CITATION: Andrade v. Collins, 2023 ONSC 6011
COURT FILE NO.: CV-20-0000230
DATE: 2023-10-25

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:	)	
	)	
Yvette Kramer and Garry Andrade	)	David Morin and Peter Reinitzer, for the Plaintiffs
	)	
Plaintiffs	)	
– and –	)	
	)	
Rosellee Collins and Johnson Collins	)	
	)	Ben Thind and Rana Nostratpanah-Gashti, for the Defendants
Defendants	)	
	)	
	)	**HEARD:** April 3, 4, 5, 6, 11, 12, 13, 14, 17, 18, 19, 20 and 21, 2023
	)	Further submissions received April 27, May 31, June 1 and 5, 2023

REASONS FOR JUDGMENT

STOTHART J.

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S.K. STOTHART J.

I. Introduction

[1] This action arises out of the plaintiffs' purchase of a business known as the Rock Pine Motel and Restaurant (the "Rock Pine"), located in Marten River, Ontario in March 2016.

[2] The Rock Pine consists of a motel, restaurant and a general store with gas pumps. It sits on the shore of Frenchman's Bay, just north of North Bay, Ontario. The Rock Pine is frequented by those who enjoy outdoor recreational activities in the area all year round. The Rock Pine sells gas to individuals operating motor vehicles, all-terrain vehicles and snowmobiles.

[3] The plaintiffs, Yvette Kramer and Garry Andrade ("Yvette and Garry") purchased the Rock Pine from the defendants, Johnson and Rosellee Collins ("John and Rose") with the intent of continuing to run the business as it had been run in the past, as a motel, restaurant and gas station.

[4] The plaintiffs claim that John told them that the tank system at the Rock Pine was in a good condition and only required some testing in the spring. Yvette and Garry claim that these representations were fraudulent and/or negligent and that they relied on them in deciding to purchase the property.

[5] As part of the Agreement of Purchase and Sale (the "APS"), the defendants agreed to obtain a report from a fuel oil distributor stating that the tank system was in a safe operating condition and complied with the requirements of the *Technical Standards and Safety Act*, 2000, S.O. 2000, c. 16. The plaintiffs claim that the defendants did not provide them with such a report and, as such, breached the terms of the APS.

[6] The plaintiffs claim that they were left with an unsafe and non-compliant tank system and have had to incur and will continue to incur significant costs to remediate the issues.

[7] The plaintiffs seek as against the defendants:

1. Damages for breach of contract and negligent and/or fraudulent misrepresentation in the amount of $750,000;

2. Special damages;

3. Prejudgment and postjudgment interest pursuant to the provisions of the *Courts of Justice Act*, R.S.O. 1990, 1990, c.C.43, as amended; and

4. Costs of this action on a substantial indemnity basis plus HST.

[8] Before the trial commenced, the plaintiffs entered into a "Perringer" agreement with their real estate lawyer, Laurie Ballantyne-Gaska ("Ballantyne-Gaska"), who had been a defendant in this matter. On March 27, 2023, Regional Senior Justice G. Ellies ordered that the plaintiffs be permitted to amend their Amended Statement of Claim and the trial proceeded on the basis of the Amended Amended Statement of Claim which removed Ms. Ballantyne-Gaska from these proceedings.

[9] The trial proceeded with John and Rose as the remaining defendants.

II. Background Facts

A. The operation and regulation of gas stations in Ontario

[10] I will begin by setting out non-contentious facts about gas stations and how they are regulated in Ontario. This background provides context for the remaining facts surrounding the purchase and subsequent issues faced by the plaintiffs with respect to the Rock Pine's fuel tank system. When I refer to the fuel tank system, I am referring to the Rock Pine's underground fuel tanks, fuel pipes and fuel dispensing units.

[11] Gas stations in Ontario are governed by the Technical Standards Safety Authority (the "TSSA") who enforce the *Technical Standards and Safety Act*, 2000, S.O. 2000, c.16 (the "TSSA Act") and any related regulations. The *Liquid Fuel Handling Code*, O. Reg. 217/01 (the "LFHC") is a regulation pursuant to the *TSSA Act*, which regulates the storage and handling of gasoline and associated products at gas stations.

[12] The TSSA is a non-profit organization that operates under the *TSSA Act*, 2000. It took over regulatory functions that were previously carried out by a predecessor of the Ontario Ministry of Government and Consumer Services.

[13] The TSSA issues Advisories and posts them on their website. These Advisories set out existing requirements under the *LFHC* for easy references. Copies of the *TSSA Act*, the *LFHC* and Advisories were filed at trial. It is agreed that for most of the events at issue in this case, the *LFHC*, 2007, applied. The *LFHC* was amended in 2017.

[14] The *TSSA Act* provides for the regulation of gasoline distribution systems through powers and processes granted to TSSA directors and inspectors. Inspectors attend at gas stations and conduct inspections to determine compliance with the applicable regulations. The TSSA inspectors have the authority to make orders to comply with the *LFHC*. Where an inspector determines that there is or may be a demonstrable threat to public safety, the inspector may seal anything to which the Act or regulations apply (*TSSA Act*, s. 21).

[15] Failure to comply with an order made by a TSSA inspector is an offence under the *TSSA Act* and may result in the imposition of a fine up to $50,000 or to imprisonment for up to one year, or to both (*TSSA Act*, s. 37).

[16] A TSSA director may give a safety order to any person with respect to any matter governed by the *TSSA Act* that pertains to safety. This includes an order that anything, part of a thing, or class of things be (a) shut down, (b) be used only in accordance with the order; and (c) not be used (*TSSA Act*, s. 14(2)).

[17] The *LFHC* contains specific requirements applicable to the operation of retail gas stations. It sets out requirements related to record keeping, gasoline storage, dispensing equipment (including tanks, piping, pumps and dispensers), the location of the equipment, testing of the

equipment (including leak detection and corrosion monitoring), temporary/permanent disuse of tanks, closure and environmental restoration.

[18] The *LFHC* provides, amongst other things, that:

i. A person operating a gas station must have a licence;

ii. A licence holder is required to ensure that the gas station is operated in compliance with the *LFHC* and that anything used in the handling of gasoline is kept in a safe operating condition; and

iii. A licence holder may not make a modification to the facility unless they receive permission from the director of the TSSA.

[19] The *LFHC* provides that every storage tank, piping system and sump shall be tested and monitored for leaks in accordance with Tables 3 and 7, which specify the minimum frequency and methods for commissioning testing, subsequent in-service monitoring and testing when a leak is suspected. Normally, for a gas station, this is every two years (*LFHC*, 2007, s. 7.3.1).

[20] With respect to leak testing, an owner/operator can participate in a Statistical Inventory Reconciliation program ("SIR program"), which would allow leak testing to take place every five years, instead of every two.

[21] The *LFHC* provides that the corrosion protection system for an underground storage tank system shall be tested and certified in writing to be in working order at intervals not exceeding two years (*LFHC*, 2007, s. 2.3.1.2).

[22] If piping fails the cathodic protection test, the owner/operator must do a leak test on the piping within 30 days. If the pipe passes the leak test, then the piping system may continue in operation for up to 12 months. Within 12 months, all underground single-wall steel piping, associated with the same tank next as the pipe run, that failed the cathodic protection test, must be removed from the ground (*LFHC*, 2007, s. 2.3.1.4)

[23] Cathodic protection is required for underground gas storage tanks and piping because it provides protection against corrosion. If a tank and/or pipe corrodes, there is a risk that gas will leak into the ground, causing contamination and other hazards.

[24] All sumps where fuel can collect must be electronically monitored with a liquid sensor that will signal to the attendant and shut down the dispenser when any product or high level of liquid is present in the sump (*LFHC*, 2007, s. 4.5.2.6)

[25] Sometime around January 2015, the TSSA took a revised approach with respect to the enforcement of the *LFHC* in Northern Ontario. This revised approach was called the "TSSA Northern Ontario Compliance Strategy - Gas Stations and Marinas" (the "Northern Compliance

Strategy"). A copy of the media release dated January 14, 2015, outlining this strategy was filed as an exhibit at trial.

[26] The Northern Compliance Strategy was developed in collaboration with the industry and the TSSA to allow gas stations in Northern Ontario additional time to address outstanding orders or problems, as long as there was not an immediate hazard. The program recognizes that the longer winters in Northern Ontario mean that there is a shorter season to have work done and the program provides gas station owners in Northern Ontario more time to bring their systems up to code. The goal of the program is to bring all gas stations up to the *LFHC*. The program is still in existence at this time.

[27] Under the Northern Compliance Strategy:

1. With respect to single walled steel underground piping, if no record is available for pressure, precision leak or cathodic protection tests, a compliance order will be issued within 90 days to comply. Extensions can be provided to address seasonal or other site-specific circumstances.

2. With respect to single-wall steel underground piping, if there is no acceptable corrosion test or if the system was never protected, the equipment will have to be upgraded with cathodic protection. However, an owner/operator can apply for a variance from the TSSA which could allow them to keep the piping in the ground, provided it is pressure tested every six months.

3. With respect to sumps that do not have an electronic leak detection system, the owner/operator will be allowed to continue to operate, provided the operator: (a) performs daily visual inspections; (b) maintains a log of daily visual inspections; and (c) installs an electronic leak detection system within two years. In order to be permitted to do this, an owner must apply for a variance from the TSSA.

[28] The *LFHC* provides that facilities/equipment must comply with the Code that was in effect on the date they were installed and must be maintained in accordance with the current Code. This is called "grandfathering."

[29] Underground steel single-wall fuel tanks and piping lose their grandfathering status if they have been out of service for more than one year. If they lose their grandfathering status, they must be removed. (LFHC, 2007, s. 2.4.2.1). Under the *LFHC*, 2007, they had to be removed within two years. Under the current *LFHC*, 2017, they must be removed within one year.

[30] Ontario Regulation 216/01, *Certification of Petroleum Mechanics*, requires that all persons who work on gasoline storage and dispensing equipment be certified.

B. Events leading up to the plaintiffs' purchase of the Rock Pine

[31] In 2015, Yvette and Garry were considering purchasing a resort-type property that they could operate together as part of their semi-retirement. Yvette was searching online listings when she came across a listing for the Rock Pine. She reached out to John, and they spoke over the phone about the property. John told Yvette that he was selling the property as the mortgage holder and that he and his wife had possession of the property because the prior owner had left.

[32] John and Rose owned and operated the Rock Pine between May 2004 and December 2011. In December 2011, they sold the property to John Sullivan and Alina Hogia with a vendor take-back mortgage. Sullivan and Hogia owned and operated the Rock Pine for a short period of time. By March 2012, the mortgage was transferred to Paul Snell and Carol Wanger. Snell and Wanger operated the Rock Pine until the Fall of 2013 when they began to run out of money and could no longer afford the place.

[33] The Collins re-took possession of the property in January 2014, and cleaned it up and got it ready for sale. In the interim, John and his wife owned and operated the Rock Pine.

[34] The parties agree that Yvette and Garry went up to see the property on or around December 18, 2015. At that time, they were taken on a tour and saw the motel, the cabins, the campground, the restaurant, and the gas pumps which were in the front. John told them that he and Rose were operating the business because the prior owner "took off". John and Rose did not want to run the business anymore and wanted to sell it. John told them that if they were interested in purchasing the business, the Collins would be around to help them because they lived up the road.

[35] John, Yvette and Garry discussed how the business was run, looked at the survey and at the health inspection for the restaurant. John told them that they had to do a water test once a month and send it in. They talked about what the defendants wanted in terms of a down payment and what kind of price they were looking for. The defendants wanted at least $100,000 down and were asking a purchase price of $465,000. John told them that he could offer a vendor take-back mortgage.

C. Representations made prior to sale

[36] The parties disagree about what representations were made about the fuel tank system during the negotiations leading up to the purchase of the Rock Pine.

<u>Yvette and Garry</u>

[37] According to Yvette, John told them that they made good money with selling fuel to the snowmobilers in the winter, the campers in the summer and the hunters in the fall. When Yvette asked what kind of condition the fuel system was in, John told her that it was "really good", and he would help them with transferring the licence. When Yvette asked if there was something they would need to do in order to operate the fuel system, John said the system was all good and it just needed a test that had to be done bi-annually. John said he would get the test done for them in the

spring when the ground thawed enough for the testing to be done. According to Yvette and Garry, John told them "I've sold this place three times before, I will take care of you."

[38] Yvette testified that John did not tell them about any outstanding TSSA orders prior to purchase. According to Yvette, John told them that the system was in good shape, and he would take care of the testing in the spring.

[39] Garry testified that in December, he and Yvette spent about 1-2 hours looking at the property. John was in and out during the tour of the property, which included looking at the restaurant, cabins, a trailer, hotel rooms and a front apartment. Garry testified that John and Rose seemed conscientious, and he felt they were being forthright.

[40] Garry testified that they asked what they needed to know about the fuel system. John showed them his licence on the wall in his office and said the system does not need anything. John told them they would just have to transfer the licence.

[41] Garry testified that they were not shown any historical records when they met with John. He did not tell them about any outstanding TSSA orders. The only thing he showed them was the valid licence.

[42] Yvette and Garry went home and discussed purchasing the property. They decided to offer $375,000 with a vendor take back mortgage at 3%. They drafted an offer and contacted their lawyer, Ballantyne-Gaska. The Collins counter offered $400,000 and the parties went back and forth over the terms of the APS with their respective lawyers. The parties wanted to close the deal in the spring.

[43] Yvette testified that John and Rose were anxious to stop running the business and suggested that she and Garry come up early and start running the business before the closing date so that they could take advantage of the lucrative snowmobiling season and could learn how to run the business. Yvette and Garry took them up on this offer and came up and ran the business prior to the sale closing on March 7, 2016. During the time up to and following closing, Yvette and Garry sold gasoline at the Rock Pine.

[44] Garry testified that he and Yvette went up and ran the business from January 2016 onward. During this time, they assumed everything was up to code, and in March 2016 the sale of the property closed. They were told by John that they could not get the licence to sell fuel transferred to their names until the testing was completed.

John Collins

[45] John testified that during the December 2015 visit, the plaintiffs were at the property for about 1 to 1.5 hours. During this visit, he had a sales file that he shared with the plaintiffs. The sales file contained their financial statement, an estimate of income, the last report from the Health Services and the September 5, 2014 TSSA report.

[46] John testified that the plaintiffs asked how busy the business was and he explained that they had snowmobilers in the winter, hunters in the fall and summer took care of itself because that was vacation time. He testified that the plaintiffs did not really ask about the operation of the gas station. They were more interested in income potential. John testified in-chief that the plaintiffs did not ask any questions about the age or condition of the fuel tanks.

[47] John testified that he showed the plaintiffs the September 5, 2014 TSSA report and the plaintiffs did not ask any questions about it. John testified that he told the plaintiffs that there were tests that had to be done with respect to the fuel system. According to John, the plaintiffs did not ask about the testing, how often testing needed to be done, who would conduct the testing, or why testing was required.

[48] During cross-examination, John was taken to his evidence given at his examination for discovery where he was asked about his first visit with Yvette and Garry and whether he recalled any discussion about the operation of the gas business during that visit. John's response at examination for discovery was that he did not specifically recall what the plaintiffs asked, but he recalled that they asked about the sales, the condition of the pumps, etc. He further stated that he told them that the tanks were about 20 to 30 years old.

[49] John initially agreed in his examination for discovery that while he told Yvette and Garry about TSSA inspections, he did not tell them about any TSSA orders. His evidence on examination for discovery was as follows:

> Q. Okay, did you advise them that there were TSSA orders?
>
> A. Inspections, no orders.
>
> Q. You told them about inspections?
>
> A. Yes.
>
> Q. Did you advise them that there was anything that had to be done?
>
> A. Yes.
>
> Q. What did you say to them?
>
> A. I said we were ordering Tanknology to do the precision tests and the cathodic protection test.
>
> Q. And what was their response to that?
>
> A. They didn't know what that was.

> Q. Did you say to them at that initial meeting words to the effect that all that needs to be done is a test but the test can't be done until the spring?
>
> A. At the end of the sale, yes, and that was part of the offer to purchase.
>
> Q. I'm sorry I don't understand.
>
> A. They wanted this test done and it couldn't be done in the wintertime and it would be finished in the spring.
>
> Q. Okay. So, to answer my question, yes, you said words to that effect to them?
>
> A. Yes.

[50] During examination for discovery, John later qualified these answers and stated that while he agreed that he told the plaintiffs that all that needed to be done was a test in the spring, he believed he said this sometime after the initial meeting. He also qualified his answer with respect to work orders and stated that he believed he showed Yvette and Garry the TSSA work order but was not positive on that. He stated that he told them that the TSSA work orders would be complied with.

[51] During cross-examination at trial, John was taken to a TSSA report dated December 9, 2015, and an e-mail, dated December 13, 2015, wherein a TSSA inspector, Vince Golby ("Golby") told him not to sell gas in the winter of 2015/2016 and that he needed a variance from the TSSA regarding the fuel system. John agreed that he received this report and e-mail shortly before he met with Yvette and Garry and that he did not tell them about it.

D. The APS

[52] According to Yvette, she and Garry discussed the fuel tank system with their lawyer. They did not understand what John was talking about when he referred to needing to get the fuel system tested in the spring. They asked their lawyer to put something in the APS to ensure that John had the time to do the fuel system testing and to ensure that if anything turned out to be wrong, the defendants would be responsible for it. Their concern was that they were going to be taking possession of the property prior to the testing being completed and they wanted to be protected if something went wrong.

[53] As a result of these discussions, Ballantyne-Gaska inserted a clause in Schedule "A" of the APS, that was accepted by the defendants, which stated:

> The Sellers agree to obtain and provide to the Buyers at their own cost, a report from a fuel oil distributor registered under the Technical Standards and Safety Act, 2002, and any regulations thereto from time to time stating that the tank system in, on and about the property is in a safe operating condition and complies with the requirements of the Technical Standards and Safety Act, 2002, and any Regulations

> thereto as amended from time to time. In the event that this inspection and report cannot be obtained due to adverse weather conditions at this time, the Sellers agree to hold back the sum of $500.00 to cover any costs and to provide this report as soon as possible in the spring.

[54] For the purposes of this decision, I will refer to this portion of the APS as the "TSSA clause."

[55] Yvette testified that on the closing date they sat down with their lawyer and asked her again if the TSSA clause would protect them. They discussed a few other issues surrounding the sale and then they signed the paperwork. Yvette understood that John had until April to satisfy the TSSA clause and that there was a holdback so he could do what he needed to do and provide them with a report confirming that the fuel system was up to Code.

[56] Garry testified that he understood the TSSA clause to mean that the defendants would provide a report in the spring stating that the fuel system was operating up to TSSA Codes, it was in safe operating condition, up to date, there were no work orders, and there was nothing to be done. Garry testified that he understood the $500 holdback was to cover the cost of providing the report.

[57] According to Yvette, her real estate lawyer did not suggest that they wait until the spring to close on the property.

[58] It was suggested to Yvette during cross-examination that she understood that the sale of the Rock Pine was on an "as is" basis. Yvette disagreed with this suggestion and stated that the sale was subject to the TSSA clause. It was their expectation that they would receive a TSSA compliant fuel system.

[59] In cross-examination, Yvette agreed that they relied on their lawyer's expertise in reviewing and drafting the terms of the sale. She testified that they also relied on John's representation to them that the fuel system was in a good and safe condition and that nothing needed to be done to it.

[60] In cross-examination, Yvette and Garry agreed that they did not independently verify what John had told them about the fuel tank system prior to closing.

[61] Ballantyne-Gaska was the real estate lawyer retained by the plaintiffs for the purchase of the Rock Pine. She testified that the plaintiffs contacted her with respect to the purchase of the Rock Pine.

[62] Ballantyne-Gaska testified that the plaintiffs brought in a drafted APS for the purchase of the Rock Pine and asked her to look it over. At trial, she could not recall who came up with the original wording of the TSSA clause, but she remembered adding the term about the tank system being in a safe and operating condition and in compliance with the TSSA. She added these conditions because the system could not be inspected due to the time of year, and she wanted her

clients to be protected. Her clients were eager to get into the property so that they could profit from selling gas during the snowmobile season.

[63] Ballantyne-Gaska testified that she inserted the TSSA clause to protect her clients. They had been told that everything was fine, but they needed more security. She would have preferred to make the sale conditional upon receiving a report that the property was in compliance with TSSA standards, and she recommended this to her clients, but her clients were already taking possession of the property a month prior to closing and there were negotiations back and forth. Ballantyne-Gaska testified that in her view the TSSA clause superseded the "as is" clause because it related to a specific issue and the "as is" clause was a general clause.

[64] Ballantyne-Gaska testified that she did not search TSSA records with respect to the property because the closing was very quick, and her clients had been assured that reports would be available in the spring. They had been assured that the defendants had sold the property before and that everything was fine.

[65] Ballantyne-Gaska agreed in cross-examination that her clients relied on her expertise in drafting the TSSA clause. She was trying to assist them and protect them. She agreed that this was the first time she had assisted in the purchase of a gas station, and she did not advise her clients to contact the TSSA or to obtain independent legal advice regarding the transaction.

[66] In cross-examination, it was pointed out that the TSSA clause did not provide for a remedy or recourse if the condition was not fulfilled. Ballantyne-Gaska testified that it was assumed that if the defendant failed to provide a report in accordance with the TSSA clause, they would be in breach of the APS.

[67] Ballantyne-Gaska agreed that she made an error when she used the word "fuel oil" distributor in the TSSA clause, because the fuel delivery system dispensed gasoline not oil. She described this as a slight error in wording that did not impact compliance with the clause. Ballantyne-Gaska was also taken to the reference to the *Technical Standards and Safety Act*, "2002," and testified that she was not aware at the time that she incorrectly cited the legislation and now understands that it should have said "2000."

[68] John Collins testified that when they received the plaintiffs' offer to purchase the Rock Pine, they brought it to their lawyer. They wanted to ensure that there was a power of sale condition and an "as is" clause to protect them.

[69] With respect to the TSSA clause, John testified that it was his understanding that this clause provided he was supposed to get a report from TSSA, following testing in the spring, and they would hold back money to cover that cost.

[70] John testified that he understood paragraph 2(e) of the APS to mean that the property was sold "as is" without any representations or warranty as to fitness.

[71] Paragraph 2(e) of Schedule "A" to the APS stated as follows:

> The Purchaser acknowledges and agrees that it has relied on its own inspections and investigations and that there were no representations and/or warranties by the Vendor with respect to any matter whatsoever, except as is set out in writing in this Agreement of Purchase and Sale, and without limiting the generality of the foregoing, there are no representations and/or warranties with respect to fitness, value, title, condition, size and area, zoning or lawful use of the Property and premises therein. The Purchaser agrees to accept the Property and premises on an "as is" basis on closing and subject to any order or notice affecting the Property regarding its use and subject to an outstanding work orders or notices of infractions as of the date of closing, including but to limited to work or other orders, as well as any existing municipal or other governmental by-laws, restrictions or orders affecting its use, including subdivision agreements and easements and any minor encroachment by the subject or nearby buildings or by fences located on the subject or adjacent Property onto adjoining properties or streets as well as any registered or unregistered restrictions, agreements or covenants which run with the land.

[72] In his examination for discovery, which was read in at trial, John acknowledged that when he signed the APS, he understood that he was agreeing to comply with the outstanding TSSA orders, notwithstanding the "as is" clause.

E. The Defendants' knowledge of the state of the fuel tank system prior to purchase

[73] John testified that when he and his wife purchased the property in 2004, there was a warranty in the APS for six months that the gas tanks were in good condition. According to John, they were told that the tanks could be 15-20 years old. He testified that cathodic testing took place, "on the tanks for sure" by Wagg's Petroleum Equipment Ltd. ("Wagg's") and were found to have cathodic protection.

[74] A copy of the 2004 Wagg's report was filed as an exhibit at trial. A review of the report indicates that the fuel tanks were cathodically protected, but the fuel lines were not. Under "Observations & Comments," the report states "Lines are not protected (steel galvanized lines)."

[75] John testified that they were told at the time of the 2004 Wagg's report that the lines did not have to be cathodically protected. He did not identify who told him this.

[76] John testified that to his knowledge the tanks and lines never leaked. During the time he and Rose owned the property, they did not do any repairs or upgrades to the tanks or the lines.

<u>Tanknology Testing in 2010</u>

[77] John testified that they had the tanks and lines re-tested in 2010 prior to the sale of the property and that they "both passed." A certificate of tightness for the tank and line system, a precision tank test report and precision line test report, dated November 20, 2010, from

Tanknology were filed as evidence at trial. John testified that based on these reports he concluded that everything was fine with the tanks and the lines.

[78] No report was filed at trial indicating that the tanks and lines had been tested by Tanknology in 2010 for cathodic protection.

The Terraspec Engineering Inc. ("Terraspec") Report - 2010

[79] Terraspec was retained by John in 2010 to conduct an environmental inspection in anticipation of selling the property. The purpose of the inspection was to assess whether there was leakage from the underground fuel tanks.

[80] Shane Galloway, a geotechnical specialist who works for Terraspec, was called as a witness at trial. He produced a report that he provided to John in September 2010, which was entered at trial. The report indicated that there was trace evidence of fuel contamination in some of the soil samples taken around the tanks. Galloway testified that there were many possible reasons for this contamination, including the use of contaminated fill, a fuel repair, spillage at the surface, or corrosion of the tanks or tank fittings. In 2010, Terraspec recommended having the tanks checked further or decommissioned.

Testing by Gord MacFarland in 2010-2015

[81] Gord MacFarland ("MacFarland") testified that he was a certified corrosion technologist in his prior career and had some involvement with the Rock Pine between 2010 and 2015.

[82] MacFarland was asked by the Collins to conduct a survey on the underground tanks at the Rock Pine to see if they met the cathodic codes for Ontario. MacFarland's first visit to the Rock Pine was in October 2010. At that time, MacFarland found that there was a "big problem" with the tanks due to interference coming from the Trans-Canada Pipeline ("TCPL"). He told John that the tanks were at risk of corroding at a higher rate than normal and that he should contact Moore's Petroleum, the fuel provider for the Rock Pine.

[83] MacFarland went back to the Rock Pine in May 2011. At that time, Moore's Petroleum had installed a device in the pump cannisters in order to block the current affecting the tanks. When MacFarland went back in May, he noted that the readings were not as drastic as they were in October; however, the tanks remained electro-positive which was causing an anodic reaction. MacFarland produced a report, dated June 6, 2011, addressed to John Collins that indicated that the two underground tanks did not satisfy the Ontario Fuel Safety Code standards. In his report, he stated that the anodic reaction would cause the tanks to corrode at a higher rate than normal and cause the tank walls to eventually break down. This report was entered as an exhibit at trial.

[84] MacFarland provided John with a price to install anode protection for the tanks and pipes. The amount he quoted for this work was $8,788.50. According to MacFarland, John did not end up having this work done because he did not want to pay for it, he wanted the TCPL to pay for it. John kept pushing the work off.

[85] John testified that they did not follow up on the 2011 MacFarland report because they were investigating whether the TCPL would help them with the issue of current interference. He agreed that they did not get another petroleum contractor to look into the issue or concerns surrounding cathodic protection, as identified by MacFarland, and eventually the Rock Pine was sold to other owners.

[86] By the spring of 2014, John had taken over possession and ownership of the Rock Pine again. John asked MacFarland if anything had been done regarding the TCPL and the tanks. MacFarland told John that TCPL was not prepared to take care of the problem.

[87] In February 2015, John reached out to MacFarland and enclosed a copy of the January 2015 TSSA report and orders. John asked if MacFarland could help him out. MacFarland told John he needed a complete upgrade to his system to bring it up to ULC protection standards.

[88] MacFarland testified that, by this time, the relationship between him and John had become strained. He had done work at the site and had not received payment. MacFarland testified that he was getting to the point where he did not want to do anything to protect the tanks because he had no historical information on them. He was concerned about environmental issues that might arise if he did work on the tanks.

[89] In December 2015, John contacted MacFarland again, advising that he had just received a call from the TSSA and was told that if they did not have an inspection they would be shut down. MacFarland testified that he did not conduct any further testing. He was busy with other projects and had had enough of this location.

[90] MacFarland was challenged on cross-examination about his reference to the Ontario Fuel Safety Code. It was suggested to him that no such code had ever existed. MacFarland disagreed with this suggestion.

[91] MacFarland agreed in cross-examination, that if the TCPL shut down their system, the tanks could have become protected over time. MacFarland was shown photos of the tanks when they were ultimately removed by the plaintiffs in 2020. MacFarland testified that he observed some indicia of corrosion in the photos, including some breakdown in the coating of the tank and the anodes were gone. He agreed that a person who observed the tanks in person would be in the best position to comment on their condition at that time.

[92] MacFarland testified that galvanized steel pipes have some form of corrosion protection provided there are dialectic units in the pipes, and they are not affected by outside currents. He agreed that dialectic units had been put in during the Spring of 2011. He agreed that the piping at the Rock Pine was probably in good shape.

Prior Owner - Paul Snell - 2012 to 2013

[93] Paul Snell (“Snell”), along with his partner, owned and operated the Rock Pine between March 2012 and the Fall of 2013.

[94] Snell initially visited the Rock Pine in 2011. John showed him around the property, and they discussed the business. Snell asked if there were any issues with the water, fuel system, or septic system. John told him that there were no issues and the fuel system had passed inspection every time. At that time, Snell backed out of purchasing the property for financial reasons.

[95] At some point following 2011, Snell was contacted by the owners of the Rock Pine (not the Collins) and asked if they wanted to take over the business. Snell and his partner assumed the mortgage that the prior owners held with the Collins and took over the business in the Spring of 2012.

[96] In the Spring of 2012, Snell met with John to review the operation of the business. Snell testified that he asked John if there were any concerns about the gas pumps or the system. John told him that it had passed all previous inspections.

[97] According to Snell, there were issues with the gas pumps and the fuel system during his ownership. He had the pumps tested and they were leaking. As a result, he purchased reconditioned gas pumps. He spoke to John about buying the reconditioned pumps because the old pumps were in bad shape.

[98] At one point, a TSSA inspector attended and took Snell through the new regulations and things that needed to be inspected and looked at. The TSSA inspector asked for a history on the tanks because they had been in the ground a long time. Snell tried to contact John about this but was unable to get in touch with him.

[99] The TSSA inspector came back to see if anything had been done. He told Snell that the tanks would have to come out of the ground because there was no history on them. He told Snell, verbally, that if there was any contamination, Snell would be responsible for it. The TSSA inspector did not give a written order that the tanks be removed.

[100] Snell testified that he tried to talk to John about these issues, but they were not getting along. Snell testified that he never really had a discussion with John about the concerns raised by the TSSA.

[101] Snell testified that he spoke to a bunch of contractors about how much it would cost to address the issues raised by the TSSA inspector. Ultimately, he and his partner decided that they did not have the money to do the work needed. They decided to go back to Alberta, and John took back the mortgage and the property in the fall of 2013.

TSSA inspection reports and orders - 2014-2015

[102] John testified that he and his wife did not own the property between 2011 and 2014, and as such would not have seen any TSSA reports during that time period. He agreed that he did receive the January 31, 2014 TSSA report and subsequent reports when they resumed possession of the property.

[103] John testified that during this time he and his wife were trying to sell the property and did not have the money to get the work done to comply with the TSSA orders.

[104] Between January 31, 2014 and December 15, 2015, inspectors with the TSSA attended at the property and provided inspection reports and orders to the defendants. Five of those inspection reports were introduced as evidence at trial and the orders made can be summarized as follows:

Date and Inspector	Orders made
January 31, 2014 Inspector Jean-Marc Leblond	1. Ordered to comply with section 7.32.1 of the Liquid Fuels Handling Code, 2007; ordered to have underground storage tanks tested and monitored for leaks and provide inspector with copy of the precision leak test. 2. Ordered to comply with section 2.3.1.2 of the *Liquid Fuels Handling Code*, 2007; ordered to provide a copy of a current corrosion protection survey report for the underground steel tank system and product piping. 3. Ordered to comply with section 1.3.4 of the *Liquid Fuels Handling Code*, 2007; ordered to replace/repair the whip hoses. 4. Ordered to comply with section 4.5.2.6 of the *Liquid Fuels Handling Code*; ordered to install an electronic sump monitoring system in all sumps. Inspection report states: "Inspector Leblond conducted a change of licence inspection at the above mentioned location. At the time of the inspection it was discovered that the facility had deficiencies. A conversation was held with the site operator and the dangers of the situation were discussed."
March 14, 2014 Inspector Jean-Marc Leblond	Letter sent to Johnson Collins enclosing latest amendment to the *Liquid Fuels Handling Code* regarding the removal of the foot or seney valves from single wall suction systems. Letter states: "These valves must be removed by December 31, 2014 at the latest."
September 5, 2014 Inspector Jean-Marc Leblond	1. Ordered to comply with section 7.32.1 of the *Liquid Fuels Handling Code*, 2007; ordered to have underground storage tanks tested and monitored for leaks and provide inspector with copy of the precision leak test.

	2. Ordered to comply with section 2.3.1.2 of the *Liquid Fuels Handling Code*, 2007; ordered to provide a copy of a current corrosion protection survey report for the underground steel tank system and product piping. 3. Ordered to comply with section 4.5.2.6 of the *Liquid Fuels Handling Code*, 2007; ordered to install an electronic monitoring system in all sumps. Compliance date: October 27, 2014 Inspection report states: "Failure to comply with this order may result in the fill pipes for the storage tanks being sealed."
January 21, 2015 Inspector Jean-Marc Leblond	1. Ordered to comply with section 7.3.2.1 of the *Liquid Fuels Handling Code,*2007; ordered to have underground storage tanks tested and monitored for leaks and provide inspector with copy of the precision leak test. 2. Ordered to comply with section 2.3.1.2 of the *Liquid Fuels Handling Code*, 2007; ordered to provide a copy of a current corrosion protection survey report for the underground steel tank system and product piping to inspector J. Leblond. 3. Ordered to comply with section 4.5.2.6 of the *Liquid Fuels Handling Code*, 2007; ordered to install an electronic monitoring system in all sumps. 4. Ordered to comply with section 4.2.1.6 of the *Liquid Fuels Handling Code*, 2007; Ordered to provide protection against vehicle impact for the fill pipe for the underground storage tank. Compliance date: April 27, 2015 Inspection report states: "Inspector Leblond conducted a follow up inspection of the above-mentioned facility on January 20, 2015. At the time the owner was not present, however the Inspector did talk to him over the phone. A conversation was held with Mr. Collins in regards to the outstanding orders. Mr. Collins informed the inspector that he is on an SIR program and the precision leak test is not due yet. The inspector informed him that a copy of the test and documentation of the SIR program is required. Without the documentation of the precision leak test

	and the SIR, the variance for sump leak detection and cathodic protection will not be granted." … "Failure to comply with this order by the compliance date will result in the fill pipes for the underground storage tanks being sealed."
December 9, 2015 Inspector Vince Golby	1. Ordered to comply with section 7.32.1 of the Liquid Fuels Handling Code, 2007.; ordered to have underground storage tanks tested and monitored for leaks and provide inspector with copy of the precision leak test. 2. Ordered to comply with section 2.3.1.2 of the *Liquid Fuels Handling Code*, 2007; ordered to provide a copy of a current corrosion protection survey report for the underground steel tank system and product piping. 3. Ordered to comply with section 4.5.2.6 of the *Liquid Fuels Handling Code*, 2007; ordered to install an electronic monitoring system in all sumps. 4. Ordered to comply with section 4.2.1.6 of the *Liquid Fuels Handling Code*, 2007; ordered to provide protection against vehicle impact for the fill pipe for the underground storage tank. Compliance date: March 9, 2016 Inspection report states: "December 9/15 – Completed a follow-up inspection and all orders remain outstanding. Granted a further extension to comply. Must complete pressure testing in order to apply for a variance for testing of cathodic protection and for electronic monitoring of sump pumps."

[105] In cross-examination, John agreed that during the January 31, 2014 inspection, he had a conversation with Inspector Leblond about the orders and the dangers the inspector found on the site.

[106] During cross-examination, John was taken to the notes in the September 5, 2014 TSSA inspection report which state "Inspector Leblond conducted a follow up inspection at the above mentioned location on September 05, 2014. At the time of the inspection not all orders were

resolved. The inspector had a conversation with the owner on the phone, the owner explain(ed) to the inspector that the contractor will be returning to the site to complete the work required. The owner did mention that a pressure test was completed however, he did not have a copy of the test report."

[107] John agreed that he spoke to Inspector Leblond on the phone following the September 5, 2014 inspection. At the time, Inspector Leblond told him that failure to comply with the orders might result in the fill pipes being sealed. John acknowledged that if the fill pipes were sealed, there would be no way to sell fuel.

[108] John testified that when he told Inspector Leblond that the pressure test had been done, he was referring to the 2010 testing conducted by Tanknology.

[109] John agreed that he had no knowledge or records of any cathodic testing between 2004 and 2016.

[110] With respect to the January 21, 2015 site inspection, John agreed that he told Inspector Leblond that he was on the SIR program and that Leblond requested a copy of the SIR program materials and a copy of the precision leak test.

[111] John testified that the SIR program was put out by Tanknology for "northern compliance", and it involved having daily dips conducted on the fuel system. Being on the SIR program meant that you only had to do the required testing on the fuel system every five years instead of every two years.

[112] John understood that being on the SIR program was required in order to seek a variance from the TSSA regarding the sump leak detection system and cathodic protection testing. Two issues that the TSSA had been addressing in their orders since at least 2014. John testified that he set up the SIR program in 2010 with Tanknology but he was not sure if the subsequent owners continued with it after he sold the property.

[113] John was challenged in cross-examination about his conversation with Inspector Leblond in January 2015, and his representation that he was on the SIR program. It was suggested to John that what he told Inspector Leblond was false. John disagreed and testified that he thought he was on the SIR program with Tanknology. When asked if he had ever sent the required SIR materials to the TSSA, he testified that he thought he sent them. John agreed that he had never produced any SIR materials as part of this litigation, nor were there any in the TSSA file. John agreed in cross-examination that there was no evidence from Tanknology that he was ever on the SIR program and that he had never produced any invoices for the work required for the SIR program.

[114] John agreed that in January 2015, Inspector Leblond told him that failure to comply with the orders would result in the tanks being sealed. This was his second warning from the TSSA about what would happen if the orders were not complied with.

[115] John agreed that following the January 21, 2015 inspection, he reached out to MacFarlane about the testing. On February 5, 2015, John forwarded a copy of the TSSA inspection report to MacFarlane and wrote: "gord, can you help me out with this to get an extension? I have tried to call jeff @ tanknology with no response? I know you did work for me before I sold will that suffice? Let me know." MacFarlane wrote back on February 12, 2015, advising "[T]he only thing I can tell you regarding your cathodic protection situation is that a complete upgrade of the system on your tanks and piping is required in order to bring your system up to acceptable ULC protection standards." MacFarlane advised John that it would cost approximately $7,000 to perform this work.

TSSA Inspector Vince Golby – the December 2015 report

[116] Inspector Vince Golby testified at trial as the representative from the TSSA. He testified that the TSSA is a body that regulates all fuel handling in Ontario. The Rock Pine falls under the jurisdiction of the TSSA and must comply with its codes and regulations.

[117] Golby testified that he attended the Rock Pine in December 2015, as a follow up to a previous inspection conducted by Inspector Leblond. When he arrived, he discovered that none of the prior orders had been complied with.

[118] Golby testified that the TSSA requires that precision line testing take place every two years. Golby noted that when he attended the property, the Collins did not provide a report to show that this testing had taken place. Neither did the Collins provide a report related to cathodic testing.

[119] Golby granted the Collins a further three-month extension for his orders to be complied with. At the time, he believed the Rock Pine was shut down for the winter.

[120] Golby testified that the purpose of this extension was to provide the Collins with time to submit the required applications for variances, which in turn would give them more time with respect to some of the TSSA orders. He expected that the Collins would hire contractors to comply with the orders. Golby testified that if the Collins did not comply with his orders in the time provided, he could have provided a further extension or could have shut them down.

[121] Four days following the December inspection, Inspector Golby e-mailed John and attached the follow-up inspection report and two variation applications. In this e-mail, Golby advised John that he would have to submit a variance application to obtain additional time to place sump sensors at the pumps and a separate variation application to obtain a variance with respect to the cathodic protection testing. Golby wrote: "You will not be able to use the tank system over the winter without these requirements being met."

[122] Golby testified that he did not believe he sent the Collins anything after this telling them that they could sell gasoline. He testified that he would be surprised to learn that the gas had been sold over the winter. Golby agreed that he did not order the Collins not to sell gas over the winter.

[123] John acknowledged receiving Golby's e-mail. He testified that he thought he completed the variance applications, but "guessed" that he did not. He agreed that he had no evidence that he had ever sent an application for a variance to the TSSA. John agreed that no variance was ever granted by the TSSA regarding sump pump leak detectors or cathodic testing.

[124] John testified that in January 2016, he reached out to Tanknology, and a company called "Tank Tek" about the costs required to set up the testing required by the SIR program. He agreed that he, ultimately, did not hire either company.

[125] With respect to Golby's direction in the December 2015 e-mail, that he was not to sell gas over the winter, John testified that he "wasn't sure," it may have been verbally, but "someone" with the TSSA after the fact, told him that he was allowed to sell fuel. He agreed in cross-examination, that there was nothing from the TSSA in writing that said he could sell fuel over the winter.

F. After closing – The Spring 2016 testing by Tanknology

[126] John testified that he arranged for the fuel tank system testing to be conducted by Tanknology. The testing took place in May 2016, and he received their report in late May or early June 2016. John testified that he forwarded the report to the TSSA.

[127] According to John, the Tanknology report indicated that the lines passed. He understood that he was to take care of the last year's TSSA deficiency report and the rest would be up to the plaintiffs.

[128] Yvette testified that on May 17, 2016, a company called Tanknology showed up and conducted the testing on the fuel distribution system. When she and Garry spoke with the individual doing the testing, they were left with the impression that there was something wrong. Yvette contacted John and told him that they were being told that the system was failing. John told her that he would look into the test results.

[129] Garry testified that a man named Joey Rivers attended to do the testing. Rivers told them that the system had failed before and was going to fail again. They asked Rivers questions, trying to understand what the problem was. He told them that he would be sending the results to John because he was paying for the testing and that John could share the results with them.

[130] The reports from Tanknology were filed at trial. They indicate that the testing took place on May 17, 2016. The testing consisted of a precision line test, a precision tank test and cathodic protection testing which was conducted on the two fuel tanks and two fuel lines at the Rock Pine.

[131] Precision line testing checks to see if there are any leaks in the fuel system. Cathodic testing checks to see if the fuel system is protected from corrosion.

[132] The test reports from Tanknology indicated that the two underground fuel tanks and the two fuel lines passed the precision line testing. Tanknology provided a "Certificate of Tightness" for the fuel tanks and line systems.

[133] The cathodic protection test report from Tanknology indicated that the two underground fuel tanks (T1S and T2R) were protected. However, the two fuel lines (L1AS and L2AR) were unprotected. Tanknology provided a "Certificate of Compliance for Cathodic Protection Systems" only with respect to the two fuel tanks (T1S and T2R).

[134] On May 21, 2016, following the testing, John wrote to Claude Briere ("Briere") from Tanknology, asking about what transpired during the testing and indicated that the new owners were wanting "a lot more done than the tssa request." On May 27, 2016, Briere sent John a copy of the test report.

G. The June 2016 TSSA inspection

[135] Yvette and Garry were waiting for the test results when Michael Madigan ("Madigan"), a TSSA inspector, showed up at the business unexpectedly in June 2016. According to Garry, Madigan spent about an hour at the property and asked them about the fuel licence. They told Madigan that John was taking care of this.

[136] During this visit, Madigan asked them if they were aware that there was an outstanding TSSA work order with respect to the fuel tank system and they told him no. They asked Madigan to walk them through the TSSA issues and tell them what needed to be done. They told Madigan that they would address these issues with John and ensure they were taken care of. At that point, Garry and Yvette became scared and wondered what they had gotten themselves into. They contacted their lawyer.

[137] Madigan testified that he was employed by the TSSA as an inspector for nine years and worked in Northern Ontario between 2016 and 2018. He is no longer employed by the TSSA and now runs his own petroleum construction company.

[138] Madigan's recollection of his involvement with the Rock Pine was not very good and was mostly limited to the TSSA orders produced at trial. Madigan testified that he was off work for health reasons, and he has trouble remembering some things.

[139] Madigan testified that during the time he worked in the north, there was a Northern Ontario strategy where an assigned task force had been assigned to deal with the backlog regarding gas stations.

[140] Madigan testified that he attended at the Rock Pine on June 17, 2016 to conduct a follow-up inspection. He had a conversation with the new owners and explained that they needed to apply to change the fuel licence in order to continue to operate. He noted that the Rock Pine still had the

same deficiencies noted in the prior TSSA inspections. On June 17, 2016, Madigan made the following orders:

1. You are hereby ordered to comply with section 7.3.1 of the liquid fuels handling code 2007. You are to ensure that the underground storage tanks are tested and monitored for leaks in accordance with tables 3 and 5 of the LFHC 2007. Provide the inspector with a copy of the precision leak test;

2. You are hereby ordered to comply with section 2.3.1.2 of the Liquid Fuels Handling Code 2007. Ensure compliance by providing a copy of a current corrosion protection survey report for the underground steel tank(s) system and product piping by e-mail: mmadigan@tssa.org;

3. You are hereby ordered to comply with section 1.3.4 of the Liquid Fuels Handling Code 2007. Ensure compliance by replacing/repairing any defective equipment (this order related to the whip hoses that were found to be weather cracked);

4. You are hereby ordered to comply with section 4.5.2.6 of the Liquid Fuels Handling Code 2007. Ensure compliance by installing electronic sump monitoring system in all sumps.

5. You are hereby ordered to comply with clause 4.2.1.6 of the Liquid Fuels Handling Code 2007 (this dealt with having vehicle protection for the above grade spill containers);

6. You are hereby ordered to ensure that the foot/check valves are removed and appropriate check valves are installed under the pumps; and

7. You are hereby ordered to ensure that an application for change of license holder is submitted to the TSSA.

[141] Madigan testified that with respect to Order No. 2, if an operator did not have any records of cathodic protection for the tanks and lines, the typical step would be for the tanks to be sealed. However, during this time frame the Ontario Northern strategy was going on and inspectors were not shutting down facilities. If there was non-compliance with an order, the matter would go to a supervisor to decide what the outcome should be.

H. After Madigan's Inspection - July 2016

[142] Yvette testified that following Madigan's inspection they were trying to figure out who to contact to find out what was wrong and how to fix it. On the advice of their lawyer, they drafted a letter to John setting out the outstanding issues with the TSSA and asking when he was going to get the issues fixed. According to their APS, they were supposed to be purchasing a fuel system

that was up to the *LFHC* and the TSSA was saying it was not. John responded that he would look into it and then told them to speak with his lawyer.

[143] On July 6, 2016, Yvette wrote to John and provided a copy of the June 17, 2016 TSSA report that they had received following Madigan's visit. In her e-mail, she stated that they were still waiting for a copy of the Tanknology report. Yvette summarized the deficiencies noted by the TSSA inspector and ended her e-mail with "[P]lease advise how you would like to proceed with bringing the equipment up to regulation and safe operating condition, as from this report the system is not in compliance with TSSA regulations."

[144] On July 7, 2016, John wrote to Briere asking if the Tanknology report had been sent to the TSSA and whether it met the requirements of the last work order. Briere responded that they do not send the reports to the TSSA, they send the reports to the customer and let them send them to the TSSA.

[145] The same day, John wrote to Briere again asking: "[A]gain, as asked does it meet the work order I sent you last fall? What is failing on the report? I do not understand this report enough to explain to new owner? Please advise thx jc." Briere responded "…the work order was for precision testing the tanks and lines and to test the Cathodic Protection on the tanks and lines. So the precision test went well, the tanks and lines all passed. The Cathodic Protection was tested and the tanks are protected but the product lines are not protected.".

[146] John sent this e-mail exchange to Yvette and Garry and stated: "fyi, will dig deeper for balance of info thx jc."

[147] On July 19, 2016, John sent a copy of the Tanknology reports to Madigan and stated: "I thought you had this from claude at tankology? Please let Yvette know all issues pertaining to the 1st work order have been cleared." On the same date, John forwarded this e-mail to Yvette advising "this info was sent to vince and now forwarded to M. Madigan, shows all issues with 1st work order have been cleared. This will be sent to my solicitor for his file."

[148] Yvette testified that she and Garry tried to find a petroleum contractor to tell them what was wrong and how to fix it. They had the TSSA inspection report that talked about foot valves, sump pumps and cathodic testing and they did not understand what it all meant. They called Wagg's to get a quote to repair the issues; however, the owner advised that he would not touch the system because there was no history regarding prior testing. A copy of Wagg's response, dated July 27, 2016, was entered as an exhibit at trial and stated:

> Thank you for your call yesterday and considering Wagg's Petroleum for the various TSSA required repairs to your site. Due to the anticipated concerns associated with re-establishing and confirming effective cathodic protection on your existing tanks and lines, Wagg's recommend that these underground components be removed and replaced. On that basis we have prepared the following proposal and estimate for your site. As we

> discussed yesterday, Wagg's recommends the removal of underground fuel tanks and piping, new fuel dispensers, new above ground tanks for regular gas/premium gas and the installation of a new leak detection system to meet the 2007 TSSA Liquid Fuels Code". The estimate for this work was $148,700 plus HST.

[149] The plaintiffs reached out to Jim Moore Petroleum, who had delivered fuel to the business in the past, to see if they could obtain a history of the fuel system. They received a package of documents that included communications between John and MacFarlane, and communications between John and two TSSA inspectors, Golby and Leblond.

[150] Yvette testified that they reached out to Raymar Equipment Service ("Raymar") to get a second opinion with respect to repairing the fuel system. They walked around the property with Lloyd Banks ("Banks") a sales manager with Raymar and discussed options for repairing the fuel system. They discussed possibly using a fiberglass tank or moving the tank closer to the restaurant but that would involve possibly blasting rock and the cost would be astronomical.

[151] Yvette testified that after meeting with Banks they thought that they might have a solution by replacing the existing tanks with a fiberglass tank. She called Madigan to discuss this option. Madigan told her that if they replaced the tanks, they would lose their grandfathering status. Madigan told them that the current tanks were too close to the water and if they had to do any digging to repair the pipe or foot valve, the entire system would have to be removed.

[152] Madigan was shown and acknowledged an e-mail exchange he had with Yvette and Garry in November 2016. On November 4, 2016, Yvette wrote:

> Hello Michael. It is my understanding the seller finally had Tankology (*sic*) forward the precision and cathodics testing results to the TSSA. In that report it states that the tanks are protected but the line are UNPROTECTED. I'm assuming unprotected means it does not meet some sort of TSSA regulation. Can you please send me information as to what the regulation may be and what would be required in order to bring the line into compliance? Thank you. Yvette.

[153] Madigan wrote back on November 11, 2016:

> Hi Yvette. If there are no records that the piping previously passed a cathodic protection test the piping will need to be replaced with an approved double wall piping system. Regards.

[154] Madigan testified that if there had been no records regarding cathodic protection of the tanks at that time, he would have referred the matter to a supervisor because at the time they made the decisions regarding compliance with the TSSA.

I. The November 15, 2016 TSSA inspection

[155] Yvette testified that in November 2016, Madigan returned to do another inspection as a pre-requisite to having the fuel license transferred into their names. By this point Madigan had a copy of the Tanknology report and was aware that the cathodic testing had failed. Madigan told them he would prepare new work orders regarding the next steps. They gave Madigan permission to talk to Wagg's or J. Mac (MacFarland) to see what the problem was.

[156] Madigan conducted a further inspection of the Rock Pine on November 15, 2016. At that time, he made the following orders:

1. You are hereby ordered to ensure that the foot/seney check valves are removed from the underground product piping and the appropriate check vales are installed under the pumps before the compliance date shown;

2. You are hereby ordered to ensure that a petroleum contractor confirms the type of underground piping that is installed and the documentation is sent to the inspector before the compliance date shown;

3. You are hereby ordered to ensure that the under pump containment devices are monitored with a liquid sensor before the compliance date shown;

4. You are hereby ordered to ensure that all entry boot clamps are installed in accordance with the manufacturers installation instructions before the compliance date shown;

5. You are hereby ordered to ensure that both whip hoses are replaced before the compliance date shown;

6. You are hereby ordered to ensure that both underground storage tank fill pipes are properly identified before the compliance date shown;

7. You are hereby ordered to ensure that inventory reconciliation is being conducted and the documentation is sent to the inspector before the compliance date shown;

[157] Madigan testified that he needed to determine what the pipes were made of before any decisions were made regarding the removal of the pipes. He testified that this would involve testing at the suction pump site to see if the piping was steel or fiberglass.

[158] Madigan testified that at the time, if orders were not followed, they would be referred to a supervisor for decision making.

[159] Yvette testified that when Madigan issued his orders in November 2016, they reached the conclusion that if they did not do something he was going shut them down. They went and spoke to their lawyer and told her that TSSA was going to shut them down if something is not done. They asked their lawyer to go back to the defendants to see if they could work something out to solve the problem. The response they received back was initially that the defendants felt they only had to do the testing and they were not going to do anything else. Then they were told to wait until the defendants had a contractor look at the system. Then they were told that a contractor could not look at the system until the spring. Yvette testified that, by that point, they were told to seek out a litigation lawyer.

J. Exchanges between lawyers - August 2016 to December 2016

[160] Following receipt of the Tanknology report, correspondence was exchanged between Ballantyne-Gaska's office and the defendants' lawyer's office, C. John D'Agostino Law Professional Corporation. The defendants took the position that the APS had been complied with. On August 10, 2016, counsel for the defendants wrote to Ballantyne-Gaska enclosing a copy of the TSSA Invoice from the Tanknology and releasing the $500 holdback.

[161] The plaintiffs took the position that the defendants had not complied with the terms of the APS and wanted to know what steps would be taken to comply with the requirement for a safe and compliant fuel system.

[162] In October 2016, the plaintiffs retained a lawyer, J.A. Gaska, to attempt resolve the outstanding issues with respect to the purchase of the Rock Pine. As part of the retainer, it was acknowledged that if Mr. Gaska was unable to resolve the matter, that they would retain the services of another counsel to pursue litigation.

[163] In November 2016, Danielle Magnusson, counsel for the defendants, wrote and advised that the intention of the defendants was only to agree to complete the cathodic protection testing and precision line testing, required by the TSSA. Ms. Magnusson interpreted the reports to mean that the tank system was in compliance with respect to cathodic protection, as such, no work was done. She pointed out that the property was purchased "as is."

[164] Mr. Gaska wrote back explaining that the report indicated that the product line was not cathodically protected and as such did not comply with the *TSSA Act*. He requested a response within 10 days, or his clients will seek litigation counsel.

[165] On December 20, 2016, Ms. Magnusson wrote back stating that the defendants had contacted a contractor; however, because the ground was frozen an inspection could not take place until May or June 2017. Ms. Magnusson wrote: "we ask that your client take no further action until such time as the further inspection occurs."

[166] By February 2017, a resolution of the issues had not been reached and the plaintiffs commenced this action.

[167] No evidence was led at trial that the defendants ever arranged for a contractor to further inspect the fuel tank system.

K. The July 2017 TSSA inspection

[168] Yvette testified that by January/February 2017, they felt they were going to be shut down. They believed that they had to dig to find out what material the piping was made out, had to dig to comply with the orders regarding the foot valves, and as soon as they dug, they would lose their grandfathering status because they could not be near the lake.

[169] On July 14, 2017, Madigan attended at the Rock Pine and conducted another site inspection. At that time, he issued the same orders that were set out in his November 15, 2016 report and provided a compliance date of September 20, 2017.

[170] Madigan's July 14, 2017 inspection report added the following wording:

> **"*****IMPORTANT NOTE******* Failure to comply with the above inspectors order will result in both underground storage tanks being sealed.

[171] According to Madigan, he would have received a direction from a superior to put this last sentence in the inspection report.

[172] Yvette testified that they understood this TSSA inspection report to mean that they would be sealed if they did not do something.

[173] The plaintiffs contacted Wagg's again to see if they would dig to see what the pipes were made out of. Wagg's would not go near the system. A copy of an e-mail sent to the plaintiffs by Terry Ablett dated July 20, 2017, was entered as an exhibit at trial. In that e-mail, Ablett wrote:

> Per our discussion, Wagg's is not able to undertake a cathodic upgrade of the existing underground steel fuel tanks and connected piping. The last cathodic evaluation that we are aware of was performed in 2004. Without additional information to confirm protection since that time, we cannot be certain that the tanks or lines have been protected against corrosion. Note that this corrosion protection inspection is required on a biannual basis.

[174] Terry Ablett ("Ablett") is the current owner of Wagg's Petroleum Limited. He testified that his company supplies, installs and maintains fuel storage and pumping equipment.

[175] Ablett testified that he became the owner of Wagg's in 2003. He had no knowledge of the installation of the fuel system at the Rock Pine and Wagg's did not have any records regarding this. Ablett testified that Wagg's did not perform any service on the Rock Pine fuel system between 2004 and 2016.

[176] Ablett was shown and identified records regarding precision line and cathodic testing conducted by Wagg's in 2004. He testified that the indication in the report that the lines were "not protected" suggested to him that the lines did not have cathodic protection. Ablett testified that cathodic protection for fuel tanks and fuel lines is important because without cathodic protection there is a much higher risk that the tanks and pipes will deteriorate, corrode and leak.

[177] Ablett confirmed that when they were contacted in 2016, Wagg's was not prepared to repair the underground piping to re-establish cathodic protection without removing the underground tanks and piping. He confirmed the correspondence sent to the plaintiffs in 2016 and 2017.

[178] Ablett testified that cathodic protection is an ongoing thing. Without the history regarding cathodic protection, you would have no idea how many years of corrosion damage might have occurred. One spot of corrosion damage on a pipe could be catastrophic. The liability of undertaking work to upgrade cathodic protection, without this historical information, was not something he would expose his company to.

[179] Yvette testified that by this point they did not have the money to install an entire new fuel tank system; however, they also needed gas to sell to snowmobilers, ATV users and boaters. They spoke to Wagg's about a less expensive solution, which involved installing a used, above ground, gas tank that could be connected to the existing gas pumps. It also involved installing the detectors under the pumps, decommissioning the underground tanks/pipes and removing them later.

[180] Yvette testified that they concluded that this option was the only way they could comply with the TSSA order and avoid being shut down. They spoke to the TSSA about this possible solution and were told that they would have to submit an application for a site modification.

L. The application for site modification - September 2017

[181] In September 2017, the plaintiffs submitted a site modification application to the TSSA which proposed connecting an above ground tank to their fuel pumps as a short-term solution. The plaintiffs received TSSA approval in October 2017 and Wagg's was able to do the work in December 2017.

[182] Yvette testified that once they got the new above ground fuel tank installed, they vacuumed out the older underground tanks and the tanks were considered decommissioned. Receipts for this work were entered as exhibits at trial.

[183] Yvette testified that once they decommissioned the underground tanks, Madigan told them that they would have to remove them. Initially, Madigan told them they would have two years to remove the underground tanks. However, Madigan then advised them that the law had changed, and they now had only one year to remove the tanks.

[184] Madigan testified that he conducted a site modification inspection at the Rock Pine on May 1, 2018. This was a follow-up inspection, and by that point all deficiencies had been corrected (except for an issue regarding a vehicular protection barrier). At that time, the underground tanks and piping were still on site and had been made product-free. He ordered the plaintiffs to remove the tank and piping from the ground because the *LFHC* required that if they are taken out of service for one year or more, they must be removed.

[185] Madigan re-attended at the property in July 2018. This was the last time he went to the property as a TSSA inspector. At that time, he reminded the plaintiffs that they would have to submit an environmental assessment to the TSSA, once the tanks were taken out of the ground.

[186] The underground tanks were removed in August 2020.

[187] Yvette testified that they currently sell fuel using the above ground fuel tank. The fuel tank is not adequate for their needs, and they are constantly running out of fuel, especially in the winter.

[188] Yvette was challenged in cross-examination about the site modification. The defence suggested that the plaintiffs wanted to remove the underground tanks because they planned to build a new building where the old underground tanks were located. Yvette disagreed and testified that the old underground tanks were removed due to the TSSA orders and that the issue of building a new motel came up later. They entered into a contract to build the motel in July 2020.

[189] Yvette was challenged in cross-examination about the 2016-2017 TSSA orders, which did not order the plaintiffs to remove or decommission the underground tanks or piping. Yvette testified that the TSSA required them to determine what material the pipes were made out of and no one that they contacted would dig to see what type of piping was in the ground. Yvette testified that they were also told that if they disturbed the soil that they would lose their grandfathering status, and everything would have to come out anyway.

[190] Yvette testified that the site modification plan, which was approved by the TSSA, required the tanks to be decommissioned. Once they were decommissioned, the Collins were ordered by the TSSA to remove them.

III. Expert Evidence

The fuel delivery system/underground storage tank system

[191] Three experts testified with respect to the fuel delivery system. The plaintiffs called Fred Stanley, and the defendants called Zenon Fraczkowski and James Mackie.

[192] Fred Stanley is an Engineer with Walters Forensic Engineering Inc. He was qualified as an expert regarding: (a) remedial and forensic engineering for liquid fuels clean up, decontamination and site assessment; (b) site assessment of fuel tank decommissioning and tank removal under *TSSA Act* and *the LFHC* and related regulations; and (c) the interpretation and application of the provisions of the *TSSA Act* and the *LFHC* to site investigations concerning underground fuel tanks

and piping in the Province of Ontario and the sale or compliant operations of underground fuel tanks all in compliance with the TSSA and the *LFHC* requirements in the Province of Ontario.

[193] After a *voir dire*, I ruled that Stanley could testify with respect to the regulation of gas stations by the TSSA, the TSSA standards and policies during the time in question, whether the fuel tank system was in a safe and compliant condition at the time of sale; and what would have been required, at the time of sale, or shortly thereafter, to bring the fuel system into compliance with the TSSA standards and policies.

[194] Zenon Fraczkowski is an Engineer, who provided a joint expert report along with James Mackie, on behalf of Fuels Safety Consultants Inc. There were some unusual aspects of the joint report where it was unclear who had authored what portion of the report. Also, Fraczkowski had failed to stamp the report with his engineer's stamp, which is required by his professional body. Despite these issues, I was satisfied that Fraczkowski was qualified as an expert and could provide evidence in the areas of certification, maintenance and operation of equipment used under the TSSA fuel safety program, the *LFHC* and *Fuel Oil Handling Code* ("*FOHC*"), the regulation, storage and handling of fuel and diesel oil in Ontario, and the internal processes and procedures of the TSSA fuel safety program and the Northern Ontario Compliance Strategy.

[195] James Mackie is a petroleum equipment mechanic. I was satisfied that he could provide expert evidence regarding the *LFHC* and the certification, maintenance and operation of equipment used under the TSSA Fuel Safety Program.

[196] At the end of the day, all three experts agreed with respect to the regulation of, storage and handling of fuel oil in Ontario, the TSSA fuel safety program and the Northern Ontario Compliance Strategy. I have already summarized the points that they agreed on earlier in these reasons.

Evidence of Fred Stanley

[197] Fred Stanley testified that it was his opinion that the tank system and underground storage systems were not in compliance with the *LFHC* because there were outstanding work orders that had not been taken care of at the time of sale. These orders included the precision leak testing, cathodic testing and need for electronic monitors at the sumps. Under the *LFHC*, 2007, precision line testing and cathodic testing were required every two years.

[198] With respect to the underground tanks, Stanley testified that at the time single walled tanks could remain in the ground, provided the site remains grandfathered and complies with TSSA requirements. The TSSA requirements at the time included precision and cathodic testing at regular intervals, the removal of the foot valve and electronic monitoring at the sumps.

[199] Stanley testified that according to the *LFHC*, 2007, if the fuel pipes did not pass the cathodic protection testing, the owner had 180 days to re-establish cathodic protection or else the pipes had to be removed.

[200] Stanley noted that Madigan's direction to the plaintiffs that if there were no records that the lines had previously passed, that they would have to be replaced, was consistent with the *LFHC*, 2017, but not the *LFHC*, 2007.

[201] Stanley noted that Madigan did not offer the Northern Ontario Compliance Strategy as an option to the plaintiffs during his inspections. The Northern Ontario Compliance Strategy provided that a site owner might not have to remove pipes that did not have cathodic protection, provided the site owner obtained a variance which allowed for precision leak testing every six months and that that testing demonstrated no leaks.

[202] With respect to the installation of electronic sump monitoring, this remained outstanding at the time of sale. Stanley testified that a site operator can apply for a variance to give them more time to comply with this order. However, he did not see any evidence in this case that the Collins had ever obtained such a variance.

[203] Stanley testified that an environmentally safe tank system is one that does not leak. Based on the 2010 Terraspec report, elevated lead levels were found in the ground water. While the levels were low, they were higher than provided for under the *Environmental Protection Act* for a sensitive site. The Rock Pine is considered a sensitive site because it is near water. Stanley noted that there were no materials to indicate that a further investigation took place or that the TSSA was advised of Terraspec's findings.

[204] Stanley testified that at the time of purchase, it was theoretically possible to bring the system into compliance with the *LFHC*, but there were practical problems. In this case, the site operator would have to re-establish cathodic protection for the lines within the required time frame. If this could not be accomplished, the lines would have to be replaced.

[205] Stanley was aware that Wagg's was unwilling to do the work on the system due to the risks and liabilities attributed to the system. The TSSA in their literature has long expressed concerns that single wall underground steel tanks will corrode and leak, and that single wall galvanized piping is vulnerable to corrosion where threads are present and cannot be effectively cathodically protected. There are also concerns about fuel tanks being so close to water. Stanley testified that these recognized concerns bring context to the concerns Wagg's expressed about working on the system.

[206] According to Stanley, if no one was willing to work on the lines by 2017, the tanks would have had to be taken out because according to the *LFHC*, 2017, any single wall tank that has been out of service for more than one year must be removed. When the tank is removed, the site operator is also required to complete and submit some follow-up environmental testing to the TSSA.

[207] It was suggested to Stanley in cross-examination that the 2010 Tanknology tests addressed the 2010 Terraspec report that showed soil contamination because the Tanknology tests showed that the tank and lines did not leak. Stanley testified that precision leak testing is a very good indicator regarding leaks. However, you could have a small leak and still pass the precision leak

test. Stanley agreed that the 2010 Terraspec report only said that there was contamination and did not say how the fuel got into the soil.

[208] During cross-examination, Stanley was taken to the Englobe report from 2020, when the tanks were taken out. The 2020 report says the tanks were in very good condition, there were no apparent holes or visual signs of damage. Stanley testified that the Englobe report was referring to a visual inspection. Corrosion holes are small, and you have to brush the tanks off and look at them closely for indications of corrosion. Stanley agreed that there were no indicators from soil samples and other testing in 2020 that there was a leak. Stanley agreed that while there was lead found in the ground water, lead was used in gas a long time ago. Stanley noted that the 2020 ground water contamination, noted in the report, was above the Ministry of the Environment guidelines, and something would have to be done about that.

[209] During cross-examination, Stanley agreed that there are hundreds of petroleum contractors in Ontario, other than Wagg's. He was not aware if the plaintiffs contacted another contractor. According to Stanley, Wagg's is a well-known contractor. He could not say if another contractor would be willing to do the work or not.

Evidence of Zenon Fraczkowski

[210] Zenon Frackzkowski ("Frackzkowksi") testified that he had very small issues with Stanley's report, but there was nothing that caused him concern.

[211] Some of Fraczowski's criticisms had to do with the improper naming in the APS of the TSSA Act 2002, which should have said TSSA Act, 2000 and reference to a "fuel oil distributor" when the tanks and lines in question distributed gas.

[212] Frackzkowski testified that it was possible that work could have been done to the lines. However, in his opinion the Northern Compliance Strategy provided that you didn't have to as long as you monitored everything frequently.

[213] Frackzkowski testified that the *LFHC, 2007* required replacement of the foot valve and seeney valve. In his opinion this could have been done without having to remove the fuel tanks.

[214] Frackzkowski testified that the TSSA orders only required the owner/operator to confirm that the foot valves had been replaced. The TSSA order was not evidence that it had not been done. He testified that the removal of the foot valves arose under the *LFHC, 2007* and was extended until 2015. After that, no further extensions were to be granted. As such, these should have been removed before the property changed hands.

Evidence of James Mackie

[215] James Mackie ("Mackie") testified that the results of the 2016 Tanknology testing did not require the site owner to remove the entire underground storage tank system. The Fuel Safety Advisory provides that an underground single walled tank does not have to be removed unless it

is leaking. The *LFHC* required site operators to have underground single walled tanks tested every two years because of the risks they posed.

[216] Mackie testified that he saw no practical barrier to bringing the fuel tank system into compliance with the codes and regulations. He noted that at the time of Inspector Golby's inspection, there were four outstanding issues:

1. The fuel tank system had to have a leak test;
2. The fuel tank system had to have a corrosion survey (cathodic testing);
3. The owners had to install electronic monitoring on all sumps; and
4. The owners had to ensure the fill pipe was protected.

[217] In his opinion, the first two orders were satisfied by the 2016 Tanknology testing.

[218] With respect to the piping not having cathodic protection, the plaintiffs could have attached anodes to the piping or pressure tested the pipes every six months in accordance with the Northern Compliance strategy. In order to attach the anodes, you would dig a small hole, put the anode on the piping and then re-wrap it.

[219] With respect to the need for electronic sensors on a tank sump, this was required because the sensor will send out an alarm and then automatically lock out the dispenser if it detects a leak. This prevents, loss, leaks or overfilling the sumps. Under the Northern Ontario Compliance Strategy, a gas station owner could apply for a variance which would give them additional time to get this installed.

[220] Mackie noted that Madigan appeared to not offer the Northern Ontario Compliance Strategy to the plaintiffs.

[221] Mackie did not agree with the direction provided by Madigan to the plaintiffs that if there were no records that the pipes passed testing that they would have to be replaced. Mackie testified that Madigan would be correct for the rest of Ontario, but not Northern Ontario which was subject to the Northern Ontario Compliance Strategy.

[222] Mackie testified that in order to find out what type of material piping is made from a petroleum mechanic would have to dig down and expose the pipe. You can get an estimation of what the piping is made out of by looking into the sump to see what the piping looks like.

[223] Mackie testified that if someone had applied for and been granted a variance, a record of this would exist with the TSSA that would be publicly available. Information regarding the TSSA orders form part of the public record and any member of the public can access these records upon application.

[224] Mackie confirmed that in 2017, if an underground tank had not been used for one year, it had to be removed from the ground. This was because of concerns about single walled tanks and corrosion.

Expert evidence related to Ballantyne-Gaska's legal representation of the plaintiffs

Evidence of Robert Aaron

[225] The plaintiffs called Robert Aaron ("Aaron") as an expert witness with respect to their claim of negligence as against Ballantyne-Gaska. Aaron is a lawyer, who was called to the Bar in Ontario in 1972 and has practiced extensively in the area of real estate law. The defendants took no issue with respect to Aaron's qualifications, and he was qualified to provide expert evidence with respect to residential and commercial real estate law in Ontario and on the standard of care expected of a real estate lawyer in the commercial real estate transaction with respect to the Rules of Professional Conduct and any related statutory duties in the Province of Ontario.

[226] Aaron testified that the obligations of a solicitor representing a client in a real estate transaction are:

1. To be skillful and careful;
2. To advise the client on all matters relevant to the retainer so far as may be reasonably necessary;
3. To protect the interests of the client;
4. To carry out the instructions by all proper means;
5. To consult with the client on all questions of doubt which do not fall within the express or implied discretion left to the solicitor; and
6. To keep the client informed as may be reasonably necessary.

[227] Aaron testified that a central feature of the lawyer's duty to their clients is the duty to advise or warn them of the risks and benefits of pursuing a given course of conduct. This duty requires a solicitor to ensure that the client is fully informed of the nature of the transaction including knowledge of the risks involved in a transaction or a proposed course of action.

[228] Aaron testified that a lawyer has a responsibility to competently explain the risks to a client and allow them to make a decision. If a client's decisions/instructions are based on inadequate advice by the lawyer, or the lawyer fails to warn the client of the risk involved in a course of action, the lawyer may be in breach of their standard of care. A lawyer may be in breach of their duty of care when a course of action has foreseeable risks that could have been avoided by a different procedure. Aaron testified that when certain red flags arise in a transaction, or when a course of action imposes certain risks on the client, it is important to draw the client's attention to these issues in a way that will impress upon the client their seriousness and allow the client an opportunity to reflect on their importance.

[229] It was Aaron's opinion that in his case a competent lawyer would have recognized that a property with a fuel tank would be highly regulated and need to meet legal standards and regulations. While a lawyer would not be expected to be completely knowledgeable about the *LFHC* or the *TSSA Act*, they do have a duty to either obtain sufficient knowledge of the regulations related to underground fuel tanks or to recognize that there were red flags surrounding this type of transaction and refer their clients to a competent authority. A lawyer should warn their clients that they need to protect themselves with respect to the rigid requirements for gas tanks and the handling of liquid fuels.

[230] It was Aaron's opinion that Ballantyne-Gaska did not meet the standard of care expected of a lawyer with respect to the purchase of the Rock Pine. Specifically, Ballantyne-Gaska failed to take the following steps that one would expect from a reasonably prudent real estate lawyer in the circumstances of this case:

1. Ballantyne-Gaska was asked by the plaintiffs to assist them with drafting the APS in a way that would protect them from liabilities that could be incurred from a defective fuel tank or handling and dispensing equipment. In order to do this, Ballantyne-Gaska would have been required to have or attain sufficient knowledge of the applicable or relevant law relating to the possession and operation of an underground fuel tank. If she did not have this knowledge, she should have recognized the red flags in such a transaction and should have referred her clients to a competent authority equipped with the required knowledge in this area of law in order to protect her client's interests. In this case, Ballantyne-Gaska failed to take these steps;

2. The APS included a conditional provision that allowed the purchasers to conduct their due diligence for issues such as obtaining a licence to sell fuel from the TSSA, obtaining a liquor licence, look into any OFSC trail agreements, and "verifying information provided by the Seller and anything else necessary for the operation of the property as a commercial/residential concern.". Ballantyne-Gaska did not impress upon the plaintiffs the importance of this condition and allowed them to waive the condition without them having taken steps to verify the representations of the seller;

3. The conditional provision should have been more inclusive and protective for the plaintiffs. At a minimum, the plaintiffs should have been alerted to the need to identify all relevant legal areas of concern, especially with respect to fuel handling. Terms should have been included in the APS that permitted the plaintiffs to satisfy themselves in their absolute discretion as to compliance with all the relevant technical standards, naming them specifically, including the tanks, pumps, and other handling equipment, as well as the risk of soil contamination;

4. Ballantyne-Gaska should have assisted her clients after the contract was signed, but during the conditional period, on their options with respect to satisfying themselves, or in the alternative, to sending her clients elsewhere for appropriate advice;

5. Ballantyne-Gaska should have included in the APS provisions that would cover the possibility of any outstanding work orders or compliance notices against the equipment, or at the very least, conducted the necessary searches during the conditional period as drafted;

6. Ballantyne-Gaska should have advised her clients, so that they could protect themselves, in the event of non-compliance as set out in the APS, or she should have advised her clients that they should have terminated the contract or allowed the condition to expire in the event they were unsatisfied as to compliance with the appropriate fuel handling procedures and equipment;

7. Given that Ballantyne-Gaska knew her clients were not sophisticated in the area of operating gas stations and given the red flags that arose during the transaction, she had a duty to provide a very strong warning to the plaintiffs not to proceed with this transaction which involved old fuel storage tanks, without getting the necessary legal clearances. She was obligated to advise her clients of the possibility that the tanks, even if operated properly, could be leaking, and the very serious environmental consequences that they might be faced with having to remediate at an expense that could exceed the value of the land and business. Ballantyne-Gaska should have, at the very least, insisted on Phase I and Phase II environmental reports;

8. Despite not informing herself on the relevant laws affecting this transaction, Ballantyne-Gaska drafted the TSSA clause which included a hold back of only $500. This grossly undervalued the possible impact of an adverse test result or any regulatory compliance orders that the clients would have left with;

9. Ballantyne-Gaska should have included a clause in the APS regarding any representation, warranty or condition as to the state of the Tanks. While power of sale and “as is” conditions may be appropriate where the seller has no knowledge of the property, in this case the defendants had operated the gas station and had first-hand knowledge as to its condition. They should have been asked to provide these;

10. Ballantyne-Gaska allowed the inclusion of an “as is” clause when she knew her clients were relying on the representations of the defendants. Ballantyne-Gaska had a duty to draft and include in the APS, clauses that allocated responsibility to the defendants for the representations they had made to the plaintiffs;

11. Ballantyne-Gaska had a duty to advise the plaintiffs of the limitation of Title Insurance. She advised the plaintiffs that she did not have to conduct any searches for work orders because they would be covered by Title Insurance. In this case, the Title Insurance did not cover any facts, rights, interests or claims which could be ascertained by an inspection of the land or by making inquiry of the persons in possession thereof. In this case, any work orders would have been in the possession of the vendor or the TSSA and would have been available to the plaintiffs; and

12. When Ms. Ballantyne-Gaska requisitioned the defendants prior to closing with respect to whether there were any outstanding work orders and whether the lands/premises/structures complied with by-laws, standards and regulations, she received a response from their lawyer advising that the plaintiffs were to satisfy themselves. This should have prompted Ballantyne-Gaska to make further inquiries about any outstanding work orders and ensure the property was legally compliant. She did not do this. Further, she did not warn the plaintiffs about the serious implications and risks that could flow from not knowing if there were any outstanding work orders. Ballantyne-Gaska could have also requested evidence of past compliance with the *TSSA Act*.

[231] Aaron testified that it was his opinion that Ballantyne-Gaska's conduct fell below the standard of care of a reasonably competent lawyer under the circumstances by:

1. Not having or ascertaining a reasonable knowledge of the relevant laws affecting the transaction and services she had agreed to provide, or at the very least, not recognizing the full nature, extent, significance and risks of the gasoline storage and handling issues as a red flag, and not either informing herself as to the advice to be given to the plaintiffs, or referring the plaintiffs elsewhere to obtain competent advice to protect themselves;

2. Not advising the plaintiffs of the risks and benefits of pursuing or not pursing a given course of conduct;

3. Not protecting the interests of the plaintiffs and minimizing their risks;

4. Not consulting with the plaintiffs on all questions of doubt, concern or risk;

5. Not advising her clients on an adequate course of action to protect their interests;

6. Failing to communicate the significant legal consequences and risk to which her clients were exposing themselves;

7. Failing to communicate that title insurance is not a complete replacement for all the benefits of performing certain off title searches; and

8. Failing to draft the APS in a way that reflected the agreement the plaintiffs believed they were getting into.

[232] No other expert evidence was tendered at trial on this issue.

IV. Positions of the Parties

The position of the plaintiffs

[233] The plaintiffs submit that the defendants, specifically John, fraudulently and/or negligently misrepresented the condition of the fuel tank system at the Rock Pine when they were discussing the purchase of the property.

[234] The plaintiffs allege that but for the misrepresentations, they would not have purchased the Rock Pine in the manner they did.

[235] The plaintiffs further allege that the defendants breached the terms of the APS by failing to provide a report which demonstrated that the fuel tank system was in a safe operating system and in regulatory compliance with the TSSA, the *TSSA Act*, 2000.and the *LFHC.*

[236] The plaintiffs allege that as a result of this breach of contract, they are entitled to what they bargained for, that is, a safe, regulatorily compliant gas station.

[237] The plaintiffs submit that the misrepresentations and the breach of the terms of the APS have caused and will continue to cause them significant damages in attempting to bring the fuel tank system within the requirements of the *TSSA Act* and its associated regulations.

[238] The plaintiffs submit that their lawyer, Ballantyne-Gaska was negligent in her representation of them, and if the court finds that this negligence caused damages to them, that the court will have to apportion responsibility for those damages between Ballantyne-Gaska and the remaining defendants.

[239] In their closing submissions, the plaintiffs submitted that while Ballantyne-Gaska was negligent in her representation, at the end of the day most, if not all, of the damages suffered are the direct result of the defendants' fraudulent misrepresentations and breach of contract rather than her negligence alone.

The position of the defendants

[240] The defendants deny that they misrepresented the condition of the fuel tank system and deny that they breached the terms of the APS. They further deny that their conduct resulted in any damage to the plaintiffs.

[241] The defendants submit that the purchase of land is presumptively "as is" and the purchaser of land assumes the risk of dissatisfaction with that property unless the purchaser seeks protection

either by express warranty or by independent examination of the premises. In this case, the plaintiffs did not do either. As such, the principle of *caveat emptor* prevails.

[242] With respect to the claim of fraudulent and/or negligent representation, the defendants submit that (a) there can be no duty of care and no liability in the face of non-contractual disclaimers; (b) there can be no duty of care and no liability in the face of contractual disclaimers; (c) the alleged misrepresentations cannot support an actionable claim; (d) there is no genuine issue as to reliance; and (e) there is no genuine issue as to damage or causation.

[243] With respect to the claim of breach of contract, the defendants submit that they have complied with the TSSA clause. They provided a report that demonstrated that the fuel delivery system was safe, and compliant with the TSSA requirements given the existence of a Northern Ontario Compliance Strategy. Further, the TSSA clause only required them to produce a "report" from a qualified oil distributor and did not require them to remediate any issues that arose from the report. As such, they did not breach the terms of the contract.

[244] The defendants submit the terms of the contract set out that the sale of the property was "as is" without any warranties as to its condition. Further, in accordance with the terms of the APS, the plaintiffs were provided the opportunity to conduct their own due diligence and failed to do so. Once they waived the conditions in the APS, the defendants were no longer liable for any deficiencies with respect to the tank system.

[245] The defendants submit that if fraudulent and/or negligent misrepresentation is made out, the plaintiffs would only be entitled to be placed back in the same position they would have been but for the misrepresentation, not in the position they would be had the representations been true. The defendants submit that had the representations been true, the plaintiffs would have purchased the property on an "as is" basis.

[246] The defendants submit that the plaintiffs had intended to move the underground storage tanks all along in order to build a new motel. In doing this, they would have incurred the same expenses claimed as damages in this case.

[247] The defendants further submit that if the plaintiffs suffered any damages from the purchase of the Rock Pine, it was due to the negligence of their real estate lawyer, Laurie Ballantyne-Gaska ("Ballantyne-Gaska") and/or that the plaintiffs contributed to any damages they suffered.

[248] The defendants submit that if they are found liable for fraudulent misrepresentation and/or breach of contract, the damages claimed by the plaintiffs are excessive. The plaintiffs did not have to undertake the work to remove the underground storage tanks and incur the associated costs. The plaintiffs have a fuel delivery system in place now that is better than what they purchased and should not benefit from this. Finally, the plaintiffs failed to mitigate their losses by not taking advantage of the Northern Ontario Compliance Strategy, which would have been a much less expensive option.

V. Analysis

A. Misrepresentations

[249] There are three kinds of misrepresentations or erroneous statements:

1. Fraudulent statements;
2. Negligent statements; and
3. Inadvertent or innocent statements.

Only the first two types of statements attract liability. Neither torts nor contracts provide a cause of action for damages for innocent misrepresentations: *Usenik v. Sidorowicz*, 2008 CanLII 11373 (ON SC); *Costa v. Wimalasekera*, [2012] O.J. No. 6365 (Ont. S.C.J.), at para. 7.

Fraudulent misrepresentations

[250] A fraudulent statement is a statement of fact which is false, made by a person knowing it to be false or made so recklessly that the person does not care whether he/she is speaking the truth or not: *Peek v. Derry* (1889) 14, App. Cas. 337.

[251] The Supreme Court of Canada in *Bruno Appliance and Furniture Inc. v. Hryniak*, 2014 SCC 8, summarized the elements of civil fraud, at para. 21, as follows:

1. [There must be] a false representation made by the defendant;
2. [There must be] some level of knowledge of the falsehood of the representation on the part of the defendant (whether through knowledge or recklessness);
3. The false representation caused the plaintiff to act; and
4. The plaintiff's actions resulted in a loss.

[252] Silence will constitute a falsity (a) where known material qualifications of an absolute statement are omitted; and (b) where the circumstances raise a duty on the representor to state certain matters, if they exist, and where, therefore, the representee is entitled as against the representor to infer their non-existence from the representor' silence as to them: *Alevizos v. Nirula*, 2003 MBCA 148, at para. 20, *Halsbury's Laws of England*, 4th ed. reissue (London: Butterworths, 1998).

[253] The elements of civil fraud must be proven on the balance of probabilities: *F.H. v. McDougall*, 2009 SCC 58, at para. 40.

[254] It is not a defence to a claim in deceit that the victim of the fraud could have discovered that the statement in question was untrue. In *Performance Industries Ltd. v. Sylvan Lake Golf & Tennis Club. Ltd.*, 2002 SCC 19, at para. 69, Justice Binnie stated:

> The appellant's concept of a due diligence defence in a fraud case was rejected over 125 years ago by Lord Chelmsford L.C. who said "when once it is established that there has been any fraudulent misrepresentation or wilful concealment by which a person has been induced to enter into a contract, it is no answer to his claim to be relieved from it to tell him that he might have known the truth by proper inquiry. He has a right to retort upon his objector "You, at least, who have stated what is untrue, or have concealed the truth, for the purpose of drawing me into a contract, cannot accuse me of want of caution because I relied implicitly upon your fairness and honesty'" [citations omitted].

[255] It is also not a defence to the allegation of fraudulent misrepresentation that an agreement of purchase and sale contained an "as is" clause: *Davis v. Moranis and Smith,* [1949] O.J. No. 188 (Ont. C.A.), at para. 5.

Negligent misrepresentation

[256] A negligent misrepresentation is a representation made carelessly, not knowingly, that is untrue, inaccurate or misleading.

[257] A person may be "misled" by a failure to divulge just as much as by a statement that is inaccurate or untrue. A duty of care may be breached not only by positive misstatements but also by omissions, for they may be just as misleading: *Costa v. Wimalasekera*, at para. 7.

[258] The Ontario Court of Appeal in *Krawchuk v. Scherbak*, 2011 ONCA 352, stated that in order to succeed in an action based on negligent misrepresentation, the plaintiff must prove that:

1. The defendant owes them a duty of care based on a special relationship;

2. The defendant made a statement to them that was untrue, inaccurate or misleading;

3. The plaintiff reasonably relied on the statement; and

4. The plaintiff suffered damages as a result.

[259] The fact that the parties subsequently enter into a contract, following the representations, may play an important role in determining whether or not and to what extent a claim for negligent misrepresentations should succeed. The terms of a contract may have the effect of negating the action in tort and confining the plaintiff to remedies in accordance with the law of contract: *Queen v. Cognos Inc.*, [1993] S.C.J. No. 3, at para. 39.

[260] A "duty of care" in the context of a real estate transaction depends very much on the facts of each case. The court is required to assess the surrounding circumstances including the rights and obligations established by the contract.

[261] In *Krawchuk v. Scherbak*, the fact that a vendor made representations in a Seller Property Information Sheet ("SPIS"), which was then incorporated into the APS, created a duty of care to the purchaser. In that case, the trial judge found that the representations in the SPIS were intended by the purchaser to be relied on by the buyers. In that case, the trial judge found a special relationship that gave rise to a duty of care.

[262] In *Krawchuk v. Scherbak*, at para. 77, the court noted that while a seller does not have to make representations as to the condition of the property being sold, once they break their silence, they must do so honestly and accurately, and the purchaser is entitled to rely on the representations made. Once a vendor breaks their silence, the doctrine of *caveat emptor* falls away as a defence mechanism, and the vendor must speak truthfully and completely about the matters raised in unambiguous questions by the purchaser.

[263] An "entire agreement" clause in an APS, may, in some circumstances provide a bar to a claim of negligent misrepresentation. For example, where an entire agreement clause is included in an APS, it may apply to representations, warranties, collateral agreements and conditions made prior to and during the negotiations leading up to the signing of the APS. However, an entire agreement clause is not a bar to a claim of fraudulent misrepresentation: *Soboczynski v. Beauchamp*, 2015 ONCA 282, at para. 41; *10443204 Canada Inc. v. 2701835 Ontario Inc*., 2022 ONCA 745, at para. 25.

[264] In *Soboczynski v. Beauchamp*, at para. 44, the Ontario Court of Appeal noted that an "entire agreement" clause is intended to lift and distill the parties' bargain from the muck of negotiations. In limiting the expression of the parties' intentions to the written form, the clause attempts to provide certainty and clarity.

[265] An entire agreement clause must not be read in isolation, rather it should be considered within the context and in harmony with the rest of the contract in light of its purposes and commercial context: *Tercon Contractors Ltd. v. British Columbia (Minister of Transportation & Highways),* 2010 SCC 4, at para. 64.

[266] In *D.L.G. & Associates Ltd. v. Minto Properties Inc.*, 2015 ONCA 705, at para. 37, the Court of Appeal described the following factors that courts have considered when assessing the impact of an entire agreement clause on a pre-contractual misrepresentation:

- the language used in the entire agreement clause;
- the relationship of the parties when the contract was consummated;
- the sophistication of the parties;
- the nature of the negotiations;
- the language of other terms of the contract and, specifically, the extent to which allowing or precluding a negligent misrepresentation would be inconsistent with the other terms of the agreement.

Did John Collins fraudulently misrepresent the state of the fuel tank system?

What were the plaintiffs told during the sales process?

[267] In this case, the evidence of the plaintiffs and the evidence of the defendant, John Collins, differed with respect to what was discussed during the sales process. As such, I must assess the credibility and reliability of their evidence.

[268] As noted by Watt, J.A. in *Regina v. C.(H.)*, [2009] O.J. No.214 (C.A.), credibility focuses on a witness's veracity, while reliability has to do with the witness's accuracy. Accuracy involves the ability to observe, recall and recount events that are in issue. Any witness whose evidence on an issue is not credible cannot give reliable evidence on the same point. Credibility, on the other hand, is not a proxy for reliability. A credible witness may give unreliable evidence.

[269] I found the evidence of Yvette Kramer and Garry Andrade to be credible and reliable.

[270] Yvette's evidence was clear and detailed regarding the conversations she had with John Collins. She was unshaken on cross-examination. There appeared to be no inconsistencies with respect to her account of these conversations internally within her evidence at trial and with respect to her examination for discovery.

[271] Garry's evidence was not as detailed as Kramer's, but he recalled the essential aspects of their conversations with Collins. He was not shaken on cross-examination and there appeared to be no inconsistencies in his account either at trial or during examination for discovery.

[272] The evidence of both Yvette and Garry was consistent and made sense when examined in the context of other independent evidence called at trial.

[273] Both Yvette and Garry testified that they discussed the sale of gas at the Rock Pine during their first visit to the property in December 2015. John told them the Rock Pine made good money selling fuel to snowmobilers in the winter, campers in the summer and hunters in the fall. They both testified that they specifically asked John about the condition of the fuel system.

[274] Yvette testified that she asked John what kind of condition the fuel system was in and whether there was something they would need to do in order to operate the fuel system. According to Yvette, John told them the system was "really good" or "all good" and it "just needed a test that needed to be done bi-annually" and that he would get the test done for them during the spring when the ground had thawed enough for the testing to be done. He told them that he would help them with transferring the licence to sell fuel. According to Yvette, John told them "I've sold this place three times before, I will take care of you."

[275] Garry testified that they asked John what they needed to know about the fuel system. Andrade testified that John showed them the licence in his office and said the "system doesn't need anything". John told them they would just need to transfer the licence. John told them that he had sold the property three times before, he knew what to do, and he would take care of everything.

[276] I find the evidence of Yvette and Garry to be reliable and credible with respect to the representations made to them. Given that the fuel system was a source of a good income for the business, it makes sense that they would make inquiries about its condition and what they would need to know in order to operate it.

[277] Further, the fact that they spoke to their lawyer about the fuel system and the need to address it in the APS supports their evidence on this point. I find that it makes no sense that the plaintiffs would insist that the APS include a specific condition about the condition of the fuel tank system and a condition that the defendants produce a report in the spring, having never spoken to John about the fuel system, its condition, and the need for testing in the spring.

[278] I found the evidence of John Collins on the issue of the representations he made during his meetings with the plaintiffs to be unreliable and not credible. It appeared to me that John was attempting to paint a picture at trial that depicted a scenario where the plaintiffs asked no questions about the fuel delivery system and, as such, he made no representations as to its condition.

[279] John testified in-chief that during his initial meeting with the plaintiffs, he had a sales file that contained the September 5, 2014 TSSA report and that he showed this report to the plaintiffs who asked no questions about it. This report, which was entered as an exhibit at trial, sets out the orders made with respect to the Rock Pine at that time.

[280] John's evidence at trial on this point was different than his evidence during examination for discovery. During examination for discovery, John initially stated that he told the plaintiffs about TSSA inspections, but not any orders. He later changed this statement during examination for discovery and said he believed he showed Yvette and Garry the TSSA work order but was not positive on that.

[281] It does not make sense that during examination for discovery, John could not be sure that he showed the plaintiffs the TSSA report, but by the time of trial he was now able to testify that he in fact showed them this report. No evidence was led at trial to explain why his memory on this point improved with time. I find that even at the discovery, the improvement in John's memory was self-serving and not credible.

[282] Further, I find it unlikely that Yvette and Garry would have been shown a TSSA report that included several outstanding work orders and would not have asked any questions about it. I accept their evidence that they wanted to know how the condition of the fuel tank system, how to run it, and whether there was anything they needed to do. If they were shown the TSSA report and the outstanding orders, this would have raised immediate red flags about issues surrounding not only the need for testing, but the need to install electronic monitoring at the pumps. The September 2014 report stated, "failure to comply with this order may result in the fill pipes for the storage tanks being sealed." I find that had the plaintiffs been shown this TSSA report, they would have surely raised this last, very concerning, issue with John and their lawyer.

[283] John testified at trial that the plaintiffs did not ask any questions about the operation, age or condition of the fuel tanks. This was in direct contradiction to his evidence during examination for discovery where he stated that he could not specifically recall what the plaintiffs asked, but he recalled that they asked about the sales, the condition of the pumps, etc., and that he told the plaintiffs that the tanks were about twenty or thirty years old. I find this to be a significant inconsistency in John's evidence.

[284] John testified in chief that the plaintiffs did not ask about the testing, how often testing needed to be done or who would conduct the testing that was required. During his examination for discovery, John testified that he told the plaintiffs that they were ordering Tanknology to do the precision tests and the cathodic protection tests and the plaintiffs didn't know what that was.

[285] In his examination for discovery, John agreed that he told the plaintiffs at the end of the sale that "all that needed to be done was a test and the test could not be done until the spring." It would be odd that he would tell them this, when, as he testified at trial, the plaintiffs asked no questions about the operation, age or condition of the fuel tanks.

[286] I accept the evidence of Yvette and Garry regarding the discussions they had with John about the fuel delivery system. Where John's evidence differs from that of the plaintiffs with respect to the conversations leading up to the sale of the Rock Pine, I reject his evidence. Overall, I find his evidence was not credible and was unreliable with respect to these events.

[287] Having made these findings of credibility and reliability, I am satisfied, and find as a fact, that John made the following representations to the plaintiffs as part of the sales process:

1. That the Rock Pine generated a good income through the sale of fuel (gas) throughout the year;

2. That the fuel tank system was "really good" or "all good;"

3. That the system "didn't need anything" other than two tests that needed to be completed in the spring, when the ground thawed; and

4. That all that needed to be done was to transfer the fuel license and John would help them with this.

[288] I further find as a fact that John did not tell the plaintiffs as part of the sales process that:

1. There were outstanding TSSA orders related to the fuel tank system;

2. He had been told by TSSA inspectors that failure to comply with the TSSA orders could result in the fuel tanks being sealed;

3. The fuel piping had not passed cathodic testing in the past; and

4. He had been told by Inspector Golby, in December 2015, not to sell gasoline over the winter.

Was what they were told true?

[289] I find that the evidence clearly demonstrates that not all of John's representations were true. The fuel tank system at the Rock Pine was not "really good" or "all good" it had several outstanding TSSA orders that had not been complied with. The fuel tank system needed more than just two tests to be conducted in the spring. It needed cathodic protection for the fuel pipes, foot valves to be removed from the tanks, and electronic monitors installed under the pumps.

[290] At the time John spoke to the plaintiffs, he had just been told days earlier by a TSSA inspector, that if the TSSA orders were not complied with the fill pipes would be sealed and he would not be able to sell gas. While I appreciate that John had not been "ordered" by the TSSA to stop selling gas over the winter, one cannot ignore the fact that he had been "directed" by a TSSA inspector on December 13, 2015, to not sell gasoline over the winter. I am satisfied that John's failure to tell the plaintiffs this was fraudulent omission.

[291] I am satisfied, on a balance of probabilities, that what John represented to the plaintiffs was untrue.

Did the defendants know it was not true?

[292] On December 18, 2015, the day John first met with the plaintiffs, John knew that:

1. The fuel tank lines had not passed cathodic testing during the time John and Rose owned and operated the Rock Pine;

2. John had not had the tanks and lines tested regularly (both precision line and cathodic testing), as required by the *LFHC*;

3. The underground tanks might not be cathodically protected as per information received from MacFarland;

4. There was some soil contamination discovered in 2010 and no steps had been taken to investigate this further;

5. John had been repeatedly ordered to install electronic monitors on the sumps to detect any possible leaks and he had not taken steps to complete this;

6. A TSSA inspector had just told him that he would not be able to use the tank system over the winter without complying with the orders set out in the December 9, 2015 inspection report; and

7. The Rock Pine fuel tank system was at risk of being shut down by the TSSA.

[293] At trial, John did not deny knowledge of the issues with the fuel tank system. He had some explanations:

1. He testified that he was not sure, but "someone" from the TSSA verbally told him he could sell gas over the winter;

2. He testified that when they purchased the property someone told him that the lines did not have to be cathodically protected;

3. He testified that he "thought" he had completed and submitted variance applications to the TSSA to give him more time to comply with the TSSA orders, but guessed he in fact had not done this; and

4. He thought he was on the SIR program, which gave him more time to comply with the TSSA orders for testing.

[294] I do not accept these explanations. In fact, I find them to be untrue.

[295] To begin, Inspector Golby testified that he did not subsequently tell John that he could sell gas over the winter. There was no evidence at trial that another TSSA inspector attended the property shortly after Golby's December inspection or was otherwise involved with the property. A review of the TSSA records indicates that the next inspection was not until June 2016, when Madigan dropped by unexpectedly. It makes no sense that some other person, who had not inspected the site, would override Golby's direction. I reject John's evidence that he was later told by someone with the TSSA he could sell gas over the winter.

[296] I found John's evidence regarding TSSA variations to be evasive and contradictory. Inspector Golby testified that he spoke to John about obtaining variances from the TSSA in December 2015 for the electronic monitoring and cathodic protection. I find that this must have

been because no variances had been previously granted. Why else would Golby provide John with direction on how to submit them?

[297] Further, given that John was in the process of selling the property to the plaintiffs, one would expect that he would have told the plaintiffs about the variances, or completed the variances, as part of the sale process to ensure the fuel delivery system was TSSA compliant. John agreed at trial that no TSSA variation was ever granted to him. On all of the evidence, I reject John's evidence that he thought he had applied for variances. I am satisfied that John never applied for a TSSA variance for these two issues, despite Golby's urging.

[298] I do not accept John's evidence that he had been told by someone that the pipes did not need to be cathodically protected. This is in direct contradiction to the provisions in the *LFHC*. The pipes were tested by the defendants in 2004, they were found to be unprotected. I find it incredible that anyone in authority, or with knowledge of the *LFHC*, would suggest that the underground piping did not have to comply with the *LFHC*.

[299] More importantly, John had been ordered multiple times by TSSA inspectors to have the tanks and pipes specifically tested for cathodic protection. For years, the defendants put this testing off. In my view, this is because they knew the pipes, and possible the tanks would fail and that this would mean the defendants would have to incur the cost of fixing the fuel tank system. In 2011, MacFarland had quoted $8,788.50 plus HST to attach an anode bed to the tanks and anodes to the piping. This work was never done. I find, as a fact, that John knew that the tanks and pipes needed to be cathodically protected, and that the cost of repairing them would be high.

[300] John's evidence regarding his participation in the SIR program was problematic. John testified that the SIR program was put out by Tanknology so that instead of testing the fuel system every two years, you could do it every five years. John testified that he thought it was set up in 2010, before he sold the property. He testified that he did not know if the previous owners kept up with the program or not. His evidence was silent on what, if any steps, he took to ensure the SIR program was in place when he and his wife resumed possession and operation of the Rock Pine in January 2014.

[301] John agreed that he reached out to Tanknology and Tank Tek sometime around early 2016 about setting up the SIR program and that their set up fees were similar.

[302] A letter addressed to the Rock Pine, dated January 15, 2016, from Tank Tek sets out the SIR program and describes a process where the owner measures the product level each day using a gauge stick and keeps regular records of all withdrawals and deliveries to the fuel tank system (tank and associated product lines). This data is then sent to the company who analyzes the data to determine if the system might be leaking. In the letter, Tank Tek states that the initial precision leak testing would cost $600 per storage tank and $125 per product line. The SIR program would involve a $300 deposit for a "set-up fee," as well as first and last month of the SIR fees which were $27 per underground storage tank per month.

[303] It makes no sense that if the Rock Pine was enrolled and participating in the SIR program in 2014 and 2015, that John would reach out in 2016 for quotes from two companies with respect to setting the program up.

[304] John agreed at trial that he told TSSA Inspector Leblond in January 2015 that he was on the SIR program and therefore the precision leak test was not due. John further agreed that Leblond asked him for documentation establishing that the Rock Pine was the SIR program. John was challenged at trial about this conversation with Inspector Leblond and it was suggested that what he told Leblond was false. John disagreed with this suggestion and testified that at the time he spoke to Inspector Leblond he thought he was on the SIR program with Tanknology.

[305] I do not accept John's evidence on this point. First, given the SIR program involved "daily dips" and monthly billing, one would expect that John would know if the Rock Pine was enrolled in this program in 2014/2015 because he would have been the one submitting the information and paying the monthly bills. Second, John agreed at trial that there was no evidence that the Rock Pine had been enrolled in the SIR program, such as invoices from Tanknology. Third, as pointed out above, it makes no sense that John would be reaching out in 2016 to inquire about the cost of setting up the program if it was already in place.

[306] I find as a fact that John knew the Rock Pine was not enrolled in the SIR program and what he told TSSA inspector Leblond in 2015 was false. In my view, John's comments to Inspector Leblond in early 2015 were simply another example of John's attempt to put off compliance with the TSSA's orders or addressing issues with the fuel delivery system until he could find a buyer for the property. John agreed at trial that he and his wife did not have the money to put into the Rock Pine, and that they wanted to sell it.

[307] I find it telling that shortly after Inspector Golby inspected the Rock Pine on December 9, 2015, John immediately reached out to MacFarland that same day stating: "gord, just got a call from tssa?, have you heard from jean marc? They are saying if we don't have inspection done will close us down?". MacFarland had been the person John was dealing with regarding the issue of cathodic protection.

[308] MacFarland wrote back: "I heard a story coming out of Sault Ste. Marie recently that TSSA is not allowed to shut down stations anymore and that owners are being given extra time, especially in the winter months, to comply with orders issued by the TSSA. You may want to check with Moore Petroleum over this as I believe it was them who passed this info along to me."

[309] John met with Yvette and Garry only nine days after Inspector Golby's inspection and nine days after John had reached out to MacFarland expressing his concern that the TSSA was going to shut the Rock Pine down. Despite his obvious concerns nine days earlier, John did not tell the plaintiffs that the TSSA had said they were going to close the Rock Pine down if he did not have an inspection done on the fuel system. Instead, John told the plaintiffs that the fuel delivery system was "all good" and just needed a few tests in the spring. This was false, and John knew it was false.

[310] It was suggested at trial that the fact that the Northern Ontario Compliance Strategy was in place, made what John said, “technically true.”

[311] The existence of the Northern Ontario Compliance Strategy did not make what John said true. It did not make the fuel tank system “all good” or “really good.” It did not make John’s statement, that all that needed to be done were two tests in the spring, true. There was no evidence that John had ever applied for or been granted variances under the Northern Ontario Compliance Strategy with respect to the *LFHC* requirement for cathodic protection for the fuel lines and the requirement for electronic monitoring at the sumps. I find that he had not.

[312] At the time John spoke to the plaintiffs he knew that he had not had the lines tested for cathodic protection every two years; that the prior cathodic testing in 2004 had failed; that testing in 2010 demonstrated problems with cathodic protection for the tanks; and that he had not installed electronic monitors at the sumps, despite being repeatedly ordered to do so by TSSA inspectors.

[313] I am satisfied, on a balance of probabilities, that John knew that what he represented to the plaintiffs about the fuel tank system, in the time leading up to the sale of the Rock Pine, was not true.

Did John intend the plaintiffs to act on his representations?

[314] Having considered the evidence in its totality, I am satisfied that John intended that the plaintiffs act on his representations that there was nothing wrong with the fuel delivery system, other than the need to have two tests completed.

[315] John knew that Yvette and Garry were inexperienced in running a gas station. In his examination for discovery, he said that they didn’t know what he was talking about when he told them about the testing that had to be done.

[316] John testified that when he took possession of the Rock Pine in early 2014, they cleaned the property up and got it ready to be sold while they operated it. When they received the TSSA orders in January 2014, they were aware that there was work that had to be done to the system, including the need for testing and the need to install electronic monitoring at the sumps to detect leakage. At the time he and his wife were trying to sell the Rock Pine and did not have the money to get the work done.

[317] The defendants went on to receive further orders from the TSSA on September 5, 2014, January 21, 2015 and December 9, 2015 that they complete the precision line testing, the cathodic testing and install the electronic monitors. No work was ever done to comply with the orders.

[318] I find, based on all of the evidence, that the defendants simply wanted to sell the property without having to invest any further money into it. It was very much in their interest that the plaintiffs purchase the property and take it off their hands. I find that John was strongly motivated to sell the property without having to invest any further money into bringing the fuel tank system into TSSA compliance.

[319] It is within this context that I find, on a balance of probabilities, that John intended that the plaintiffs act on his misrepresentations. He wanted to make the Rock Pine look attractive to the potential buyers by representing that the Rock Pine made good revenue selling gas and the fuel tank system was "all good." I find that John made these representations to the plaintiffs so that they would purchase the Rock Pine.

Did the false representations cause the plaintiffs to act?

[320] Yvette and Garry testified that they relied on what John told them about the fuel delivery system. They felt John was a nice guy and very helpful. He told them that he would look after them and take care of transferring the license. At one point they thought about walking away, but John came back and offered them a 3% vendor take-back mortgage. They thought he did this because he was a nice guy.

[321] Yvette testified that they relied on what John told them and that the TSSA clause in the APS gave John the time to complete what he said he would do, which was the two tests in the spring. They relied on John's representation that everything was fine other than the need for these two tests. Yvette testified that they relied both on John's honesty and their lawyer's expertise in drafting the APS.

[322] Yvette testified that they thought they were getting a safe, compliant fuel delivery system. It wasn't until Madigan attended and that they became aware of everything that was wrong.

[323] Yvette testified that purchasing the Rock Pine was supposed to be their retirement, where they would have fun and enjoy the outdoors. Instead, she has spent years trying to deal with the situation they found themselves in, at great cost to her health. She could not believe that someone would tell them everything was fine and then dump it on them.

[324] On the totality of the evidence, I am satisfied that the false representations made by John about the fuel tank system caused the plaintiffs to purchase the Rock Pine. The sale of gas was something that provided year-round revenue for the Rock Pine.

[325] When the TSSA threatened to shut down the fuel system in December 2015, John was clearly alarmed and reached out to MacFarland. It is clear to me that the sale of gas was something integral to the running of the business and the generation of revenue. Therefore, the condition of the fuel tank system would be something that would be very important to anyone considering purchasing the Rock Pine.

[326] The defendants submit that the plaintiffs could have found out about the fuel delivery system's deficiencies had they conducted their own due diligence by having a contractor come out and inspect the system and/or by checking to see if there were any outstanding TSSA orders with respect to the property.

[327] As set out in *Performance Industries Ltd. v. Sylvan Lake Golf & Tennis Club Ltd*., this is not a valid defence to a claim of fraudulent misrepresentation.

Did the plaintiffs suffer damage in so acting?

[328] The evidence at trial establishes that the plaintiffs have incurred significant costs in having the fuel delivery system brought up to the TSSA standards so that they can continue to sell gas. The plaintiffs called evidence with respect to the work they have done so far, and how much they have paid for it. To date, they have spent over $38,131.13 in having a site modification approved by the TSSA, having the underground tanks removed, replacing the underground tanks with one above ground tank, and having a mandatory environmental review conducted to assess whether there had been any fuel contamination on the property.

[329] I am satisfied that but for the representations made by John, the plaintiffs would not have had to incur these costs. They would have either walked away from the purchase of the property, had the defendants bring the fuel delivery system up to the TSSA standards at their cost, or would have asked for a price reduction to reflect these costs.

[330] In conclusion, applying the factors as set out in *Bruno Appliance and Furniture Inc. v. Hryniak*, I am satisfied, on a balance of probabilities, that John fraudulently misrepresented the condition of the Rock Pine's fuel tank system causing damages to the plaintiffs.

[331] I will address the quantum of damages, further on in this decision when I address damages globally.

B. In the alternative, did the defendants negligently misrepresent the state of the fuel tank system?

[332] If I am incorrect with respect to my analysis of fraudulent misrepresentation, I find that the evidence would clearly establish negligent misrepresentation.

[333] Specifically, I find:

1. By discussing the condition of the fuel tank system with the plaintiffs, in response to their inquiries, the defendants had a duty of care based on their special relationship as owners and operators of the Rock Pine. They knew about the condition of the fuel tank system. They had had the fuel tank system tested over the years and knew the results. And they knew about the prior unfulfilled TSSA orders.

2. John made statements that were untrue, inaccurate and misleading. I have set out my reasons for concluding this above.

3. The plaintiffs reasonably relied on John's statements that the system was in good condition. I have set out my reasons for concluding this above; and

4. I find the plaintiffs suffered damages as a result.

[334] What sets negligent misrepresentation apart from fraudulent misrepresentation, is that the court must go on to consider whether any subsequent contractual agreements impact whether a claim in tort can be advanced. In some circumstances, despite negligent misrepresentations, the terms of a contract may negate any impact of those misrepresentations.

[335] The defendants submit that absent contractual protections providing otherwise, a purchaser of real property acquires it "as is." As such, the rule of *caveat emptor* applies to the purchase of land and any protection concerning the fitness or quality of the land must be specifically negotiated and included as a specific term in a contract for purchase and sale.

[336] The defendants point to clauses contained in the APS and submit that these have the effect of eliminating any impact or reliance on pre-contractual representations by the defendants.

[337] The "due diligence" clause in the APS sets out that the agreement is conditional until February 12, 2016, on the plaintiffs using their due diligence to investigate the transfer of the gas vendor licence, any OFSC trail agreements, vendor and supplier agreements, health service inquiries, inquiries about liquor licenses, and verifying information supplied by the defendants and anything else necessary for the operation of the property as a commercial/residential concern." The defendants submit that this clause has the effect of negating any prior negligent misrepresentations because the plaintiffs had the opportunity to verify the information supplied by John.

[338] The evidence demonstrates that the plaintiffs made their own inquiries with respect to the specific items listed, including the transfer of the gas vendor license. They contacted the TSSA and confirmed the process about the transfer of the license.

[339] With respect to "verifying information supplied by the defendants and anything else necessary for the operation of the property as a commercial/residential concern," this wording must be read in conjunction with the entire APS, including the TSSA clause, and the facts known to the parties at the time of the APS.

[340] The TSSA clause sets out that the defendants were going to have an inspection conducted and provide reports confirming that the fuel tank system was in safe operating condition and in compliance with the *TSSA Act* and its regulations.

[341] The APS was drafted and signed by the parties between December 2015 to March, 2016, which was in the wintertime. Neither the plaintiffs nor the defendants could have had the fuel tank system inspected because the ground was frozen. It would have been impossible for the plaintiffs to have conducted any due diligence with respect to the condition of the fuel tank system in terms of having it tested themselves.

[342] I accept that the plaintiffs could have obtained a copy of any outstanding TSSA inspection reports and orders and that this likely would have alerted them to the fact that there might be issues with the fuel tank system. However, the plaintiffs would have seen that the inspection reports required the defendants to have the fuel tank system tested for leaks and cathodic protection. This

was what John told the plaintiffs, that the system needed two tests conducted in the spring. The TSSA inspection reports would not have revealed what John already knew that the fuel piping was not cathodically protected and that it had likely been unprotected for a significant period of time.

[343] There is no evidence that the TSSA reports would have included the results of the 2004 report from Tanknology, the 2010 report from Terraspect or the 2010/2011 reports from MacFarland. These were records kept by the defendants and not shared with the plaintiffs.

[344] With respect to the "power of sale" clause, this clause must also be read in conjunction with the entire APS and the TSSA clause. Upon a plain reading of the APS, it is clear to me that the parties intended the condition of the fuel tank system to be a separate and apart from the power of sale clause. The TSSA clause makes it clear that the plaintiffs were not purchasing the fuel tank system "as is," they were purchasing it subject to receiving a report that it was in a safe operating condition and in compliance with the *TSSA Act* and its regulations.

[345] The "power of sale" clause states: "[T]he Purchaser acknowledges and agrees that it has relied on its own inspections and investigations and that there were no representations and/or warranties by the Vendor with respect to any matter whatsoever, ***except as set out in writing in this Agreement of Purchase and Sale***" (emphasis added). The TSSA clause is set out in writing and is in the APS. The TSSA clause says that the defendant is going to have the fuel tank system tested and will provide a report that says it is safe and legally compliant.

[346] I find that the TSSA clause was a written representation by the defendants, contained in the APS, that they would provide a report that the fuel tank system was in a safe and legally compliant condition. In my view, it is reasonable to conclude that this condition is a continuation of the defendants' earlier representation that the fuel tank system was in very good condition and only required testing in the spring that would confirm that it was safe and legally compliant.

[347] In addition, the wording of the power of sale provision must be read within the factual context that existed at the time. The wording that indicates that the plaintiffs have "relied on their own inspections and investigations" must be read in the context that the fuel tank system could not be inspected by anyone at the time because the ground was frozen.

[348] I conclude that the contractual conditions of the APS do not preclude a claim in tort for negligent misrepresentation.

C. Breach of Contract

[349] The essential elements in an action for breach of contract are the existence of a contract and the breach of a term of that contract: *Atlantic Lottery Corp. Inc. v. Babstock,* 2020, SCC 219, at para 91.

[350] A plaintiff must establish a causal link between the alleged breach of contract and the damages allegedly suffered: *Persaud v. Telus Corporation,* 2017 ONCA 479, at para. 10.

[351] The leading decision on contractual interpretation is *Sattva Capital Corp v. Creston Moly Corp,* [2014] S.C.C. No. 33. In that case, the Supreme Court encouraged courts to take a common-sense approach and highlighted the importance of determining the parties' intent by considering the words of the contract in light of the factual matrix: *Sattva Capital Corp. v. Creston Moly Corp*, at para. 50.

[352] The court further held that the factual matrix "should consist only of objective evidence of the background facts at the time of the execution of the contract…, that is, knowledge that was or reasonably ought to have been within the knowledge of both parties at or before the date of contracting:" *Sattva Capital Corp. v. Creston Moly Corp*, at para. 58.

[353] The Ontario Court of Appeal recently summarized the principles applicable to interpretation of a commercial contract in *Weyerhaeuser Company Limited v. Ontario (Attorney General)*, 2017 ONCA 1007, at para. 65, as follows:

> 1. The court should determine the intention of the parties in accordance with the language they have used in the written document, based upon the "cardinal presumption" that they have intended what they have said;
>
> 2. The court should read the text of the written agreement as a whole, giving the words used their ordinary and grammatical meaning, in a manner that gives meaning to all of its terms and avoids an interpretation that would render one or more of its terms ineffective;
>
> 3. The court should read the contract in the context of the surrounding circumstances known to the parties at the time of the formation of the contract. The surrounding circumstances, or factual matrix, include facts that were known or reasonably capable of being known by the parties when they entered into the written agreement, such as facts concerning the genesis of the agreement, its purpose, and the commercial context in which the agreement was made. However, the factual matrix cannot include evidence about the subjective intention of the parties; and
>
> 4. The court should read the text in a fashion that accords with sound commercial principles and good business sense, avoiding a commercially absurd result, objectively assessed.

[354] With respect to the last point, the court must look at the result from the perspective of both parties, not simply one. What may seem a fair result to one party could seem absurd to the other: *Kentucky Fried Chicken Canada v. Scott's Food Services Inc.*, 1998 CanLII 4427 (ONCA), at para. 27.

[355] Where there is an apparent conflict between a general term of a contract and a specific term, the terms may be reconciled by taking the parties to have intended the scope of the general term to not extend to the subject-matter of the specific term: *B.G. Checo International Ltd. v. British Columbia Hydro & Power Authority*, [1993] 1 S.C.R. 12.

[356] The key contractual provisions in the APS that are relevant to this action are:

1. The "TSSA clause:"
2. The "conditional on purchaser's lawyer approval" clause;
3. The "power of sale" clause;
4. The "due diligence" clause; and
5. The "time limits" clause.

[357] Although I have referred to some of the clauses in my earlier tort analysis, I will set them out specifically as part of this analysis as the specific words have importance.

[358] The TSSA clause provides:

> The Sellers agree to obtain and provide to the Buyers at their own cost, a report from a fuel oil distributor registered under the Technical Standards and Safety Act, 2002, and any regulations thereto from time to time stating that the tank system in, on and about the property is in a safe operating condition and complies with the requirements of the Technical Standards and Safety Act, 2002, and any Regulations thereto as amended from time to time. In the event that this inspection and report cannot be obtained due to adverse weather conditions at this time, the Sellers agree to hold back the sum of $500.00 to cover any costs and to provide this report as soon as possible in the spring.

[359] The "conditional upon purchaser's lawyer approval" clause provides:

> This agreement is conditional until February 6, 2016 on the [Plaintiffs] Lawyer approving the terms and conditions of the offer that would include a review of the lenders's schedule to the agreement, a preliminary title search, requests for work orders and deficiency notices and anything else necessary for the transfer of the property.

[360] The "power of sale" clause provides:

> The Purchaser acknowledges and agrees that it has relied on its own inspections and investigations and that there are no representations and/or warranties by the Vendor with respect to any matter whatsoever, except as is set out in writing in this

> Agreement of Purchase and Sale, and without limiting the generality of the foregoing, there are no representations and/or warranties with respect to the fitness, value, title condition, size and area, zoning or lawful use of the Property and premises therein. The Purchaser agrees to accept the Property and premises on an "as is" basis on closing and subject to any order or notice affecting the Property regarding its use, and subject to any outstanding work orders or notices of infractions as of the date of closing, including but not limited to work or other orders, as well as any existing municipal, or other governmental by-laws, restrictions or orders affecting its use, including subdivision agreements and easements and any minor encroachment by the subject or nearby buildings or by fences located on the subject or adjacent Property onto adjoining properties or streets as well as any registered or unregistered restrictions, agreements or covenants which run with the land.

[361] The "conditional on due diligence" clause provides:

> This Agreement is conditional until February 12, 2016, on the [Plaintiffs] using their due diligence to investigate the transfer of the gas vendor license, any OFSC trail agreements, the Vendor and Supplier Agreements, Health Services inquiries, inquiries about Liquor License, verifying information supplied by the [Defendants] and anything else necessary for the operation of the property as a commercial/residence concern. Unless these investigations are satisfactory to the Purchasers then this transaction is at an end and the deposit funds shall be repaid in full without deductions. The condition is included for the benefit of the [Plaintiffs] and may be waived at the Purchasers' sole option by notice in writing to the [Defendants] within the time period stated herein.

[362] The "time limits" clause provides:

> Time shall in all respects be of the essence hereof provided that the time for doing or completing of any matter provided for herein may be extended or abridged by an agreement in writing signed by the Seller and Buyer or their respective lawyers who may be specifically authorized in that regard.

[363] The defendants correctly point out that absent contractual protections providing otherwise, a purchaser of land acquires property "as is." In the absence of an express warranty, the purchaser of property assumes the risk of dissatisfaction.

[364] In this case, the APS contained a TSSA clause in writing that set out a representation that the defendants would produce a report stating that the tank system was in a safe and legally compliant condition. I find that this was a specific contractual provision providing that the plaintiffs were not acquiring the Rock Pine "as is" with respect to the fuel tank system.

The words used in the TSSA clause

[365] The defendants argue that the TSSA clause referred to a report from a "fuel oil" distributor" but the Rock Pine sold "gas" and not "oil." It is clear from all of the evidence that the parties understood that the TSSA clause referred to the fuel delivery system, specifically the underground gas tanks and lines and that the reports would come from a fuel distributor. Indeed, the reports provided by the defendants in accordance with the TSSA clause related to the fuel delivery system, not the oil tanks.

[366] The defendants submit that the TSSA clause refers to the *Technical Standards and Safety Act*, 2002, when in fact the applicable legislation was the *Technical Standards and Safety Act*, 2000. The parties agree that there has never been a 2002 version of the *TSSA Act*. In my view, this is of no consequence. The parties all understood that they were referring to the existing *Technical Standards and Safety Act* and its related regulations at the time of purchase.

[367] Finally, I am satisfied that when the parties used the words "tank system," it was understood that this meant the fuel tank system, which included the underground tanks, the underground piping and the dispensing units.

[368] I am satisfied that the terms of the contract required the defendants to provide a report from a fuel distributor registered under the *Technical Standards and Safety Act*, 2000, and any regulations thereto from time to time stating that the tank system in, on and about the property was in a safe operating condition and was in compliance with the requirements of the *Technical Standards and Safety Act*, 2000, and any regulations thereto as amended from time to time.

The reports

[369] The defendants submit that the terms of the APS contract only required the defendants to produce a report from a fuel distributor regarding the tank system. Once that report was produced, the defendants had complied with the APS.

[370] The defendants further submit that, at its highest, the APS may have required the defendants to ensure that the TSSA orders issued on December 4, 2015 were complied with, and that those orders only required the defendants to produce a copy of the precision leak test report and the cathodic protection survey report.

[371] In my view, the defendants' submission is inconsistent with a plain reading of the words used in the TSSA clause, which are to be interpreted in accordance with the language used. The TSSA clause requires the defendants to produce a report stating that the tank system in, on and about the property ***is in a safe operating condition and complies with the requirements of the Technical Standards and Safety Act, 2000, and any regulations thereto as amended from time to time*** (emphasis added).

[372] Further, interpreting the APS in a manner that only required the defendants to produce a report, regardless of the results, runs contrary to sound commercial principles and good business sense, and results in a commercially absurd result, objectively assessed. It would mean that the defendants could have produced a report that the fuel tank system was in a dangerous state, and simply walked away. This makes no sense.

Did the reports state that the fuel tank system was in a safe operating condition?

[373] The defendants submit that the 2016 Tanknology reports produced do indicate that the fuel tank system was safe and that there is no evidence that it was unsafe at the time of the purchase and sale of the Rock Pine.

[374] The reports state that the fuel tank system was not leaking. The reports do not state that the fuel tank system was in a safe operating condition.

[375] Whether the fuel tank system was, in fact, in a safe operating condition is irrelevant to the issue of breach of contract. The APS contract required the defendants to produce a report from a fuel distributor registered under the TSSA stating that the tank system was in a safe operating condition, and they did not do so.

Did the reports state that the tank system complied with the TSSA Act, 2000 and its regulations?

[376] The wording of the APS required the defendants to provide a report that stated the tank system complied with the *TSSA Act*, and the regulations thereto.

[377] The defendants did not produce a report from a fuel distributor registered under the TSSA that said the tank system complied with the *TSSA Act* and regulations thereto. They produced a report that the underground tank and lines did not leak, and that the underground tank passed cathodic protection. However, the lines did not. This is far from indicating that the fuel tank system was regulatorily compliant.

[378] The *TSSA Act*, 2000, and the *LFHC* required that the corrosion protection system for an underground storage tank system (which included the underground tank and the underground piping) be tested and ***certified in writing to be in working order*** at intervals not exceeding 2 years (*LFHC*, 2007, s. 2.3.1.2) (emphasis added). The 2016 Tanknology reports state that the underground piping ***was not cathodically protected*** (emphasis added). As such, the fuel tank system could not be certified in writing to be in working order.

[379] The *TSSA Act, 2000* and the *LFHC* required that the under-dispenser sump be equipped with a liquid sensor that will signal the attendance to shut down the dispenser when any product or high level of liquid is present in the sump. (*LFHC*, 2007, s. 4.5.2.6.). The 2016 Tanknology report did not address this issue. In fact, the electronic sump monitoring system had not been installed on the dispensers.

[380] The defendants' expert, Fraczkowski, testified that the foot valves on the underground tanks had to be replaced in accordance with the *LFHC* prior to the transfer of the property.

[381] No further reports were ever provided by the defendants that stated that the tank system complied with the *TSSA Act* or its regulations. That is not surprising, given that the fuel tank system was not in compliance with the terms of the *TSSA Act* or the *LFHC*, 2007.

The Northern Ontario Compliance Strategy ("NOCS")

[382] The defendants submit that, because the 2016 Tanknology reports indicate that the underground tanks and lines passed the precision leak testing, and because the TSSA Northern Ontario Compliance Strategy ("NOCS") allowed for lines that did not pass cathodic testing to remain in the ground, provided there were regular precision line tests every six months, this meant the report provided to the plaintiffs demonstrated that the tank system complied with the requirements of the *TSSA Act*, 2000, and any regulations thereto.

[383] I do not accept this submission.

[384] The NOCS was a strategy employed by the TSSA to provide retail gas outlets in Northern Ontario more time to bring their fuel delivery systems into compliance with the *TSSA Act* and regulations. It did not amend or change the legal requirements set out in the *TSSA Act*, the *LFHC* or any other regulation. It was a policy decision directed at the issue of enforcement.

[385] The NOCS required gas station owners/operators to apply for a variance that would allow them more time to bring their systems into compliance. In this case, variances could have been sought to provide more time to address the lack of cathodic protection for the piping and the need to install an electronic sensor at the pumps to detect leaks. However, I find as a fact, that the defendants never sought these variances.

[386] The decision to grant a variance would be at the discretion of the TSSA. If approved, the owner/operator of the Rock Pine would have had to conduct monthly testing of the fuel tank system and would have had to install the electronic sensors within two years. I have received no evidence that the TSSA would have granted variances in this case. There are a myriad of factors that could have impacted the TSSA's decision to grant variances in this case, including the fact that regular testing of the fuel tank system (every two years) had not been conducted and the fact that the underground piping had not been cathodically protected since at least 2004.

[387] In this case, there is no mention of the NOCS in the January 31, 2014, September 5, 2014, and January 21, 2015 TSSA inspection reports. In all three reports, the TSSA inspectors ordered the defendants to comply with the *LFHC* and have the tank system tested for leaks and tested for corrosion protection. The first possible reference to the NOCS is the suggestion by Inspector Golby in December that John submit a variance request. Something that was ultimately never done.

[388] The evidence demonstrates that at the time the APS was signed and at the time the reports were provided to the plaintiffs, the TSSA inspectors continued to enforce the provisions of the *LFHC,* and continued to make orders for compliance, despite the NOCS.

[389] Finally, if the goal of the NOCS is to bring gas retail operators into compliance with the *TSSA Act* and regulations, it is reasonable to conclude that at some point full regulatory compliance will be required.

[390] I accept the evidence of the plaintiffs that they were never told by anyone with the TSSA about the NOCS or that they could apply for a variance which, if approved, would allow them to keep the unprotected fuel pipes in the ground subject to regular testing every six months. Their evidence is supported by the TSSA inspection reports and orders that were issued in 2016, 2017, 2018 and 2019. There is no mention of the NOCS or the possibility of applying for variances in any of these reports.

[391] In any event, the TSSA clause required the defendants to produce a report that stated the tank system complied with the *TSSA Act* and its regulations. The NOCS had no impact on the *TSSA Act* or its regulations. The strategy only impacted the enforcement of these provisions, at the discretion of the TSSA.

[392] For these reasons, I am satisfied, on a balance of probabilities, that the defendants failed to comply with the TSSA clause contained in the APS contract.

The "power of sale," "due diligence" and "time limit" clauses

[393] The defendants submit that other clauses contained in the APS, specifically the "power of sale," "due diligence" and "time limit" clauses limit their liability in this case. They submit that relief from a clause limiting liability will only be granted if the clause, seen in light of the entire agreement, can be said to be unconscionable or unfair and unreasonable.

[394] However, as stated earlier, where a general clause conflicts with a specific clause, it is open to the court to conclude that the parties intended the scope of the general term to not extend to the subject-matter of the specific term.

[395] As I have outlined earlier, I find that the "power of sale," "due diligence" and "time limit" clauses must be read within the context of the facts known to the parties at the time of the contract and the inclusion of the specific TSSA clause. The plaintiffs were not agreeing to purchase the Rock Pine "as is" with respect to the fuel tank system. The plaintiffs could not have conducted their own due diligence by having the system independently tested because the ground was frozen, and the parties agreed to extend the terms of the TSSA clause, post-closing, to allow for testing to be conducted.

[396] The defendants submitted in closing submissions that upon closing, all conditions in the APS merged.

[397] The "time limit" clause provided that while time would be of the essence, the time for doing or completing any matter may be extended by agreement in writing. In this case, the APS contained the written TSSA clause that provided that the fuel tank system testing would take place following closing.

[398] Although it is the general rule that the acceptance of a deed is prima facie full execution of the agreement to convey, and preliminary agreements and understandings related to the sale of the land become merged in the conveyance, such a rule does not apply to collateral stipulations in an agreement of sale. Where a sales agreement creates rights or imposes obligations or stipulations collateral to, or independent of the conveyance, the question of whether those stipulations are extinguished in merger is to be treated as intention. In the absence of evidence on the point, there is no presumption that the purchaser intended to surrender or abandon the rights acquired by him/her under the sales agreement: *Fraser-Reid v. Droumtsekas*, [1979] S.C.J. No. 125, at paras. 29-30.

[399] In this case, the parties explicitly contracted that the defendants would provide a report after closing. I find that the evidence clearly demonstrates that the parties intended that the TSSA clause would survive after closing. There is no evidence that the plaintiffs surrendered their right to the TSSA report. Indeed, the evidence is that they actively insisted on the report post-closing.

Collateral warranty

[400] The defendants submit that the plaintiff's claim, at its heart, is a claim of collateral agreement, wherein the plaintiffs in effect seek expectation damages enforcing some manner of alleged oral agreement that the defendants would upgrade the fuel tank system or remediate any contamination found any time after closing, or some manner of oral or implied warranty that the property was clean when purchased.

[401] I do not agree with this submission. The claim of breach of contract seeks to enforce a specific clause, agreed upon by the parties, that forms part of the written APS contract. In the TSSA clause, the defendants agreed to produce a report to the plaintiffs that stated the fuel tank system was in a safe and regulatorily compliance condition. This is not an oral collateral warranty. This is a specific term of the contract.

D. Lawyer's Negligence

Negligence

[402] To succeed in an action alleging the tort of negligence, the party alleging the tort must establish, on a balance of probabilities, that Ballantyne-Gaska failed to exercise the reasonable degree of skill and knowledge that would be reasonably expected of a normal, prudent practitioner of the same experience and standing.

[403] If the plaintiffs establish a breach of the standard of care, he/she must go on and establish, on a balance of probabilities, that the breach caused or contributed to the alleged damage and/or loss.

The Standard of Care

[404] In general, it is inappropriate for a trial court to determine the standard of care in a professional negligence case in the absence of expert evidence: *Krawchuk v. Scherbak*, 2011 ONA 352, at para. 130; *Zink v. Adrian* (2005), 37 B.C.L.R. (4tH) 389 (B.C.C.A.), at para. 43; and Stephen Grant, Linda Rothstein & John Adair, & *Lawyer's Professional Liability* 4th ed. (Toronto: LexisNexis Canada, Inc., 2020), at 56.

[405] The standard of care required of a solicitor is the same standard that would be expected from any professional. A solicitor is expected to exercise the reasonable degree of skill and knowledge that would be reasonably expected of a normal, prudent, practitioner of the same experience and standing: *Yormak v. Ledroit Professional Corp*, 2022 ONSC 4615, at para. 204; *Armstrong v. Royal Victoria Hospital*, 2019 ONCA 963, at para. 86, aff'd 2021 SCC 1; *Central & Eastern Trust Co. v. Raffuse*, [1986] 2 SCR 147; *Folland v. Reardon*, 74 O.R. (3d) 688, at para. 41.

[406] An error of judgment or ignorance of some part of the law is not, by itself, enough to ground a claim of negligence. The conduct of the solicitor must be such that it was outside the sphere of what an ordinary, competent lawyer would have done: *Folland v. Reardon*, at para. 44, *Brenner v. Gregory*, [1973] 1 O.R. 252 (Ont. H.C.), at p. 257.

[407] A reasonable prudent solicitor does not need to know all of the law related to the legal service undertaken. "An attorney is expected to possess knowledge of those plain and elementary principles of the law that are commonly known by well-informed attorneys, and to discover additional rules of law which, although not commonly known, may readily be found by standard research techniques:" *Central & Eastern Trust Co. v. Raffuse*, at para. 59.

[408] In assessing whether the conduct of a lawyer was reasonably competent, the court must be cautious against characterizing errors in judgment as negligence. Lawyers make decisions based on their judgment. A lawyer will not be held to be negligent if the judgment he/she makes is within the range of reasonable choices that could have been made by a competent member of their profession. A poor result, viewed in hindsight, does not necessarily ground a finding of negligence: *Folland v. Reardon*, at para. 44. *Di Martino v. Delisio*, 2008 Can LII 36157 (ONSC), at para. 54.

[409] The reasonableness of a solicitor's conduct depends on the particular circumstance in each case. These circumstances include the form and nature of the client's instructions, the experience and sophistication of the client, the nature of the action or legal assignment, the time available to complete the work, the experience and training of the solicitor, the course of the proceedings and the influence of other factors beyond the control of the client and solicitor: *Pilotte v. Gilbert, Wright & Kirby, Barristers and Solicitors*, 2016 ONSC 494, at paras. 39-40.

Causation

[410] If the plaintiff establishes a breach of the standard of care, he/she must go on and establish, on a balance of probabilities, that the defendant's actions caused a loss and/or injury and that the loss and/or injury would not have occurred "but for" the fault of the defendant or if that test is inappropriate, that the defendant's breach contributed to the loss and/or injury in a material way, although there may have been other causes: *Athey v. Leonati*, [1996] 3 S.C.R. 458 (S.C.C.), at paras. 13-19.

[411] The "but for" test was set out in *Clements (Litigation Guardian of) v. Clements*, 2012 SCC 32, at para. 8, as follows:

> The test for showing causation is the "but for" test. The plaintiff must show on a balance of probabilities that "but for" the defendant's negligent act, the injury would not have occurred. Inherent in the phrase "but for" is the requirement that the defendant's negligence was necessary to bring about the injury – in other words that the injury would not have occurred without the defendant's negligence. This is a factual inquiry. If the plaintiff does not establish this on a balance of probabilities, having regard to all the evidence, her action against the defendant fails.

[412] In a case of solicitor's negligence, where a plaintiff can establish on a balance of probabilities that "but for" the solicitor's negligence he/she would have avoided a loss, then he/she should be fully compensated for that loss: *Jarbeau v. McLean*, 2017 ONCA 115, at para. 27-28.

Analysis

[413] In this case, I have received the uncontested opinion evidence of Robert Aaron, who has opined that Ballantyne-Gaska's representation of the plaintiffs fell below the standard of care expected of a reasonably prudent real estate lawyer.

[414] At the time, Ballantyne-Gaska had little, if any, experience with respect to the purchase and sale of gas stations. She testified that it was an area that was quite far from her area of practice. Further, she was aware that her clients were inexperienced with respect to the running of a gas station. Ballantyne-Gaska agreed that she did not advise her clients to obtain independent legal advice regarding the sales transaction.

[415] It is clear from the evidence that the sale of the Rock Pine was rushed. Ballantyne-Gaska testified that her clients were anxious to close on the deal and there was not enough time to conduct searches such as the TSSA searches.

[416] Ballantyne-Gaska testified that she inserted the TSSA clause to protect her clients. She would have preferred to make it stronger, but they were negotiating back and forth, and it was rushed.

[417] Ballantyne-Gaska testified that she would have preferred to make the sale of the Rock Pine conditional upon receipt of a satisfactory report that the fuel tank system was in compliance with the TSSA standards. However, her clients wanted to get the deal closed as soon as possible and they had been assured by the defendants that the fuel tank system was okay and that they could produce a report that said this. She testified that she advised the plaintiffs that they should wait and close after the reports were available.

[418] Ballantyne-Gaska agreed that there some errors in the TSSA clause such as reference to a "fuel oil distributor," when everyone understood they were dealing with gas, and the incorrect citation of the *TSSA Act.*

[419] Ballantyne-Gaska testified that the $500 hold back was a small amount to cover cost of obtaining the report. She agreed that there was no holdback to address any issue of repairs, nor did she set out what would happen if the report came back with deficiencies.

[420] Ballantyne-Gaska testified that she did her best, it was not necessarily how she wanted to handle the transaction, but at the end of the day she did not have the final say, her clients did.

[421] I am satisfied, on a balance of probabilities, that Ballantyne-Gaska fell below the standard of care expected from a reasonably prudent real estate lawyer with respect to the purchase of the Rock Pine.

[422] I accept the evidence of Aaron that Ballantyne-Gaska had a duty to inform herself about the purchase and sale of gas stations and to inform herself of the applicable legislation. She did not do so. This resulted in errors in drafting the TSSA clause and the failure to include further clauses that would have protected her clients. It also led to a failure to fully advise her clients as to the risks associated with purchasing a gas station, which is a highly regulated industry.

[423] I accept the evidence of Aaron that the $500 holdback was clearly an inadequate amount to address any issues that could arise with the fuel tank system. I accept that this grossly undervalued the impact that an adverse test result or regulatory compliance order would have on her clients.

[424] I accept that Ballantyne-Gaska failed to address the fact that the plaintiffs had received and relied on certain representations from the defendants in the APS. Instead, it appears that she drafted a clause that was predicated on those misrepresentations. In essence, she drafted a clause that assumed the defendants could produce what they promised, a safe and legally compliant fuel tank system, and did not address what would happen if they failed to do so. In doing this, she fell below the standard of care expected from a reasonably prudent real estate lawyer, which requires a lawyer to address important and fundamental representations made during contractual negotiations and to ensure his/her clients are protected if those representations turn out to be inaccurate.

[425] Having found that Ballantyne-Gaska was negligent in her representation of the plaintiffs, I must go on to determine whether her negligence in fact caused damage to the plaintiffs. This is a factual inquiry.

[426] The plaintiffs must show on a balance of probabilities that "but for" Ballantyne-Gaska's negligent act, the injury would not have occurred. I must ask myself, whether Ballantyne-Gaska's negligence was necessary to bring about the injury or, in other words, whether the injury would not have occurred without her negligence.

[427] I am satisfied that it is likely that had Ballantyne-Gaska informed herself about legalities surrounding the purchase of a gas station, conducted the TSSA searches, advised her clients about the outstanding TSSA orders, and warned her clients about the dangers surrounding purchasing a gas station with power of sale provisions, that the plaintiffs would either have not purchased the Rock Pine or insisted that the deficiencies be addressed by either a reduction in price or by requiring the defendants to take the steps required to bring the fuel tank system in compliance with the *LFHC*.

[428] That being said, I am also satisfied that the language ultimately used in the TSSA clause was broad enough that it was capable of holding the defendants accountable for their misrepresentations about the state of the fuel tank system and ensured that the defendants were contractually required to provide proof, in the form of a report, that the fuel tank system was in a safe and legally compliant condition.

VI. Apportionment of Liability

[429] The parties agree that I must consider and apportion liability, if appropriate, between Ballantyne-Gaska and the remaining defendants.

[430] The plaintiffs submit that Ballantyne-Gaska's negligence, at the end of the day, did not contribute significantly to their damages. They submit that the defendants' fraudulent and/or negligent misrepresentations and their failure to comply with the terms of the APS caused most, if not all, of the damages they have suffered.

[431] The defendants submit that the plaintiffs relied on their lawyer in this transaction, and that Ballantyne-Gaska bears most, if not all, of the responsibility for the plaintiffs' damages.

[432] The defendants submit that Ballantyne-Gaska had several conditional periods, prior to closing, to approve the conditions and conduct due diligence. She also had the opportunity to address any issues with respect to the property when she requisitioned the defendants' real estate lawyer who responded that the plaintiffs were to satisfy themselves. Despite these opportunities, Ballantyne-Gaska failed to conduct the proper background checks, failed to ensure the conditions of the APS protected her clients, and failed to warn them about the consequences of having to satisfy themselves as to the condition of the property, which was being sold "as is." Once a sale closes, it is presumed that all parties are satisfied with the transaction.

[433] While the defendants initially submitted that the plaintiffs were also negligent and as such should be attributed some liability, this was not seriously advanced at trial, and I find that there is no evidence that would establish contributory negligence on the part of the plaintiffs.

[434] I find that the negligence of Ballantyne-Gaska did contribute to the damages suffered by the plaintiffs. For example, had there been an appropriate holdback to account for any issues related to the fuel tank system, this amount could have been immediately made available to the plaintiffs to address some of the issues they faced.

[435] However, I find that the bulk of liability rests with the defendants, John and Rose Collins. Their fraudulent misrepresentation that the fuel tank system was in good working order and their failure to produce a report that demonstrated that the fuel tank system was in a safe and legally compliant condition, has led to years of frustration and expense for the plaintiffs.

[436] For these reasons, I apportion liability as follows:

1. John Collins and Rose Collins: 80%
2. Ballantyne- Gaska: 20%
3. The plaintiffs: 0%

VII. Damages

[437] The assessment of damages in each case turns on its own facts and the process of assessing damages should be a practical one designed to do justice between the parties: *James Street Hardware and Furniture Co. v. Spizziri*, 1987 CanLII 4172 (Ont. C.A.).

[438] The general rule for the assessment of compensatory damages in tort actions is that, as far as damages can accomplish this, the plaintiff is entitled to be put into the position he or she would have occupied but for the injury caused by the defendant: *Bowman v. Martineau*, 2020 ONCA 330, at para. 8.

[439] Restoration of the plaintiff's position should not amount to an under or overcompensation but should only result in the amount of compensation that will make the plaintiff whole. As such, a plaintiff can generally only recover for actual injury caused by the defendant's conduct and not for damages that are too remote in that they are speculative or not reasonably foreseeable: *Bowman v. Martineau*, at para. 9.

[440] A plaintiff must establish, on a balance of probabilities, what position they would have been, but for a fraudulent or negligent misrepresentation. Where there has been a material negligent misrepresentation that has induced the plaintiff to enter into a transaction, the plaintiff's position is usually that, absent the misrepresentation, the plaintiff would not have entered into the transaction. In this case, the plaintiff is restored to the position he/she would have occupied had he never entered the transaction: *Rainbow Industrial Caterers Ltd. v. Canadian National Railway*, 1991 SCC 27, at para. 22.

[441] Damages for breach of contract should place a plaintiff in the same position as if the contract had been performed. However, these damages must be "such as may fairly and reasonably be considered either arising naturally… from such breach of contract itself, or as may reasonably be supported to have been in the contemplation of both parties: *Fidler v. Sun Life Assurance Co. of Canada*, 2006 SCC 30, at para. 27; *Samaria Crescent General Partner Inc. v. Delco Wire and Cable Limited*, 2018 ONCA 519, at para. 31.

[442] In *Samaria Crescent General Partner Inc. v. Delco Wire and Cable Limited*, Ontario Court of Appeal held, at para. 36, that damages may be recovered for breach of contract if:

1. in the usual course of things, they arise fairly, reasonably and naturally as a result of a breach of contract; or

2. they were within reasonable contemplation of the parties at the time of the contract. Put another way – would the parties understand that the damages claimed would be the probable result of a breach of contract at the time of the contract.

[443] Once the loss occasioned by the transaction is established, the plaintiff has discharged its burden of proof with respect to damages. If a defendant alleges that a plaintiff would have entered into a transaction on different terms, the burden rests on the defendant to establish this: *Rainbow Industrial Caterers Ltd. v. Canadian National Railway*, at para. 28.

[444] Further, it is the defendants' onus to demonstrate that the plaintiffs failed to mitigate their damages: *Bowman v. Martineau*, at para. 31-32.

The positions of the parties

[445] The plaintiffs submit that they intended to purchase a business that had a gas station with a safe and regulatorily compliance fuel tank system. They submit that but for the defendants' misrepresentations, they would have been able to negotiate on an informed basis and could have insisted that the defendants address the deficiencies that existed.

[446] The plaintiffs further submit that they contracted for a safe and legally compliant fuel tank system, as such they should be placed in the position they contracted for, which is the cost of installing a safe and compliant underground fuel tank system.

[447] The defendants submit that had the misrepresentation been true (i.e., the fuel tank system was in a safe and regulatorily compliance condition) the plaintiffs would have still obtained the property "as is" subject to the outstanding TSSA orders.

[448] The defendants submit that the plaintiffs did not have to remove the underground storage tanks or the piping. They could have applied to the TSSA for a variance to address the issue of cathodic protection for the underground piping and the issue of electronic monitoring at the pumps.

The defendants point out that the plaintiffs were never ordered by the TSSA to remove the tanks, until they chose to decommission them.

[449] The defendants further submit that the plaintiffs wanted to remove the underground storage tanks because they wanted to build a new motel structure in the area directly above or near the underground storage tanks.

[450] The defendants submit that some of the plaintiffs' claim for damages amounts will result in a better fuel tank system and property then what they intended to purchase. If awarded the cost of installing a new underground tank system, along with the cost of re-paving the entire parking lot and installing lighting, they will end up with a much better property.

[451] The defendants ask why the plaintiffs did not sell the property when they learned that the cost of replacing the fuel tank system would exceed the purchase price. Further, the plaintiffs could have sought to rescind the contract.

[452] It was not suggested by any of the parties in this case that damages should be assessed on the basis of the diminution in value of the Rock Pine. I have received no evidence in this regard.

Evidence regarding damages

[453] The plaintiffs led evidence with respect to the expenses they have incurred to date with respect to maintaining the ability to sell fuel as well as estimates with respect to how much it would cost to install underground fuel tanks and lines.

Costs incurred to date

[454] The plaintiffs provided evidence and receipts with respect to the expenses they have incurred with respect to the removing the underground fuel tanks and installing the temporary above ground fuel tank system so that they could continue to sell gas. These amounts total $38,131.12. The evidence in support of this total consisted of:

1. Invoice for the TSSA inspection related to the site modification: $689.30.

2. Invoice for pre-engineering services for site modification: $339.

3. Invoice from Wagg's Petroleum to install and connect the above ground tank: $15,074.20.

4. Invoice for TSSA inspection following installation of the above ground tank: $994.40.

5. Invoice from Wagg's to replace the hose whips and breakaway: $333.11.

6. Invoice from Wagg's re: weights and measure certification: $601.73.

7. Invoice for the TSSA site modification follow-up: $347.48.

8. Invoice from Canor Construction for clean backfill material where old tanks were located: $7,236.46.

9. Invoice from Wagg's for the removal of the underground tanks and soil sampling: $411,278.09.

10. Invoice for TSSA site modification follow-up and inspection report: $468.95.

11. Invoice for the TSSA Environmental Review: $768.40.

Estimated cost to address the environmental impact of removing the underground tanks

[455] I received the following evidence in the form of estimates for addressing issues related to the removal of the underground fuel tanks.

[456] Victoria Rochon, from ROAR Engineering, testified that ground water contamination was identified around the area where the underground tanks were located and removed. A Limited Phase II Environmental Assessment, which would involve testing the area where the underground tanks were located will cost between $12,000 and $13,000 plus HST. This amount does not include hiring a contractor to drill and install three wells to test the soil for contamination or any follow-up testing if needed.

[457] Jason Berghamer, from Englobe Corp., testified that the cost of environmental impact testing, which would include installing three monitoring wells to test the ground water, would cost $12,000 to $13,000 in 2023. Berghamer testified that the cost of drilling the boreholes (for the wells, which was not included in the Rochon report) would be $2,950 plus HST.

Estimated cost to install an underground fuel tank system

[458] In addition, I received evidence with respect to estimates to install two underground fuel tanks and piping at the Rock Pine.

[459] Loyd Banks, from Raymar, testified that they could not install underground tanks where the old underground tanks were, because they were too close to the water. Banks testified that in 2020, the cost of installing double walled tanks, double walled piping, a tank monitoring system, two concrete pads to put dispensers on, cover the area with aggregate, pass electricity to the gas bar, install two light poles to light the area and obtain the required certificates would cost approximately $344,475 plus HST.

[460] Banks testified that it would cost about $5,000 less if they install above ground tanks, instead of underground tanks. This option would be less visually appealing; however, it would be more cost effective.

[461] Banks testified that the cost of completing this work in 2023, has increased by about 20%-25%, and the quote he provided would be increased to reflect this. Using the lesser percentage of 20%, this would place the cost in 2023 at approximately $413,370.

[462] Dan McDonald, from Miller Paving, testified that the cost of re-paving the parking area in 2019, would have been $98,440. The cost to complete this work in 2023 would be in the range of $150,000 plus HST. This is based on the size of the parking lot provided to him by the plaintiffs.

[463] The defendants did not call any evidence with respect to the projected cost of remediating the property or estimates with respect to the cost of installing an underground tank system.

Analysis

[464] In my view, whether damages are assessed as a matter of breach of contract (expectation damages that put the plaintiff in the position it would have been had the contract been performed) or as a matter of fraudulent and/or negligent misrepresentation (compensatory damages which are measured either by the cost of repair or by the diminution in value), in this case, they are ultimately the same.

[465] I do not accept the defendants' submission that had the representations been true, the plaintiffs would have still obtained the property "as is" and subject to the outstanding TSSA orders. The evidence establishes that the complainants were specifically concerned about the fuel tank system and wanted to ensure it was safe and legally compliant when they purchased it. There is no evidence that they would have taken the property "as is" and subject to the outstanding TSSA orders.

[466] With respect to the defendants' submission that the plaintiffs did not have to remove the underground fuel tanks or the piping, this submission must be viewed within the context of the evidence led at trial and the circumstances the plaintiffs faced following closing.

[467] Following the closing in March 2016, the plaintiffs were faced with the following:

1. A TSSA inspector told them that if they did not have records of cathodic protection for the pipes they would have to be replaced;

2. The plaintiffs did not have any records of the pipes having cathodic protection. In fact, no such records existed;

3. On November 15, 2016, as part of the pre-licence inspection, Inspector Madigan noted that s. 2.3.1.2 of the *Liquid Fuels Handling Code* required that the underground storage tank system undergo cathodic testing and be certified in writing to be in working order at intervals not exceeding two years. He further noted: "[a]t the time of the inspection this inspector could not determine if the underground piping was steel and/or fiberglass after reviewing the cathodic protection testing documentation (unprotected). As a result, Madigan ordered the

plaintiffs to "ensure that a petroleum contractor confirms the type of underground piping that is installed and the documentation is sent to the inspector" before April 9, 2017."

4. On July 14, 2017, Inspector Madigan re-attended and issued the same orders. Except this time he wrote that "failure to comply with the above inspectors orders will result in both underground storage tanks being sealed," According to Madigan, he would have received this direction from his supervisors.

5. Inspector Madigan did not offer them the option of applying for a variance in accordance with the NOCS; and

6. The petroleum contractor the plaintiffs contacted, Wagg's, was not prepared to undertake the work to determine what the pipes were made of or install cathodic protection for the pipes, because there was no history of cathodic protection on the pipes and they were not prepared to take on the risk of environmental damage if they dug and the pipes were corroded.

[468] The defendants suggest that the plaintiffs did not do enough to find a petroleum contractor that would do the work required, including installing cathodic protection on the pipes. I note that the defendants did not call any petroleum contractor to provide evidence that they would have been prepared to undertake the work to install cathodic protection for the pipes in light of the lack of any history of cathodic protection related to the fuel piping.

[469] I found the evidence of Terry Ablett, the owner of Wagg's, on this issue to be compelling. He testified that cathodic protection is an ongoing requirement. Without having a history regarding cathodic protection, you would have no idea how many years of corrosion damage might have occurred. One spot of corrosion damage could be catastrophic, and the liability of undertaking that type of work, without any historical information, was not something he would expose his company to.

[470] Although it was suggested that Wagg's had not been provided with the 2016 Tanknology report when they were asked to conduct the work on the lines, I fail to see how this would have made any difference. The 2016 Tanknology report indicated that the lines were not cathodically protected. On July 20, 2017, Terry Ablett wrote to the plaintiffs:

> Per our discussion, Wagg's is not able to undertake a cathodic upgrade of the existing underground steel fuel tanks and connected piping. The last cathodic evaluation that we are aware of was performed in June, 2004. Without additional information to confirm protection since that time, we cannot be certain that the tanks or lines have been protected against corrosion Note that this corrosion protection inspection is required on a biannual basis.

[471] The 2016 Tanknology report only showed that the tank and lines did not leak during that test. It did not provide evidence of cathodic protection for the lines, nor did it address whether the lines might have corroded, which was Ablett's concern.

[472] The defendants point to the evidence of Lloyd Banks, from Raymar, that it would cost much less to simply swap out the fuel lines, at a cost of about $15,000. I note that the question put to Banks was whether the lines could be replaced, assuming perfectly compliant tanks. I also note that Banks qualified his answer and stated that it depended on the tanks and that he would normally open up the ground to see the tanks before replacing the lines. I find that Banks' evidence on this point was not sufficiently connected to the specific facts in this case. Banks was not specifically asked if his company would be prepared to conduct this work at the Rock Pine in light of the history of the fuel tank system.

[473] The experts called by the plaintiffs and the defendants were not that far apart with respect to whether cathodic protection could be re-established for the fuel piping. Stanley testified that theoretically it could; however, there was the practical problem of finding someone to do the work. Mackie described how one could re-establish cathodic protection on the pipes, which involved digging a small hole, placing an anode on the piping and then re-wrapping it. However, his evidence did not address the issue of finding someone prepared to do this work in light of the risks identified by Ablett.

[474] I accept the evidence of the plaintiffs that they were in an impossible position. The TSSA inspector had made repeated orders that they could not comply with because they could not find a petroleum contractor to do the work. They had been told in July 2017, that failure to comply with the orders would result in both underground storage tanks being sealed.

[475] The petroleum contractor they contacted told them that if they dug, they would have to replace the entire fuel tank system. The plaintiffs did not have the money to install a new fuel tank system.

[476] The plaintiffs had no choice but to comply with the direction and orders made by the TSSA inspector and to comply with the *TSSA Act* and the *LFHC*. The following wording is found on all of the TSSA inspection reports filed in this case:

> [e]very person who, (a) contravenes or fails to comply with any provision of this Act, the regulations or a Minister's order; (b) knowingly makes a false statement or furnishes false information under this Act, the regulations or Minister's order; (c) contravenes or fails to comply with a term or condition of an authorization; (d) contravenes or fails to comply with an order or requirement of an inspector or obstructs an inspector, is guilty of an offence and on conviction is liable to a fine of not more than $50,000 or to imprisonment for a term of not more than one year, or to both, or, if the person is a body corporate, to a fine of not more than $1,000,000 (*Technical Standards and Safety Act*, 2000, Section 37(1).

[477] Given these circumstances, I find it was reasonable for the plaintiffs to proceed with the less expensive option of having an above ground fuel tank installed so that they could continue to sell gas. Otherwise, they would have had to stop selling fuel, which was an integral part of their business.

[478] Once the plaintiffs decided to do this, they were required to apply for TSSA approval for this site modification. The site modification plan included that the underground fuel tank system would be decommissioned. Once the tanks were decommissioned, the *TSSA Act* and the *LFHC* dictated that they had to be removed and the plaintiffs were ordered to do so by the TSSA inspector.

[479] In my view, the actions of the plaintiffs were entirely reasonable in the circumstances. Their actions necessarily flowed from the orders received from the TSSA between 2016 to 2019 and their legal requirement to comply with those orders or stop selling fuel.

[480] With respect to the defendants' submission that the plaintiffs could have applied for variances from the TSSA pursuant to the NOCS, there are two problems. First, I have no evidence that the variances would necessarily have been granted, given the history of the fuel tank system. Second, variances would have only delayed the need for the plaintiffs to comply with the *TSSA Act* and the *LFHC*. The NOCS is a strategy aimed at eventually having gas stations in Northern Ontario comply with the *LFHC*. The experts testified that they do not know how long this strategy will remain in place. On the evidence before me, the fuel tank system was not in compliance with the *LFHC.* I find it is reasonable to conclude that the plaintiffs would have had to replace the fuel tank system at some point in the future, likely at a cost even greater than that set out in this trial.

[481] With respect to the defendants' submission that the plaintiffs wanted to remove the underground storage tanks in order to build a new motel, I accept the evidence of the plaintiffs that the idea of building a new motel arose after they had submitted their site modification plan, and after it became clear that the underground tanks system had to be decommissioned and removed.

[482] The defendants submit that some of the plaintiffs' claim for damages amounts will result in a better fuel tank system and property then what they intended to purchase. If awarded the cost of installing a new underground tank system, along with the cost of re-paving the entire parking lot and installing lighting, they will end up with a much better property.

[483] The defendants did not call any competing evidence with respect to the issue of damages. As such, I am left with the uncontradicted plaintiffs' evidence regarding the estimated cost to install an underground tank system.

[484] I found the evidence to be unclear as to why the entire parking lot would have to be repaved, and whether the installation of new lighting in the area was connected to the plaintiffs' claims and am prepared to deduct the cost of lighting and some of the cost of paving.

[485] Beyond this aspect of the evidence, the defendants have failed to satisfy me that the expenses incurred and the estimated expenses to replace the fuel tank system would result in a windfall to the plaintiffs.

[486] As pointed out in in *Gendron v. Thompson Fuels*, 2017 ONSC 4009, at paras. 365-367, in some cases, replacing an old system with a new one does not increase the value of the property. In cases of doubt, the onus is on the defendants to prove the value of an alleged improvement.

[487] The defendants ask why the plaintiffs did not sell the property when they learned that the cost of replacing the fuel tank system would exceed the purchase price. Further, the plaintiffs could have sought to rescind the contract.

[488] With respect to the option of selling the property, I find it unlikely that the plaintiffs could have sold the Rock Pine and recovered any money. By that point, they knew the Rock Pine had a non-compliant fuel tank system, that there were outstanding TSSA orders that could result in the fuel tank system being sealed, and that there were possible environmental impacts that would have to be addressed.

[489] Further, I have received no evidence as to how much the Rock Pine could have sold for, in the condition it was in, in 2016.

[490] With respect to the option of rescinding the contract, the defendants never offered to take the Rock Pine back when the plaintiffs first raised the issues they discovered in June/July 2016. Instead, the defendants took the position that they had complied with the terms of the APS and requested the release of the $500 holdback. Months later, the defendants took the position that the plaintiffs should wait until the spring of 2017, until they could arrange for a contractor to come out and look at the fuel tank system.

[491] I am satisfied that the plaintiffs have established on a balance of probabilities that they suffered damages directly related to the defendants' misrepresentations and their breach of the terms of the APS.

[492] The cost of responding to the TSSA orders and installing an above-ground fuel tank was a reasonable response to the immediate need to comply with the TSSA and the need to continue to sell fuel.

[493] The cost of installing an underground fuel tank system arises fairly, reasonably and naturally as a result of the breach of contract – which was a contract to purchase a property with a safe, legally compliant underground fuel tank system. Further, I am satisfied that it was within reasonable contemplates of the parties at the time of the contract that the damages claimed would be the probable result of a breach of contract at the time of the contract.

[494] Given the evidence presented, I am satisfied that the plaintiffs are entitled to an award of damages in the amount of $635,189.12.

[495] I have calculated this amount as follows:

1. Expenses incurred to date: $38,131.12.

2. Cost of a Phase II Environmental Assessment: $15,000 plus HST = $16,950

3. Cost to install an underground fuel tank system: $413,370 plus HST = $467,108

4. Cost of re-paving: $100,000 plus HST = $113,000. (I have deduced $50,000 to reflect the installation of lighting and the fact that the entire driveway may not need to be re-paved. I appreciate this is an imprecise amount, but I find it to be reasonable in the circumstances).

[496] I have turned my mind to the fact that after installing an underground fuel tank system, the plaintiffs will still have the temporary used above ground fuel tank. This might leave the plaintiffs in a better position; in that they will have both an underground tank system and an above ground tank system. It may be that the plaintiffs are left with a used above ground tank that could possibly be sold. I haven't received any evidence as to how much a used above ground tank could be sold for, or how much it would cost to have it removed. Given the onus rests on the defendants to establish betterment, I am unable to make a finding on whether there would be betterment from keeping the used above ground tank, and if there would be betterment, I have no evidence as to its value.

Equitable set-off

[497] The plaintiffs seek equitable set-off against the amounts they owe under the vendor take-back mortgage.

[498] I did not receive extensive submissions on this point at trial.

[499] The plaintiffs cite *7895 Tranmere Drive Management Inc. v. Helter Investments Ltd.*, 2005 Can LII 24252 (ONSC), in support of their argument. I note that in that decision the court found that equitable set-off was not appropriate having regard to the terms of the mortgage. Further, the court held that the mortgage was a separate document negotiated between the parties and that the plaintiffs in that case still held title to the property.

[500] I find that I have not received sufficient evidence to determine whether equitable set-off is appropriate. The mortgage is held by a numbered company, not the plaintiffs. I do not know how much is currently owing on the mortgage, how much interest has accrued, what fees might be attributed to the mortgage, what the history is regarding payments, and when payments stopped.

[501] Without a fulsome record on this issue, I decline to find that the plaintiffs are entitled to equitable set-off.

The Perringer Agreement

[502] Following the trial, I received additional submissions with respect to the Perringer Agreement entered into with Ballantyne-Gaska and what should happen if there is over-compensation.

[503] Having received those submissions, the issue appears to be premature given that the Perringer agreement will be shared between the parties following the release of these reasons. It will only be at that point that the parties can determine if there is an overcompensation.

[504] If the parties wish to address the issue of overcompensation, they can arrange a further appearance before me to make submissions on this issue, in addition to the helpful written submissions that have been already filed.

VIII. Costs

[505] If the parties cannot agree upon costs, within 7 days from the date of these reasons, the plaintiffs shall serve and file a concise 3-page submission regarding costs along with a costs outline, bill of costs and any authorities. The defendants shall have 7 days thereafter to serve and file the same materials. If a reply is required, the plaintiffs shall serve and file their reply within 5 days of the defendants' submissions.

The Honourable Madam Justice S.K. Stothart

Released: October 25, 2023

CITATION: Andrade v. Collins, 2023 ONSC 6011
COURT FILE NO.: CV-20-0000230
DATE: 2023-10-25

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:

Yvette Kramer and Garry Andrade

Plaintiffs

– and –

Rosellee Collins and Johnson Collins

Defendants

REASONS FOR JUDGMENT

S.K. Stothart, J.

Released: October 25, 2023