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Thornhill v Highland Fuels Reinforces Need for Tank Installers and Fuel Suppliers to Follow Statutory Requirements and Fuel Oil Code

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On May 15, 2014, the Ontario Superior Court of Justice released its decision in Thornhill v Highland Fuels.[i] *Highland Fuels, the tank installer and fuel oil supplier, was found not negligent in its tank installation and supply of fuel to Thornhill's aboveground fuel oil storage tank. This is notwithstanding that the tank leaked two years after Highland Fuels installed it and just a few months after Highland Fuels refilled it. The Court found that Highland Fuels installed the tank in accordance with statutory requirements. The Court found there was no breach of the standard of care by the tank installer. The Court determined that the requisite standard of care for the installation of a fuel oil tank is established through reference to the* Technical Standards and Safety Act,[ii] *its associated Ontario Regulation 213/01 and the Installation Code for Oil-Burning Equipment (CAN/CSA B139). The Court commented extensively on Thornhill's damages claim. The Court highlighted the difficulty that environmental contractors often face in estimating remediation costs at the outset of a clean up and the too-often-seen situation where actual remedial costs have no resemblance to initial estimates.*

Most interesting is the Court's finding that "...the EPA creates a statutory obligation to remediate, in the circumstances of this case and in the absence of evidence of prior spills, to a non-detect basis".

On June 12, 2014, the homeowners filed their Notice of Appeal.

The Spill

During the Labour Day weekend in 2006, Kevin Thornhill and Jackie Normore (the homeowners) discovered that their oil burning furnace would not turn on. As a result, the homeowners contacted their heating fuel oil supplier, Highland Fuels Dundalk Ltd. (Highland Fuels). Highland Fuels had installed the homeowners' outdoor and aboveground fuel oil tank in 2004 and supplied the homeowners with fuel oil on a regular basis. Highland Fuels discovered that the tank was empty and oil in the tank had leaked through a broken valve. Highland Fuels replaced the valve and advised the homeowners to contact their insurer, Peel Maryborough Mutual Insurance Company (Peel Maryborough). Peel Maryborough told the homeowners that Peel Maryborough would cover the entire clean up costs so long as D L Services (DLS) conducted the clean up. On September 17, 2006, DLS began remedial work at the property. One month later, DLS provided the homeowners and Peel Maryborough with an estimate of $179,900.00 (with a contingency of plus or minus 15%) to clean up the fuel oil contamination. DLS' ultimate cost totalled $1,195,269.56.

The homeowners issued a civil claim against Highland Fuels alleging that Highland Fuels negligently installed and supplied fuel oil to the fuel oil tank and that the negligence caused the spill. Highland Fuels denied that it negligently installed the fuel oil tank and in the event Highland Fuels was held liable, alleged contributory negligence against the homeowners. Highland Fuels also pleaded that the remedial costs were grossly disproportionate to the gravity of the spill.

Standard of Care for Fuel Oil Tank Installers

The Court cited the Ontario Superior Court of Justice's decision *Maddock v McRobert Fuels Ltd.*[iii] in swiftly establishing that "an oil technician or supplier of fuel oil to the consumer" owes that consumer a duty of care.[iv] The Court held that there was "no question that Highland Fuels owed a duty of care" to the homeowners,[v] and focussed the majority of its analysis on whether Highland Fuels breached the standard of care when installing the fuel oil tank at the homeowners' property. The Court heard from seven experts on this issue.

All seven experts agreed that the installation of fuel oil tanks in Ontario is governed by the *Technical Standards and Safety Act*, Ontario Regulation 213/01 and the national code embodied in CAN/CSA B139 (better known as the "Fuel Oil Code"). The Court referred to these documents collectively as the "Code".[vi]

The Court reviewed whether a tank must be installed by a qualified technician who followed "certified instructions". The Court grappled with the word "certified", and the experts disagreed about its meaning and application.[vii] Highland Fuels admitted that it did not follow the tank manufacturer's installation instructions, but argued that such instructions were not "certified" and were simply "guidelines". Despite similarities to the Code, the manufacturer's instructions for installation of the tank were neither verified nor tested by a regulatory body. Therefore, the Court held that the tank manufacturer's instructions were not certified. [viii] The Court concluded that the manufacturer's instructions were helpful as a guideline, but were not determinative of the requisite standard of care. That Highland Fuels did not follow the manufacturer's instructions when installing the tank did not mean that Highland Fuels' conduct fell below the standard of care, but constituted one factor to be considered in the overall analysis.[ix]

The Court relied on the expert opinions of two licensed Oil Burning Technicians who testified that Highland Fuels met the standard of care for fuel oil tank installations in 2004 by following the Code. Specifically, the Court accepted that Highland Fuels installed the tank in accordance with six steps set out in the Code, and by doing so, complied with the Code and met the standard of care of a tank installer in 2004.[x]

Notwithstanding that the Court found that Highland Fuels did not breach the standard of care and therefore is not negligent, for completeness, the Court analyzed causation. The Court found that there was no causal connection between the cracked valve and Highland Fuels' method of installation. Rather, the Court accepted Highland Fuel's expert's opinion that the tank tilted as a result of natural subsurface erosion which put stress on the valve, causing it to crack.[xi]

Standard of Care for Fuel Oil Suppliers

The Court relied on Highland Fuels' unchallenged testimony in summarily deciding that Highland Fuels did not breach the standard of care when it delivered fuel to the homeowners. Highland Fuels' employee who last delivered fuel to the homeowners' tank in April 2006 (less than five months before the homeowners detected the oil spill) testified that he had not noticed

anything unusual about the tank, including any tilting of the tank. He also testified that "he would not have delivered fuel if there were any issues with the tank."[xii]

Costs of Remediation

Highland Fuels objected to a number of aspects of DLS' remedial work. Highland Fuels argued that DLS should have been held to its cost estimate and that DLS' remediation methods were inappropriate, which led to the exorbitant costs.

The Court scrutinized DLS' inaccurate estimate of the remedial costs [xiii]

> It concerns me that after DLS had conducted a detailed assessment of the site for approximately one month, the estimate contained in the Preliminary Report was so inaccurate when compared to the final costs.

Nevertheless, the Court found that the preliminary estimate was not a contract that bound DLS to its cost estimate.[xiv]

The Court faced opposing submissions as to the appropriate "level of remediation". Highland Fuels argued that the remediation should ensure that the soil and groundwater meets the applicable Ontario Ministry of the Environment's Site Condition Standard, pursuant to Ontario Regulation 153/04. However, the Court sided with the homeowners and held that the homeowners were entitled to be put in the position they were in prior to the spill, which required complete removal of the fuel oil from their property.[xv]

Finally, the Court assessed the cost of remediation and the steps taken by DLS. The Court commented on the lack of supervision by Peel Maryborough despite its awareness of the increasing costs as the process continued. By his own evidence, the adjuster at Peel Maryborough only visited the site twice during the remediation process.[xvi] Several experts critiqued many aspects of DLS' invoices.[xvii] The Court noted that factors such as delays and improper charges associated with travel time contributed to the high costs of remediation. After calculating the total costs of assessment and remediation, the Court concluded that DLS' total invoice should not have exceeded $685,737.07, almost half of its actual cost of $1,195,269.56.[xviii]

Conclusion and Appeal

The decision in *Thornhill* provides some comfort to fuel oil tank installers (and fuel oil suppliers) that following the statutory requirements when installing and supplying fuel oil to tanks will reduce their exposure to liability in negligence.

Thornhill shows that in the absence of prior spills, insurance companies obliged to cover spill clean up costs might expect to pay for remediation of the fuel oil contamination to 'pristine', not just to the applicable Ontario Ministry of the Environment's Site Condition Standards. *Thornhill* demonstrates that without proper oversight, costs for remediation can get out-of-control.

The plaintiff homeowners have filed their Notice of Appeal.

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[i] *Thornhill v Highland*, 2014 ONSC 3018.
[ii] 2000, SO 2000 c 16.
[iii] *Maddock v McRobert Fuels Ltd.*, [2009] OJ No 3167 (SCJ).
[iv] *Supra*, note 1 at para 39.
[v] *Supra*, note 1 at para 38.
[vi] *Ibid*, para 45.
[vii] *Ibid*, paras 47 to 54.
[viii] *Ibid*, paras 55 to 71.
[ix] *Ibid*, para 72.
[x] *Ibid*, paras 60 and 61. The Court agreed with Highland Fuels' expert's testimony that the six steps performed by Highland Fuels in installing the tank , in accordance with the Code, were: (1) the soil was removed from where the concrete pads were placed, (2) soil was compacted by throwing the concrete pads down, (3) some gravel was used to level the tank, (4) it was not recently disturbed soil, (5) the pad[s] designed for this type of installation were used, and (6) the tank had a 1 inch slope towards the fuel outlet.
[xi] *Ibid*, para 119.
[xii] *Ibid*, paras 93 to 95.
[xiii] *Ibid*, para 145.
[xiv] *Ibid*.
[xv] *Supra*, note 1 at para 156.
[xvi] *Ibid*, paras 217-226.
[xvii] *Ibid*, para 207.
[xviii] *Ibid*, para 226.