

# THE PROBLEM

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The competition case is an appeal to the Supreme Environmental Moot Court of Canada of the Ontario Court of Appeal's decision in *Midwest Properties Ltd v Thordarson*, 2015 ONCA 819. The Supreme Environmental Moot Court of Canada is a Canadian appellate court of last resort. The doctrines of precedent and *stare decisis* apply as if it were the Supreme Court of Canada.

## INSTRUCTIONS:

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Midwest Properties Ltd. and Thorco Contracting Limited own adjoining properties in an industrial area of Toronto. Thorco historically stored large volumes of petroleum hydrocarbons ("PHCs") on its property.

Prior to its purchase of the property, Midwest obtained a Phase I Environmental Audit of the property and was advised that further investigation was not required. Subsequently, Midwest discovered PHC contamination had migrated to the Midwest property from the Thorco property. Midwest sued Thorco and Thorco's principal, John Thordarson, relying upon three causes of action: (i) breach of the Ontario *Environmental Protection Act* ("EPA") section 99(2), (ii) nuisance, and (iii) negligence.

Between 1988 and 2011, Thorco was in breach of Orders issued by the Ministry of the Environment and Climate Change. In 2000, Thorco and Mr. Thordarson were convicted of offences under the EPA and a Court Order was issued requiring removal of waste. At the time of the Midwest trial, the respondents were in breach of both the Ministry and Court orders.

At trial, the Court found Thorco and Mr. Thordarson not liable under all causes of action. On appeal, the Court found Thorco and Thordarson jointly and severally liable under all causes of action. Further, the Court held that EPA section 99(2) is a separate and distinct ground of liability for polluters. The Court awarded \$1.3 million in damages and \$100,000 in punitive damages (\$50,000 each) from Thorco and Mr. Thordarson.

The Supreme Environmental Moot Court of Canada has granted leave to appeal the decision of the Ontario Court of Appeal on the following questions:

1. Did the Court of Appeal err in finding that liability under s. 99(2) is not dependent on establishing an actionable nuisance at common law?
2. Did the Court of Appeal err in finding that damages are not precluded under s. 99(2) where the Ministry of the Environment and Climate Change had ordered the defendant to remediate the plaintiff's property?

3. Did the Court of Appeal err in finding that the appropriate measure of damages under s. 99(2) was the cost of remediation of the plaintiff's property as opposed to diminution in value?

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