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 #2017-04

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

A. Overview of the Respondent's Position

1 Environmental protection is a fundamental value in Canadian society and has been given far-reaching application through codification in Canadian environmental legislation. The broad framing of Canadian environmental legislation has provided flexibility in responding to a wide variety of environmental harms (*Canadian Pacific*).

> *R v Canadian Pacific Ltd*, [1995] 2 SCR 1031 at paras 56, 42-44, 125 DLR (4th) 385 Gonthier J [*Canadian Pacific*].

2 In enacting Part X of the Ontario *Environmental Protection Act* ("*EPA*"), the Legislature intended to create a statutory cause of action that would overcome the inadequacies of the common law and the existing provisions of the *EPA* in responding to environmental harm (*Hansard* 14/12/1978). The legislation had four primary objectives:

- The polluter must pay;
- There must be prompt action taken when there is a spill;
- There must be restoration of the environment; and,
- There must be compensation for the victim. (*Hansard* 15/05/1979).

> *Environmental Protection Act*, RSO 1990, c E.19 [*EPA*].
> Ontario, Legislative Assembly, *Official Report of Debates (Hansard)*, 31st Parl, 2nd Sess, No 151 (14 December 1978) at 6178-6179 (Hon Harry Parrott) [*Hansard* 14/12/1978].
> Ontario, Legislative Assembly, *Official Report of Debates (Hansard)*, 31st Parl, 3rd Sess, No 47 (15 May 1979) at 1954, 1958 (Marion Bryden, Floyd Laughren) [*Hansard* 15/05/1979].

3 This appeal centers on the importance of environmental protection, preservation, and restoration, and fulfilling the objectives of Part X of the *EPA* ("the Spills Bill").

> *EPA*, *supra* para 2, ss 91-123.

4 Midwest Properties Ltd. ("the Respondent") submits that John Thordarson and Thorco Contracting Limited ("the Appellants") are liable to compensate the Respondent for loss or damage sustained as a direct result of a spill that caused or is likely to cause an adverse effect pursuant to s. 99(2) of the *EPA*.

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

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

5 The Respondent accepts the Appellants' statement of facts, subject to the following additions and corrections.

(i) *The Appellants Violated the MOE Certificate of Approval*

6 From 1988-2011, the Appellants were in almost constant breach of the Ministry of the Environment and Climate Change ("MOE") compliance orders (*Midwest* CA).

Midwest Properties Ltd v Thordarson, 2015 ONCA 819 at para 2, 128 OR (3d) 81 Hourigan JA [*Midwest* CA].

7 In 1996, the Appellants were exceeding the MOE Certificate of Approval by 53,000 gallons and increased their storage to 111,000 gallons in 1999 without storing the waste in accordance with MOE guidelines (*Midwest* CA).

Midwest CA, *supra* para 6 at paras 13,15.

8 The Appellants did not reduce their waste inventory significantly until 2008. However, a report indicated that the Appellants continued to store the waste improperly, which posed a significant risk of impairing the natural environment (*Midwest* CA).

Midwest CA, *supra* para 6 at para 17.

9 In 2009, approximately 10,000 litres of waste remained in non-approved storage tanks (*Midwest* CA).

Midwest CA, *supra* para 6 at para 18.

10 Although the Appellants had removed all liquid waste from their property in 2011, a waste storage pit remained on the property which continued to spill oily water (*Midwest* CA).

Midwest CA, *supra* para 6 at para 18.

(ii) *The Appellants' Waste Contaminated 285 Midwest*

11 The Court of Appeal ("CA") found that "[g]roundwater flows from [the Appellants'] property into [the Respondent's] property. This has contaminated 285 Midwest with significant concentrations of [petroleum hydrocarbons ("PHCs")]" (*Midwest* CA).

Midwest CA, *supra* para 6 at para 3.

12 Between 2008 and 2012, contamination on 285 Midwest exceeded MOE guidelines. PHCs were detected on 285 Midwest in 2011 and 2012. Another monitoring well on the property indicated a risk that volatile PHCs could enter the building and pose a health risk to the occupants (*Midwest* CA).

Midwest CA, *supra* para 6 at para 25.

13 Evidence at trial established that contamination on the property was getting worse over time (*Midwest* CA).

Midwest CA, *supra* para 6 at para 26.

(iii) *The MOE Ordered the Appellants to Remediate 285 Midwest*

14 The Appellants failed to meet the requirements of the 2012 MOE remediation order (*Midwest* CA).

Midwest CA, *supra* para 6 at para 34.

15 As of the appeal, the Appellants had not begun remediation of 285 Midwest (*Midwest* CA).

Midwest CA, *supra* para 6 at para 36.

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

16 In response to the Appellants' statement of questions in issue, the Respondent submits:

a) The CA was correct in holding that liability under s. 99(2) is not dependent on establishing a nuisance at common law;
b) The CA was correct in holding that remediation damages under s. 99(2) are not precluded by an MOE remediation order; and
c) The CA was correct in awarding damages for cost of remediation rather than diminution in value.

PART III -- ARGUMENT

A. A Nuisance at Common Law is Not Required for Liability Under s. 99(2)

17 The Appellants submit that in order to establish liability under s. 99(2), the elements of a common law nuisance must be satisfied (Appellant Factum). This argument is incorrect for the following reasons:

i) Nuisance is inconsistent with the proper interpretation of the *EPA*; and
ii) A s. 99(2) claim is distinct from common law nuisance.

Factum of the Appellants (Team #2017-03) at para 22 [Appellant Factum].

(i) Nuisance is Inconsistent with the Proper Interpretation of the *EPA*

18 The Appellants submit that a purposive interpretation of s. 99(2) is consistent with an actionable nuisance requirement (Appellant Factum). This argument fails to consider the approach to statutory interpretation endorsed by the Supreme Court of Canada ("SCC"), the "Driedger Principle" (*Bell*).

Appellant Factum, *supra* para 17 at para 31.
Bell ExpressVu Ltd Partnership v Rex, 2002 SCC 42 at para 26, [2002] 2 SCR 559 Iacobucci J [*Bell*].

19 The Driedger Principle states "the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament" (Driedger). Application of the Driedger Principle demonstrates that common law nuisance is inconsistent with the proper interpretation of the *EPA* based on the legislative intent, the scheme of the Spills Bill and the purpose of the *EPA*.

Elmer Driedger, *The Construction of Statutes* (Toronto: Butterworths, 1974) at 67 [Driedger].

a) The Legislature Intended to Address Common Law Inadequacies Through a Statutory Cause of Action

20 It is well accepted that Parliamentary debates are persuasive authority in establishinging the intention of the Legislature in enacting a particular provision (*Castillo*).

> *Castillo v Castillo*, 2005 SCC 83 at para 23, [2005] 3 SCR 870 Bastarache J [*Castillo*].

21 Prior to the enactment of the Spills Bill, a series of environmental incidents resulting from spills demonstrated difficulty in establishing liability and awarding compensation for the victims under the common law regime (*Hansard* 14/12/1978). The Legislature created a statutory cause of action under s. 99(2) to resolve the inadequacies of the common law in addressing environmental spills (*Hansard* 15/05/1979).

> *Hansard* 14/12/1978, *supra* para 2 at 6178-6179 (Hon Harry Parrott).
> *Hansard* 15/05/1979, *supra* para 2 at 1952-1953 (Marion Bryden).

22 By example, if the Mississauga Derailment occurred after the enactment of the Spills Bill, "there is no doubt that the Spills Bill would [have allowed] affected persons, such as businesses and individuals who sustained economic loss… to recover against the owner or person in control… of the spill" (*Bates*). The Legislature specifically mentioned the Port Loring water contamination and the High Park oil spill as instances where the common law failed to adequately respond (*Hansard* 15/05/1979).

> TP Bates, "The Spills Bill Defence Perspective and Loss Control" in Stanley Makuch, ed, *The Spills Bill: Duties, Rights and Compensation* (Toronto: Butterworths, 1986) 43 at 47 [Bates].
> *Hansard* 15/05/1979, *supra* para 2 at 1955 (Marion Bryden).

23 Section 99(2) establishes liability for compensation for damage resulting from a spill that extends beyond, and is not dependent on, the common law (*Hansard* 14/12/1978). Section 99(2) provides "a better mechanism for recovering costs and damages from the responsible parties" than the common law (*Hansard* 27/03/1979).

> *Hansard* 14/12/1978, *supra* para 2 at 6178-6179 (Hon Harry Parrott).
> Ontario, Legislative Assembly, *Official Report of Debates (Hansard)*, 31st Parl, 3rd Sess, No 8 (27 March 1979) at 255 (Hon Harry Parrott) [*Hansard* 27/03/1979].

24 The requirement of establishing a nuisance at common law would also render s. 99(2) duplicative. It would not make sense for the Legislature to enact a statutory cause of action that mirrored the very thing that was deemed to be inadequate in responding to environmental concerns in the first place (*Hansard* 11/12/1979). Liability under s. 99(2) is intended to accomplish more than nuisance.

> Ontario, Legislative Assembly, *Official Report of Debates (Hansard)*, 31st Parl, 3rd Sess, No 88 (11 December 1979) at 5375, 5379 (Marion Bryden) [*Hansard* 11/12/1979].

b) Nuisance is Inconsistent with the Scheme of the Spills Bill

25 The legislative debates in Hansard demonstrate a consensus as to the main objectives of the Spills Bill, as mentioned in paragraph 2 of this factum (*Hansard* 14/12/1978). The Spills Bill broadened the authority of the MOE to order clean-up of spills and to restore the environment, while creating liability for compensation for damages of a spill from the polluter (*Hansard* 27/03/1979). Specifically, the provisions under s. 99(2) embrace a no-fault regime, which enables the MOE to respond to a broad range of environmentally harmful scenarios (*Castonguay*).

> *Hansard* 14/12/1978, *supra* para 2 at 6178-6179 (Hon Harry Parrott).
> *Hansard* 27/03/1979, *supra* para 23 at 255-256 (Hon Harry Parrott).
> *R v Castonguay Blasting Ltd*, 2013 SCC 52 at para 9, [2013] 3 SCR 323 Abella J [*Castonguay*].

26 Provisions of the Spills Bill are aimed at preventing, eliminating and ameliorating harm or risk of harm to the natural environment (*EPA*). Nuisance, however, is not aimed at preventing harm or ameliorating the risk of an adverse effect (*Wiggins*). Rather, a nuisance claim cannot be assessed until the damage or interference has materialized (*Wiggins*). Nuisance fails to engage in environmental protection with the same rigour as the Spills Bill.

> *EPA*, *supra* para 2, s 93(1).
> *Wiggins v WPD Canada Corp*, 2013 ONSC 2350 at paras 41-42, 74 CELR (3d) 310 Healey J [*Wiggins*].

27 The reasonableness inquiry under nuisance requires the balancing of a claimant's interest in being free from an interference with a defendant's interest in continuing the impugned activity (Chamberlain). This inquiry may lead to the result that a "person whose property suffered the adverse effects [will be] expected to tolerate those effects as the price of membership in the larger community" (*Inco*).

> Erika Chamberlain et al, *Cases and Materials on the Law of Torts*, 9th ed (Toronto: Carswell, 2015) at 909 [Chamberlain].
> *Smith v Inco*, 2011 ONCA 628 at para 39, 107 OR (3d) 321 [*Inco*].

28 The scheme of the Spills Bill is designed to do everything practicable to prevent, eliminate, and ameliorate an adverse effect (*EPA*). By permitting persons to suffer adverse effects without remedy, nuisance runs contrary to the scheme of the Spills Bill.

> *EPA*, *supra* para 2, ss 93-94.

c) A Requirement of Nuisance is Incongruous with the Purpose of the EPA

29 The purpose of the *EPA* is to provide for the protection and conservation of the natural environment. This purpose extends beyond the definition of "natural environment" (*EPA*), as it

also protects those who use the natural environment by protecting human health and safety, plant and animal life, property and business" (*Castonguay*). For example, in *Kawartha* a municipality was ordered to remediate a spill despite no finding of fault. This demonstrates the paramount importance of environmental protection in the legislation (*Kawartha* CA).

EPA, *supra* para 2, ss 3(1), 1(1).
Castonguay, *supra* para 25 at para 10.
Kawartha Lakes (City) v Ontario (Director, Ministry of the Environment), 2013 ONCA 310, 74 CELR (3d) 1 Goudge JA [*Kawartha* CA].

30 The *Legislation Act* requires that statutes be interpreted broadly "as best ensures the attainment of [their] objects". Section 99 must be interpreted in a manner that achieves the *EPA*'s stated purpose.

Legislation Act, 2006, SO 2006, c 21, s 64(1) [*Legislation Act*].

31 Nuisance relates only to injury to, or interference with, property or its owner (*Antrim*). Nuisance does not employ an environmental protection objective and fails to respond to the broad range of compensable losses contemplated under s. 99(1). The CA found that the *EPA* must be given broad and expansive interpretation (*Midwest* CA). A requirement to establish a nuisance under common law for a s. 99(2) claim would restrict the range of environmental harms that the MOE could respond to and is inconsistent with the purpose of the *EPA*.

Antrim Truck Centre Ltd v Ontario (Transportation), 2013 SCC 13 at paras 18, 23, [2013] 1 SCR 594 Cromwell J [*Antrim*].
EPA, *supra* para 2, s 99(1).
Midwest CA, *supra* para 6 at paras 50-51.

(ii) A S. 99(2) Claim is Distinct from Common Law Nuisance

32 The Appellants contend that an adverse effect on property requires establishing the elements of common law nuisance (Appellant Factum). Common law nuisance requires a substantial and unreasonable interference with an owner's use or enjoyment of land (*Antrim*). To demonstrate liability under s. 99(2), however, a claimant has multiple avenues, most of which are irrelevant to the elements of nuisance. A s. 99(2) claim is distinct from common law nuisance:

a) "Loss or damage" does not include consideration of "reasonableness";
b) Section 99(2)(b) does not require adverse effect, nor any element of nuisance; and
c) Not all spills constitute actionable nuisance.

Appellant Factum, *supra* para 17 at 31.
Antrim, *supra* para 31 at para 18.

a) "Loss or Damage" Does Not Include Consideration of "Reasonableness"

33 The balancing exercise within the reasonableness inquiry of nuisance, mentioned in paragraph 27 of this factum, may give legal priority to a defendant's conduct (*Inco*). From this, a

plaintiff may be expected to suffer an adverse effect even where a defendant's conduct constitutes a substantial interference (*Inco*).

Inco, *supra* para 27 at para 39.

34 In contrast, with the advent of s. 99(2), citizens no longer have to suffer adverse effects to their property without compensation. A claim under s. 99(2) provides that "any loss of use or enjoyment of property caused by a spill is recoverable; unlike the law of private nuisance, there is no need to consider whether the loss of use or enjoyment amounts to an unreasonable interference" (Faieta).

EPA, *supra* para 2, s 99(2).
Mario Faieta, *Environmental Harm: Civil Actions and Compensation* (Toronto: Butterworths, 1996) at 158 [Faieta].

35 If nuisance was "intended to form the basis for a claim under s. 99, the Legislature could have expressly incorporated those elements into the section" (Intervener Factum CA). A plain reading of s. 99(2) demonstrates that the Legislature has not elected to do so.

Midwest Properties Ltd v Thordarson, 2015 ONCA 819 (Factum of the Intervener (Minister of the Environment and Climate Change) at para 36) [Intervener Factum CA].
EPA, *supra* para 2, s 91(1).

36 Additionally, the Appellants rely on *Canadian Pacific* in submitting that an adverse effect must be substantial and unreasonable (Appellant Factum). *Canadian Pacific* interpreted only the "impairment of the quality of the natural environment for any use that can be made of it[.]" "Adverse effect" in the *EPA* is much more broadly defined and is not required to be substantial and unreasonable.

Appellant Factum, *supra* para 17 at para 26.
Canadian Pacific, *supra* para 1 at paras 40-41.
EPA, *supra* para 2, s 1(1).

37 In the alternative that this Court finds "adverse effect" to require substantial damage and unreasonableness, s. 99(2)(a)(i) does not require that an adverse effect actually occur; likely occurrence is sufficient. Nuisance, on the contrary, requires an actual interference or physical damage to land (*St. Pierre*).

EPA, *supra* para 2, s 99(2)(a)(i).
St. Pierre v Ontario (Minister of Transportation & Communications), [1987] 1 SCR 906 at 914-915, 39 DLR (4th) 10, McIntyre J [*St. Pierre*].

38 The Appellants argue that *Hollick* supports liability under s. 99(2) as dependent on establishing an actionable nuisance (Appellant Factum). The SCC in *Hollick* was clear, however, that the merits of a s. 99(2) claim were not at issue. *Hollick* is distinguishable from this case.

Appellant Factum, *supra* para 17 at para 30.
Hollick v Metropolitan Toronto (Municipality), 2001 SCC 68 at para 1, [2001] 3 SCR 158 McLachlin CJ [*Hollick*].

b) Section 99(2)(b) Does Not Require Adverse Effect, nor Any Element of Nuisance

39 A polluter may incur liability under s. 99(2)(a) or s. 99(2)(b) (*Midwest* CA). Irrespective of whether an adverse effect requires the elements of nuisance to be satisfied, under s. 99(2)(b) a claimant can recover "all reasonable cost[s] and expense[s] incurred in respect of carrying out or attempting to carry out an order or direction under [the Spills Bill]" from a polluter (*EPA*). Section 99(2)(b) does not require an adverse effect nor consideration of 'reasonableness' or 'substantial damage'.

Midwest CA, *supra* para 6 at para 69.
EPA, *supra* para 2, s 99(2)(b).

c) Not All Spills Constitute Actionable Nuisance

40 A nuisance is commonly understood to consist of a continuing state of affairs (Chamberlain). Liability under s. 99(2) can be established upon a single incident, even if a spill is cleaned promptly, provided loss or damage and/or costs or expenses in carrying or attempting to carry out an order or direction are incurred as a result (*EPA*).

Chamberlain, *supra* para 27 at 915.

41 A situation is conceivable where a spill will satisfy the elements of s. 99(2) and not nuisance. By example, where a pollutant is spilled on public land and a Good Samaritan immediately cleans up the spill, the owner of the pollutant can be liable under s. 99(2) for costs incurred by the person in cleaning the spill. This single incident would not constitute a continuing state of affairs that substantially and unreasonably interferes with the use and enjoyment of one's land.

42 In addition, nuisance claims are restricted to persons who have property rights over land that has been substantially and unreasonably interfered with (*Cuff*), whereas s. 99(2) does not require a property right over contaminated land. A spill that does not interfere with a property right, but nonetheless causes loss or damage, will be distinct from nuisance.

Cuff v Canadian National Railway Co, 2007 ABQB 761 at paras 36-37, 51 CPC (6th) 383 Belzil J [*Cuff*].
EPA, *supra* para 2, s 99(2).

B. An MOE Remediation Order Does Not Preclude Damages Under s. 99(2)

43 The mere existence of an MOE order against the Appellants does not preclude civil damages under s. 99(2). The Appellants, in their supplementary factum to the CA, "agree that

there is no statutory language that restricts the right to compensation under subsection 99(2) if there is a ministry order in relation to a past spill" (Thorco Supplementary Factum CA). The MOE also asserts that the *EPA* contains no language to limit the right to compensation where an order exists (Intervener Factum CA). Damages are the appropriate remedy in this case especially considering the Appellants' poor track record of compliance with MOE orders and standards:

> i) The Appellants cannot use the existing MOE order as a shield from liability; and
> ii) Civil damages and the MOE order, in combination, achieve the objectives of the Spills Bill.

Midwest Properties Ltd v Thordarson, 2015 ONCA 819 (Supplementary Factum of the Respondents (Thordarson) at para 62) [Thorco Supplementary Factum CA].
Intervener Factum CA, *supra* para 35 at para 27.

(i) An MOE Remediation Order Cannot Be Used as a Shield

44 Civil damages are in line with the objectives of the Spills Bill (*Hansard* 15/05/1979). Taking a broad interpretation of the *EPA* (*Castonguay*), the CA correctly found that damages and an MOE order are complementary.

Hansard 15/05/1979, *supra* para 2 at 1954, 1958 (Marion Bryden, Floyd Laughren).
Castonguay, *supra* para 25 at para 9.

a) Precluding Damages Frustrates the Objectives of the Spills Bill

45 The Appellants argue that the MOE remediation order precludes damages (Appellant Factum). The result is that the order will be used to shield against liability. The Appellants have been grossly irresponsible in carrying out their business and have not complied with MOE orders and standards for almost three decades (*Midwest* CA). Contamination is still flowing onto the Respondent's property and the Appellants have been held negligent (*Midwest* CA). Damages will rectify the situation to satisfy the objectives of the Spills Bill by assuring the polluter pays, achieving speedy clean-up, restoring the environment, and compensating the victim of the pollution (*Hansard* 15/05/1979).

Appellant Factum, *supra* para 17 at para 43.
Midwest CA, *supra* para 6 at paras 12, 15, 26, 106, 114.
Hansard 15/05/1979, *supra* para 2 at 1954, 1958 (Marion Bryden, Floyd Laughren).

46 Allowing the remediation order to be a shield will frustrate the objectives of the Spills Bill. The MOE stated that the use of an order as a shield is contrary to public policy because it would "act as a disincentive to remediate [and]… have the unintended effect of discouraging [the MOE] from issuing orders out of a concern that [they] could interfere with the rights of property owners to compensation" (Intervener Factum CA).

Intervener Factum CA, *supra* para 35 at para 33.

47 The Ontario Law Reform Commission suggested that even if a defendant is in compliance with an order, civil damages for environmental harm under s. 99(2) should not be precluded. The MOE, as an intervener, would appropriately respond to these damages (Commission). In the situation at hand, the Appellants were not even in compliance with the MOE order and the MOE *still* intervened to comment on the necessity of the damages.

> Ontario Law Reform Commission, *Report on Damages for Environmental Harm* (Toronto: Ontario Law Reform Commission, 1990) at 24-25 [Commission].

b) The MOE Cannot Practically Enforce Every Outstanding Order

48 The MOE is able to use its discretion in enforcing remediation orders. The fact that it has other mechanisms of enforcement is irrelevant. In *Commander*, Hackett J stated that "[the] accused alone is expected to…act with due diligence [in relation to an existing order]" to address the MOE's inaction in enforcing the order (*Commander*). But where the polluter has not complied with the order, s. 99(2) allows a victim to undertake the necessary steps to ensure clean-up. Considering the annual average of over 4,800 spills reported in Ontario between 2007 and 2009, it would be administratively unworkable for the MOE to monitor and enforce every outstanding order (2007 Summary; 2008 Summary; 2009 Summary).

> *R v Commander Business Inc*, 8 WCB (2d) 298 at paras 113, 261, 9 CELR (NS) 185 (Ont Ct J (Prov Div)) Hackett J, aff'd [1994] OJ No 313 (Ct J (Gen Div) [*Commander*].
> Ontario, Ministry of Environment, "Spills Action Centre: 2007 Summary Report", by Spills Action Centre, PIBS 6743e (Toronto: MOE, 2007) at 3 [2007 Summary].
> Ontario, Ministry of Environment, "Spills Action Centre: 2008 Summary Report", by Spills Action Centre, PIBS 7088e (Toronto: MOE, 2008) at 3 [2008 Summary].
> Ontario, Ministry of Environment, "Spills Action Centre: 2009 Summary Report", by Spills Action Centre, PIBS 7653e (Toronto: MOE, 2009) at 3 [2009 Summary].

49 The role of the private individual in enforcing environmental legislation should not be overlooked. In *Podolsky* and *Cyanamid*, private individuals who lacked property rights brought successful actions against polluters, showing the role for citizen action. To achieve the objective of compensating *all* victims of pollution, s. 99(2) provides affected parties with a cause of action against polluters.

> *Podolsky v Cadillac Fairview Corp*, 2012 ONCJ 545, 112 OR (3d) 22 Green J [*Podolsky*].
> *R v Cyanamid Canada* (1981), 11 CELR 31, 1981 CarswellOnt 1399 (Ont Prov Ct) Wallace J [*Cyanamid*].

c) A Successful Claim under s. 99(2) Does Not Require an Existing MOE Remediation Order

50 The Appellants argue that, where there is an active remediation order, a claimant can only bring an action under s. 99(2)(b) provided that the claimant itself is under an order (Appellant Factum). This is a misinterpretation of s. 99(2). The CA found that the Respondent suffered

damages and appropriately falls under s. 99(2)(a). A successful claim under s. 99(2) requires only one of, not both, ss. 99(2)(a) or 99(2)(b) to be satisfied (*Midwest* CA).

Appellant Factum, *supra* para 17 at paras 41-42.
Midwest CA, *supra* para 6 at para 69.

51 In the alternative, if this court finds that both ss. 99(2)(a) and 99(2)(b) of the *EPA* must be satisfied, the Respondent meets the criteria set out in both subsections (*Midwest* CA). Under s. 99(2)(a)(i), the Respondent suffered damage as a result of a spill that is likely to cause an adverse effect. In addition, the Respondent satisfies s. 99(2)(b) by attempting to carry out the duty to mitigate found in s. 93(1) of the *EPA* and damages would provide the requisite remediation costs.

Midwest CA, *supra* para 6 at para 69.
EPA, *supra* para 2, ss 99(2)(a)-(b), 93(1).

(ii) The MOE Remediation Order and Damages Under s. 99(2) Jointly Satisfy the Objectives of the Spills Bill

52 The powers of the MOE to issue orders are derived from ss. 17, 18, 97, 157, 157.1, and 157.3 of the *EPA*. The MOE can also levy fines under s.187 and restitution orders under s. 190. These sections along with s. 99 "are complementary and there is no language in the *EPA* to suggest that they are exclusive of one another" (Intervener Factum CA).

EPA, *supra* para 2, ss 17-18, 97, 157, 157.1, 157.3, 187, 190, 99.
Intervener Factum CA, *supra* para 35 at para 19.

a) Remediation Orders Serve a Public Function and Civil Damages Serve a Private Function

53 The remediation order serves the public objective of protecting and restoring the environment. The Appellants are liable for the clean-up of their contamination and must pay for it under the polluter pays principle (*Midwest* CA).

Midwest CA, *supra* para 6 at para 68.

54 Civil damages serve the objective of compensating the Respondent for the damages suffered as a result of the Appellants' pollution. The intent of the legislature was to "strengthen the right of victims to compensation beyond what the common law [then provided]" (*Hansard* 11/12/1979). There is no risk of double recovery because an order and civil damages serve two distinct objectives. The quantum of those damages is up to this Court to decide.

Hansard 11/12/1979, *supra* para 24 at 5379 (Marion Bryden).

b) Civil Damages Protect Against Polluter Insolvency

55 Damages serve the goal of protecting the Respondent if the Appellants go bankrupt. Section 100.1(5) of the *EPA*, in combination with the *Municipal Act* or the *City of Toronto Act*,

provides municipalities with a priority lien in the event of a bankrupt polluter. Individuals do not explicitly have the same right in the *EPA*. For example, in *Technical*, a municipality ordered innocent property owners to pay to clean up their property pursuant to s.100.1(1) of the *EPA* and would have had a priority lien on that property.

> *EPA*, *supra* para 2, s 100.1(5).
> *Municipal Act*, SO 2001, c 25, s 1 [*Municipal Act*].
> *City of Toronto Act*, SO 2006, c 11, Schedule A, s 3 [*Toronto Act*].
> *Technical Standards and Safety Authority v Kawartha Lakes (City)*, 2015 CarswellOnt 2271 (Ont ERT) [*Technical*].

56 The clear goal of a priority lien for municipalities is to protect taxpayer dollars from being spent on a polluter's remediation, which is an important tenet of the polluter pays principle (*Kawartha* ERT). It would be inconsistent to prevent an individual from recovering civil damages under s. 99(2). Withholding damages from the Respondent would yield the unjust result of shifting the cost of remediation directly to the taxpayer in the event of polluter insolvency. Civil damages will allow the Respondent to be a creditor of the Appellants, which protects the Respondent in the event the Appellants go bankrupt.

> *Kawarth Lakes (City) v Ontario (Director, Ministry of the Environment)*, [2010] OERTD No 32 at paras 26, 49-50, 52 CELR (3d) 273, aff'd 2012 ONSC 2708, aff'd 2013 ONCA 310 [*Kawartha* ERT].

C. Cost of Remediation is the Appropriate Measure of Damages

57 The modern approach to statutory interpretation requires courts to apply a multi-dimensional approach to interpretation. Not only should the court employ the criteria Driedger Principle, but also these considerations "must be read in concert with… established legal norms" (*Application*). For compensation under s. 99 (2), cost of remediation is the appropriate method of quantifying damages:

i) The Driedger Principle supports cost of remediation as the correct remedy; and
ii) Established laws of damages show cost of remediation is the just result.

> *Application Under s 83.28 of the Criminal Code, Re*, 2004 SCC 42 at para 34, [2004] 2 SCR 248 Iacobucci & Arbour JJ (*Application*).

(i) The Driedger Principle Supports Cost of Remediation as the Correct Remedy

58 An examination of the Driedger Principle, as stated in paragraph 19 of this factum, shows that he CA correctly interpreted cost of remediation as the appropriate amount of damages under s. 99(2) (*Midwest* CA):

a) The "grammatical and ordinary sense" of s. 99(2) supports cost of remediation;
b) Cost of remediation is appropriate when s. 99(2) is read "in context… of the Act";
c) Cost of remediation achieves "the object[s] of the Act" as stated in Hansard; and
d) Authorities endorse cost of remediation as fulfilling "the intention of Parliament.

Midwest CA, *supra* para 6 at at para 80.

a) The "grammatical and ordinary sense" of s. 99(2) Supports Cost of Remediation

59 The starting point of a s. 99(2) analysis is a "plain reading" (*Canadian Pacific*). A plain reading of ss. 99(2)(a) or 99(b) allows for the costs of remediation (*Midwest* CA). Section 99(2)(b) grants compensation for "cost and expense incurred in respect of…attempting to carry out…an order" (*EPA*). Cost of remediation will allow the Respondent to attempt to carry out the MOE order directed at the Appellants with respect to remediation of 285 Midwest (*Midwest* CA).

Canadian Pacific, *supra* para 1 at para 11.
EPA, *supra* para 2, ss 99(2)(a)-(b).
Midwest CA, *supra* para 6 at paras 69, 35.

60 The Appellants submit that the word "incurred" limits s. 99(2) to compensation for past costs, relying on an interpretation of a B.C. Act (Appellant Factum). However, a "comparison of like statutes is at most peripheral assistance" (*Gouldbourn*). Section 99(2)(a) allows for "loss or damage incurred", not merely cost incurred. Under s. 99(1), "loss or damage" includes "loss of use or enjoyment of property[.]" Cost of remediation is an established means of quantifying damages for loss of use or enjoyment of property (*Pun*), which the Respondent has suffered (*Midwest* CA).

Appellant Factum, *supra* para 17 at paras 59-61.
Goulbourn (Township) v Ottawa-Carleton (Regional Municipality) (1979), [1980] 1 SCR 496 at 515, 101 DLR (3d) 1 Estey J [*Goulbourn*].
EPA, *supra* para 2, s 99(2)(a), 99(1).
Gregory Pun, Margaret Hall & Ian Knapp, *The Law of Nuisance in Canada*, 2nd ed (Toronto: LexisNexis Canada, 2015) at 260 [Pun].
Midwest CA, *supra* para 6 at at paras 106-107, 112.

b) Cost of Remediation is Appropriate in the "entire context... of the Act"

61 Section 99(2) should also be considered in the context of the Act (*Canadian Pacific*). The Appellants argue that the broad powers of the MOE under the *EPA* to undertake remediation should necessarily restrict a s. 99(2) claim to losses *other* than cost of remediation (Appellant Factum). As previously mentioned, there is nothing in the Act to indicate that MOE orders and claims under s. 99(2) are mutually exclusive (*Midwest* CA). Allowing cost of remediation under s. 99(2) does not lead to discrepancy within the *EPA*; it facilitates consistency.

Canadian Pacific, *supra* para 1 at para 11.
Appellant Factum, *supra* para 17 at paras 50-51.
Midwest CA, *supra* para 6 at at para 53.

62 Section 99(2) must be read to allow harmony within the entire legislation (*Willick*). The purpose of the *EPA* is to protect and conserve the environment (*EPA*) and cost of remediation achieves that purpose. Diminution in value leaves the contamination untreated. An award for less than cost of remediation disregards the duty to "do everything practicable… to restore the environment", which requires amelioration to the state "existing immediately before the spill" (*EPA*). Diminution in value fails to fulfill the purpose of the act.

Willick v Willick, [1994] 3 SCR 670 at 689, 119 DLR (4th) 405 Sopinka J [*Willick*].
EPA, *supra* para 2, ss 3(1), 93(1), 91(1).

c) Cost of Remediation Achieves "the object of the Act" as Stated in Hansard

63 The Appellants rely on Hansard in asserting that the dominant objective of the Spills Bill is to expand the MOE's authority over remediation, thus supporting a restrictive interpretation of damages under s. 99(2) (Appellant Factum). However, as indicated above, the legislative debates show that there were several goals behind the Spills Bill. Disallowing claims for costs of remediation will frustrate the totality of these objectives.

Appellant Factum, *supra* para 17 at paras 53-54.

64 The four objectives of the Spills Bill (*Hansard* 15/05/1979) are achieved by awarding cost of remediation. Diminution in value fails to achieve the goals of prompt remediation, environmental restoration, and full compensation to affected parties. As stated at the CA, "it would indeed be a remarkable result if legislation enacted to provide a new statutory cause of action to innocent parties who have suffered contamination of their property did not permit the party to recover the costs of remediating their property, given the EPA's broad and important goals" (*Midwest* CA).

Hansard 15/05/1979, *supra* para 2 at 1954, 1958 (Marion Bryden, Floyd Laughren).
Midwest CA, *supra* para 6 at para 70.

d) Authorities Endorse Cost of Remediation as Fulfilling "the intention of Parliament"

65 In addition to Hansard, scholarly, administrative and judicial authorities can be relied on to support the same interpretation of s. 99(2) (Sullivan). There is significant scholarship supporting cost of restoration as the ideal damages for claims of environmental contamination (Pardy; Olszynski), including claims under s. 99(2) (Faieta; Benidickson). The Ontario Law Reform Commission shares this same viewpoint (Commission).

Ruth Sullivan, *Sullivan on the Construction of Statutes*, 5th ed (Markham, ON: LexisNexis Canada, 2008) at 575 [Sullivan].
Bruce Pardy, *Environmental Law: A Guide to Concepts* (Markham, ON: Butterworths, 1996) at 223 [Pardy].
Martin Olszynski, "The Assessment of Environmental Damages Following the Supreme Court's Decision in Canfor" (2005) 15 J Env L & Prac 257 at 293 [Olszynski].
Faieta, *supra* para 34 at 294.
Jamie Benidickson**,** *Environmental* Law, 2nd ed (Toronto: Irwin Law, 2002) at 192 [Benidickson].
Commission, *supra* para 47 at 55-56.

66 Administrative interpretations of s. 99(2) also support claims for remediation costs (*Nowegijick*). The MOE intervened at the CA stating that cost of remediation is the appropriate remedy (*Midwest* CA) and have always held this opinion. In 1993, the MOE instructed potential dischargers to prepare contingency plans that included compensating for clean-up costs (Planning), and in 1988, the MOE stated that spill victims must claim compensation including clean-up costs (Spills). The government clearly intends for polluters to be liable to victims for cost of remediation.

Nowegijick v R, [1983] 1 SCR 29 at 37, [1983] 2 CNLR 89, Dickson J [*Nowegijick*].
Midwest CA, *supra* para 6 at para 5.
Ontario, Ministry of Environment & Energy, "Planning for Spill Contingencies: A Supplement to the Province of Ontario Contingency Plan for Spills of Oil and Other Hazardous Materials", by Spills Action Centre (Toronto: MOEE, 1993) at 3-4 [Planning].
Ontario, Ministry of the Environment, "Spills Response Program: Information on the Law, the Public and Private Sectors' Role and Responsibilities, Government Resources, Compensation", (Toronto: MOE, 1988) at 21 [Spills].

67 Judicial authorities in Ontario also endorse cost of remediation as appropriate damages for claims of contaminated property (*Midwest* CA). The Appellants attempt to distinguish *Tridan* as a *Rylands* claim (Appellant Factum), but s. 99(2) includes elements of *Rylands* and is therefore indistinguishable (Makuch). *Canadian Tire* is also not distinguishable (Appellant Factum). Though there was some pre-trial remediation in *Canadian Tire*, it was limited to stopping noxious vapours rather than remediating contaminated soil.

Midwest CA, *supra* para 6 at at paras 64-67.
Tridan Developments Ltd v Shell Canada Products Ltd (2002), 57 OR (3d) 503, 110 ACWS (3d) 1045 (CA) Carthy JA [*Tridan*].
Appellant Factum, *supra* para 17 at para 63-64.
Stanley Makuch, "The Spills Bill – An Overview" in Stanley Makuch, ed, *The Spills Bill: Duties, Rights and Compensation* (Toronto: Butterworths, 1986) 27 at 30-34 [Makuch].
Hansard 14/12/1978, *supra* para 2 at 6178-6179 (Hon Harry Parrott).
Canadian Tire Real Estate Ltd v Huron Concrete Supply Ltd, 2014 ONSC 288 at paras 112-121, 315, 45 RPR (5th) 214 Leitch J [*Canadian Tire*].

(ii) Established Laws of Damages Show Cost of Remediation is the Just Result

68 The established principle guiding the law of damages is *restitutio in integrum*, to restore fully the plaintiff's loss (Cassels). The Respondent agrees with the Appellants that this Court

should employ the doctrine when measuring damages (Appellant Factum). However, *restitutio in integrum* supports cost of remediation as the superior remedy:

a) Cost of remediation is an appropriate measurement for property damage and is reasonable in the circumstances;
b) Cost of remediation compensates for the ongoing nuisance; diminution in value does not; and
c) The human health risk is addressed by cost of remediation but ignored by diminution in value.

Jamie Cassels & Elizabeth Adjin-Tettey, *Remedies: The Law of Damages*, 2nd ed (Toronto: Irwin Law, 2008) at 90 [Cassels].
Appellant Factum, *supra* para 17 at para 57.

a) Cost of Remediation is an Appropriate Measurement for Property Damage and is Reasonable in the Circumstances.

69 The Respondent is the victim of multiple types of loss. First, the Respondent suffered physical harm to the property as the result of the contaminants (*Midwest* CA). Cost of remediation will be available to a plaintiff if he can demonstrate that it is the best measure of his true loss (Cassels).

Midwest CA, *supra* para 6 at paras 99, 101.
Cassels, *supra* para 67 at 90.

70 Three factors are relevant to assessing whether cost of remediation appropriately measures property damage. The first is the disparity between cost of remediation and diminution in value (Cassels). In this case, there is no evidence to quantify the amount of diminution in value (*Midwest* CA) and therefore no proof of any disparity. Although the Appellants challenge the cost of the restoration plan, the CA found the amount to be reasonable (*Midwest* CA).

Cassels, *supra* para 67 at 90-92 [Cassels].
Midwest CA, *supra* para 6 at paras 28-30, 80.

71 The remaining two factors that go to assessing the reasonableness of cost of remediation are whether the property is fungible and whether the owner intends to remediate (Cassels). The Respondent's property is the site of an ongoing manufacturing business (*Midwest* CA) and not easily replaceable. The Respondent also has reason to remediate, as the MOE will redirect its order should the Respondent succeed in its claim (*Midwest* CA). The Respondent may also be subject to its own MOE order should it fail to remediate (*Montague*). These details distinguish this case from *Cousins* (Appellant Factum), which pertained to undeveloped property that the plaintiff had no desire to remediate.

Cassels, *supra* para 67 at 90-92 [Cassels].
Midwest CA, *supra* para 6 at paras 9, 55.

Montague v Ontario (Minister of the Environment) (2005), 12 CELR (3d) 271 at paras 1, 2, 52-54, 196 OAC 173 (Sup Ct J (DC)) Heeney J [*Montague*].
Cousins v McColl-Frontenac Inc, 2006 NBQB 406 at para 14, 307 NBR (2d) 95 McLellan J [*Cousins*].
Appellant Factum, *supra* para 17 at para 65.

b) Cost of Remediation Compensates for the Ongoing Nuisance; Diminution in Value Does Not

72 Property damage is not the only loss afflicting the Respondent. The ongoing contamination of 285 Midwest was held to be a nuisance (*Midwest* CA), which entitles the Respondent to a remedy for that loss going forward *in addition* to physical damage already caused (Pun). The traditional remedy for nuisance is an injunction (*Pride of Derby*). An award for diminution in value robs the Respondent of this right.

Midwest CA, *supra* para 6 at paras 106-107, 112.
Pun, *supra* para 59 at 259.
Pride of Derby v British Celanese Ltd, [1952] 1 All ER 1236, [1953] 1 Ch 149 (CA).

73 In this instance, the cost of remediation is an appropriate alternative to an injunction. Damages may substitute for an injunction where the injury to the plaintiff can be easily quantified (*Canada Paper*). Contrary to any assertion that remediation costs were ambiguous (Appellant Factum), the expert's estimate for remediation costs was accepted at trial (*Midwest* CA). Additionally, the remediation plan includes a barrier wall to stop the continued flow of contamination (Midwest CA Factum). Cost of remediation achieves the same goal as an injunction by providing the Respondent with funds to abate the nuisance (Pun).

Canada Paper Co v Brown, (1922) 63 SCR 243 at 252, 66 DLR 287 Duff J [*Canada Paper*].
Appellant Factum, *supra* para 17 at paras 18, 66.
Midwest CA, *supra* para 6 at paras 31, 80.
Midwest Properties Ltd v Thordarson, 2015 ONCA 819 (Factum of the Appellant (Midwest) at para 27) [Midwest CA Factum].
Pun, *supra* para 59 at at 224.

c) The Human Health Risk is Addressed by Cost of Remediation but Ignored by Diminution in Value

74 A final type of loss inflicted upon the Respondent is a risk to human health. The Respondent presented uncontradicted evidence of such a risk should the presence of PHCs on its property continue (*Midwest* CA). Personal injury losses are compensable under s. 99(1) and a continuing potential cause of action will exist so long as contamination remains (*Bolton*). This Court should address this health risk to prevent the potential of future actions (*Aikman*).

Midwest CA, *supra* para 6 at paras 69, 98-101.
EPA, *supra* para 2, s 99(1).
Bolton Oak Inc v McColl-Frontenac Inc, 2011 ONSC 6567 at para 52, 64 CELR (3d) 239 Penny J [*Bolton*].
Aikman v George Mills & Co, [1934] OR 597, [1934] 4 DLR 264 (HC) Rose CJ [*Aikman*].

75 In a situation where a plaintiff shows that irreparable harm may occur as the result of an imminent danger, an appropriate remedy is a *quia timet* injunction (*Highland*). Personal injuries are forms of irreparable harms (*Palmer*) and the CA found the PHC contamination "to pose a risk to human health [that] cannot be classified as trivial, insubstantial, or reasonable" (*Midwest* CA). In fulfilling the same role as an injunction, the remediation plan addresses the future personal injury loss.

> *Canadian Pacific Ltd v Highland Valley Cattle* Co, [1990] BCWLD 2090 at paras 45-47, [1990] BCJ No 1860 (CA) Toy JA [*Highland*].
> *Palmer v Nova Scotia Forest Industries* (1983), 2 DLR (4th) 397 at 493, [1984] 3 CNLR 107 (NS SC (TD)) Nunn J [*Palmer*].
> *Midwest* CA, *supra* para 6 at para 107.

76 Although harm to human health has yet to materialize (Appellant Factum), compensation under s. 99(2) also includes adverse effects that are *likely* to be caused but have yet to occur (*EPA*). The judge also accepted the health risk as a matter of fact and this finding cannot be overturned barring a palpable and overriding error (*Housen*). Additionally, the common law supports compensation for the future health risk, if the risks of future harm are tied to other legal injuries (Collins). Here the risk is tied to losses in nuisance and property damage and must be addressed to achieve a just result.

> Appellant Factum, *supra* para 17 at paras 25-27.
> *EPA*, *supra* para 2, s 99(2)(a).
> *Housen v Nikolaisen*, 2002 SCC 33 at para 10, [2002] 2 SCR 235 Iacobucci & Major JJ [*Housen*].
> Lynda Collins & Heather McLeod-Kilmurray, *The Canadian Law of Toxic Torts* (Toronto: Canada Law Book, 2014) at 179 [Collins].

PART IV -- SUBMISSIONS IN SUPPORT OF COSTS

77 The Respondent requests an award of its costs on a fixed (*Boucher*) and partial indemnity basis pursuant to rule 57.01(3) of the *Rules of Civil Procedure*. The Respondent requests that partial indemnity be awarded at a rate of 75% due to the importance of the issues litigated to environmental law and the complexity of the proceeding (*Rules of Civil Procedure*; *Chartis*).

> *Boucher* v Public Accountants Council (Ontario) (2004), OAC 201 at para 15, 71 OR (3d) 291 (CA) Armstrong JA [*Boucher*].
> *Rules of Civil Procedure*, RRO 1990, Reg 194, r 57.01(1)(0.a), (c)-(d) [*Rules of Civil Procedure*]
> *Ontario (Minister of Finance) v Chartis Insurance Co of Canada*, 2015 ONSC 3380 at para 7, 254 ACWS (3d) 286, Hambly J [*Chartis*].

PART V -- ORDER SOUGHT

78 The Respondent respectfully requests:

a. An order by this Honourable Court dismissing this appeal and upholding the Ontario Court of Appeal's decision with respect to both liability and quantification of damages; and
b. Costs of this appeal.

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

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Mohamed Abdel Hadi

_____

James Boyd

_____

Kevin Spykerman

Counsel for the Respondent
Midwest Properties Ltd.

PART VI -- TABLE OF AUTHORITIES

Paragraph No.

A. Legislation

B. Jurisprudence

C. Government Documents

D. Secondary Sources and Other Materials

PART VII -- LEGISLATION AT ISSUE

***Environmental Protection Act* RSO 1990, c E.19, s 99(2).**

Right to Compensation

99 (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.

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 #2017-04

Mohamed Abdel Hadi
James Boyd
Kevin Spykerman

Counsel for the Respondent,
Midwest Properties Ltd.

Document #: 1121661