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 RESPONDENT
MIDWEST PROPERTIES LTD.

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

TEAM #2

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

AND TO: **ALL REGISTERED TEAMS**

PART I -- OVERVIEW AND STATEMENT OF FACTS

1. Overview of the Respondent's Position

1 Thorco Contracting Ltd and Mr. Thordarson ("The Appellants") must be held to account for the environmental damage they caused to Midwest's property. Midwest Properties Ltd. ("Midwest") asks that the Supreme Environmental Moot Court of Canada ("SEMCC") uphold the Ontario Court of Appeal's unanimous decision to award $1.328 million in damages to Midwest. Midwest advances three points in support of this claim: (1) an existing order from the Ministry of Environment and Climate Change ("The Ministry") does not preclude a claim under section 99(2); (2) Midwest does not need to demonstrate an actionable nuisance to pursue the section 99(2) remedy; and (3) the correct measure of Midwest's damages is the cost of future remediation, not the diminution in property value.

> *Midwest Properties Ltd v Thordarson*, 2015 ONCA 819, 128 OR (3d) 81 at paras 1-4 [Appeal Decision].
> *Environmental Protection Act*, RSO 1990, c E-19 ss 91-123 [EPA].

2 The *Environmental Protection Act* ("EPA") achieves its purpose by forcing polluters to pay for their environmental contamination, promoting prompt and effective clean-up of contaminants, and filling gaps present at common law. Ultimately, this court can uphold the fundamental Canadian value of environmental preservation embodied in the EPA by holding the Appellants liable for the full costs needed to remediate Midwest's property.

3 Midwest discovered that Petroleum Hydrocarbons ("PHCs") had contaminated its property one year after acquiring it. The Appellants' neglect and failure to properly store PHC waste for more than 40 years caused the contamination. Furthermore, the Appellants have failed to comply with the Ministry's order to remediate Midwest's property. This court should hold Thorco Contracting Ltd. and Mr. Thordarson responsible for their actions by affirming the Ontario Court of Appeal's unanimous decision that the Appellants are liable under section 99(2) of the EPA.

> Appeal Decision, *supra* para 1 at paras 1-4.
> EPA, *supra* para 1 s. 91-123.

2. Respondent's Position with Respect to the Appellant's Statement of the Facts

(i) *Factual Background*

(a) Midwest Discovers the Appellants' Contamination

4 Midwest Properties Ltd., the Respondent, manufactures and distributes clothing out of 285 Midwest Road ("Midwest's Property") in Toronto, Ontario.

Appeal Decision, *supra* para 1 at para 9.

5 Thorco Contracting Ltd. and Mr. Thordarson, who controls the Corporation, are the Appellants. The Appellants store petroleum waste as a necessary feature of their business—servicing petroleum tank linings and equipment at 1700 Midland Avenue, Toronto, Ontario ("The Appellants' Property"). The Appellants' Property borders Midwest's property.

Appeal Decision, *supra* para 1 at paras 1, 10.

6 In 2008, Midwest discovered that the Appellants' petroleum waste had contaminated its property—PHCs are known noxious substances. Midwest purchased its property in 2007 and conducted a Phase I Environmental Assessment: there were no signs of contamination. Furthermore, because there was no history of toxic chemicals being used at Midwest's property, the contractor who conducted the assessment did not recommend a Phase II Environmental Assessment.

Appeal Decision, *supra* para 1 at para 9

7 Midwest only discovered the contamination on its property when it sought to purchase the Appellants' property and conducted a Phase II Assessment. The Appellants had never conducted a Phase II Assessment despite being advised through a Phase I Assessment and two previous Environmental Assessments that a more invasive Phase II Assessment was needed to assess the subterranean pollution's extent.

Appeal Decision, *supra* para 1 at paras 11, 12-26

8 The 2011 Phase II Assessment uncovered new pollution on Midwest's property since the 2008 assessment. Both Midwest's and the Appellants' experts agreed at trial that not only were the PHCs present at 285 Midwest Avenue, they would also eventually enter the Great Lakes water system through Highland Creek, magnifying the risk that these PHCs pose.

Appeal Decision, *supra* para 1 at para 122.

9 Monitoring wells on Midwest's property also indicated that PHCs were present in volatile concentrations great enough to pose a substantial risk to human health. Environmental expert Robert Tossell testified at trial that the contaminants would likely enter Midwest's factory and substantially impact human health. The Appellants' contaminants increased over time after the initial monitoring wells were dug, further exacerbating the material harm to human health and the environment.

Appeal Decision, *supra* para 1 at paras 101-02.

10 At trial, Ministry Officer Mitchell testified that the Appellants' storage practices were some of the 'worst he had ever seen'. The Appellants left the pollutants open to mix with storm water and saturate the soil. In his 2008 inspection Officer Mitchell observed that a breached containment structure immediately adjacent to Midwest's property was leaking furnace oil, mixing with storm water.

(b) Thorco Has a Long History of Non-Compliance and Poor Storage Practices

11 Both Pollak J and the Ontario Court of Appeal ("ONCA") confirmed that the Appellant's failure to comply with Ministry regulations caused the PHC contamination on Midwest's property.

Appeal Decision, *supra* para 1 at para 37.

12 The Appellants refused to obtain Ministry approval to store PHCs until nine years after they began storing them. By 1996, the Appellants were exceeding their storage limit by 53,000-gallons and were storing nearly five times the amount that the Ministry mandated by 1999. (111,000-gallons).

Appeal Decision, *Supra* para 1 at paras 12-23.

13 In 2000, the Appellants were convicted of several *EPA* offences. Although the Appellants began winding down their business after the conviction, they did not meet the Ministry's storage requirements until 2009, and the PHCs that remained continued to be stored improperly.

Appeal Decision, *supra* para 1 at paras 12-23.

(c) PHCs Pose Substantial Risks and Remediation is Required

14 PHCs are widely understood to be toxic if found in significant quantities. Several wells drilled into the Appellant's property showed high levels of PHC pollution on the Appellant's' property, and that a Phase II assessment was needed for Midwest's property. This Assessment uncovered PHC pollution on Midwest's property. It also determined that the pollution still poses significant health risks to anyone accessing Midwest's property.

Appeal Decision, *supra* para 1 at paras 11, 24-26, 31.

15 Midwest's experts estimated that the cost to remediate Midwest's property would total $1.328 million. At trial, all experts agreed with the plan. The Appellants have failed to produce any evidence to suggest an alternative cost for remediation.

Appeal Decision, *supra* para 1 at para 31.

(ii) *Procedural History*

16 Contrary to Paragraph 8 of the Appellants' factum, the contamination's cause is not in dispute. At trial, Pollack J found that the Appellants had contaminated Midwest's property, but dismissed Midwest's section 99(2) claim on purely legal grounds: (1) that recovery under section 99 was precluded where the Ministry has already ordered remediation; and (2) that Midwest could not demonstrate that its property was contaminated after it was purchased in 2007.

Midwest v Thordarson, 2013 ONSC 775, 73 CELR (3d) 303 at paras 20, 23, 31.

17 Hourigan JA and the ONCA found that the trial judge made a palpable and overriding error in discounting the evidence of damage. The Court found that: (1) An existing MOE order does not preclude a private cause of action under section 99(2); (2) this cause of action does not depend on an actionable nuisance; and (3) remediation costs is the superior measure of damages for section 99(2), as opposed to a diminution in property value.

Appeal Decision, *supra* para 1 at paras 6, 105.

PART II -- THE RESPONDENT'S POSITION WITH RESPECT TO THE APPELLANT'S QUESTIONS

18 The issues in this appeal are as follows:

Issue 1: Did the Court of Appeal err in finding that damages are not precluded under section 99(2) where the Ministry of the Environment and Climate Change had ordered the defendant to remediate the plaintiff's property?

The fundamental rules of statutory interpretation, the Polluter Pays Principle, and the EPA's purpose all demonstrate that the Ministry's order to remediate should not preclude Midwest's private cause of action under the statute.

Issue 2: Did the Court of Appeal err in finding that liability under section 99(2) is not dependent on establishing an actionable nuisance at common law?

Midwest does not need to establish an actionable nuisance at common law to access a statutory remedy afforded by section 99(2). The less onerous standard under section 99(2) allows liability for spills to be assigned promptly and serves the Legislature's goal to protect the environment.

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

The appropriate remedy afforded to Midwest should be the property's remediation costs, regardless of whether the costs have been incurred. This remedy coincides with existing case law and serves the EPA's purpose: environmental protection.

PART III -- ARGUMENT

1. Damages are not Precluded Under Section 99(2) Where the Ministry Has Issued a Remediation Order.

19 Applying Driedger's Modern Principle to the EPA illustrates that a Ministry order does not preclude damages under section 99(2). The ONCA clarified the Supreme Court of Canada's ("SCC") statutory interpretation test in *Blue Star Trailer Rentals Inc v 407 ETR Concession*. The ONCA found that the modern interpretive principle examines three factors: (1) A plain reading of the provision; (2) the Act's entire context and the Legislature's intent; and (3) the legislation's purpose.

> Elmer A. Driedger, *Construction of Statutes*, 2nd ed (Toronto: Butterworths, 1983) at 87 [Driedger].
> *Bell ExpressVu Ltd Partnership v Rex*, 2002 SCC 42, 2 SCR 559 at para 26 [*Bell ExpressVu*].
> *Blue Star Trailer Rentals Inc v 407 ETR Concession*, 2008 ONCA 561, 295 DLR (4th) at paras 23-25.

20 Midwest submits that the ONCA was correct to find that Part X of the EPA ("The Spills Bill") does not bar an action under section 99(2) where the Ministry has issued a remediation order for the following reasons: (1) A plain reading of section 99(2) indicates that the remedy is not precluded when the Ministry has issued a remediation order; (2) the legislative context in which the Spills Bill was enacted shows that private recovery under section 99(2) is permitted where a Ministry order has been issued; and (3) permitting recovery where the Ministry has ordered remediation is congruent with the EPA's purpose.

(i) *A Plain Reading of Section 99(2) Indicates that the Remedy is not Precluded When the Ministry Has Issued a Remediation Order.*

21 When read in its plain and ordinary language, section 99(2) allows a private claimant to seek compensation from both the pollutant's owner and controller, and the Crown, for direct damage arising, or that will likely arise, from a spill. In effect, section 99(2) contemplates that a Ministry order may exist in tandem with a private action, and does not contain an explicit bar to recovery where a Ministry order exists. The provision's broad language, without an express bar to recovery, demonstrates that Hourigan JA was correct to conclude that a Ministry order does not preclude recovery under section 99(2).

> EPA *supra* para 1 ss 99(2)(a)(i)-(iii).

(ii) *The Legislative Context in Which the Spills Bill was Enacted shows that Private Recovery Under s 99(2) is Permitted Where a Ministry Order Has been Issued*

22 The ONCA correctly found that the Ontario Legislature intended for section 99(2) to have as few restrictions as possible within the Spills Bill's entire context. The ONCA was correct to make this finding for three reasons: (1) the Spills Bill allows the Ministry to issue complimentary orders; (2) Section 99(2) does not expressly exclude recovery; and (3) the Ontario Legislature intended for the Spills Bill to promote the Polluter Pays Principle.

(a) The Spills Bill Allows the Ministry to Issue Complementary Orders

23 Midwest agrees with the Appellants' submission at paragraph 25 that the EPA grants the Ministry broad and complementary powers to preserve the environment. However, the Legislature did not intend to make the Ministry the sole authority responsible for clean-up. Section 93(1) places a duty on the polluter to do everything practicable to prevent, eliminate, and ameliorate a spill's adverse effects. This duty exists independent of a Ministry order, and demonstrates that liability for polluters can arise whether the Ministry has issued an order or not.

EPA, *supra* para 1 s 93(1).

(b) Section 99(2) Does Not Expressly Exclude Recovery

24 The complementary measures within the Spills Bill fits within the EPA's framework overall. Hourigan JA was correct to find that the EPA empowers the Ministry to issue a range of orders to address pollution, which do not limit one another. Although the EPA does contain limits on remedies, they only exist expressly. For example, section 186(4) of the EPA precludes the Ministry from prosecuting a polluter who fully complies with an order. This exception prevents the Ministry from convicting the polluter twice for the same offense, which is consistent with the principles of natural justice. This limit is express, and further demonstrates that the EPA does not limit actions by implication.

Appeal Decision, *supra* para 1 at para 52.
EPA, *supra* para 1 ss 186(4)

25 In contrast to section 186(4), section 99(2)(a)(iii) provides for recovery of loss or damage that a polluter's negligence or default in carrying out an order to remediate causes. This provision contemplates that a private action can exist in tandem with a Ministry order to remediate. A private cause of action for a failure to carry out a remediation order means that an

order must exist. Section 99(2) does not preclude recovery where a Ministry order to remediate exists; it provides a cause of action to a private party against polluters who fail to carry out an existing order. This parallels with the Appellants' failure to carry out the 2012 Ministry order and the damage suffered by Midwest. As a result, Midwest should be allowed to recover for the contamination of its property through a private cause of action under section 99(2).

Appeal Decision, *supra* para 1 at para 52.
EPA, *supra* para 1 ss 186(4), 92(2)(a)(iii).

26 Midwest submits that, irrespective of when the contamination occurred, the Appellants' historic contamination constitutes a spill under section 91(1). Farley J found in *Mortgage Insurance Co. v Innisfil Landfill Corp* that each escape of a toxic substance constitutes a fresh spill. The Appellants have argued, at paragraph 14, that their historical contamination should shield them from liability because multiple, successive discharges do not satisfy a spill's definition—this directly contradicts Farley J's decision. The SEMCC should follow the precedent set in *Mortgage Insurance Co.*, which both Pollack J and the ONCA relied on in their decisions to find that the Appellants' routine discharges of PHCs constituted a spill.

Mortgage Insurance Co v Innisfil Landfill Corp (1996), 2 CPC (4th) 143 (ON Gen Div), at 17.

27 The Appellants further argue at paragraphs 21-23 that their discharge of PHCs is not an 'emergency situation' that the Spills Bill was allegedly intended for. At paragraph 19, they also infer that a spill must meet some objective criteria to qualify as a spill under the EPA. Midwest submits that this interpretation violates the Legislature's express written intention, and is out of step with the EPA's overall context. The Legislature defined a spill as a discharge that is "abnormal in quality or quantity in light of all of the circumstances of the discharge". If the Legislature wished to limit spills to 'emergency' situations, it would have expressly included this limitation in the definition of a spill; no such limit exists. Therefore, section 99(2) does not require the claimant to establish that an 'emergency' arose.

EPA, *supra* para 1 s 91(1), 99(2).

(c) <u>The Ontario Legislature Intended for the Spills Bill to Promote the Polluter Pays Principle</u>

28 The Spills Bill obligates polluters to clean up a spill in a timely manner to reduce the spill's damage and ensures persons receive compensation from a pollutant's owner where they suffer damage. Minister Parrot's statements at the bill's Second Reading on March 27, 1979 demonstrates the Legislature's intent to promote these goals. He stated that the Spills Bill places

initial responsibility on the polluter to encourage prompt cleanup. Moreover, Minister Parrott states that the bill extends the right to compensation beyond common law remedies, allowing individuals exposed to toxic spills to seek compensation from *either* the polluter or the Crown. The Minister's statements were echoed by other members in the Legislature, which supports the assertion that the remedy in section 99(2) complements the Spills Bill's other measures, as opposed to being restricted by them.

> Mario D. Faieta, et al., Environmental Harm: Civil Actions and Compensation (Toronto: Butterworths, 1996) at 144 [Faieta, et al.].
> Ontario, Legislative Assembly, *Official Report of Debates (Hansard)*, 31st Parl, 3rd Sess (27 March 1979) at 1400 (Hon. Mr. Parrot) [Spills Bill Second Reading].

29 The SCC directly recognized in *Imperial Oil v Quebec (Minister of the Environment*) that these goals are embodied in the Polluter Pays principle. The Court found that the Polluter Pays principle assigns responsibility on polluters to clean up the pollution that they have caused. Furthermore, the SCC found that sections 93, 97, and 99 of the EPA enshrined the principle within Ontario's environmental law. Hourigan JA correctly used this decision to find that section 99(2) imposes strict liability on polluters once ownership and control over the pollutant has been determined.

> *Imperial Oil v Quebec (Minister of the Environment)*, 2003 SCC 58, 2 SCR 235 at paras 24, 23.
> Appeal Decision, *supra* para 1 at para 68

(iii) *Permitting Recovery where the Ministry has Ordered Remediation is Congruent with the EPA's Purpose*

30 If the SEMCC precludes Midwest from recovering damages, it would undermine the EPA's purpose to preserve the natural environment and promote the "Polluter Pays" principle. The preclusion of recovery would allow polluters to: (1) download the costs of their non-compliance to innocent parties; (2) use the mere possibility of double recovery to evade remediation; and (3) shield themselves from cleaning up the spill.

(a) <u>The Preclusion of Damages Would Allow Polluters to Download the Costs of their Non-Compliance to Innocent Parties</u>

31 The EPA was enacted to preserve the natural environment, and it achieves this goal by forcing polluters to pay for the damage caused by their pollution. The "Polluter Pays" principle creates a financial disincentive for pollution—it prevents polluters from passing on the costs of non-compliance to innocent parties. In the case at bar, if Midwest is precluded from recovering

damages under section 99, it will be forced to absorb the costs flowing from the Appellants' non-compliance that is not specified in the Ministry's order.

Imperial Oil, *supra* para 29 at paras 24, 23.
EPA, *supra* para 1 ss 93, 97, 99.

32 The Appellants claim at paragraph 25 that the EPA establishes the Ministry as a clean-up's exclusive administrator. However, the Ministry's order was limited in this case, as it only required the Appellants to complete a subterranean investigation and restoration program. It failed to address all damages flowing from the Appellants' spill. In effect, the Appellants would force Midwest to absorb several costs flowing from their spill: (1) economic losses that may arise from disruptions to its manufacturing process; (2) human health costs that will arise if the PHCs migrate into Midwest's building; (3) potential legal liability for Midwest if PHCs move from the soil on Midwest's property to its neighbours; and (4) a decrease in Midwest's property value because of the spill. Quite simply, the Ministry order requires the Appellants to create a remediation plan that adequately meets the Ministry's needs: it does not require the plan to meet Midwest's needs.

Appeal Decision, *supra* para 1 at para 33.

33 Unlike the Ministry's order, Midwest's remediation plan is sensitive to its business needs, addresses the potential risks to human health, eliminates any potential legal liability, and restores the property's value. If the Appellants can use the Ministry's order as a shield, Midwest would be forced to absorb all the costs that arise from the Appellants' pollution. This would undermine the EPA's purpose by allowing the Appellants to pass the costs of its non-compliance onto an innocent party, violating the tort principle of *restitutio in integrum*, which the Appellants reference at paragraph 59.

(b) <u>The Preclusion of Damages Would Allow Polluters to Use the Mere Possibility of Double Recovery to Evade Remediation</u>

34 The Appellants claim at paragraph 30 that the EPA does not mandate the Ministry to redirect its order to Midwest, which would create the possibility of double recovery. Midwest submits that this possibility is largely speculative, and the Ministry's or the Court's broad powers can easily avoid this possibility. Double recovery does not manifest at the moment Midwest receives damages under section 99(2). It manifests after Midwest receives damages, and the Ministry still attempts to force the Appellants to remediate Midwest's property. The EPA's text gives the Ministry broad discretionary powers that allow it to make and withdraw orders.

Furthermore, the Courts have ultimate jurisdiction to determine the appropriate level of damages to award. Ultimately, it is up to the Ministry to harmonize its orders with private actions. Where the Ministry fails to do so, the courts will limit the Ministry's orders to prevent a double recovery.

EPA, *supra* para 1 s 196.
Courts of Justice Act, RSO 1990 c C-43 s 131(1).

35 In this case, the Ministry stated that it would redirect the Appellants' order to Midwest. Moreover, based on the Appellants' long history of negligence, it is improbable that the Appellants will comply with the Ministry's order to remediate Midwest's property. To date, the Appellants have taken no action to remove the contaminated soil and groundwater from their own property, and have not taken any steps to improve their storage practices. This court should not preclude damages based on a hypothetical result, when it can use its flexible powers to craft an appropriate remedy, if the Ministry does not exercise its own discretion.

Appeal Decision, *supra* para 1 at para 36.

(c) <u>The Preclusion of Damages Would Allow Polluters to Shield Themselves from Cleaning Up their Spill</u>

36 Hourigan JA was correct to recognize that a limitation would enable the Appellants and other polluters to shield themselves from cleaning up their spill. This would go against the Legislature's explicit purpose to strengthen the Ministry's powers. In this case, the Appellants have used the Ministry's order as a shield to evade their responsibilities. To date, they have failed to take any steps to comply with the 2012 order, and it is unlikely that they will without a court order to enforce it. In fact, Mr. Thordarson testified at trial that it was not lucrative to comply with the Ministry's order. If Midwest's private claim is barred, the Appellants will have successfully used section 99(2) as a shield, will continue to ignore the Ministry's order, and Midwest's property will remain contaminated.

Appeal Decision, *supra* para 1 at paras 49, 122.

(iv) *Section 99(2) Does Not Preclude Private Recovery Where a Ministry Order Exists*

37 In summary, an existing Ministry order does not preclude a successful claim under Section 99(2) of the EPA. Not only does the EPA specifically contemplate that Ministry orders will complement each other, but it also does not explicitly limit the section 99(2) remedy where a

Ministry order exists as it does in other sections. The private cause of action under section 99(2) would enable the Appellants from evading their statutory responsibilities. This interpretation is consistent with the SCC's recognition that environmental preservation is a fundamental Canadian value that deserves an expansive reading.

114957 Canada Ltée (Spraytech, Société d'arrosage) v Hudson (Town), 2001 SCC 40, 2 SCR 241 at para 1 [Spraytech].

2. Liability Under Section 99(2) Does Not Depend on Establishing an Actionable Nuisance at Common Law

38 Liability under section 99(2) of the EPA is not dependent on establishing an actionable nuisance for two reasons: (1) Section 99(2) only requires that substantial harm occur, or be likely to arise, while private nuisance requires the harm to be substantial and unreasonable; and (2) The less onerous threshold is consistent with the legislature's goal to preserve the environment.

(i) *Section 99(2) only Requires that Substantial Harm Occur, or be Likely to Arise, while Private Nuisance Requires the Harm to be Substantial and Unreasonable*

39 A nuisance requires that an interference with a plaintiff's use or enjoyment of land be both substantial and unreasonable. While the Appellants accurately state the test for nuisance at paragraphs 34 and 35, they erred in its application to the Spills Bill. Midwest submits that section 99(2) allows recovery for claims that would not meet the nuisance standard.

Antrim Truck Centre v Ontario (Transportation), 2013 SCC 13, 1 SCR 594 at paras 18 and 19, 26 [*Antrim*].

40 Section 99(1) does not require that a spill cause substantial harm at the time the spill occurs. Damage that will likely arise in the future is sufficient to satisfy these provisions. The Appellants have argued at paragraph 37 that section 99(2) depends on establishing actual physical damage to Midwest's property. Midwest respectfully disagrees. In *Mortgage Insurance Co.*, Farley J held that section 99(2) requires a claimant to show "loss or damage as the direct result of the spill. However, the loss or damage can arise because the spill 'causes or is likely to cause an adverse effect.'" Therefore, section 99(2) differs substantially from nuisance by permitting recovery where damage has not occurred, but will likely arise.

Mortgage Insurance Co., supra para 26 at 17.
EPA, *supra* para 1 ss 99(1).

41 The Appellants also failed to correctly apply the test for unreasonable interference. They claim at paragraph 39 that the nuisance test's reasonableness branch is incorporated in section 99(2) through the definition of a spill set out in section 91(1)(c). However, this definition does not take into account various factors that Cromwell J required in *Antrim*. The test for a private nuisance requires the claimant to demonstrate that it would be unreasonable for them to suffer the loss without compensation, while section 91(1)(c) is concerned with whether a spill occurred. It does not consider various factors that the nuisance remedy does, such as: the social utility of the defendant's actions, the spill's location, or whether the claimant is particularly sensitive. The remedy simply asks whether a known pollutant spilled into the natural environment and caused or will likely cause non-trivial harm.

Antrim, *supra* para 39 at paras 25-29.
EPA, *supra* para 1 ss 99(2) and (3).

42 In this case, the Appellant's liability arose immediately after the spill. Pursuant to section 99(3), the Appellants could have fully defended against liability under section 99(2) had they taken all reasonable steps to prevent the spill; they did not. Officer Mitchell testified at trial that the Appellants' storage practices were some of the worst he had ever seen, and that it was very likely that the PHCs would migrate offsite. Furthermore, Midwest's expert testified at trial that these contaminants were present in volatile concentrations within the building at Midwest's property and posed a risk to human health.

EPA, *supra* para 1 ss 99(2), (3).
Appeal Decision, *supra* para 1 at paras 14, 15, 19, 20 25

(ii) *The Less Onerous Threshold is Consistent with the Legislature's Goal to Preserve the Environment*

43 Environmental preservation is the EPA's goal. By allowing the courts to award damages where the harm has not yet materialized, sections 99(1) and (2) permit courts to assign liability promptly, ensure quick clean-up, and minimize environmental damage. The environmental harm's full extent may take years to manifest, and may not be fully understood when the spill occurs. To prevent deficiencies in scientific knowledge from becoming legal barriers to clean-up, section 99(2) does not require claimants to demonstrate that the harm has actually materialized. Instead the threshold is met if the claimant can demonstrate that personal injury, loss of use or enjoyment of property, or financial loss is likely to arise.

EPA *supra* para 1 ss 99(1), (2).

See Lynda Collins & Heather McLeod-Kilmurray, "Material Contribution to Justice? Toxic Causation after *Resurface Corp v Hanke*" (2010) 48 ¾ Osgoode LJ 411.

44 The ONCA was correct to find that section 99(2) imposes a less onerous threshold on claimants than private nuisance, thereby addressing the common law's limits. At the Spills Bill's Second Reading, Minister Parrot stated that the bill would allow the Ministry to devote its resources to remediate the natural environment in a timely manner and prevent future spills. Liability under section 99(2) can be met without pursuing the question of fault, intention, and the reasonableness of the polluter's conduct.

Appeal Decision, *supra* para 1 at para 73.
EPA, *supra* para 1 s 99(2).
Spills Bill Second Reading, *supra* para 28.

45 Contrary to the Appellants' claim at paragraphs 51 to 60, reading an actionable nuisance into section 99(2) would undermine the EPA's remedial functions, and its overall purpose. The Appellants want to restrict access to section 99(2), by forcing claimants to demonstrate that an interference was both substantial and unreasonable. Section 99(2)(a) only requires the claimants to demonstrate loss or damage, it does not consider the reasonableness of the polluter's actions. If the Legislature intended to codify nuisance in section 99(2), it would have required that the damage have materialized at the time of the claim, and would have contemplated whether the polluter's conduct was reasonable.

(iii) *Claimants Do Not Need to Demonstrate an Actionable Nuisance to Succeed in a Section 99(2) Private Cause of Action*

46 In summary, Midwest does not have to demonstrate an actionable nuisance under section 99(2) of the EPA. A private nuisance requires the claimant to demonstrate both substantial and unreasonable harm, while section 99(2) only requires that harm will likely arise. The Appellants' interpretation would reverse the Legislature's express intention of addressing limitations in common law causes of action.

3. The Future Cost of Remediation is the Appropriate Remedy for Midwest

47 The ONCA was correct to conclude that the future costs of remediation are the appropriate measure of Midwest's damages. A 1996 Ontario Law Reform report discussed the benefits in calculating damages based on the remediation's cost, over the property value's

diminution. *Tridan Developments Ltd v Shell Canada Products* followed the Law Reform Commission's report and awarded damages based on the future cost of remediation. The ONCA's award was consistent with all three aspects of Driedger's modern principle: (1) A plain and ordinary reading of section 99(2) supports remediation damages; (2) the EPA's entire context supports the ONCA's damages award; and (3) future remediation damages best support the EPA's overarching purpose to preserve the natural environment. Finally, Midwest's remediation plan was reasonable.

Ontario Law Reform Commission, *Report on Damages for Environmental Harm* (Toronto, 1990) at 36 and 37 [Ontario Law Reform Commission].
Tridan Developments Ltd v Shell Canada Products, [2002] 57 OR (3d) 503, 110 ACWS (3d) 1045.
Driedger, *supra* para 19.

(i) *A Plain and Ordinary Reading of Section 99(2) Supports Remediation Damages*

48 Section 99(2)(a)(i) permits compensation for any damage incurred as the direct result of a spill that has or will likely cause an adverse effect. Moreover, section 99(1) defines personal injury or loss of life as compensable damage. Remediation can adequately mitigate injury or loss of life that might arise before it occurs. Damages based on a property value's diminution does not address the negative health effects that the Appellants' spill will likely cause to Midwest's occupants. Read plainly, section 99(2) allows claimants to receive the costs necessary to remediate their properties.

EPA, *supra* para 1 ss 99(1), (2)(a)(i).

49 However, Section 99(2)(b) may contradict section 99(2)(a)(i) by limiting recovery to remediation costs that have been "incurred." This limited interpretation of section 99(2) is at odds with both the legislative context of the EPA and its overall purpose. To be in step with the Act's overall purpose, the SEMCC should uphold the ONCA's finding that the appropriate remedy is the full cost for Midwest's remediation plan.

EPA, *supra* para 1 ss 99(2)(a)(i), (b).

(ii) *The EPA's Entire Context Supports the ONCA's Damages Award*

50 The ONCA's remediation award is consistent with the Appellants' statutory duties under sections 93 and 157.1, as well as recent developments in the common law. If this court uses the decrease in value of Midwest's property to measure damages, it will undermine other provisions in the Spills Bill, and limit its remedies to those available in 1985.

(a) The Appellants' Duties under the Spills Bill Supports the ONCA's Award

51 Section 93(1) of the EPA imposes a general duty on the Appellants as the owners of PHCs. This duty became effective under section 93(2) when the Appellants knew, or ought to have known, that the spill was likely to cause an adverse effect. The Ministry's 2012 order also imposes a duty on the Appellants to restore Midwest's property pursuant to sections 157.1 of the EPA. Calculating damages on the decrease in Midwest's property value would not restore Midwest's property to its pre-contaminated condition, and the Appellants will have failed to meet their statutory duties under Spills Bill.

EPA, *supra* para 1 ss 93(1), (2).
EPA, *supra* para 1 ss 157.1.

52 Future remediation costs best allow the Appellants to meet their statutory duty under sections 93(1) and 157.1 of the EPA. These damages would also remove the adverse health risks that the PHCs pose to persons accessing Midwest's property. Additionally, restoration costs would put Midwest back in the same position they were in prior to the harm, meeting the damages principle of *restitutio in integrum*. Ultimately, if this court measures costs based on the decrease in Midwest's property value, the award will not capture all of the damage that Midwest will likely endure, while future remediation costs will.

EPA, *supra* para 1 ss 93(1), 157.1.
Livingstone v Raywards Coal Co (1880), 5 App Cas 25 at 39, 7 R 1 (HL) Lord Blackburn [Livingstone].

(b) The EPA's Remedies Should Keep Pace with the Common Law

53 This court should not freeze the remedies available in section 99(2) to those available at the time it was enacted, especially when the common law allows future remediation damages. In *Tridan*, the ONCA established that costs of future remediation was the correct measure of damages in private nuisance. More recently, *Tridan* was reaffirmed in *Canadian Tire Real Estate Ltd v Huron Concrete Supply Ltd*, where the court awarded damages for future remediation costs under the torts of strict liability, nuisance, negligence and trespass.

Tridan, *supra* para 47.
See Canadian Tire Real Estate Ltd v Huron Concrete Supply Ltd, 2014 ONSC 288, 88 CELR (3d) 93.

54 Midwest submits that the EPA's legislative context has evolved since 1985, and the damages under section 99(2) must develop accordingly. In *Ontario v Canadian Pacific Ltd*, Gonthier J found that provincial and federal environmental legislation should be interpreted

broadly, so that the legislation can adapt to scenarios that were unforeseen by the drafters. The drafters could not have foreseen these particular developments in the common law. If this court allows Midwest to recover remediation costs prior to remediation, it will allow the EPA to grow in step with the common law.

Ontario v Canadian Pacific Ltd., [1995] 2 SCR 1031, 125 DLR (4th) 385 at paras 43-44.

(iii) *Future Remediation Damages Best Support the EPA's Purpose to Preserve the Natural Environment*

55 Remediation costs, rather than the diminution of property value, best promotes environmental preservation. However, if this court limits Midwest's damages to only those costs it has already incurred, it will also undermine the EPA's purpose to preserve the natural environment. Three important ways illustrate that future remediation costs are superior to diminution of property value: (1) Permitting recovery of restoration costs prior to remediation best ensures the preservation of the natural environment; (2) Diminution in property value does not adequately account for environmental damage; and (3) a narrow reading of restoration costs would have a chilling effect on remediation.

(a) Permitting Recovery of Restoration Costs Prior to Remediation Best Ensures the Preservation of the Natural Environment

56 Remediation costs restore both the decrease in property and address other non-economic damages flowing from a spill. If Midwest receives future remediation costs, it will be able to address the adverse health effects its occupants will likely face, and would also prevent the environmental harm, legal liability, and decrease in its property value that the Appellants' spill caused. In fact, the Ontario Law Reform Commission's Report favoured remediation costs to a decrease in property value for environmental harm precisely because remediation best ensures that the environment is returned to its original, pre-contaminated state. In essence, restoration costs would cover all harms flowing from the spill, whether or not they impact the property value.

Ontario Law Reform Commission, *supra* para 47

57 In addition to addressing all the harms flowing from the spill, the remediation costs are easily quantifiable and pose no risk of overcompensation. At trial, Midwest demonstrated that it would cost $1.328 million to remediate its property; this is not an inflated valuation based on a

phantom project. Rather, $1.328 million is the true cost needed to address all the damage caused to Midwest's property.

> Ontario Law Reform Commission, *supra* para 47 at 42.
> Appeal decision, *supra* para 1 at para 31.

(b) Diminution in Property Value does not Adequately Promote Environmental Preservation

58 In contrast to remediation damages, if this court calculates damages by the diminution of property value, it would fail to account for the increased health risks that Midwest's employees, delivery contractors, and customers now face. In addition to these increased health risks, Midwest also faces potential legal liability if it fails to protect its employees from exposure to the PHCs when they migrate from Midwest's soil to the air and cause adverse health effects. In effect, damages based on the decrease of Midwest's property value does not fully compensate Midwest for all the damage it has, or will likely suffer.

59 If damages are measured by the diminution of property value, Midwest will be forced to bear the costs of the Appellants' long history of non-compliance. This would directly violate the EPA's purpose to preserve the natural environment. The decrease in property value overemphasizes one harm associated with the Appellants' spill, and does not provide the resources needed to restore the natural environment. Such damages preserve—rather than restore—the contaminated state of Midwest's property.

(c) Limiting remediation damages to only include those already incurred would create a remediation chill

60 If the SEMCC limits remediation damages to restoration costs that have already been incurred, it would discourage individuals from taking the necessary steps to remediate environmental damage to their property. Victims of spills will not remediate their properties out of fear that the courts will not compensate them for their work. The EPA's main purpose is to preserve the natural environment and, where the environment has been contaminated, encourage prompt clean-up and restoration. Limiting remediation damages to those costs already incurred by the victims of a spill would discourage prompt clean-up, thereby undermining the EPA's essential purpose.

61 Midwest would bear an unreasonable risk if it remediated first and then sought to cover the costs through litigation. If Midwest were to spend $1.38 million remediating its property, and was denied compensation at trial, the Appellants would receive a windfall. Midwest would have

paid for a large part of the remediation costs that the Appellants should be responsible for. The EPA's purpose does not require victims of spills to pay for the damage caused by those spills, it forces the polluters to pay.

62 The Appellants have repeatedly disregarded the Ministry's regulatory requirements and orders in the 43 years that it has conducted business. They do not intend to remediate Midwest's property without a court order. A victim of a spill should not have to bear the risk that a judge might not fully compensate it for the costs it incurred remediating its property, especially when there is evidence of damage to the natural environment and adverse health effects are likely to arise.

See Appeal Decision, *supra* para 1.
See also Trial Decision, *supra* para 16 at para 13.

(iv) *Midwest's Remediation Plan is Reasonable*

63 The Appellants' claim at paragraph 72 of their factum that Midwest has no genuine interest to remediate its property. This claim is unfounded. The Appellants cite *Safe Step Building Treatments Inc v 1382680 Ontario Inc* to show that genuine interest in remediating the property will be a factor in assessing whether a remediation plan is reasonable. However, there are two problems with the Appellants' reliance on *Safe Step*: (1) the case discusses damages resulting from a breach of contract; and (2) a closer examination of the analysis in that case would actually show that Midwest has a genuine interest in remediating its property. Just like in *Safe* Step, Midwest obtained two estimates for its remediation plan, which the ONCA characterized as reasonable. All experts agreed at trial that the plan's measures were necessary and reasonable. The only aspect of the plan that the Appellants' disagreed on was the cost. Yet, they tendered no evidence at trial to suggest an alternative.

Safe Step Building Treatments Inc v 1382680 Ontario Inc (2004), 37 CLR (3d) 281 ACWS (3d) 235 at para 66, 67.
Appeal Decision, *supra* para 1 at paras 80 and 31.

64 Citing *Housen v Nikolaisen*, the Appellants assert at paragraph 65 that the ONCA committed a palpable and overriding error by introducing new facts at appeal. However, Hourigan JA expressly found at paragraph 105 that the evidence led at trial relating to Midwest's damage was uncontradicted. Thus, he found that Pollack J actually made a palpable and overriding error in failing to consider this evidence in her ruling. It is not that Hourigan JA

introduced new evidence at trial, but that he gave judicial credence to facts ignored by the trial judge.

> Housen v Nikolaisen, 2002 SCC 33, 2 SCR 235 at para 10.
> Appeal Decision, *supra* para 1 at para 105.

65 The Appellants further submit at paragraphs 70 and 71 that Midwest purchased a contaminated property, and that it should have sued the previous owner for misrepresenting the property's condition. However, the Appellants have led no evidence as to when the contamination occurred. On the other hand, Midwest submitted evidence that its initial assessment showed no signs of pollution. After Midwest purchased its property, subterranean tests uncovered significant contamination. The Appellants have submitted no evidence to show that the previous owner of Midwest's property misrepresented the property's condition. There is clear evidence that Midwest's property was contaminated after its purchase.

> Appeal Decision, *supra* para 1 at para 9
> Trial Decision, *supra* para 16 at para 7.

(v) *Future Remediation Damages Promote the EPA's Objectives, and were the Correct Remedy for the Case at Bar*

66 In summary, the cost for future remediation is the appropriate measure of damages. Not only does the EPA mandate restoration costs over the diminution in property value, a reading of "will incur" into section 99(2) would be consistent with the common law. Finally, it will adhere to the EPA's purpose of preserving the natural environment and the polluter pays principle. This principle does not place the monetary burden of remediation on the affected person. The principle instead places the costs on the polluter's shoulders.

4. The Appellants Should be Held Accountable for their Spill

67 The Appellants' long history of negligence violates the EPA's central purpose to preserve the natural environment. The Legislature empowered private claimants to hold polluters accountable under section 99(2). As such, the remedy is not precluded by an existing Ministry order. Furthermore, the Legislature intended to create an accessible remedy for claimants that they can favour over the more onerous threshold at common law. As a result, claimants should not be required to demonstrate an actionable nuisance to seek the section 99(2) remedy. Finally, the costs of future remediation are the measure that best fulfills the EPA's central purpose. Over the last 20 years, the Supreme Court has continuously recognized that the preservation of the

natural environment is a fundamental Canadian value. Midwest asks this court to craft its order in a way that best meets that value.

Spraytech, *supra* para 37 at para 1.
Castonguay Blasting Ltd v Ontario (Environment), 2013 SCC 52, 3 SCR 323.

PART IV -- SUBMISSIONS IN SUPPORT OF COSTS

68 Midwest requests that the SEMCC award it costs for this appeal and for the courts below it.

69 In the alternative, Midwest requests that each party bear its own costs. Midwest will still need to remediate its property in line with the EPA's purpose. It must have the adequate resources to undertake this task.

PART V -- ORDER SOUGHT

70 Midwest respectfully requests the following:

a) that this court dismiss the appeal;

b) costs for this appeal and for the courts below; and

c) that this court award any other remedies as it finds just.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 6 day of February, 2017.

_____
Ryan MacNeil

_____
Matthew Lakatos-Hayward

_____
Madiha Vallani

Counsel for the Respondent
Midwest Properties Ltd.

PART VI -- TABLE OF AUTHORITIES

D. Secondary Sources

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.]
99(14) [Repealed 2002, c. 24, Sched. B, s. 25, item 8.]

JOHN THORDARSON and
THORCO CONTRACTING LIMITED
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 RESPONDENT MIDWEST PROPERTIES LTD.

TEAM #02

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Document #: 1121661