WILLMS & SHIER ENVIRONMENTAL LAW MOOT COURT COMPETITION 2017

S.E.M.C.C. File Number: 03-04-2017

IN THE SUPREME ENVIRONMENTAL MOOT COURT OF CANADA

(ON APPEAL FROM THE ONTARIO COURT OF APPEAL)

B E T W E E N:

JOHN THORDARSON and THORCO CONTRACTING LIMITED

APPELLANTS
(Respondents)

- and -

MIDWEST PROPERTIES LTD.

RESPONDENT
(Appellant)

FACTUM OF THE APPELLANTS JOHN THORDARSON and THORCO CONTRACTING LIMITED

Pursuant to Rule 12 of the
Willms & Shier Environmental Law Moot Official Competition Rules 2017

TEAM #2017-01

TO: **THE REGISTRAR OF THE**
SUPREME ENVIRONMENTAL MOOT COURT OF CANADA

AND TO: **ALL REGISTERED TEAMS**

TABLE OF CONTENTS

Page No.

PART I -- OVERVIEW AND STATEMENT OF FACTS

A. Overview of the Appellants' Position

1 This appeal seeks to overturn a dangerous precedent that would allow private parties to collect damages any time they are unsatisfied with the orders of the Ministry of the Environment and Climate Change ("MOE"). In a society that became industrialized and advanced through the use of fossil fuels, it is important to balance environmental objectives against protecting business and property owners from being unduly liable for historic contamination. The notion of a public right to a healthy environment is gaining traction (Gage), but it is economically inefficient and uncertain to enforce public rights under the subterfuge of private rights through civil action (Metcalf). This level of uncertainty is inconsistent with the rule of law.

> Andrew Gage, "Asserting the Public's Environmental Rights" in Meinhard Doelle & Chris Tollefson eds, *Environmental Law Cases and Materials*, 2nd ed (Toronto: Carswell, 2013) 156 at 157.
> Cherie Metcalf, "*Litigating Environmental Quality: An Economic Approach*" (2004) 13 J Env L & Prac 293 at 322-323.

2 Midwest ("the Respondent") is intentionally circumventing *caveat emptor* and claiming damages for historic contamination, which, coupled with the MOE order to remediate, forces John Thordarson and Thorco ("the Appellants") to compensate the Respondent twice.

3 The Appellants have operated a small business servicing petroleum handling equipment and storing petroleum hydrocarbon ("PHC") waste on 1700 Midland Avenue since 1973 (*Midwest* CA). Over the course of decades, some PHC material has leaked. However, a leak is not a spill. Section 99(2) of the *Environmental Protection Act* ("*EPA*") establishes a statutory remedy for loss or damage sustained as a direct result of a discrete and abnormal spill that causes or is likely to cause an adverse effect.

> *Midwest Properties Ltd v Thordarson*, 2015 ONCA 819 at para 10, 128 OR (3d) 81 Hourigan JA [*Midwest* CA].
> *Environmental Protection Act*, RSO 1990, c E.19, s 99(2) [*EPA*].

4 In this case, the Ontario Court of Appeal ("CA") held the Appellants liable for historic contamination under Part X of the *EPA* ("Spills Bill"), contrary to the spirit and intent of the provision. The Respondent has suffered neither damages nor the infringement of any right that would permit compensation under s. 99(2). To find damage where none exists is an error in statutory interpretation and a distortion of common law principles that frustrates the purposes of the *EPA*.

Bill 24, *An Act to amend the Environmental Protection Act, 1971*, 3rd Sess, 31st Parl, Ontario, 1979 (assented to 20 December 1979), SO 1979, c 91, s 2 [Spills Bill].

B. Statement of the Facts

5 In 2007, the Respondent purchased a property in an industrial area without diligently investigating to determine whether or not the soil and groundwater complied with MOE standards (*Midwest* Sup Ct).

Midwest Properties Ltd v Thordarson, 2013 ONSC 775 at para 7, 73 CELR (3d) 303 Pollak J [*Midwest* Sup Ct].

6 Subsequent to acquiring the industrial property, the Respondent completed a Phase II environmental assessment that reported PHC contamination on its land. The Respondent did not pursue action against the property vendor or the environmental consultant who conducted pre-purchase Phase I testing on the property, which mistakenly indicated that testing of the soil and groundwater was not required (*Midwest* CA).

Midwest CA, *supra* para 3 at paras 11, 9.

7 The Respondent sued the Appellants for damages based on two causes of action: nuisance and negligence. The Respondent also argued a breach of s. 99(2) of the *EPA*, which has never been successfully used as a cause of action or interpreted by the courts (*Midwest* CA).

Midwest CA, *supra* para 3 at para 3.

8 Expert testimony was accepted at trial disclosing that PHCs would flow in the groundwater from the Appellants' property to the Respondent's property. However, no evidence was found to prove timing of PHC migration. To be awarded damages under the claims of nuisance and negligence, the Respondent must prove an increase in contamination since purchasing the property (*Midwest* Sup Ct.).

Midwest Sup Ct, *supra* para 5 at paras 8, 28.

9 The trial judge found no evidence proving loss or damage, which, as defined by s. 99(1), includes loss in property value, inability to use property to operate a business, and business losses. At trial, Pollak J interpreted s. 99(2) to preclude damages since the Appellants had been issued an MOE order in 2012 to remediate both 1700 Midland and 285 Midwest. There was no evidence of an imminent risk of adverse effects or evidence regarding how long remediation would take. The well-reasoned decision of Pollak J prevented double recovery and interference in private affairs between the Respondent and the Appellants (*Midwest* Sup Ct).

Midwest Sup Ct, *supra* para 5 at paras 23, 22.

10 The CA reversed the lower court decision entirely and found a s. 99(2) breach, nuisance, and negligence, and awarded punitive damages (*Midwest* CA).

Midwest CA, *supra* para 3 at para 125.

PART II -- QUESTIONS IN ISSUE

11 The Appellants submit:

A. The CA erred in finding that damages are not precluded under s. 99(2) where the MOE had ordered the Appellants to remediate the Respondent's property;

B. The CA erred in finding that liability under s. 99(2) is not dependent on establishing an actionable nuisance at common law; and,

C. The CA erred in finding that the appropriate measure of damages under s. 99(2) was the cost of remediation of the Respondent's property as opposed to diminution of value.

PART III -- ARGUMENT

A. Damages Are Precluded Under s. 99(2) When an MOE Order Has Been Issued

12 The Supreme Environmental Moot Court of Canada ("SEMCC") should find that s. 99(2) damages are inapplicable because:

(i) Part X was only intended to cover spills, not historic contamination; and,

(ii) Awarding damages frustrates the purpose of the statute.

13 In the alternative, should this Court continue to classify this historic contamination as a spill, civil damages are precluded under s. 99(2) because:

(iii) In light of legislative intent and the case law, MOE remedial orders are sufficient to achieve the goals of the *EPA*.

(i) Part X of the *EPA* is Not Meant to Address Historic Contamination

14 The Appellants submit that this case allows the SEMCC to find that s. 99(2) should not be applicable because the provision only pertains to spills and not historic contamination. The contamination on the Respondent's property has been improperly characterized as a spill. The SEMCC should seize this opportunity to safeguard businesses and property owners from being burdened with liability for historic contamination that is pre-existing and being dealt with by the MOE.

EPA, *supra* para 3 at s 99(2).

(a) Historic Contamination is Not an Abnormal Discharge

15 Part X was enacted as a result of Bill 24, informally known as the Spills Bill. Spills are defined in s. 91(1) of the *EPA* as discharges into the natural environment out of a container that is abnormal in quantity or quality in light of all the circumstances. Section 91(2) defines abnormal discharge and includes location as a factor for consideration. This definition will be parsed below by using precedent from cases considering claims under the rule in *Rylands* on natural use of land, which the Appellants submit is analogous.

> Spills Bill, *supra* para 4.
> *EPA*, *supra* para 3 at ss 91(1), 91(2).
> *Rylands v Fletcher* (1868), LR 3 HL 330, 37 LJ Ex 161 [*Rylands*].

16 In *Tock*, Sopinka J explained that "the notion of non-natural use is a flexible concept." Use of land is non-natural where damage is incurred from a substance that is maintained in an inappropriate location (*Tock*). The CA in *Inco* developed this proposition by stating that use of land is not ordinary when there is an "exceptionally dangerous or mischievous substance or that the circumstances were extraordinary or unusual."

> *Tock v St John's Metropolitan Area Board*, [1989] 2 SCR 1181 at 1189-1190, 64 DLR (4th) 620 La Forest J [*Tock*].
> *Smith v Inco Ltd*, 2011 ONCA 628 at para 103, 107 OR (3d) 321 [*Inco*].

17 In *Gersten*, the Ontario Supreme Court held that a seeping substance that caused damage to a neighbouring residential area was a non-natural use of land. Here, there is no concern for residential properties in the industrial area. Although storing chemicals may be a non-natural use of land even in the context of industrial operations (*Cambridge Water*), it was in a heavily industrialized area and it "did not create risks beyond those incidental to virtually any industrial operation" (*Inco*). Taking the flexible approach from *Tock*, with the context of time, place and manner of the activity from *Gersten*, and distinguishing this case from *Cambridge Water* using *Inco*, it can be concluded that the pollutant discharge in this case was not abnormal.

> *Gersten v Metropolitan Toronto (Municipality)*, 1973 CarswellOnt 360 at para 62, 2 OR (2d) 1 Lerner J [*Gersten*].
> *Inco*, *supra* para 16 at para 103.
> *Cambridge Water Company v Eastern Counties Leather* (1993), [1994] 2 AC 264 at 284, [1994] 2 WLR 53 (HL) Lord Goff of Chieveley [*Cambridge Water*].

18 To say that PHC contamination is abnormal is unreasonable given the long-established use of the property and surrounding properties for industrial purposes. Considering these circumstances, it is a stretch to conclude that the PHC contamination is abnormal in quality.

19 The former Minister of the Environment, the Honourable Dr. Harry Parrott, stated during the Spills Bill debates in 1978, that each year 600 spills are reported to the MOE involving "approximately 1.25 million gallons of petroleum products, non-petroleum oils, toxic chemicals and other hazardous materials" (*Hansard*). That averages out to over 2,000 gallons for each reported spill. The historic discharge that allegedly emanated from the Appellants' property is not within the scope of quantity contemplated by the Legislature that amounts to a spill.

> Ontario, Legislative Assembly, *Official Report of Debates (Hansard)*, 31st Parl, 2nd Sess, No 151 (14 December 1978), at 6178 (Hon Harry C Parrott).

20 In *McCann*, the CA dismissed an appeal from a decision refusing compensation from the Environment Compensation Corporation due to lack of evidence that losses were incurred as the direct result of an identifiable spill. This illustrates that the Spills Bill contemplates allowing compensation for a spill where the abnormal discharge is identifiable and results in proven loss or damage. The Spills Bill does not consider a loss or damage compensable from the mere polluted condition of the environment.

> *McCann v Environmental Compensation Corp* (1990), 5 CELR (NS) 247, 22 ACWS (3d) 1118 (Ont CA) [*McCann*].

(b) Historic Contamination is Not an Emergency Spill Event

21 The Environmental Commissioner of Ontario, Dianne Saxe, endorses the *McCann* precedent in the annotated *EPA*, and further explains that there is no spill when contaminants from earlier discharge move from soil to groundwater, as spills cannot be longstanding or indeterminate. Rather, "in all respects spills are treated in the Act as emergencies" (Saxe).

> Dianne Saxe et al, *Ontario Environmental Protection Act Annotated* **(**Aurora, ON: Canada Law Book, 1990) (loose-leaf updated 2016, release 105), Part X at X-23 [Saxe**]**.

22 Statements in the Ontario *Hansard* by past MOE Ministers use the terms "emergency" and "event" to characterize spills. All incidents discussed in the *Hansard* during the Spills Bill debates were emergency events that differ greatly from the undefined historic discharge in this case. Former Minister of the Environment, the Honourable Mr. Bradley, implemented a 24-hour spills action centre to ensure prompt and effective response to spills (*Hansard*). This all implies that the Legislature meant for spills to be conceptualized as specific emergency occurrences.

> *Hansard*, *supra* para 19.
> Ontario, Legislative Assembly, *Official Report of Debates (Hansard)*, 33rd Parl, 1st Sess, No 3 (7 June 1985), at 64 (Hon Susan Fish).
> Ontario Legislative Assembly, *Official Report of Debates (Hansard)*, 33rd Parl, 1st Sess, No 25 (28 October 1985) (Hon Jim Bradley).
> Ontario Legislative Assembly, *Official Report of Debates (Hansard)*, 38th Parl, 1st Sess, No 156 (8 December 2004) (Hon Leona Dombrowsky).

Ontario Legislative Assembly, *Official Report of Debates (Hansard)*, 33rd Parl, 1st Sess, No 40 (29 November 1985) at 1947 (Hon Jim Bradley).

23 The MOE never issued time sensitive orders to effect the clean-up of the Appellants' property, which demonstrates that this is not an emergency and therefore not a spill subject to s. 99(2). The Respondent claims that it requires immediate s. 99(2) compensation (*Midwest* Sup Ct). However, with no emergency spill and no proven loss or damage, s. 99(2) compensation is unnecessary and inappropriate. The Respondent must not construe the contamination as a spill to benefit from the s. 99(2) compensation scheme.

Midwest Sup Ct, *supra* para 5 at para 22.

(ii) Awarding Civil Law Damages Frustrates the Purpose of the *EPA*

24 The Appellants are currently under an MOE order to investigate and remediate the Respondent's property under s. 93(1) (*Midwest* CA). Finding s. 99(2) liability is contrary to the intention of the Legislature. Prospective plaintiffs should not be able to turn to the courts where awarding civil damages would frustrate the statute.

Midwest CA, *supra* para 3 at para 33.

25 The Supreme Court of Canada (SCC) in *Rizzo* adopted the Driedger principle, which states that a statute must be read "harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament." The Legislature gave the MOE broad powers to protect the environment and ensure polluters comply with orders under Part XIV of the *EPA*. This indicates that the Legislature's intention was to give the MOE far-reaching authority to achieve the *EPA*'s environmental protection goals.

Rizzo v Rizzo Shoes Ltd (Re), [1998] 1 SCR 27 at paras 20-21, 154 DLR (4th) 193 Iacobucci J [*Rizzo*].
Elmer Driedger, *Construction of Statutes*, 2nd ed (Toronto: Butterworths, 1983) at 87.
EPA, *supra* para 3 at Part XIV, s 3(1).

26 In *Buschau*, the majority found that legislation can displace common law rules. This precedent was adopted and contextualized in *Remmem*, where the British Columbia Supreme Court found that a common law presumption that is inconsistent with a statute frustrates the statutory scheme and shall therefore be displaced. The MOE remedial order is already in place and the use of courts for damages is inconsistent with the statute's compensatory scheme.

Buschau v Rogers Communication Inc, 2006 SCC 28 at para 33, [2006] 1 SCR 973 Deschamps J [*Buschau*].
Remmem v Remmem, 2014 BCSC 1552 at para 50, [2014] BCWLD 7064 Butler J [*Remmem*].

27 The common law may develop alongside statute if the construction is prospective (*Amato*), but the use of the courts for compensation where the MOE has the means to address the

issue indicates that civil damages in this case were never prospective. The MOE's authority in this regard is frustrated if the court is permitted to step in to provide civil damages.

R v Amato, [1982] 2 SCR 418 at 443, 140 DLR (3d) 405 Estey J [*Amato*].

(iii) MOE Remedial Orders Are Exclusive

28 Where an MOE remedial order is in place, civil damages for the cost of remediation under s. 99(2) should be precluded to avoid double recovery. It is inappropriate for civil courts to override the MOE where it has been given statutory authority to act on the matter. To supplant the expertise of the MOE with the court's own opinion is to usurp the power of the MOE.

29 During the Bill 133 debates in 2005 about administrative penalties under the Spills Bill, then Minister of the Environment, the Honourable Ms. Dombrowsky, made clear that "if you spill, you pay" (*Hansard*). The current remedial order is consistent with this goal. Additionally, the plethora of enforcement tools granted by the *EPA* provide sufficient and clear options to ensure remediation. These tools uphold the polluter pays principle and access to justice objectives that the *EPA* seeks to achieve without resulting in unfair or arbitrary financial awards (*Hansard*).

Ontario, Legislative Assembly, *Official Report of Debates (Hansard)*, 38th Parl, 1st Sess, No 153 (2 June 2005) at 1530 (Hon Leona Dombrowsky).
EPA, *supra* para 3 at ss 7(1), 8(1), 94-97, 124(1), 128, Part XI, Part XIV.

30 At the CA, the MOE made a commitment to redirect its remediation order upon the awarding of damages to the Respondent (*Midwest* CA). This will not avoid double recovery. The CA is silent on how the Minister should redirect an order and there is no provision in the *EPA* that requires the Minister to do so. This implies that orders are exclusive and it is at the Minister's unfettered discretion to determine what necessary, practicable work must be done to achieve remediation, irrespective of how long it may take (Saxe).

Midwest CA, *supra* para 3 at para 55.
Saxe, *supra* para 21 at X-12, X-12.1-12.2.

(iv) Conclusion

31 Section 99(2) was intended to provide compensation for spill events that require immediate clean-up. Allowing the courts to supersede an MOE remedial order, which adequately achieves *EPA* objectives, is a frustration of the Legislature's vision for the *EPA*. Furthermore, misconstruing the Legislature's intended conception of a spill is an error in statutory interpretation that distorts common law principles in a way that unfairly harms industrial

businesses such as the Appellants'. If the Respondent had shown that it suffered any damages to establish a claim in nuisance, the common law would have been the adequate route for recovery.

B. Liability Under S. 99(2) is Dependent Upon Establishing an Actionable Nuisance at Common Law

32 Contrary to the CA's findings, liability under s. 99(2) is dependent on establishing an actionable nuisance at common law:

(i) The Legislature defined s. 99(2) in a manner consistent with the existing common law of nuisance;

(ii) Section 99(2) was not intended to eliminate common law tort doctrine; and,

(iii) Establishing nuisance elements to find liability under s. 99(2) is entirely consistent with the purpose of s. 99(2).

(i) Language of s. 99(2) is Consistent with Nuisance Law

33 The CA erred when stating that the Legislature did not intend to include elements of nuisance (*Midwest* CA). The language in s. 99(2) is consistent with the existing common law tort of nuisance and therefore does not oust common law principles.

> *Midwest* CA, *supra* para 3 at para 74.

(a) Elements of Nuisance: Substantial and Unreasonable Interference

34 Cromwell J, in his judgment in *Antrim*, affirmed the test for nuisance as an "interference with the claimant's use or enjoyment of land that is both substantial and unreasonable." This is a two-part test requiring a finding of substantial and unreasonable interference in light of all the circumstances.

> *Antrim Truck Centre Ltd v Ontario (Transportation)*, 2013 SCC 13 at para 18, [2013] 1 SCR 594 Cromwell J [*Antrim*].

(b) Substantial Interference is a Prerequisite Under the Definition for Loss or Damage

35 In *Antrim*, substantial interference was not limited to physical damage to land and included other interferences, such as the health, comfort, or convenience of the owner or occupier.

> *Antrim, supra* para 34 at para 23.

36 However, in *Tock*, La Forest J stated that an actionable nuisance includes "only those inconveniences that materially interfere with ordinary comfort as defined according to the

standards held by those of plain and sober taste" and not claims based "on the prompting of excessive delicacy and fastidiousness." Substantial interference means that "compensation will not be awarded for trivial annoyances" (*St Lawrence Cement*).

> *Tock*, *supra* para 16 at 1191.
> *St. Lawrence Cement Inc v Barrette*, 2008 SCC 64 at para 77, [2008] 3 SCR 392 LeBel and Deschamps JJ [*St Lawrence Cement*].

37 Under the *EPA*, the scope of loss or damage is the same. Section 99(1) defines loss or damage as including "personal injury, loss of life, loss of use or enjoyment of property and pecuniary loss, including loss of income." Furthermore, s. 99(2)(a) states that the right to compensation is for "loss or damage incurred" rather than speculative or future loss.

> *EPA*, *supra* para 3 at s 99(1).
> *EPA*, *supra* para 3 at s 99(2).

38 Incurred loss or damage under s. 99(2) requires the same substantial interference as nuisance. The Legislature could have chosen language similar to other torts that require a lower threshold of interference if that was the intent.

(c) Unreasonable Interference is a Prerequisite Under the Definition for Spill

39 As previously stated, unreasonable interference in light of all the relevant circumstances is the second part of an actionable nuisance (*Antrim*). Section 91(1) characterizes a spill that is captured under Part X to be "abnormal in quality or quantity in light of all the circumstances." The plain language of the spill definition in Part X has an embedded reasonableness analysis, similar to that of a claim in nuisance.

> *Antrim*, *supra* para 16 at para 25.
> *EPA*, *supra* para 3 at s 91(1).

40 Furthermore, the reasonableness analysis under Part X's spill definition pertains to the spill itself, rather than the conduct that led to the spill. The spill definition is not concerned with the reasonableness of the act of spilling. The definition is concerned with whether the interference, via the spill, was reasonable. This distinction also arises in nuisance law (*Jesperson's*).

> *Jesperson's Brake & Muffler Ltd v Chilliwack (District)* (1994), 88 BCLR (2d) 230, 52 LCR 95 (CA) Finch JA [*Jesperson's*].

41 Both substantial interference and unreasonableness must be proven to find liability under s. 99(2). Therefore, this claim necessarily relies on establishing an actionable nuisance at common law.

(ii) Nuisance Must Not Be Conflated with Other Actionable Torts

42 The CA erred when Hourigan JA concluded that a s. 99(2) claim is not dependent on establishing an actionable nuisance because "[t]his new cause of action eliminated in a stroke such issues as intent, fault, duty of care, and foreseeability" (*Midwest* CA). As stated by the Honourable Minister, Dr. Harry Parrot in *Hansard*, the Spills Bill was not intended to eliminate common law tort doctrine; it was intended to extend and clarify it to fit better with environmental objectives.

> *Midwest* CA, *supra* para 3 at para 73.
> Ontario, Legislative Assembly, *Official Report of Debates (Hansard)*, 31st Parl, 3rd Sess, No 8 (27 March 1979) at 255 (Hon Harry C Parrott).

(a) The Intent of s. 99(2) Was Not To Eliminate Elements of Nuisance

43 The CA clarified the spirit of the Spills Bill, stating that, "[a]n early commentator understood Part X to 'superimpose liability over the common law, where intent, fault, reasonable use, escape, extent of damage, duty of care and foreseeability are not an issue. Rather, the ownership and control of the spill pollutant is the primary question'" (*Midwest* CA).

> JW Harbell, "Common Law Liability for Spills" in Stanley M Makuch, ed, *The Spills Bill: Duties, Rights and Compensation* (Toronto: Butterworths, 1986) 1 at 25 [Harbell].
> *Midwest* CA, *supra* para 3 at para 46.

44 The CA used this commentary to eliminate the analysis of fundamental tort issues to find liability under s. 99(2). With respect, this is an error in interpretation. Harbell intended to emphasize the importance of attributing the most weight to the polluter pays principle when balancing issues relevant to a s. 99(2) analysis. The suggestion to eliminate elements of an actionable nuisance from this analysis is unfounded.

> Harbell, *supra* para 43 at 25.

(b) Elimination of Some Tort Issues Does Not Eliminate All Tort Issues

45 In the alternative, if a s. 99(2) analysis was intended to eliminate the issues listed by Hourigan JA and Harbell, the CA erred by extending this list of issues beyond its intended scope. The list pertains solely to elements of negligence, intentional torts, and *Rylands* and not to the elements of a common law nuisance.

46 The CA, reciting Harbell, used a logical fallacy to conclude that "I am not persuaded that, in order to succeed in its claim under s. 99(2), the Respondent is required to prove an actionable nuisance" (*Midwest* CA).

Midwest CA, *supra* para 3 at para 73.

47 Harbell's list of issues divides into three fundamental tort topics: *Rylands v Fletcher*, negligence, and intentional torts. The elements relevant to establish a *Rylands* claim include an unreasonable use of land (i.e. non-natural) and an escape. The elements relevant to establish a negligence claim include fault, the extent of damage, duty of care, and foreseeability (*Kamloops*). These elements of *Rylands* and negligence claims, along with the element of intent, are the only ones mentioned on Harbell's list. These elements do not negate the application of elements of nuisance for a s. 99(2) analysis.

Rylands, *supra* para 15.
Anns v Merton London Borough Council, [1978] AC 728 at 751, [1977] All ER 492 (HL);
Kamloops (City) v Nielsen, [1984] 2 SCR 2 at 10, 10 DLR (4th) 641 [*Kamloops*].

48 A nuisance claim does not rely on the elements of Harbell's list. For example, LeBel and Deschamps JJ in *St Lawrence Cement* stated that "whether the interference results from intentional, negligent or non-faulty conduct is of no consequence provided that the harm can be characterized as a nuisance." In *Hare*, nuisance was found where the harm was not foreseeable. In *Revelstoke*, there was a nuisance despite the finding of a reasonable use of land.

St Lawrence Cement, *supra* para 36.
Hare v Liuza (2003), 32 CLR (3d) 220, 127 ACWS (3d) 381 (Ont Sup Ct) Ashby DJ [*Hare*].
John McLaren, "Nuisance in Canada" in AM Linden, ed, *Studies in Canadian Tort Law* (Toronto: Butterworths, 1968) 320 at 325, 321 [McLaren] [emphasis added].

49 Nuisance is sometimes confused with *Rylands* because liability is strict in both cases (*Antrim*). Nuisance is sometimes confused with negligence because courts have viewed nuisance as a concept that regulates "a group of disparate sins ranging… from unwitting and indirect interference with proprietary interests in land on the one hand, to the *negligent causation* of personal injury" (McLaren). Courts must resist the temptation to conflate these torts and their elements.

Antrim, *supra* para 16 at para 29.
McLaren, *supra* para 48 at 325, 321 [emphasis added].

50 There is clear precedent that justices should not blur the lines between different torts. In *Pugliese*, Howland JA stated that "negligence is not a prerequisite for nuisance." Therefore, the elimination of negligence issues for a s. 99(2) analysis does not eliminate the need for consideration of the elements of nuisance.

Pugliese v Canada (National Capital Commission) (1977), 79 DLR (3d) 592 at 617, 17 OR (2d) 129 (CA) Howland JA [*Pugliese*].

(iii) The Purpose of the Common Law and Part X of the *EPA* Are Harmonious

51 The CA erred when stating "that under this new cause of action a plaintiff could only recover if it could first prove that the defendant's conduct constituted a nuisance at common law, is entirely incongruous with the purpose of the enactment of s. 99(2)" (*Midwest* CA). The precedent is clear that the purposes of the common law of nuisance and s. 99(2) overlap significantly.

> *Midwest* CA, *supra* para 3 at para 74.

(a) Environmental Protection is Entrenched in the Common Law and Nuisance Law

52 Environmental protection has a significant purpose and value in the common law. La Forest J stated in *Hydro-Quebec* that "[the] stewardship of the environment is a fundamental value of our society." L'Heureux-Dubé J further emphasized the importance of environmental goals in *Spraytech* "our common future, that of every Canadian community, depends on a healthy environment…environmental protection [has] emerged as a fundamental value in Canadian society."

> *R v Hydro-Québec*, [1997] 3 SCR 213 at para 127, 151 DLR (4th) 32, La Forest J *[Hydro Québec]*.
> *114957 Canada Ltée (Spraytech, Société d'arrosage) v Hudson (Town*), 2001 SCC 40 at para 1, [2001] 2 SCR 241 L'Heureux-Dubé J [*Spraytech*].

53 Not only is the purpose of environmental protection generally entrenched in the common law, nuisance law has embraced this purpose as well. Major J in *Ryan* stated that "any activity which unreasonably interferes with the public's interest in questions of health, safety, morality, comfort or convenience" is capable of constituting a public nuisance. Scholars have asserted that "nuisance law has become a citizen's weapon in the battle for a better environment."

> *Ryan v Victoria (City)*, [1999] 1 SCR 201 at para 52, 168 DLR (4th) 513 Major J [*Ryan*].
> Bruce Feldthusen & Allen M Linden, *Canadian Tort Law*, 9th ed (Markham, ON: LexisNexis Canada, 2011) at 571.

54 These cases and commentary highlight the importance of entrenching the elements and spirit of nuisance into s. 99(2). This harmonizes the statute and common law.

(b) Goals of Part X of the EPA Align with Compensatory Nature of Nuisance Law

55 Hourigan JA stated that the two main goals of Part X are to "minimize the harm caused through the discharge of pollutants by requiring prompt reporting and clean-up by the party that owned or controlled the pollutant, regardless of fault…[and] to ensure that parties that suffer damage through the discharge of pollutants are compensated" (*Midwest* CA). These goals are not

frustrated by requiring a finding of nuisance for establishing liability under s. 99(2) because the process of awarding damages for nuisance addresses both goals.

Midwest CA, *supra* para 3 at para 45.

56 The first goal of ensuring prompt reporting and clean-up of spills, regardless of fault, is also congruous with nuisance law. The finding of liability under nuisance incentivizes both the plaintiff and defendant to clean-up and report the spill promptly, which serves the purposes of the *EPA*.

57 For the defendant, remunerating the plaintiff for consequential losses provides an incentive to report and clean the spill promptly. Additionally, if the courts find that the defendant's conduct, such as ignoring MOE orders and not promptly cleaning up a spill, was a "marked departure from ordinary standards of decent behaviour," the defendant may be liable for punitive damages (*Whiten*). Exacerbated damages from egregious conduct incentivizes the defendant to promptly report and clean up spills.

Whiten v Pilot Insurance Co, 2002 SCC 18 at para 36, [2002] 1 SCR 595 Binnie J [*Whiten*].

58 In the event that the defendant does not promptly clean up the spill, the plaintiff must do so as they have a duty to mitigate damages (*Red Deer College*). The defendant will ultimately pay for the clean-up costs as mitigation costs are recoverable by the plaintiff to encourage such mitigation (*Slevin*). Thus, this process adheres to the first goal of Part X by incentivizing the prompt clean-up and reporting of spills by the defendant.

Red Deer College v Michaels (1975), [1976] 2 SCR 324 at 328, 57 DLR (3d) 386 Donaldson LJ [*Red Deer College*].
Granville Savings and Mortgage Corp v Slevin, [1993] 4 SCR 279, 108 DLR (4th) 383 Cory J [*Slevin*].

59 The compensation principle of *restitutio in integrum* was first stated in *Livingstone* and restated by Donaldson LJ in *Dodd Properties*. The principle aims to "to place the plaintiff in the position which he would have occupied if he had not suffered the wrong complained of." The goal of obtaining compensation from the liable party for the damage suffered in nuisance is congruous with the second goal of Part X. It is also sufficient.

Livingstone v Rawyards Coal Co (1880), 5 App Cas 25 at 39, 7 R 1 (HL) Lord Blackburn *[Livingstone]*.
Dodd Properties Ltd v Canterbury City Council, [1980] 1 All ER 928 at 938, [1980] 1 WLR 433 (CA) Donaldson LJ [*Dodd Properties*].

60 Hourigan JA erred when stating that the requirement of proving nuisance frustrates the purpose of the enactment of s. 99(2); the precedent is clear that the goals of nuisance law and s. 99(2) are not incongruous.

(iv) Conclusion

61 In the 1970s, early promoters of the Spills Bill reasoned that the "[c]ommon law and the existing provisions of the Environmental Protection Act are inadequate in spelling out the necessary procedures to control and clean up spills and restore the natural environment" (*Hansard*).

> Ontario, Legislative Assembly, *Official Report of Debates (Hansard)*, 31st Parl, 2nd Sess, No 151 (14 December 1978) at 6178 (Hon Harry C Parrott).

62 However, there have been significant developments in nuisance law since the 1970s. Currently, the Courts are empowered to take an active and flexible approach when analyzing nuisance claims, as any inherent limitations of nuisance law can be mitigated by applying its "sufficiently elastic" principles (*Foster*).

> *Foster v McCoy* (1998), 203 NBR (2d) 252 at para 45, 518 APR 252 (QB) Garnett J [*Foster*].

63 Not only is establishing an actionable nuisance for a s. 99(2) claim a correct interpretation of the Legislature's intent and the plain reading of the statute, this requirement best aligns with the policies of environmental protection, the compensatory nature of nuisance law, and prompt clean-up and reporting of spills.

C. The Appropriate Measure of Damages Under s. 99(2) is Diminution of Property Value

64 The CA erred in finding that costs of remediation were superior to diminution in value by rejecting principles of:

(i) Deference;

(ii) *Restitution in integrum;*

(iii) *Caveat emptor*; and,

(iv) Reasonableness.

(i) Standard of Review Not Met

65 The trial judge made a finding of fact that "the Plaintiff did not introduce evidence of damage or loss" (*Midwest* Sup Ct). As a matter of procedure, the CA decision cannot stand without engaging with the common law rule of deference to the trial judge's evidentiary

findings. In an area of law that the CA itself described as having "significant debate in the case law" and for a section of the *EPA* that has never been interpreted by the courts (*Midwest* CA), it must be demonstrated that the trial judge's interpretation contained some palpable and overriding error (*Housen*). No such analysis was undertaken.

> *Midwest* CA, *supra* para 3 at para 7, 60.
> *Midwest* Sup Ct, *supra* para 5 at para 23.
> *Housen v Nikolaisen*, 2002 SCC 33 at para 10, [2002] 2 SCR 235 Iacobucci and Major JJ [*Housen*].

(ii) *Restitutio In Integrum* Supports Depreciation in Value

66 Absent statutory direction otherwise, the court should default to the common law principle of *restitutio in integrum* for damages (*Livingstone*). If the SEMCC accepts that common law principles should not prevail, a reading of s. 99(2), subject to the Driedger principle, yields the same finding.

> *Livingstone*; *BG Checo International Ltd v British Columbia Hydro and Power Authority*, [1993] 1 SCR 12 at 37, 99 DLR (4th) 577 La Forest and McLachlin JJ [*BG Checo*].

67 *Restitutio in integrum* puts the plaintiff in the position they were in prior to the damage. The position that the Respondent was in at time it purchased 285 Midwest was that of an owner of industrially contaminated property, not a pristine property. Damages can only be awarded to account for loss incurred since the time of purchase.

68 The Appellants do not wish to avoid remediation to meet MOE standards for an industrial property, but rather to avoid paying for a windfall to the Respondent. The SCC has held that a complainant must demonstrate infringement of some right in order to succeed in a claim for damages (*Mason*). The Respondent has not demonstrated an infringement of any right. There is no right to a specific soil profile (*Inco*). The Respondent has also failed to demonstrate any other damage to the property. Not only does a potential contaminant need to exist, damage must be significant (*Inco*).

> *Mason v Grandel*, [1953] 1 SCR 459 at 477, [1953] 3 DLR 65 Locke J, dissenting [*Mason*].
> *Inco*, *supra* para 16 at para 55, 36.

69 The standard of proof rests with the Respondent to demonstrate that the damages sought are justified (*BC Telephone Co*). A defendant is not required to compensate the plaintiff for "plainly unreasonable restorative measures" (*Kates*). Furthermore, courts have the authority to deduct from damages any "betterment" of the property to which the plaintiff is not entitled (*Upper Lakes*). Plaintiffs have only avoided deductions for betterment where the improvements

were obligatory and reasonable (*Harbutt's Plasticine*). The Respondent has not ventured to prove any such claims, nor has the Respondent justified its betterment.

> *British Columbia Telephone Co v Shell Canada Ltd* (1987), 13 BCLR (2d) 210 at para 35, 5 ACWS (3d) 106 (SC) Callaghan J [*BC Telephone Co*].
> *Kates v Hall* (1991), 53 BCLR (2d) 322 at para 26, 25 ACWS (3d) 285 (CA) Proudfoot JA [*Kates*].
> *Upper Lakes Shipping Ltd v St Lawrence Cement Inc* (1992), 89 DLR (4th) 722 at 724, 32 ACWS (3d) 328 (Ont CA) [*Upper Lakes*].
> *Harbutt's Plasticine Ltd v Wayne Tank & Pump Co*, [1970] 1 QB 447, [1970] 1 All ER 225 [*Harbutt's Plasticine*]; *Penn West Petroleum Ltd v Koch Oil Co* (1994), 148 AR 196 at para 114, 16 Alta LR (3d) 318 (QB) Fruman J [*Penn West*].

70 If the Respondent desired a pristine property, this should have been included in the contract for sale. If the Respondent failed to include such a provision, it could not recover from the prior landowner due to the well-established principle of *caveat emptor*, buyer beware (*Choubal*).

> *1348623 Alberta Ltd v Choubal*, 2016 SKQB 129 at paras 174-5, 66 RPR (5th) 232 RW Danyliuk J [*Choubal*].

71 Contrary to contract law principles of damage where the court aims to uphold the bargained expectations of the parties, tort law does not contemplate the position that the plaintiff expected to be in (*Petro Canada*). The CA award to the Respondent is akin to expectation damages for a pristine property and is contrary to *restitutio in integrum*. The Respondent is circumventing *caveat emptor* by seeking damages from the Appellants rather than the prior landowner.

> *862590 Ontario Ltd v Petro Canada Inc* (2000), 33 CELR (NS)107 at para 346, 95 ACWS (3d) 975 (Ont Sup Ct) C Campbell J [*Petro Canada*].

72 It is important for the court to consider the likelihood that the plaintiff will effect the remediation (*McGarry*). The Respondent has shown no "genuine interest" to remediate its property (*Safe Step*), and the cost award does not further the Respondent's intended use of the property (*Hepworths*), with which the Appellants have not interfered. An interest in remediation could have been demonstrated by commencement of remediation prior to trial, for which costs could have been recovered. There are no advantages to the Respondent in remediating the property, which poses a risk that the Respondent would pocket the money as a windfall. An award for diminution in value would prevent squandering the Appellants' assets and direct damages solely to the loss incurred by the Respondent.

> *McGarry v Richards, Akroyd & Gall Ltd*, [1954] 2 DLR 367 at 391 [1953] BCJ No 139 (SC) Davey J [*McGarry*]; *Strata Corp NW 1714 v Winkler* (1987), 20 BCLR (2d) 16 at para 17, 45 DLR (4th) 741 (CA) Esson JA [*Strata*]; *Hospitality Investments Ltd v Everett Lord Building Construction Ltd (1993),*

143 NBR (2d) 258 at para 108, 366 APR 258 (QB) Jones J [*Everett*].
Safe Step Building Treatments Inc v 1382680 Ontario Inc (2004), 37 CLR (3d) 281 at para 66, 134 ACWS (3d) 235 (Ont Sup Ct) Lalonde J [*Safe Step*].
C R Taylor Wholesale Ltd v Hepworths Ltd, [1977] 2 All ER 784, [1977] 1 WLR 659 (QB) May J [*Hepworths*].

(iii) No Trend Toward Cost of Remediation

73 *Tridan* and *Canadian Tire* were cited inappropriately by Hourigan JA as illustrating a "trend" toward a choosing cost of remediation over diminution in value in contaminated lands cases (*Midwest* CA). The court in *Canadian Tire* did not discuss the merits of depreciation in value as it was not pursued by the plaintiff (*Canadian Tire*). *Canadian Tire* cannot demonstrate a trend toward choosing costs of remediation over diminution in value when the cost did not consider the merits of each alternative.

Midwest CA, *supra* para 3 at para 64.
Canadian Tire Real Estate Ltd v Huron Concrete Supply Ltd, 2014 ONSC 288 at para 6, 88 CELR (3d) 93 LC Leitch J [*Canadian Tire*].

74 In *Tridan*, the CA was not debating the merits of diminution of value against cost of remediation. The trial judge had already selected remediation as an appropriate remedy. On appeal, the court in *Tridan* chose to show deference to the findings at trial and was limited to assessing the reasonableness of costs of remediation. *Tridan* can be distinguished from the current case as it involved more than 9,000 litres of oil spilled, a clear need to remediate the plaintiff's property, and damage was proven on a balance of probabilities (*Tridan*). In this case, the Respondent has not demonstrated such a need and cites the CA decision in *Tridan* inappropriately as authority.

Tridan Developments Ltd v Shell Canada Products Ltd, 35 RPR (3d) 141 at para 1, 97 ACWS (3d) 246 (Ont Sup Ct) Binks J, aff'd (2002), 57 OR (3d) 503, 154 OAC 1 (CA) [*Tridan*].

75 In the wake of *Tridan*, the now Honourable Katherine Van Rensburg wrote a comprehensive analysis of the decision and damage awards for contaminated lands. She lamented the fact that "pristine" had been misused in *Tridan* to mean the site condition prior to contamination (Rensburg). The article reinforces that the level of remediation required is subjective and based on reasonableness and the intended use of the property. Here, the trial judge found no interference with the use or enjoyment of the land (*Midwest* Sup Ct). The Respondent suffered no immediate loss or damage and additionally no consequential loss as the business was able to carry on as usual.

Katherine Van Rensburg, "*Deconstructing Tridan; A Litigator's Perspective*" (2004) 15:1 J Envtl L & Prac at 93 [Rensburg].
Midwest Sup Ct, *supra* para 5 at para 23.

76 The Respondent is unhappy with the level of remediation that took place, but is seeking a remedy absent proof of damage or any discrete spill. Such an argument has been barred in similar cases (*Chippewas*). There are numerous avenues that can be pursued if a member of the public is not satisfied with the level of remediation on a property including those under the *Ontario Environmental Bill of Rights*. Civil claims should not be confused with those public rights.

> *Chippewas of the Thames Land Claim Trust (Trustee of) v Chrysler Canada Inc*, 2016 ONSC 793 at para 151, 1 CELR (4th) 95 LC Leitch J [*Chippewas*].
> *Ontario Environmental Bill of Rights*, RSO 1993, c 28, Parts V and VI.

(iv) Costs of Remediation Are Unreasonable

77 Damages in contaminated lands cases must be reasonable. Not only is the cost of remediation an order of magnitude more than the depreciation in value, the Respondent also made no attempts to mitigate the contamination. Mitigation indicates a demonstrable need for remediation as it can show that the plaintiff was obliged to remediate in order to facilitate its continued use and enjoyment of the property.

> *Tridan*, *supra* para 74 at para 12.
> *Canadian Tire*, *supra* para 73 at para 321.

78 The Respondent was sufficiently aware of the potential for future costs related to upkeep of the property given that it completed a Phase I site assessment. There are inherent risks to locating beside a PHC business, which the Respondent was aware of. Where it is obvious that a plaintiff might encounter additional costs in the future with their industrially used property, it is unreasonable to seek remediation damages (*Biskey*). These risks should have been bargained in the initial purchase of the property rather than retroactively implied in a civil claim. It is unreasonable to expect a pristine property in an industrial area, it is unreasonable to fail to include such an expectation in a contract, and it is unreasonable to remediate a property to a pristine condition in the middle of an industrial area where no need, loss, or damage has been demonstrated by the Respondent. Therefore, cost of remediation is an unreasonable measure of damages.

> *Biskey v Chatham-Kent (Municipality)*, 2012 ONCA 802 at para 13, 4 MPLR (5th) 1 [*Biskey*].

(v) Conclusion

79 The Respondents should not profit from the pollution resulting from the Appellants' small business activity. Loss and damage must be tied to the private rights of the Respondent, not

to public rights that are addressed by the MOE. The existence of a remediation order from the MOE is not proof of damage suffered by the Respondent.

PART IV -- SUBMISSIONS IN SUPPORT OF COSTS

80 In assessing costs, the overriding principle of reasonableness to facilitate access to justice must be considered (*Boucher*). As this case is of great importance to the public at large, it would be unreasonable to expect the Appellants to bear the full burden of its participation in the case. Regardless of the outcome of the appeal, costs against the Appellants should be denied.

> *Boucher v Public Accountants Council (Ontario)* (2004), 71 OR (3d) 291 at para 37, 132 ACWS (3d) 15 Armstrong JA [*Boucher*].

PART V -- ORDER SOUGHT

81 The Appellants respectfully request:

(a) an order by this SEMCC allowing the appeal and restoring the decision of the trial judge with respect to both liability and quantification of damages; and

(b) costs of this appeal and from the Courts below.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 23 day of January, 2017.

_____
Jimmy Ding

_____
James Goacher

_____
Rachel Islam

Counsel for the Appellants
John Thordarson and Thorco Contracting Limited

PART VI -- TABLE OF AUTHORITIES

Paragraph No.

A. Jurisprudence

B. Legislation

C. Government Documents

D. Secondary Sources

PART VII -- LEGISLATION AT ISSUE

Environmental Protection Act R.S.O. 1990, c. E.19, s. 99

99(1) Definition
In this section,
"loss or damage" includes personal injury, loss of life, loss of use or enjoyment of property and pecuniary loss, including loss of income.

99(2) Right to Compensation
Her Majesty in right of Ontario or in right of Canada or any other person has the right to compensation,
(a) for loss or damage incurred as a direct result of,
(i) the spill of a pollutant that causes or is likely to cause an adverse effect,
(ii) the exercise of any authority under subsection 100(1) or the carrying out of or attempting to carry out a duty imposed or an order or direction made under this Part, or
(iii) neglect or default in carrying out a duty imposed or an order or direction made under this Part;
(b) for all reasonable cost and expense incurred in respect of carrying out or attempting to carry out an order or direction under this Part,
from the owner of the pollutant and the person having control of the pollutant.

99(3) Exception
An owner of a pollutant or a person having control of a pollutant is not liable under subsection (2) if they establish that they took all reasonable steps to prevent the spill of the pollutant or if they establish that the spill of the pollutant was wholly caused by,
(a) an act of war, civil war, insurrection, an act of terrorism or an act of hostility by the government of a foreign country;
(b) a natural phenomenon of an exceptional, inevitable and irresistible character; or
(c) an act or omission with intent to cause harm by a person other than a person for whose wrongful act or omission the owner of the pollutant or the person having control of the pollutant is by law responsible,
or any combination thereof.

99(4) Qualification
Subsection (3) does not relieve the owner of the pollutant or the person having control of the pollutant,
(a) from liability for loss or damage that is a direct result of neglect or default of the owner of the pollutant or the person having control of the pollutant in carrying out a duty imposed or an order or direction made under this Part; or
(b) from liability, under clause (2)(a), for cost and expense incurred or, under clause (2)(b), for all reasonable cost and expense incurred,
(i) to do everything practicable to prevent, eliminate and ameliorate the adverse effect; or
(ii) to do everything practicable to restore the natural environment,
or both.

99(5) Enforcement of Right
The right to compensation under subsection (2) may be enforced by action in a court of competent jurisdiction.

99(6) Liability
Liability under subsection (2) does not depend upon fault or negligence.

99(7) Contribution
In an action under this section,
(a) where the plaintiff is an owner of the pollutant or a person having control of the pollutant, the court shall determine the degree, if any, in which the plaintiff would be liable to make contribution or indemnification under subsection (8) if the plaintiff were a defendant; and
(b) where the plaintiff is not an owner or a person having control referred to in clause (a), the court shall determine the degree, if any, in which the plaintiff caused or contributed to the loss, damage, cost or expense by fault or negligence,
and the court shall reduce the compensation by the degree, if any, so determined.

99(8) Extent of Liability
Where two or more persons are liable to pay compensation under this section, they are jointly and severally liable to the person suffering the loss, damage, cost or expense but as between themselves, in the absence of an express or implied contract, each is liable to make contribution to and indemnify the other in accordance with the following principles:
1. Where two or more persons are liable to pay compensation under this section and one or more of them caused or contributed to the loss, damage, cost or expense by fault or negligence, such one or more of them shall make contribution to and indemnify,
i. where one person is found at fault or negligent, any other person liable to pay compensation under this section, and
ii. where two or more persons are found at fault or negligent, each other and any other person liable to pay compensation under this section in the degree in which each of such two or more persons caused or contributed to the loss, damage, cost or expense by fault or negligence.
2. For the purpose of subparagraph ii of paragraph 1, if it is not practicable to determine the respective degrees in which the fault or negligence of two or more persons liable to pay compensation under this section caused or contributed to the loss, damage, cost or expense, such two or more persons shall be deemed to be equally at fault or negligent.
3. Where no person liable to pay compensation under this section caused or contributed to the loss, damage, cost or expense by fault or negligence, each of the persons liable to pay compensation is liable to make contribution to and indemnify each other in such degree as is determined to be just and equitable in the circumstances.

99(9) Enforcement of Contribution
The right to contribution or indemnification under subsection (8) may be enforced by action in a court of competent jurisdiction.

99(10) Adding Parties

Wherever it appears that a person not already a party to an action under this section may be liable in respect of the loss, damage, cost or expense for which compensation is claimed, the person may be added as a party defendant to the action upon such terms as are considered just or may be made a third party to the action in the manner prescribed by the rules of practice for adding third parties.

99(11) Settlement and Recovery Between Persons Liable
A person liable to pay compensation under this section may recover contribution or indemnity from any other person liable to pay compensation under this section in respect of the loss, damage, cost or expense for which the compensation is claimed by settling with the person suffering the loss, damage, cost or expense and continuing the action or commencing an action against such other person.

99(12) Amount of Settlement
A person who has settled a claim and continued or commenced an action as mentioned in subsection (11) must satisfy the court that the amount of the settlement was reasonable, and, if the court finds the amount was excessive, the court may fix the amount at which the claim should have been settled.

99(13) [Repealed 2002, c. 24, Sched. B, s. 25, item 8.]
[Note: The Limitations Act, 2002, S.O. 2002, c. 24, Schedule B, s. 25, item 8 (in force January 1, 2004) repealed the limitation periods prescribed by s. 99(13). Reference should be made to ss. 1, 4, 15 and 17 of the Limitations Act, 2002 for the relevant new limitation periods and related definitions, and to s. 24 of that Act for the applicable transitional rules. Immediately before its repeal, s. 99(13) read as follows:
(13) Limitation for Actions for Compensation
No person is liable to an action for compensation under this section unless the action is commenced within two years from,
(a) where the person commencing the action incurred loss or damage as a result of the spill of a pollutant, the date when the person knew or ought to have known of the loss or damage;
(b) where the person commencing the action incurred loss or damage as a result of carrying out or attempting to carry out or neglect or default in carrying out a duty imposed or an order or direction made under this Part, the date when the person knew or ought to have known of the loss or damage; or
(c) where the person commencing the action incurred cost and expense in respect of carrying out or attempting to carry out an order or direction made under this Part, the date when the person incurred the cost and expense.

99(14) [Repealed 2002, c. 24, Sched. B, s. 25, item 8.]
[Note: The Limitations Act, 2002, S.O. 2002, c. 24, Schedule B, s. 25, item 8 (in force January 1, 2004) repealed the limitation periods prescribed by s. 99(14). Reference should be made to ss. 1, 4, 15 and 17 of the Limitations Act, 2002 for the relevant new limitation periods and related definitions, and to s. 24 of that Act for the applicable transitional rules. Immediately before its repeal, s. 99(14) read as follows:
(14) Limitation for Actions for Contribution or Indemnity

Where, within the period of time prescribed by subsection (13), an action for compensation is commenced against a person liable to pay compensation under this section or a person liable to pay compensation under this section settles a claim for compensation with a person who has suffered loss, damage, cost or expense, no proceeding for contribution or indemnity against another person liable to pay compensation under this section is defeated by the operation of any Act limiting the time for the commencement of action against such other person if,

(a) the proceeding is commenced within one year of the date of the judgment in the action or the settlement, as the case may be; and

(b) there has been compliance with any Act requiring notice of claim against such other person.

JOHN THORDARSON and
THORCO CONTRACTING LIMIED
APPELLANTS
(Respondents)

-and-

MIDWEST PROPERTIES LTD.

RESPONDENT
(Appellant)

S.E.M.C.C. File Number: 03-04-2017

SUPREME ENVIRONMENTAL MOOT
COURT OF CANADA

FACTUM OF THE APPELLANTS JOHN THORDARSON and THORCO CONTRACTING LIMITED

TEAM # 2017-01

Jimmy Ding
James Goacher
Rachel Islam4

Counsel for the Appellants,
John Thordarson and
Thorco Contracting Limited