Did Upper Canada Breach the Standard by Failing to "Tag Out" the Vent Pipes?

266. I do not accept the plaintiff's submission that Upper Canada breached the standard by failing to "tag out" the vent pipes on any occasion when they delivered fuel to Mr. Snodden or when Mr. Judges attended on December 28, 2017. I accept Mr. Perrin's evidence that drivers are not trained to identify *Code* violations. The obligation to identify *Code* violations falls to "certificate holders" and "contractors" who are trained, licensed and knowledgeable in identifying *Code* violations. With respect to any obligation upon Mr. Judges when he attended on December 28, 2018, in response to the "no heat" call – as opined by Mr. Moreau there was no obligation upon Mr. Judges to complete any inspection – there is also no evidence at to what time he attended and whether he would have seen the vent pipes. Mr. Judges situation is quite different to Mr. Gourlie who was Mr. Snodden's "furnace guy" and who attended the property to provide annual service and maintenance. However, even if I am mistaken and failure to "tag out" the vent pipes was a breach of the standard of care by Mr. Judges, I do *not* find that any such breach caused or contributed to the loss for the same reasons that apply to Mr. Gourlie.

Did the Defendants Breach by Failing to "Tag Out" the Tank Due to the Fuel Guage Connection Not Being "Fuel-Oil-Tight"?

267. The plaintiff alleges that the photographs taken by Mr. Moreau on June 5, 2018, depict oil weeping/leakage in and around the top fuel gauge contrary to s. 5.3 of the *Code* which

requires that all joints and connections shall be made "fuel-oil-tight". I agree that the photo confirms that the gauge connection is not "fuel-oil-tight". However, the question arises as to when the weeping/leakage occurred?

268. By their testimony and their October 2018 report, Mr. Moreau and Mr. Flynn opined that the weeping/leakage "occurred at the time of a previous filling" and/or "possibly the tank may have been overfilled some time recently". These opinions are entirely incorrect and amount to pure speculation that ignores the actual evidence in this case.

269. When the oil spill event was reported to Upper Canada on June 3, 2018, Upper Canada responded immediately and dispatched Mr. Judges, Mr. Hurst, and Mr. Bell, to the Snodden residence to stop the leak and contain the spill.

270. Mr. Hurst testified that on June 3, 2018, when he arrived at the Snodden property, one of his first priorities was to stop the leak and to remove oil from the DTE tank – which he did by "pumping the oil out of the tank through the gauge hole".

271. The photographs taken by Mr. Moreau on June 5, 2018, that depict the oil leakage around the gauge hole are *not* indicative of any breach by Upper Canada. Instead, they serve to document the diligence and conscientiousness of Upper Canada's OBTs on June 3, 2018, when responding to the oil spill event.

<u>Did Upper Canada Breach the Standard of Care by Not Obtaining a Comprehensive Inspection Prior to the Commencement of Fuel Delivery on December 1, 2015?</u>

272. The plaintiff claims that Upper Canada breached ss. 7 and 20 of O Reg 213/01 when it delivered fuel oil to Mr. Snodden's DTE tank on December 1, 2015, without obtaining a comprehensive inspection of Mr. Snodden's DTE tank.

273. The plaintiff further claims that Upper Canada continued to commit separate independent breaches on each occasion that they delivered fuel to Mr. Snodden following December 2015 prior to the July 29, 2016, comprehensive inspection completed by Mr. Gourlie.

274. Additionally, the plaintiff claims that following July 29, 2016, that Upper Canada *remained* in breach of O Reg 213/01 as Upper Canada as "distributor" was *obligated* by the *Regulation* to have personally completed the inspection and were *not* entitled to rely upon an inspection completed by a third party OBT.

275. Mr. Perrin testified that, due to the huge influx of new customers requiring comprehensive inspections, Upper Canada prioritized the accounts and determined that unless an "immediate hazard" existed Upper Canada would deliver fuel oil to their customers for a limited period until they were able to obtain comprehensive inspections for all customers.

276. Mr. Perrin denied that Mr. Snodden was prohibited from retaining Mr. Gourlie to complete the comprehensive inspection on July 29, 2016, and testified that he has been "through many TSSA audits" and there is *no* breach when a *qualified* third party OBT completes the comprehensive inspection.

277. With respect to Upper Canada's delivery of fuel prior to receipt of the comprehensive inspection on July 29, 2016, these deliveries were clearly in breach of O Reg 213/01 . The obligation prohibiting delivery of fuel is mandatory and contains no exceptions.

278. As a result, when Upper Canada delivered fuel to Mr. Snodden on December 1, 2015, *and on the additional five occasions thereafter,* prior to obtaining the July 29, 2016, comprehensive inspection, their conduct was in breach of the standards imposed by O Reg 213/01.

279. The next question that arises is whether Upper Canada was obligated to use their own OBT to complete the comprehensive inspection or whether it was permissible for Upper Canada to allow Mr. Snodden to utilize his own OBT (Mr. Gourlie) to complete the inspection.

280. In *Gendron Fuels,* Charney J. considered this issue in the context of the interpretation of an exclusionary clause. Charney J. found that it would be unconscionable and contrary to public policy to allow a fuel distributor to use an exclusionary clause in a commercial contract to escape liability for failure to perform a comprehensive inspection required under O Reg 213/01 as a condition to supply fuel to that customer.

281. Charney J. also concluded that "a party upon whom the law has imposed a strict statutory duty to do a positive act cannot escape liability by *delegating* the work to an independent contractor". He held that 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".* Charney J. concluded by finding that fuel distributors cannot escape liability by delegating the duty or by seeking to exclude liability by contract.

282. I do not disagree with Charney J.'s conclusions. However, the facts in the present case are *not* like those found in *Gendron,* and Upper Canada did not *delegate* their duty.

283. In the present case Mr. Snodden had a long-standing relationship with his OBT, Mr. Gourlie, who was his "furnace guy" as was his father before him.

284. Upper Canada did not "delegate" the comprehensive inspection to Mr. Gourlie. Instead, Mr. Snodden choose to retain Mr. Gourlie to complete the inspection, which was completed by him on July 29, 2016, and forwarded to Upper Canada that same day. Mr. Perrin testified that prior to accepting the inspection, Upper Canada verified that Mr. Gourlie was a certified OBT in good standing on the TSSA website, and the inspection was placed in Mr. Snodden's file.

285. I accept Mr. Perrin's evidence that there is *no* breach of O Reg 213/01 when an owner chooses to retain a *qualified* third party OBT to complete the comprehensive inspection. I find this interpretation to be reasonable and supported by industry practice.

286. I also find that if s. 7 of the O Reg 213/01 were interpreted to require distributors to attend inside owners homes to complete inspections, that this obligation would impose a corresponding obligation on homeowners to permit a fuel distributor's OBT to enter their home, in breach of their *Charter*-protected privacy rights. Clearly provincial legislation governing obligations relating to fuel tanks cannot run roughshod over *Charter*-protected

rights. This is especially true when there is an alternative interpretation available that ensures compliance with the *Regulation,* protects the privacy rights of the owners/operators *and* is supported by industry practice.

287. For the foregoing reasons, I find that s. 7 of O Reg 213/01, upon proper interpretation, allows an owner/operator to retain a *qualified* OBT to complete the required inspection. I also find that Upper Canada did not breach of s. 7 of the *Regulation* by permitting Mr. Snodden to retain his own OBT to complete the comprehensive inspection on July 29, 2016.

Did Mr. Gourlie or Upper Canada Breach the Standard by Failing to Add Biocides to the DTE Fuel Tank?

288. With respect to the "addition of biocides", the plaintiff argued that this practice was required by the manufacturer's installation instructions and/or by the prevailing standard of care and failure to add biocides to the tank during inspection or at the time of fuel delivery constituted a breach.

289. Mr. Moreau testified that when he owned his heating business, it was his practice to add some biocides to "all tanks" when he delivered fuel as "it was easier to add biocide than to figure out the manufacturer of each tank".

290. Mr. Flynn testified that the 2001 DTE Installation Instructions applicable to Mr. Snodden's 2006 DTE tank recommended the addition of biocides to the fuel at the time of delivery and that such instructions were binding upon Upper Canada and that failure to add biocides to the fuel at the time of delivery constituted a breach of duty.

291. Mr. Perrin testified that Upper Canada never sold DTE tanks, did not have a copy of the manufacturer's instructions, and was not aware that DTE recommended adding biocides to the fuel at the time of delivery.

292. Mr. Perrin further testified that Upper Canada *never* added biocides to their fuel but did offer a product called Therma Clean. Therma Clean is not a biocide but an additive that coats the inside of the tank to prevent corrosion. It increases the cost of the fuel by three cents per litre. Therma Clean was advertised on all Upper Canada invoices. In 2018 approximately 20% of Upper Canada's customers used the product, but Mr. Snodden did not purchase it.

Manufacturer's Instructions

293. Dealing first with the issue of whether the 2001 DTE manufacturer's instructions were binding upon service providers, the law is clear that unless the instructions were certified, they are not binding.

294. In *Thornhill v. Highland Fuels,* Edwards J. analysed the meaning "manufacturer's instructions" as referenced in B-139. Edwards J. determined that there is no consistent use of "manufacturer's instructions" in B-139.

295. Edwards J. accepted that industry interpretation of B-139 was that references to "manufacturer's instructions" meant "*certified* manufacturer's instructions". Otherwise,

untested, unverified manufacturer's instructions could be imposed upon the industry and the public, which could create unsafe requirements.

296. In the present case, I find that references to "manufacturer's instructions" in the B-139 *Code* means *certified* manufacturer's instructions. As the 2001 DTE fuel oil tank instructions were *not* certified such instructions do *not* impose regulatory standards.

Addition of Biocides as an Industry Standard

297. The only relevant evidence regarding whether the practice was an industry standard was provided by Mr. Moreau and Mr. Perrin. Mr. Perrin's testimony regarding the addition of Therma Clean was supported by documentary evidence in the form of Upper Canada's invoices each of which contained a reference to Therma Clean.

298. There was no regulatory standard that required the addition of biocides and the evidence established that the DTE manufacturer's instructions were difficult if not impossible to obtain. There is no evidence that the DTE instructions were provided to Mr. Snodden by the installer on installation as required nor is there any evidence that the instructions were posted in a *conspicuous* location near the fuel tank also as required. What the evidence did disclose is that the DTE instructions were almost impossible to obtain.

299. I accept Mr. Perrin's evidence that he had *no* knowledge that biocides were recommended to be added to metallic tanks, and that, despite being a member of a large fuel oil association, attending seminars, and reading trade books, he was never aware of any recommendation regarding biocides.

300. Having considered the overall credibility of the witnesses and the reliability of their evidence, I find that I accept and prefer the evidence of Mr. Perrin on this issue and find that it was *not* the industry standard to add biocides to the fuel at the time of fuel delivery or on inspection.

<u>Did Upper Canada Breach a Duty to Inform Mr. Snodden of Obligation to Obtain Annual Service?</u>

301. The plaintiff alleges that Upper Canada was obligated to inform Mr. Snodden of his obligation to obtain annual service and maintenance of his system and did not, thus committing a breach.

302. I reject the plaintiff's submission and find that the duty to inform is owed by the installer, not the distributor. Pursuant to s. 4.3.2 of the 2006 *Code*, before leaving a new installation, the *installer* is required to instruct the user (owner) on the safe and correct operation and maintenance requirements of the appliance. There is no corresponding duty placed on distributors.

303. If I am mistaken and Upper Canada owed a duty to inform and breached that duty, the evidence established that Mr. Snodden retained Mr. Gourlie on an annual basis to complete the service and maintenance of his heating system, and if a breach occurred, no loss resulted due to the breach.

Issue #4: Is the Plaintiff Mr. Snodden Contributorily Negligent?

304. It is necessary to review the conduct of the plaintiff, Mr. Snodden, to see if he bears any liability for the loss on account of contributory negligence.

305. Having considered the whole of the evidence, I find the following to be informative of this issue:

    a. On June 1, 2018, Mrs. Snodden first noticed a strong smell of oil in the home and called her daughter Ms. Harper to attend and investigate.

    b. Ms. Harper attended at 5:30 p.m. and discovered a pool of oil on the basement floor. Mr. Harper then called Mr. Gourlie who assured that he would attend that day.

    c. Mr. Snodden arrived home at 6 pm, was advised of the oil leak and the call to Mr. Gourlie, investigated and (also) determined there was a patch of oil on the basement floor.

    d. When Mr. Gourlie failed to attend by 8 pm, Mr. Snodden called Mr. Gourlie who advised that he was busy on another job and would attend the following morning on June 2, 2018.

    e. Mr. Snodden did not contact Upper Canada or any other person on June 1, 2018, after being advised that Mr. Gourlie would not attend for (a minimum) of 12 further hours.

    f. On June 2, 2018, Mr. Gourlie failed to attend in the morning as promised. Ms. Harper suggested that Mr. Snodden call someone else. Mr. Snodden did not follow this advice and continued to wait for Mr. Gourlie. Mr. Snodden did not, in fact, make any further calls to anyone following his initial call to Mr. Gourlie on June 1, 2018.

    g. On June 3, 2018, at 8 am, approximately 38 hours after the oil spill was discovered, Mrs. Snodden reported the fuel oil leak to Upper Canada.

    h. Had Mr. Snodden called Upper Canada at anytime following discovery of the oil leak, Upper Canada would have responded that same day within an hour, the leak would have been fixed, the tank pumped out, and/or removed and replaced immediately. This would have greatly reduced the quantity of oil that escaped, and the damages incurred. Mr. Snodden, however, did not act in this manner and nearly 38 hours elapsed before Mrs. Snodden reported the oil escape event to Upper Canada.

306. 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. In the present case, Mr. Snodden's daughter reported the leak to Mr. Gourlie, an OBT, upon discovery, and Mr. Gourlie advised he would attend that evening. Contacting your "furnace

guy" and waiting for him to attend as promised that same day is something that an ordinary, reasonable, and prudent person would do in the circumstances.

307. When several hours passed without Mr. Gourlie attending, Mr. Snodden made a further call to Mr. Gourlie. This action is also something that an ordinary, reasonable, and prudent person in the circumstances would do.

308. When Mr. Gourlie advised Mr. Snodden that he would *not* attend until the following morning, thus allowing a further 12 hours for the fuel oil to leak unabated into the Snodden basement, Mr. Snodden's decision to *wait* and not seek help elsewhere stretches the limits of what an ordinary reasonable and prudent person would do in the circumstances.

309. When Mr. Gourlie failed to attend the morning of Saturday June 2, 2018, and ignored Ms. Harper's advice to contact another person knowing that the oil leak had become "much worse", Mr. Snodden's decision *not* to contact anyone on June 2, 2018, is *not* in keeping with an ordinary reasonable and prudent person in the same circumstances and constitutes negligent behaviour.

310. Mr. Snodden's conduct defies common sense and cannot be explained away as attempted by Mr. Flynn. There was no evidence that Mr. Snodden suffered from age-related issues that would have affected his intellect or physical abilities. Instead, the evidence established that he had recently sold the home and was golfing when the leak was first discovered.

311. By the date of the oil escape event, Mr. Snodden had owned a fuel oil system for 39 years. He should have understood the dangers and the obligations attached to ownership of his system. His failure to report the oil spill event in a timely manner constituted negligence.

312. In addition to Mr. Snodden's failure to act in accordance with an ordinary, reasonable, and prudent person, his conduct also breached ss. 92(1) and (2) of the *Environmental Protection Act* that required Mr. Snodden, as the homeowner, to immediately report an oil leak to the Spills Action Centre. He did not.

313. On the facts, I find that a reasonable and prudent person would have called for professional assistance immediately, and if such assistance was unavailable or delayed, would have sought alternative assistance.

314. The plaintiff had *ample* time to call Upper Canada Fuels or any other authority while turning off the valve to the oil tank, sweeping the oil towards (and into) his sump pump, picking up absorbent from Canadian Tire and laying it down on his basement floor.

315. I find that Mr. Snodden was negligent in failing to seek assistance on Saturday June 2, 2018, when Mr. Gourlie failed to attend, and when it was clear to him that the oil spill escape event had worsened considerably.

Issue #5: What is the Apportionment of Damages Between Mr. Gourlie and Mr. Snodden?

316. 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.

317. In the present case, Mr. Gourlie was found to be liable for the loss. I have also found contributory negligence on the part of the plaintiff, Mr. Snodden. In the circumstances, I must apportion fault between them.

318. In my view, as Mr. Gourlie was the OBT retained to maintain and service Mr. Snodden's heating system, and was the OBT who neglected to attend the Snodden home when advised of the presence of an oil leak *inside* the home, he bears the bulk of the liability.

319. Mr. Snodden, however, is not without fault. As a homeowner, Mr. Snodden had an obligation to ensure that his fuel oil system was properly maintained and serviced, *and* he had an obligation pursuant to the *Environmental Protection Act* to immediately report the oil leak.

320. Mr. Snodden's contribution to the oil escape event and ensuing damages did not amount to a minor inadvertent lapse, but akin to *Gendron* included a series of actions that contributed to the leak and increased the damages.

321. Mr. Snodden was remiss in failing to educate himself on his obligations as a homeowner of a fuel oil system and the need to seek maintenance and service on an annual basis. Mr. Snodden was negligent in failing to seek alternative assistance on a *timely* basis when Mr. Gourlie advised he would not attend the home on June 1, 2018. Mr. Snodden was negligent when, *during an ongoing oil leak,* he actively interfered with his oil heating system by shutting off the valve to the oil tank *without* obtaining any professional advice or guidance, and by sweeping fuel oil from his basement floor towards his sump pump again *without* obtaining *any* professional advice to so act.

322. However, Mr. Snodden's primary act of negligence was when he failed to seek alternative assistance when Mr. Gourlie failed to attend on June 1, 2018, and again on June 2, 2018, knowing that the leak had worsened considerably. Mr. Snodden's negligence *increased* as time passed and the oil continued to leak unabated onto and into the Snodden's property.

323. Mr. Snodden by his actions delayed the reporting, containment, and remediation of an active fuel oil leak in the basement of his home for approximately 38 hours. Mr. Snodden also actively interfered with his fuel oil system *without* obtaining professional advice, and seemingly without any knowledge or training regarding the system.

324. Mr. Gourlie was negligent in his failure to test the Snodden oil tank for water and to remove any such water if found during any of the annual inspections that Mr. Snodden alleged were carried out, including the annual inspection allegedly conducted in the fall of 2017. This

breach was a direct cause of the failure of the DTE tank. Mr. Gourlie was also *grossly and seriously* negligent, as Mr. Snodden's OBT for failing to respond in an emergent manner (or *any* manner) to the report of an oil leak at the Snodden residence on June 1, 2018.

325. In my opinion, considering all the circumstances, the appropriate apportionment of fault is that Mr. Gourlie is 75% liable, and Mr. Snodden is 25% liable.

Issue #6: What is the Quantum of Damages?

326. Upper Canada challenged the damages claimed, alleging that the property was over-remediated, that too many underpinnings were utilized, and that the site was over/under sampled causing an increase in the cost of remediation.

327. The witnesses called to prove damages, Mr. Madill, Ms. Mercer, and Mr. Samis, were *all* credible witnesses, with extensive experience, knowledge, and training, who provided reliable evidence. I found their testimony to be instructive, balanced, and informative.

328. The total damages incurred, including remediation, was $339,557.79.

329. The remediation costs were documented by invoices. There is no dispute that the money was spent. All invoices were cross-checked by Mr. Madill, who proved himself to be exceptionally competent.

330. The criticisms advanced by the defence expert, Mr. Hubley, were not sound. The property was required to be remediated to non-detect, not Level 2. His evidence that the property was over-remediated was based on an error of law. The necessity of the underpinnings was determined by a structural engineer, not Ms. Mercer or Mr. Samis. Mr. Hubley is not a structural engineer and lacks the expertise to dispute the necessity of the underpinnings. Finally, with respect to Mr. Hubley's criticism that the testing undertaken by Pario was too much/too little, I accept and prefer the evidence provided by Ms. Mercer that the testing undertaken was both necessary and reasonable. As a result, I reject all criticisms and objections to the remediation as alleged by Mr. Hubley and prefer and accept the evidence provided by Mr. Madill, Ms. Mercer, and Mr. Samis.

331. As a result of the foregoing, I find that the plaintiff proved the damages claimed totaling $339,577.79 as per their updated damages chart, without deduction.

CONCLUSION

332. Judgment is granted in favour of the plaintiff against Norman Gourlie, with liability apportioned as follows: Norman Gourlie 75% and Roger Snodden 25% on account of contributory negligence. The case is dismissed as against Upper Canada.

333. The damages claimed in the amount of $339,557.79 are awarded without deduction.

334. If the parties cannot agree on costs within 30 days of the release of this decision, the defendant Upper Canada shall within 45 days of the date herein serve and file their cost submissions not to exceed 4 pages (not including cost outlines/offers to settle). The plaintiff

Mr. Snodden shall within 60 days of the date herein serve and file his cost submissions subject to the same conditions. Reply, if any, is to be served and filed within 70 days, limited to one page.

Justice S.J. Woodley

Released: September 27, 2024

CITATION: Snodden v. Upper Canada Fuels, 2024 ONSC 5244

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:

ROGER SNODDEN

Plaintiff

– and –

2568832 ONTARIO INC. O/A UPPER CANADA FUEL & BURNER and NORMAN GOURLIE

Defendants

REASONS FOR JUDGMENT

Justice S. J. WOODLEY

Released: September 27, 2024