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 #2017-03

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

AND TO: **ALL REGISTERED TEAMS**

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PART I -- OVERVIEW AND STATEMENT OF FACTS

1 It is fair that businesses must compensate third parties for damage they cause through contamination. It is not fair for businesses to have to compensate third parties who have not demonstrated any actual damage from contamination. It is fair that businesses must remediate properties that they contaminate. It is not fair for businesses to have to pay for third parties' future remediation costs when there is no guarantee that these funds will be used to remediate.

2 This appeal is about fairness.

A. Overview of the Appellants' Position

3 The Appellants, John Thordarson and Thorco Contracting Limited ("Thorco"), submit that the Court of Appeal made three main errors in interpreting subsection 99(2) of the *Environmental Protection Act ("EPA").* These errors led the Court to find that the Appellants were liable for the remediation costs of the property at 285 Midwest Road ("285 Midwest").

Environmental Protection Act, RSO 1990, c E.19 [*EPA*].

4 First, contrary to the findings of the Court of Appeal, liability under subsection 99(2)(a) requires that actionable nuisance is established when there is an alleged adverse effect to property. Demonstrating an adverse effect to property requires substantial and unreasonable interference with the use or enjoyment of property. If the Court of Appeal had adopted this higher standard of actionable nuisance, the evidence would not have demonstrated that there was compensable loss or damage to the Respondent, Midwest Properties Limited ("Midwest").

5 Second, the Court of Appeal erred in finding that remediation damages could be awarded to Midwest when Thorco was already subject to a remediation order. Midwest is not subject to a remediation order, which means that it is not required to remediate the property. If Midwest receives remediation costs, the *EPA* provides no mechanism to ensure that Thorco will not remain liable for contamination in the future. Therefore, the Court of Appeal erred in importing future remediation costs into its award of damages to Midwest when Thorco was already subject to a remediation order.

6 Third, the Court of Appeal erred in finding that remediation damages should be awarded rather than diminution of value. The *EPA* does not allow for future remediation costs to be awarded under subsection 99(2)(a). Midwest has not incurred any remediation costs. Midwest

claimed diminution in value as the loss they incurred. Therefore, in the event that the Court finds Thorco liable for damages, Midwest should only be compensated for this alleged diminution in value. Where the Legislature develops a comprehensive framework for site clean-up, courts should not undercut this framework by granting future remediation costs to third parties.

B. Statement of the Facts

(i) Thorco Property History

7 In 1973, Mr. Thordason acquired the industrial property, 1700 Midland Avenue ("1700 Midland"). On this property, Mr Thordarson operated Thorco Contracting Limited ("Thorco"). Thorco has a long history of providing customers with high quality tank lining products for the floors of above-ground petroleum, chemical and water tanks. As part of these operations, Thorco stored materials and waste on the property.

Midwest Properties Ltd v Thordarson, 2015 ONCA 819 at paras 10, 12, 128 OR (3d) 81 [*Midwest* CA].

8 In 1983, Thorco applied for a Certificate of Approval from the Ministry of Environment ("MOE") to store waste at 1700 Midland. Thorco received the certificate to store 22,520 gallons of waste on the property in 1988.

Midwest CA, *supra* para 7 at para 12.

9 In 2000, the Court ordered Thorco and Mr. Thordarson to remove excess waste materials to comply with the Certificate of Approval. In response to this order, Thorco significantly reduced the amount of waste stored on the property. In 2001, an updated assessment report showed that Thorco had reduced the amount of waste it was storing on the property by approximately 66,000 gallons. As of 2002, Mr. Thordarson began to wind down business operations.

Midwest CA, *supra* para 7 at paras 13-17.

10 By 2008, Thorco had significantly reduced the volume of waste on the site. However, the MOE issued a new order in 2008 directing Thorco to further improve waste storage practices. In response, Thorco improved its practices. By January 4, 2011, Thorco had removed all liquid waste from the property.

Midwest CA, *supra* para 7 at para 18.

(ii) Petroleum Hydrocarbon Contamination

11 In 2007, Midwest acquired 285 Midwest, an industrially zoned property that adjoins 1700 Midland. Prior to purchasing 285 Midwest, Midwest conducted a Phase 1 Environmental Audit of 285 Midwest, which did not identify any risk of potential contamination. Midwest did not test the soil or groundwater for contamination.

Midwest CA, *supra* para 7 at para 9.

12 Midwest became interested in purchasing 1700 Midland in 2008. On this occasion, Midwest commissioned both a Phase I and Phase II environmental study of the area, which included groundwater and soil testing. These site assessments found areas of the 1700 Midland property that exceeded MOE standards for petroleum hydrocarbon ("PHC") in groundwater and in the soil. A 2008 MOE report also indicated that there was a risk of PHC contamination at 1700 Midland. In 2011, an MOE report confirmed the presence of PHC in soil samples from 1700 Midland.

Midwest CA, *supra* para 7 at paras 20-23.

13 Midwest then tested 285 Midland for PHC contamination. Monitoring from 2008 to 2012 found that soil and groundwater exceeded MOE guidelines for PHC.

Midwest CA, *supra* para 7 at paras 24-25.

14 In 2012, the MOE ordered Thorco to remediate 1700 Midland and 285 Midwest. The order required Thorco to conduct a full investigation of PHC contamination, develop a restoration plan, and implement the plan. An MOE Officer testified at trial that Thorco had taken steps to meet the requirements of the MOE remediation order but had not met the timelines set out in the order.

Midwest CA, *supra* para 7 at paras 32-36.

(iii) Impact of Contamination

15 The Trial Judge found that groundwater containing PHC had migrated on to 285 Midwest from 1700 Midland.

Midwest v Thordarson, 2013 ONSC 775 at para 8, 226 ACWS (3d) 1039 [*Midwest* Trial].

16 After hearing the testimony of both the Appellants' and the Respondent's experts, the Trial Judge found that there was no evidence of any actual diminution in Midwest's property value, interference with its use of its property, or business losses.

Midwest Trial, *supra* para 15 at para 23.

17 However, the Court of Appeal found that there was evidence at trial that established both a diminution of value of Midwest's property and a human health risk caused by the contamination. The Court of Appeal cited overriding and palpable error on the part of trial judge in making this finding. The only evidence presented at trial as to the diminution of value of 285 Midwest was the testimony of two environmental site assessment experts. No details were given to quantify or demonstrate this loss in value. The only evidence of health risks at trial was the testimony of Midwest's expert, Mr. Tossell, who said that the exceedances of MOE standards for volatile PHC could pose a health risk to occupants of the building on 285 Midwest. Mr. Tossell is an environmental site assessment expert, not a public health expert. The Trial Judge, who heard the evidence, did not find this evidence compelling.

Midwest CA, *supra* para 7 at paras 25, 28-29, 98-100.
Midwest Trial, *supra* para 15 at paras 23, 31.

18 Midwest's expert estimated the cost of remediating 285 Midwest to be $1,328,000. Thorco's expert indicated that these estimates were "high," ambiguous, and uncertain because of insufficient data.

Midwest CA, *supra* para 7 at para 31.

PART II -- QUESTIONS IN ISSUE

19 The first issue raised in this appeal is whether liability under subsection 99(2) of the *EPA* is dependent on establishing elements of an actionable nuisance.

20 The second issue is whether an order directing Thorco to remediate precluded the Court of Appeal from awarding remediation damages under subsection 99(2).

21 The third issue is whether the Court of Appeal erred in granting remediation damages rather than damages for the diminution in value of 285 Midwest.

PART III -- ARGUMENT

A. An Actionable Nuisance Must Be Established for Liability under Subsection 99(2)(a)

22 Subsection 99(2)(a) of the *EPA* creates a statutory cause of action for anyone who incurs loss or damage as a result of a spill that causes or is likely to cause an adverse effect. The claimant must demonstrate that the elements of an actionable nuisance are present to establish an adverse effect on property. This means that liability for loss or damage under subsection 99(2)(a) can only flow from *substantial* damage. Midwest has not established substantial damage to 285 Midwest and therefore should not be compensated under subsection 99(2)(a).

(i) Adverse Effects to Property Require the Establishment of an Actionable Nuisance

23 Demonstrating an adverse effect on property requires establishing the elements of actionable nuisance. Subsection 1(1) of the *EPA* defines "adverse effect" as:

> **Interpretation**
> 1. (1) In this Act,
> …
> "adverse effect" means one or more of,
> (a) impairment of the quality of the natural environment for any use that can be made of it,
> (b) injury or damage to property or to plant or animal life,
> (c) harm or material discomfort to any person,
> (d) an adverse effect on the health of any person,
> (e) impairment of the safety of any person,
> (f) rendering any property or plant or animal life unfit for human use,
> (g) loss of enjoyment of normal use of property, and
> (h) interference with the normal conduct of business;

24 This definition of "adverse effect" requires that the impact of a spill be significant. The Supreme Court of Canada in *Canadian Pacific* found that words like "injury," "damage," and "impair" indicated that the Legislature only intended for adverse effects to include non-trivial impacts to the environment.

> *Ontario v Canadian Pacific Ltd,* [1995] 2 SCR 1031 at paras 40, 64, 65, 125 DLR (4th) 385 [*Canadian Pacific*].

25 A non-trivial interference with property is a main element of actionable nuisance. Actionable nuisance requires substantial and unreasonable interference with property. Substantial

interference is a non-trivial interference that significantly damages the property or interferes with the owner's use or enjoyment of the property.

> *Antrim Truck Centre Ltd v Ontario (Transportation)*, 2013 SCC 13 at paras 19, 22, [2013] 1 SCR 594 [*Antrim*].

26 The Court in *Canadian Pacific* found that adverse effects must be substantial and unreasonable. First, the Court held that the release of a contaminant that poses only a trivial threat to the environment is not an adverse effect. Second, the Court held that to establish an adverse effect an interference to property must be unreasonable. The Court found that:

> The kinds of environmental "uses" that can be made of a particular area, and the question of whether the release of a contaminant has impaired these "uses" in a manner which is more than trivial or minimal, will involve certain factual inquiries. The character of the neighbourhood in which the contaminant has been released, the nature of the released contaminant, and the amount released, will all be important factors.
>
> *Canadian Pacific supra* para 24 at para 69.

27 These factors are analogous to the factors considered for establishing an actionable nuisance in *Antrim*. In *Antrim,* the reasonableness of a substantial interference was assessed by examining the gravity of harm, the severity of the interference, the character of the neighbourhood, and the sensitivity of the plaintiff.

> *Antrim, supra* para 25 at para 26.

28 Without interpreting "adverse effect" to require substantial and unreasonable damage, section 99 could potentially create liability for trivial interferences with property. Therefore, the common law principles of actionable nuisance must be used as a reference point to determine the Legislature's intended threshold for establishing an "adverse effect." In requiring that adverse effects be substantial and unreasonable, the elements of actionable nuisance are an essential part of establishing an adverse effect.

29 This interpretation of adverse effect is further supported by commentary in the *Annotated Ontario EPA*. In cases where material damage or loss of enjoyment of normal use of property is assessed, "considerable guidance can be gleaned from the law of nuisance."

> Dianne Saxe, *Ontario Environmental Protection Act Annotated* (Aurora, Ont: Canada Law Book, 1990), (loose-leaf 1995 supplement), vol 1 at A-1 [*Annotated Ontario EPA*].

30 Therefore, establishing an adverse effect on property requires an actionable nuisance. The Court in *Hollick* supported this interpretation in finding that liability under subsection 99(2) for

interference with use or enjoyment of property required proof of an actionable nuisance. The Court of Appeal in *Midwest* CA dismissed this statement, finding that the Court was referring to nuisance in a colloquial sense. However, the Court in *Hollick* used the word nuisance in its full legal sense. The Court explicitly referenced the legal definition for actionable nuisance: interference with the reasonable enjoyment of property. This is not merely a colloquial reference to nuisance.

> *Hollick v Metropolitan Toronto (Municipality)* (1999), 46 OR (3d) 257 at paras 18-21, 181 DLR (4th) 426 aff'd 2001 SCC 68, [2001] 3 SCR 158 [*Hollick*].
> *Midwest* CA*, supra* para 7 at para 75.

(ii) A Purposive Interpretation of Section 99 Supports an Actionable Nuisance Requirement

31 Contrary to the finding of the Court of Appeal, requiring the establishment of an actionable nuisance in these circumstances does not go against a broad and purposive interpretation of the *EPA*. First, nuisance is not excluded from the *EPA,* unlike the explicit exclusion of fault and negligence in s. 99(6) of the *EPA*. Second, the Legislature did define the cause of action in a manner consistent with the existing common law of nuisance.

> *Midwest* CA, *supra* para 7 at para 74.

32 The Hansard record of debate cited by the Court of Appeal does not demonstrate a legislative intention to exclude actionable nuisance from the meaning of adverse effect. Although the Minister referred to wanting to extend compensation beyond the common law, he listed what specific elements of the common law needed to be changed. These were limited to 1) removing the need to establish fault for spills and 2) expanding liability to persons in control of contaminants. Nowhere in the Hansard record is there a stated intention to lower the standard for compensable damage.

> *Midwest* CA, *supra* para 7 at para 46.
> Ontario, Legislative Assembly, *Official Report of Debate (Hansard),* 31st Parl, 2nd Sess, No 151 (14 December 1978), at 6178 (Hon Harry Parrott).

(iii) No Evidence Established Substantial Damage to Property

33 To establish an adverse effect, Midwest must establish that there was substantial and unreasonable damage to property, or interference with enjoyment and use of property. Merely showing that MOE standards have been exceeded is not enough to establish actual and substantial damage to property. According to the factual findings of the Trial Judge, who had the

benefit of assessing all of the evidence at trial, Midwest did not establish proof of actual and substantial damage to land.

Smith v Inco Ltd, 2011 ONCA 628 at para 60, 107 OR (3d) 321 [*Inco*].
Midwest Trial, *supra* para 15 at para 23.

34 The Court of Appeal made its own findings of fact in determining that there had been actual and substantial damage to the property. To overturn a finding of fact or a factual inference from a trial judge, the appellate court must establish that the trial judge made a "palpable and overriding error." This is a high standard that recognizes the advantageous position of a trial judge to weigh evidence.

Housen v Nikolaisen, 2002 SCC 33 at paras 21-22, [2002] 2 SCR 235.

35 The Court of Appeal found that the Trial Judge had made a palpable and overriding error in not considering the "uncontradicted" evidence of Midwest's experts. The Court of Appeal then found based on the trial record that expert testimony had established that contamination created a health risk and caused a diminution in value.

Midwest CA, *supra* para 7 at para 105.

36 There was no substantial health risk established. The Trial Judge heard the testimony of Mr. Tossell, who said that there was a risk that volatile PHC could get into the building and that this was a *potential* health risk to the occupants. This was the testimony of one person, who was not a public health expert and who offered no specific information regarding whether PHC had been detected in the building. Mr. Tossell inferred this potential risk based on the exceedances of the MOE standards.

Midwest CA, *supra* para 7 at paras 25, 100.

37 It is the plaintiff's responsibility to establish actual and substantial damage on a balance of probabilities and, as this was the only evidence presented on this factual issue, it was up to the Trial Judge to decide whether this threshold was met. As the Trial Judge was making a determination on *substantial* damage and not on *potential* risk, she made no palpable and overriding error in inferring that the evidence did not meet the threshold of actual and substantial damage.

Midwest Trial, *supra* para 15 at paras 23, 31.

38 Midwest did not establish a diminution in value of 285 Midwest. The Court of Appeal erred in finding that there was "uncontradicted" evidence of diminution in value. Midwest's experts only indicated that there was a potential for "stigma" regarding the property, which provides no evidence as to an actual or likely decline in property value. Diminution in value for an actionable nuisance requires that a plaintiff demonstrate an actual decline in the property's market value or an actual failure of the property to appreciate in value. Midwest's experts did not demonstrate either.

Midwest CA, *supra* para 7 at paras 29-30.
Inco, supra para 33 at para 116.

39 Subsection 99(2)(a) was created to compensate people who suffer substantial loss or damage from contamination; for property damage this is assessed by examining whether damage is substantial and unreasonable. Subsection 99(2)(a) only intends to compensate for claims of property damage when there is an actionable nuisance. Midwest did not demonstrate an actionable nuisance.

B. Remediation Costs are Precluded by the Remediation Order

40 If the Court finds that Thorco is liable to Midwest under subsection 99(2) for loss or damages, Thorco's existing remediation order precludes a damage award to Midwest for remediation costs. Because Thorco is subject to a remediation order, and Midwest is not, section 99 does not allow for compensation for remediation costs to Midwest. The Court of Appeal erred in finding that remediation orders and remediation costs under subsection 99(2) are complementary.

(i) <u>Midwest Cannot Get Remediation Costs Because Midwest is not Subject to a Remediation Order</u>

41 The only provision under section 99 that contemplates compensation for remediation costs while there is a remediation order is subsection 99(2)(b), which is not applicable in the circumstances. For remediation damages to be awarded under subsection 99(2)(b), both of the following conditions must exist: 1) the MOE must have issued a remediation order that applies to the plaintiff, and 2) the plaintiff must have incurred costs physically carrying out site remediation. Subsection 99(2)(b) reads as follows:

> **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,
> …
> (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. [Emphasis added].

42 Midwest has not incurred any costs in carrying out an MOE order or direction to conduct remediation. First, Midwest is not subject to an MOE order and second, they are asking for an award for *future* remediation costs, not for expenses they have already *incurred*. In this case, it is Thorco who is subject to a remediation order, not Midwest.

(ii) Remediation Orders Cannot Be Used as a Shield against Civil Liability

43 The Court of Appeal erred in finding that remediation orders could be used as a shield against civil liability if remediation damages were precluded by existing remediation orders. The Court of Appeal then concluded that the MOE would issue fewer remediation orders to avoid blocking compensation of third parties. This conclusion assumes that third parties are compensated for remediation costs under subsection 99(2)(a) as opposed to compensation for other losses.

> *Midwest* CA, *supra* para 7 at para 49.

44 Subsection 99(2)(a) creates a statutory cause of action for anyone who has incurred losses or damages as a result of a spill. The issuance of a remediation order by the MOE would not interfere with a third party's claim for compensation for losses that cannot be rectified by remediation. Third parties would still be compensated for damages like business losses or diminution in value of property. Thus, a remediation order does not shield against civil liability and precluding remediation costs would not discourage the MOE's issuance of remediation orders.

(iii) Remediation Orders and Remediation Damage Awards Are Not Complementary Remedies

45 At the Court of Appeal, the MOE stated that it would be "forced" to remove Thorco's remediation order in the event that Thorco pays remediation damages to Midwest. Although this

prevents double recovery in this situation, the MOE's statement also demonstrates that third party remediation damages and remediation orders are not complementary.

Midwest CA, *supra* para 7 at para 55.

46 The *EPA* includes no provision requiring the MOE to switch Thorco's remediation order to apply to Midwest. In addition, the MOE has not indicated that Thorco would no longer be liable for any remaining or additional contamination in the event that Midwest does not fully complete remediation. Thorco, as the person in control of the pollutant, would still have a duty under subsection 93(1) of the *EPA* to mitigate and restore 285 Midwest. Therefore, even if the MOE removed Thorco's remediation order there is no legal guarantee that Thorco will not be held responsible for paying for remediation in the future.

47 The Court of Appeal also erred in using subsection 99(2)(a)(iii) to demonstrate that remediation orders and remediation damages were intended to be complementary. Subsection 99(2)(a)(iii) states that there should be compensation for damage or loss incurred for neglect and default in performing obligations under the *EPA*. Although this could apply to neglect and default in performing a remediation order, there is nothing to indicate that the Legislature intended to grant remediation damages when the defendant is subject to a remediation order. Instead this subsection refers to situations where additional damage has occurred because of neglect in carrying out an order. For example, subsection 99(2)(a)(iii) would apply if actual damage and loss had increased because of a delay in remediation. However, in this situation Thorco still has an obligation to remediate and Midwest has not alleged any damage arising from a delay in remediation.

Midwest CA, *supra* para 7 at para 53.

C. Diminution in Value Damages are More Appropriate than Remediation Damages

48 In the event that this Court finds Thorco liable under subsection 99(2)(a), the courts should only award damages equivalent to the diminution of value of 285 Midwest. Subsection 99(2)(a) was never intended to award future remediation damages.

49 The Court of Appeal found that awarding damages for the diminution in the value of the Midwest property was inappropriate because it "is contrary to the wording of the *EPA*, the trend in the common law to award restorative damages, the polluter pays principle, and the whole

purpose of the enactment of Part X of the *EPA*." However, the specific wording of subsection 99(2)(a) and the larger environmental objectives of the *EPA* support the conclusion that diminution in value is the most reasonable measure of damages in these circumstances.

Midwest CA, *supra* at para 7 at para 70.

(i) Subsection 99(2)(a) Does Not Allow for a Remediation Cost Award

50 Subsection 99(2)(a) cannot be interpreted as providing compensation in the form of *remediation costs*. As a statutory cause of action, the compensation that is available under subsection 99(2)(a) is limited by the other available remedies under the *EPA*. The MOE has clear remediation procedures and powers under the *EPA* to oversee remediation and force defendants to pay for the costs. These powers can be found in sections 147 and 150 of the *EPA*. Section 147 empowers the Director to undertake remediation when a party has not complied with their remediation order promptly, and subsection 150(1) empowers the Director to bill the ordered party for remediation costs. These provisions are the intended mechanism for ensuring timely and complete remediation by responsible parties.

51 These sections demonstrate that the *EPA* already has the ability to ensure timely remediation without needing to stretch the interpretation of subsection 99(2)(a) to include remediation damages. Subsection 99(2)(a) should be interpreted to compensate third parties for specific types of "loss or damages" that *cannot* be remedied by other parts of the *EPA*.

52 There are strong policy reasons for excluding future remediation costs from compensation under subsection 99(2)(a). There are more effective powers under the *EPA* to achieve site remediation. Interpreting sections 147 and 150 as the intended remedies for non-compliance with remediation orders allows the MOE to remediate sites without lengthy court proceedings. This interpretation best achieves the identified purpose of the *EPA*: "to minimize harm from the discharge of pollutants through *prompt* reporting and clean-up." [Emphasis added].

Midwest CA, *supra* para 7 at para 45.

53 Further, ensuring remediation exclusively through *EPA* provisions that allow for MOE oversight better achieves the objectives of the *EPA*. The spills part of the *EPA* ("Part X") gives the government the power to use tools to enforce remediation orders and ensure that remediation

is properly completed. As stated in 1979 by Minister Parrott, the primary objective of the amended Part X was:

> To broaden the authority of the minister to *control* and cleanup spills and restoration of the environment by those responsible, *and when necessary, by other persons;* [Emphasis added].
>
> Ontario, Legislative Assembly, *Official Report of Debate (Hansard)*, 31st Parl, 3rd Sess, No 8 (27 March 1979), at 255 (Hon Harry Parrott) [*Hansard* 1979].

54 The above-stated purpose of Part X indicates that the Legislature's preference is to enforce restoration measures through the statute and ensure that the MOE oversees the process. Using subsection 99(2)(a) to award Midwest remediation damages would remove the MOE's oversight of the remediation process.

55 When remediation is directly carried out by the MOE, or the MOE oversees the process through the application of a remediation order, the MOE can ensure that remediation is done in accordance with MOE guidelines. As indicated at trial, an MOE order for remediation involves multiple steps, such as obtaining a qualified person to investigate the property and completing a restoration program, which is approved by a MOE representative.

> *Midwest* CA, *supra* para 7 at para 33.

(ii) A Damage Award Must Reflect Midwest's Actual Loss

56 Subsection 99(2)(a) states that compensation is available specifically for "loss or damage" that has been incurred. Therefore, a plain language reading of the *EPA* indicates that any compensation awarded must directly reflect the actual loss and damage incurred by the plaintiff.

57 This reading is consistent with the purpose of damage awards identified in legal texts and case law. In *Remedies: The Law of Damages*, Professors Cassels and Adjin-Tetty say that the purpose of a damage award is "to restore fully the plaintiff's loss," which requires a court to "examine the evidence to determine the true nature of the owner's loss." This understanding of damages is consistent with the Supreme Court of Canada's finding in *Ratych* that "the measure of the damages should be the plaintiff's actual loss."

> Jamie Cassels & Elizabeth Adjin-Tettey, *Remedies: The Law of Damages*, 2nd ed (Toronto: Irwin Law, 2000) at 190.
> *Ratych v. Bloomer*, [1990] 1 SCR 940 at para 71, 69 DLR (4th) 25 [*Ratych*].

58 Midwest's experts provided evidence at trial that the damage Midwest suffered as a result of the contamination was a loss in property value. With respect, this Court should award damages according to the true nature of Midwest's alleged loss by awarding damages equivalent to diminution in value.

Midwest CA, *supra* para 7 at paras 28-29.

(iii) Midwest Has Not Incurred Remediation Costs

59 The words "incurred" and "compensation" in subsection 99(2)(a) indicate that plaintiffs should only be reimbursed for expenses they have actually sustained. In the present case, Midwest has not undertaken any remediation efforts or incurred any costs in doing so. Thus, a damages award for future remediation costs is inappropriate in the circumstances.

60 This interpretation of the word "incurred" is consistent with interpretations of other Canadian provincial environmental protection statutes. For example, subsection 47(5) of the British Columbia *Environmental Management Act* reads as follows:

> …any person, including, but not limited to, a responsible person and a director, who *incurs* costs in carrying out remediation of a contaminated site may commence an action or a proceeding to recover the reasonably *incurred* costs of remediation from one or more responsible persons in accordance with the principles of liability set out in this Part. [Emphasis added].

Environmental Management Act, SBC 2003, c 53, s 47 [*Environmental Management Act*].

61 In *Swamy*, the British Columbia Supreme Court interpreted the phrasing of this subsection, which at the time was contained in subsection 27(4) of the *Waste Management Act*. The Court relied upon the phrase "incurred" in reaching its conclusion that "a plain reading of s. 27(4) makes it clear that a person can seek cost recovery from other responsible persons *only after* they have incurred costs of remediation of a contaminated site." Since the introduction of the *Environmental Management Act* and the preservation of the wording of this subsection in subsection 47(5), the same interpretation has been applied by the British Columbia Supreme Court.

Waste Management Act, RSBC 1996, c 482, s 27, as repealed by *Environmental Management Act,* SBC 2003, c 53, s 174
Swamy v Tham Demolition Ltd, 2001 BCSC 551 at para 29, 104 ACWS (3d) 330.
Environmental Management Act, supra para 60.
Domovitch v. Willows, 2016 BCSC 1068 at para 19, 267 ACWS (3d) 467.

(iv) There Is No Trend of Awarding Remediation Damages In These Circumstances

62 There is no "trend in the common law" to grant remediation damages for *future* remediation costs under a *statutory cause of action*. The Court of Appeal erred in finding that a "trend in the common law to award restorative damages" supported a finding of remediation costs under section 99 of the *EPA*. As recognized by the Court of Appeal, "there is no reported case where a court has awarded damages for the cost of *future* remediation under [section 99]."

Midwest CA, *supra* para 7 at para 67.

63 The Court of Appeal cited *Canadian Tire* as a case authority for its claimed "trend" for remediation costs because, in that case, the Court awarded remediation damages to the plaintiff. However, *Canadian Tire* can be distinguished. The plaintiffs were subject to a Ministerial order to remediate and they had already incurred expenses to remediate the property. In the present case, Midwest is not under any legal obligation to remediate the property and has not spent any funds to remediate.

Midwest CA, *supra* para 7 at para 66.
Canadian Tire Real Estate Ltd. v. Huron Concrete Supply Ltd., 2014 ONSC 288, 88 CELR (3d) 93 at paras 4, 20-23 [*Canadian Tire*].

64 In support of its claimed "trend," the Court of Appeal also cited *Tridan*. While the plaintiffs in *Tridan* were ordered *future* remediation costs, this case is distinguishable because the costs were awarded under a *Rylands v Fletcher* cause of action. In contrast, a claim for damages pursuant to subsection 99(2) is a statutory cause of action and, as recognized by the Court of Appeal, must be constrained by "the wording of the legislation…[and] the history and purpose of the statutory private right of action found in subsection 99(2)." The word "incurred" in subsection 99(2) explicitly limits claims for future remediation costs whereas a claim for damages under a common law tort is not limited in this way.

Midwest CA, *supra* para 7 at para 64.
Tridan Developments Ltd. v Shell Canada Products Ltd (2002), 57 OR (3d) 503, 110 ACWS (3d) 1045 (CA) [*Tridan*].

65 Further, quantifying future remediation costs creates uncertainty. Diminution in value is easier to quantify than future remediation costs. In *Cousins,* the Court found that damage awards should favour the certainty of market values over speculations as to remediation costs.

Cousins v. McColl-Frontenac Inc. 2006 NBQB 406 at paras 12-14, 307 NBR (2d) 95, aff'd 2007 NBCA 83, 322 NBR (2d) 159 [*Cousins*].

66 The speculative nature of future remediation costs make them inappropriate as a form of damages. As evidenced at trial, determining remediation costs is an uncertain and often contested exercise. Thorco's environmental assessment expert indicated that Midwest's estimates for remediation costs were "high," ambiguous and based on insufficient data. If Midwest's estimates are too high, then Midwest gains a windfall, which serves no environmental protection purpose.

Midwest CA, *supra* para 7 at para 31.

(v) An Award for Diminution in Value is Consistent with the Polluter Pays Principle

67 As recognized by the Court of Appeal, the "polluter pays principle… provides that whenever possible, the party that causes pollution should pay for remediation, compensation, and prevention." Damage awards that are simply used to enrich a neighbour do not fulfill this principle. In the given circumstances, the "polluter pays principle" is best served by awarding damages for diminution in value. Subject to the existing MOE remediation order, Thorco is already responsible for paying to clean up the contamination, consistent with the "polluter pays principle."

Midwest CA, *supra* para 7 at para 68.

68 The "polluter pays principle" requires that payments are directed at clean-up related measures, i.e that a polluter will pay for their *pollution*. However, there is no guarantee that an award of remediation damages to Midwest will be used to fund the clean-up of the property.

69 In summary, a diminution in value award would hold Thorco responsible for 1) paying for any proven loss in Midwest's property value caused by the contamination, and 2) funding the remediation of the property in accordance with the MOE order. This result is consistent with the "polluter pays principle."

(vi) A Diminution in Value Award is More Consistent with the Purposes of the *EPA*

70 The crux of the Court of Appeal's reasoning that remediation costs should be awarded, as opposed to diminution in property value, was that remediation costs would be "more consistent with the objectives of environmental protection and remediation that underlie [section 99]." However, without an MOE order requiring Midwest to remediate, there is no legal obligation on Midwest to spend an award of remediation costs on remediation. Therefore, awarding

remediation damages will only achieve environmental protection objectives of the *EPA* if Midwest *chooses* to use its large damages award to remediate.

Midwest CA, *supra* para 7 at para 67.

71 In *Tridan*, the Court of Appeal found it was inappropriate for remediation costs to be paid into court and released only as remediation was undertaken by the plaintiff. The Court found it was not their position or obligation to oversee the process of remediation. The Court of Appeal in *Midwest* CA also did not specify how Midwest must spend the damages award for remediation costs. The courts' reluctance to control how successful plaintiffs spend damage awards stands as a further barrier to remediation costs achieving the environmental objectives of the *EPA*.

Tridan, supra 64 at paras 21-22.
Midwest CA, *supra* para 7.

72 The only consequence guaranteed by a remediation cost award is that Midwest will be $1.3 million richer. This is not an efficient way to achieve the *EPA*'s intended purpose of environmental restoration.

Hansard 1979, *supra* 53 at 255.

D. Conclusion

73 A modern interpretation of section 99 of the *EPA,* which examines the wording of the section and the overall scheme and objectives of the Act, must find that compensation for alleged property damage requires an actionable nuisance. In addition, even if damage is found, it can only be assessed based on damage or loss already incurred – not future remediation costs.

Rizzo & Rizzo Shoes Ltd (Re), [1998] 1 SCR 27 at para 21, 154 DLR (4th) 193, citing Elmer Driedger, *Construction of Statutes*, 2nd ed (Toronto: Butterworths, 1983) at 87.

74 The Court should not extend subsection 99(2) beyond its intended application to allow for a damage award of future remediation costs. The courts have never interpreted subsection 99(2) to include compensation for future remediation costs. There are more efficient powers under the *EPA* to achieve remediation. The ultimate purpose of the *EPA* is to ensure site clean-up; it is not to grant unconditional, large damage awards to plaintiffs.

PART IV -- SUBMISSIONS IN SUPPORT OF COSTS

75 The Appellants respectfully request that the Court awards costs to the Appellants in this Court and the Courts below.

PART V -- ORDER SOUGHT

76 The Appellants respectfully request an Order:

(a) Setting aside the judgment of the Ontario Court of Appeal, dated November 27, 2015; and

(b) Reinstating the Order of Pollak, J. of the Ontario Superior Court of Justice, dated February 28, 2013.

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

_____
Andhra Azevedo

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Caitlin Stockwell

Counsel for the Appellants
John Thordarson and Thorco Contracting Limited

PART VI -- TABLE OF AUTHORITIES

Authority	**Paragraph No. Where Cited**
Legislation	
Environmental Protection Act, RSO 1990, c E.19	22-23, 28, 31, 39-41, 43-44, 46-54, 56, 59, 62, 70, 73-74
Environmental Management Act, SBC 2003, c 53, s 47	60-61
Waste Management Act, RSBC 1996, c 482, s 27, as repealed by *Environmental Management Act,* SBC 2003, c 53, s 174	61
Jurisprudence	
Antrim Truck Centre Ltd v Ontario (Transportation), 2013 SCC 1, [2013] 1 SCR 594	25, 27
Canadian Tire Real Estate Ltd v Huron Concrete Supply Ltd, 2014 ONSC 288, 88 CELR (3d) 93	63
Cousins v. McColl-Frontenac Inc. 2006 NBQB 406, 307 NBR (2d) 95, aff'd 2007 NBCA 83, 322 NBR (2d) 159	65
Domovitch v. Willows, 2016 BCSC 1068, 267 ACWS (3d) 467	61
Hollick v Metropolitan Toronto (Municipality) (1999), 46 OR (3d) 257, 181 DLR (4th) 426 aff'd 2001 SCC 68, [2001] 3 SCR 158	30
Housen v Nikolaisen, 2002 SCC 33, [2002] 2 SCR 235	34
Midwest Properties Ltd v Thordarson, 2015 ONCA 819, 128 OR (3d) 81	30-32, 35-36, 43, 45, 47, 49, 52, 55, 58, 62-64, 66-67, 70-71
Midwest v Thordarson, 2013 ONSC 775, 226 ACWS (3d) 1039	33, 37
Ontario v Canadian Pacific Ltd, [1995] 2 SCR 1031, 125 DLR (4th) 385	24, 26
Ratych v Bloomer, [1990] 1 SCR 940, 69 DLR (4th) 25	57
Rizzo & Rizzo Shoes Ltd (Re), [1998] 1 SCR 27, 154 DLR (4th) 193	73
Smith v Inco Ltd, 2011 ONCA 628, 107 OR (3d) 321	33, 38
Swamy v Tham Demolition Ltd, 2001 BCSC 551, 104 ACWS (3d) 330	61
Tridan Developments Ltd. v Shell Canada Products Ltd (2002), 57 OR (3d) 503, 110 ACWS (3d) 1045 (CA)	64, 71
Secondary Materials	
Dianne Saxe, *Ontario Environmental Protection Act Annotated* (Aurora, Ont: Canada Law Book, 1990), (loose-leaf 1995 supplement)	29
Jamie Cassels & Elizabeth Adjin-Tettey, *Remedies: The Law of Damages*, 2nd ed (Toronto: Irwin Law, 2000)	57

Other Materials	
Ontario, Legislative Assembly, *Official Report of Debate (Hansard)*, 31st Parl, 2nd Sess, No 151 (14 December 1978), at 6178 (Hon Harry Parrott).	32
Ontario, Legislative Assembly, *Official Report of Debate (Hansard)*, 31st Parl, 3rd Sess, No 8 (27 March 1979), at 255 (Hon Harry Parrott).	53, 72

PART VII -- LEGISLATION AT ISSUE

***Environmental Protection Act,* RSO 1990, c E.19, Sections 1(1) "adverse effect," 93, 99(1), 99(2), 99(6), 147(1), 150(1)**

Interpretation

1. (1) In this Act,

…

"adverse effect" means one or more of,

(a) impairment of the quality of the natural environment for any use that can be made of it,

(b) injury or damage to property or to plant or animal life,

(c) harm or material discomfort to any person,

(d) an adverse effect on the health of any person,

(e) impairment of the safety of any person,

(f) rendering any property or plant or animal life unfit for human use,

(g) loss of enjoyment of normal use of property, and

(h) interference with the normal conduct of business; ("conséquence préjudiciable")

…

Duty to mitigate and restore

93. (1) The owner of a pollutant and the person having control of a pollutant that is spilled and that causes or is likely to cause an adverse effect shall forthwith do everything practicable to prevent, eliminate and ameliorate the adverse effect and to restore the natural environment.

When duty effective

(2) The duty imposed by subsection (1) comes into force in respect of each of the owner of the pollutant and the person having control of the pollutant immediately when the owner or person, as the case may be, knows or ought to know that the pollutant is spilled and is causing or is likely to cause an adverse effect.

…

Compensation, spills

99. (1) 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.

Right to compensation

(2) 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.

…

Liability

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

…

Director may cause things to be done

147. (1) Where an order or decision made under this Act is not stayed, the Director may cause to be done any thing required by it if,

(a) a person required by the order or decision to do the thing,

(i) has refused to comply with or is not complying with the order or decision,

(ii) is not likely, in the Director's opinion, to comply with the order or decision promptly,

(iii) is not likely, in the Director's opinion, to carry out the order or decision competently, or

(iv) requests the assistance of the Director in complying with the order or decision;

(a.1) a receiver or trustee in bankruptcy is not required to do the thing because of subsection 19 (5) or 168.20 (7); or

(b) in the Director's opinion, it would be in the public interest to do so.

…

Order to pay

150. (1) The Director may issue an order to pay the costs of doing any thing caused to be done by the Minister or Director under this Act to any person required by an order or decision made under this Act to do the thing.

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 #2017-03

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Document #: 1149505