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 COURT OF APPEAL FOR ONTARIO)

B E T W E E N:

JOHN THORDARSON and THORCO CONTRACTING LIMITED

DEFENDANTS
(Appellants)

- and -

MIDWEST PROPERTIES LTD.

PLAINTIFF
(Respondent)

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 #2017-05

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

AND TO: **ALL REGISTERED TEAMS**

TABLE OF CONTENTS

Page No.

PART I -- OVERVIEW AND STATEMENT OF FACTS

A. Overview of the Appellants' Position

1. This appeal concerns an overly broad interpretation of the *Environmental Protection Act* ("**EPA**" or "**the Act**") by the Court of Appeal for Ontario ("**Appeal Court**"). If upheld, this interpretation would result in a damage award that undermines the structure of the EPA, contradicts its purpose, and was not intended by the legislature.

2. For over 40 years, the appellants Thorco Contracting Limited and John Thordarson (collectively "**Thorco**") have operated a waste storage business. During this time, the Ministry of the Environment and Climate Change ("**MOECC**") has used its enforcement powers to align Thorco's business practices with provincial waste storage guidelines. Most recently, a 2012 MOECC order compelled Thorco to investigate a spill of contaminants and perform remediation work. This included remediation of any contamination found on the neighbouring property of the respondent Midwest Properties Ltd. ("**Midwest**").

3. Unsatisfied with the pace of remediation, Midwest launched independent claims against Thorco for nuisance, negligence, and damages under s. 99(2) of the *EPA*, which allows for compensation for "loss or damage" caused by contamination. Although the trial judge dismissed all of Midwest's claims, such findings were overturned on appeal. The Appeal Court's reasoning is flawed for three reasons:

(a) The Appeal Court erred in reasoning that s. 99(2) does not require establishing nuisance at common law. In fact, nuisance establishes the threshold of harm required to determine "adverse effect" under s. 99(2). Using the common law in this way is necessary to avoid absurdities when interpreting this section. The Appeal Court also incorrectly found

liability for nuisance in this case, as the facts do not demonstrate harm that is substantial and unreasonable.

(b) The Appeal Court erred in awarding the cost of future remediation under s. 99(2). Such an award is inappropriate when an existing MOECC order already addresses the same remediation, and it presents a significant risk of double recovery by Midwest.

(c) The Appeal Court erred in assessing damages under s. 99(2) based on the cost of future remediation rather than diminution in value. This runs counter to the express wording of the *EPA*, the legislative intent, and the specific role that s. 99 plays in achieving the broader purpose of the Act – namely compensating parties for existing loss or damage suffered because of contamination.

4. The Appeal Court decision should be overturned because it interprets the EPA far more expansively than the Legislature could reasonably have intended. Further, by awarding damages without the requisite factual foundation, the Appeal Court has imposed a significant cost on Thorco and undermined the structure of the *EPA*.

B. Statement of Facts

i. Thorco Operates at 1700 Midland Avenue

5. Thorco has operated a waste storage facility at 1700 Midland Avenue in Toronto since 1974. A 1996 MOECC order required Thorco to remove excess waste, comply with storage guidelines, and stop accepting new waste at its site.

Midwest Properties Ltd v Thordarson, 2015 ONCA 819 at paras 12-13 [*Midwest CA*].

6. In 2000, Thorco was convicted of four EPA offences including failing to dispose of excess waste, failing to submit financial assurance to the MOE, and failing to ensure the proper

storage of materials on 1700 Midland. None of these offences related to spilling petroleum hydrocarbons ("**PHCs**"). Since that conviction, Thorco has been supervised by the MOECC at 1700 Midland and has taken steps to comply with MOECC standards. In 2002 it began to wind down business operations and reduced the volume of waste on site. By 2011 all liquid waste had been removed from 1700 Midland.

Midwest CA, supra para 5 at paras 16-18.

ii. Midwest Purchases 285 Midwest Road

7. Midwest purchased 285 Midwest Road, adjacent to 1700 Midland Avenue, in December 2007. Before the purchase, to check for contamination, Midwest obtained a Phase I environmental site assessment ("**ESA**") from TS Environmental Services ("**TS**"). This audit entailed a simple visual inspection of the property for signs of potential contamination. Midwest however, chose not to obtain the more costly Phase II ESA, which would have tested the property for soil or groundwater contamination. Because no Phase II ESA was performed, there is no evidence regarding the soil and groundwater conditions of 285 Midwest at the time of purchase.

Midwest CA, supra para 5 at paras 1,9.

iii. Contamination is discovered

8. In 2008, Midwest became interested in Thorco's neighbouring property at 1700 Midland. Midwest hired a different consulting firm, Pinchin Environmental Ltd. ("**Pinchin**"), to conduct both Phase I and Phase II ESAs on 1700 Midland. Pinchin found PHC contamination at that site.

Midwest CA, supra para 5 at para 11.

9. As a result of this finding, Midwest revisited their examination of 285 Midwest. In 2008, they obtained a Phase II ESA, which found PHC contamination exceeding MOECC guidelines at that site.

Midwest CA, supra para 5 at para 24.

10. Since that report was issued, Midwest has continued to monitor the contamination but there is no evidence of any steps being taken, in the intervening eight years, to remediate their property.

Midwest CA, supra para 5 at para 25.

iv. Impacts of the contamination

11. At trial, three environmental site assessment experts testified to the economic impacts of PHC contamination. Two Pinchin employees, Mr. Vanin and Mr. Tossell, were qualified as experts on environmental assessments. Despite neither witness being qualified as an expert on finance, mortgages, lending, or banking practices, they testified that PHC contamination could be an obstacle for a buyer to acquire financing. The third environmental expert, Mr. Kolokziej from XCG Consultants, testified that the likelihood of selling contaminated land "depends on the risk tolerance of the potential buyer." Accordingly, some buyers capitalize on properties with attached risk assessments in order "to find a better deal."

Midwest CA, supra para 5 at para 27-30.

12. Mr. Tossell testified that PHC levels in one of the monitoring wells at 285 Midwest were at the F2 fraction reading. This level of PHC contamination exceeds the MOECC limit and means the PHC is volatile. Mr. Tossell believed that there was a risk PHC could get into the

building on the property. If this were to happen, it could then pose a health risk to occupants. He did not testify that this will or is likely to occur.

Midwest CA, supra para 5 at para 25, 100.

13. At trial, Justice Pollak (the "**Trial Judge**") concluded that Midwest had not submitted any evidence of "actual loss in property value or its inability to use its property or operate its business on its property, or business losses." Further, there is no evidence that Midwest suffered costs or expenses from preventing or remediating the contamination on its property.

Midwest Properties Ltd v Thordarson, 2013 ONSC 775 at para 23 [*Midwest Trial*].
Midwest CA, supra para 5.

v. The MOECC issues an order to remediate

14. It was not until 2012, four years after the contamination was discovered at 285 Midwest, that the MOECC issued a remediation order against Thorco (the **"Order**"). The Order required Thorco to investigate the extent of its PHC contamination and take steps to fully remediate the damage caused. According to Officer Mitchell of the MOECC, the Order "was intended to basically go wherever they believe or demonstrated the contamination to go to." The Trial Judge found that the Order extended to 285 Midwest.

Midwest CA, supra para 5 at paras 32, 34.
Midwest Trial, supra para 13 at para 20.

15. Although often outside the MOECC prescribed timeframes, Thorco has been working towards completing the requirements of the Order.

Midwest CA, supra para 5 at para 34.

vi. Judicial history

16. In 2012, Midwest filed claims against Thorco for common law nuisance and negligence, and for breach of s. 99(2) of the *EPA*. This section provides:

> (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.

Midwest CA, supra para 5 at para 3.

Environmental Protection Act, RSO 1990, c E19, s. 99(2) [*EPA*].

17. At trial, Justice Pollak (the "**Trial Judge**") determined that the contamination at 285 Midwest had originated from 1700 Midland. However, because there had been no Phase II ESA at the time of purchase in 2007, there was no way to determine when that contamination had in fact taken place.

Midwest Trial, supra para 13 at para 7.

18. The Trial Judge dismissed Midwest's nuisance and negligence claims due to a failure to prove damages – a requirement for each cause of action. Specifically, because the state of contamination at the time of purchase in 2007 was not known, Midwest failed to prove damages caused by an increase in contamination during the period of its ownership.

Midwest Trial, supra para 13 at para 26-7, 33-34.

19. The Trial Judge also rejected the claim for s. 99(2) EPA damages because Midwest had claimed damages that were not compensable under that section of the statute. Further, she rejected Midwest's claim that it be awarded the cost of future remediation under s. 99(2) given that a MOECC remediation order already existed. This, she held, created an opportunity for double recovery.

Midwest Trial, supra para 13 at para 22.

20. Midwest appealed. The Appeal Court allowed Midwest's appeal, reasoning that:

(a) Awarding damages under s. 99(2) was not dependent on finding an actionable nuisance at common law. Section 99(2), therefore, did not have to meet the same threshold of harm required in nuisance law. The Appeal Court proceeded to conclude that there was sufficient evidence to establish a finding of nuisance.

(b) Concerns about double recovery were assuaged by the MOECC's agreement to transfer the 2012 Remediation Order. The MOECC, which was an intervener, stated that if Midwest was compensated under s. 99(2), it would be "forced" to redirect the Order. The Appeal Court concluded that this sufficiently dealt with concerns of double recover.

(c) In order to further the environmental protection purpose of the EPA, the proper measure of damages for a breach of s. 99(2) was the cost of future remediation.

Midwest CA, supra para 5 at paras 73, 55, and 70 respectively.

PART II -- QUESTIONS IN ISSUE

21. This appeal raises the following three issues:

(a) **Issue #1**: Did the Appeal Court err in finding that liability under s. 99(2) of the EPA is not dependent on establishing an actionable nuisance at common law?

(b) **Issue #2**: Did the Appeal Court err in finding that damages are not precluded under s. 99(2) where the MOECC had already ordered Thorco to remediate Midwest's property?

(c) **Issue #3**: Did the Appeal Court err in finding that the appropriate measure of damages under s. 99(2) was the cost to remediate Midwest's property, as opposed to diminution in value?

PART III -- ARGUMENT

i. Standard of Review

22. Each issue in this appeal concerns the proper interpretation of s. 99(2) of the EPA. These are questions of law and require this Court to apply a correctness standard of review. The question of whether Midwest suffered harm as a result of PHC contamination, which is relevant to the nuisance analysis, is a question of fact and, as such, is subject to review on a "palpable and overriding error" standard.

Housen v. Nikolaisen, 2002 SCC 33 at paras 8, 24 [*Housen*].

A. Issue 1: Liability Under Section 99(2) of the EPA Requires Establishing an Actionable Nuisance at Common Law

23. Establishing an actionable nuisance is required to succeed in a claim under s. 99(2) of the EPA. As set out below, the Appeal Court's interpretation that nuisance is not required would lead to absurdities that the Legislature did not intend. An actionable nuisance was not and cannot be established in this case. Therefore, the Appeal Court erred in finding Thorco liable for damages under s. 99(2).

Midwest CA, supra para 5 at para 73.

i. Adverse effect must meet the threshold of harm established by nuisance

24. The test for common law nuisance is that an interference with an owner's land must be "substantial and unreasonable." This test forms the basis of the threshold of harm required to find an "adverse effect" under s. 99(2).

Antrim Truck Centre Ltd v Ontario (Ministry of Transportation), 2013 SCC 13 at para 18 [Antrim].

25. Compensation under s. 99(2) requires finding that an "adverse effect" has, or is likely to, occur. "Loss or damage" is expressly defined under s. 99(1) as including: "personal injury, loss of life, loss of use or enjoyment of property and pecuniary loss, including loss of income." "Loss or damage" as used in s. 99(2) is subject to a finding of an "adverse effect."

EPA, *supra* para 16 at s. 99(1) and (2).

26. To avoid a circular definition, "adverse effect" must differ from the meaning prescribed to "loss or damage" under s. 99(1). It is assumed that the Legislature avoids tautology and therefore "every word in a legislative text must be given its own meaning" (*Sullivan*). Section 1(1) of the EPA defines "adverse effect" using a number of different types of potential harm. However, this section does not define such terms as "impairment", "injury", and "harm" (collectively referred to as **"harm").**

EPA, *supra* para 16 at s. 1(1).

Ruth Sullivan, *Essentials of Canadian Law: Statutory Interpretation*, 2nd ed, (Toronto, CA: Irwin Law, 2009) at 129 [*Sullivan Statutory*].

R v Kelly [1992] 2 SCR 170 at para 44 [*Kelly*].

27. Given the broad application of nuisance to claims of contaminated property, this Court should conclude that nuisance establishes the threshold for harm under "adverse effect". Nuisance ranges "from actual physical damage to land interference with … health, comfort or

convenience" (*Tock*). As Dianne Saxe has noted, "in determining whether discomfort is 'material' or whether a discharge interferes with the 'normal use of property', considerable guidance can be gleaned from the law of nuisance". The Appeal Court in *Hollick v. Metropolitan Toronto* ("***Hollick***") further reinforced this relationship by establishing that nuisance is required to establish a cause of action under s. 99.

> Dianne Saxe "*Ontario Environmental Protection Act Annotated"* (Toronto: Thomson Reuters, 2015) (loose leaf updated 2015, release 97) A 2.1 [*Saxe*].
>
> *Tock v St. John's (City) Metropolitan Area Board*, [1989] 2 SCR 1181 at para 62, 104 NR 241 Wilson J [*Tock*].
>
> *Hollick v Metropolitan Toronto (Municipality)*, 127 OAC 369 at para 18, 181 DLR (4th) 426, [*Hollick*].

28. The Appeal Court failed to acknowledge the role that nuisance plays in s. 99 when they distinguished *Hollick* from this case. The Court stated that it should not be considered "authority for the proposition that proof of common law nuisance is a prerequisite for a claim under s.99." This reasoning is flawed.

> *Midwest CA*, *supra* para 5 at para 75.

29. In *Hollick*, the statement of claim alleged negligence and nuisance, and sought s. 99 EPA damages. In that case, the Court of Appeal reasoned that "[n]o one of these claims can be established unless a nuisance is proved and thus the search for a common issue can be confined *to the claim of nuisance*" (emphasis added).

> *Hollick*, *supra* para 27 at para 18.

30. The Appeal Court attempted to distinguish *Hollick* by reasoning that "nuisance" was used in a "colloquial sense" and that it was a class action. "Nuisance" was not used in this way because the full statement made by the Court in *Hollick* refers directly to the "claim of nuisance". Furthermore, the Court's conclusion that s. 99 requires a finding of nuisance was in no way tied to the fact that it was a class action.

Hollick, supra para 27 at para 18.

31. The Appeal Court in the present case failed to sufficiently distinguish *Hollick,* and the finding that nuisance is required under s. 99 should be applied.

ii. The precedent established by the Appeal Court leads to absurdities not intended by the Legislature

32. Holding that s. 99(2) does not require a finding of nuisance would result in an arbitrary and overly broad application of this provision. Absent statutory guidance, the Court requires a common law threshold to determine what harm means under "adverse effect". The legislation outlines guiding principles but gives no direction as to what qualifies as harm.

33. A finding of harm is necessary because the Legislature cannot have intended for compensation to occur absent any harm having been suffered. Had this been the intention, the Legislature would not have included the term "adverse effect" in s. 99(2) after establishing a right to compensation for "loss or damage" incurred from a spill of a pollutant.

34. Not only is the "adverse effect" requirement found in s. 99(2)(a)(i), it is also required by the other two subsections. "Adverse effect" is found throughout Part X, including s. 97(1) "where a pollutant is spilled and the Minister is of the opinion that there is or is likely to be an adverse effect...". This is consistent with the objective of Part X in compensating parties for *damage suffered* on account of the discharge of pollutants. Thus, in including "duty imposed or an order or direction made under this Part" the legislature implicitly refers to a finding of an adverse effect as is consistent with this Part.

EPA, supra para 16 at s. 97(1).
Midwest CA, supra para 5 at para 45.

35. The Appeal Court's assertion that this "cause of action eliminated…such issues as intent, fault, duty of care, and foreseeability" fails to establish an inconsistency with the common law tort of nuisance. Unlike negligence, nuisance is not concerned with any of the above findings. Nuisance law is only concerned with whether it would be reasonable to conclude a substantial and unreasonable interference (*Barrette)*.

> *Midwest CA, supra* para 5 at para 73.
> *Barrette c. Ciment du St-Laurent Inc*, 2008 SCC 64 at para 77 [*Barrette*].

36. If the Appeal Court's interpretation is adopted, it would threaten to open the floodgates for claims under s. 99(2). This interpretation imposes an unclear requirement for establishing harm. This uncertainty may empower parties with limited or no harm suffered to pursue claims under s. 99(2). Further, private parties could bring claims under s. 99(2) where the MOECC has deemed an order unnecessary. This provides parties the opportunity to capitalize on this unclear threshold of harm. The Court of Appeal's interpretation of s. 99(2) will result in a strain on judicial resources while doing little to advance environmental protection.

iii. The Appeal Court erred on the facts in concluding that nuisance was established

37. The Appeal Court made a palpable and overriding error in distinguishing *Smith v. Inco* ("***Inco***"). The Court in *Inco* held that actual harm caused by contamination is required and that contaminant levels exceeding MOECC standards are not sufficient, on their own, to prove that there was a health risk. The Appeal Court erred in holding that there was evidence of harm when the contamination was not proven to pose a risk to health or decrease property value. Furthermore, as Midwest failed to conduct a Phase II ESA prior to purchasing the property, there is no way to know whether the alleged contamination was already present at the time of acquisition. As such, the claim under s. 99(2) must fail.

Midwest CA, *supra* para 5 at paras 99-102, 97-101, 1, 9.
Smith v Inco Ltd, 2013 ONCA 724 at para 55 [*Inco*].

38. Damages cannot be established in this case given the Court of Appeal's decision in *Inco*. Like *Midwest*, *Inco* required the court to determine whether a change in the soil's chemical composition negatively impacted property value or increased health risks. There, the Court found that a "mere chemical alteration" is insufficient to justify an award of damages.

Midwest CA, *supra* para 5 at paras 99-102.
Inco, *supra* 37 at para 55, 234.

39. Given the *Inco* precedent, finding that actual harm caused the contamination is required. To determine a decrease in property value the Court relied on experts in ESAs. They were not experts in property appraisals. There was no evidence that the PHC caused any physical damage in a way that would interfere with the beneficial use of Midwest's property. Further, PHC levels exceeding MOECC standards are not sufficient, on their own, to prove that there was a health risk (*Inco*).

Midwest CA, *supra* para 5 at paras 27-31.
Inco, *supra* para 37, at paras 33, 55-57.

40. The Supreme Court of Canada in *Antrim Truck Centre Ltd v Ontario (Ministry of Transportation),* affirmed that "private nuisance consists of an interference with the claimant's use or enjoyment of land that is both substantial and unreasonable." To determine whether an interference was unreasonable under nuisance, the Court must assess factors such as "severity of the harm, the character of the neighbourhood, the utility of the defendant's conduct, and the question whether the plaintiff displayed abnormal sensitivity" (*Tock*).

Antrim, *supra* para 24 at para 18.

Tock, supra para 27 at para 64.

41. In this case, both properties are located in an industrial part of Toronto, meaning the standard for nuisance and the expected tolerance of neighbours differ from those in residential areas.

Midwest CA, supra para 5 at para 1, 9.

42. Since 2011, a year before the contamination was discovered at 285 Midwest, all liquid waste has been removed from 1700 Midland. Even if Midwest was able to prove damages, they had likely acquired the property in a contaminated state.

Midwest CA, supra para 5 at para 18.

43. Midwest is unable to demonstrate that the alleged health risks and property damage did not exist at the time of purchase because it did not conduct a Phase II ESA of 285 Midwest prior to purchase. Midwest is subject to the "buyer beware" principle recognizing that there is no guarantee that property is sold in a particular state – even regarding contamination (*Antorisa)*. Midwest bears the risk of dealing with the consequences of its failure to conduct a Phase II ESA when it had the opportunity to do so.

Antorisa Investments Ltd v 172965 Canada Ltd 20 BLR (4th) 211 at para 74, 41 CCLT (3d) 275 [*Antorisa*].

B. Issue 2: Section 99(2) of the EPA must be interpreted in a manner that does not allow for double recovery

44. Allowing Midwest's claim under s. 99(2) fails to further the environmental protection purpose of the EPA and results in an injustice to Thorco. The Court of Appeal's decision serves only to expend judicial resources and duplicate a MOECC mandatory order already in place against Thorco. It also raises the spectre of double recovery and windfall profits where Midwest

could take the damage award, but still fail to remediate the property. To best give life to the legislative purpose of the EPA, emphasis should be placed on enforcing existing orders, rather than allowing for duplicative civil proceedings.

EPA, supra para 16 at s. 3(1).

i. The decision below allows a private plaintiff to sidestep an MOECC order

45. In the court below, the MOECC intervened and stated that they would be forced to redirect the Order to remediate from Thorco to Midwest for the contamination on Midwest's property. It is unclear why the Ministry would feel "forced" in this way. There is no statute or precedent that compels the Ministry to redirect such an order. Previous cases have held that Ministry orders under the EPA are discretionary; the Director has "no legal duty" to issue any order. Although the Ministry has made a commitment to transfer the Order, there is no indication that they would do so in every analogous case. Absent such a binding guarantee, unfairness to the defendant in the form of the risk for double recovery is unacceptably high.

Midwest CA, supra para 5 at para 55.

Re 724597 Ontario Ltd. [1994] O.E.A.B. No. 17, 13 CELR (NS) 257 [*Appletex*].

Kawartha Lakes (City) v. Ontario (Director, Ministry of the Environment), 2013 ONCA 310 at para 25 [*Kawartha Lakes*].

46. Double recovery occurs when a judgment would allow a claimant to unjustifiably profit off of a claim for compensatory damages. The Supreme Court of Canada held in *Ratych v Bloomer* ("***Ratych***") that a plaintiff "should not recover unless he can demonstrate a loss, and then only to the extent of that loss. Double recovery violates that principle." This rule has been repeatedly upheld by the Ontario Court of Appeal and Supreme Court of Canada.

Ratych v Bloomer, [1990] 1 SCR 940 at para 71, 1990 Carswell Ont 644 [Ratych].

Appletex, supra para 45.

Kawartha Lakes, supra para 45 at para 25.
Demers v BR Davidson Mining and Development Ltd, 2012 ONCA 384 at para 11 [*Demers*].

47. Alternatively, if the MOECC *is* forced to redirect the Order in every similar case, this Court should be concerned about the ability of a private claimant to sidestep the discretion of the MOECC and timelines set out in the EPA. The MOECC is vested with broad discretionary powers under the EPA to issue and enforce orders. Section 99(2) cannot, and should not, be interpreted so broadly as to give a private party the right to circumvent established procedure and to force the government's hand.

EPA, supra para 16 at ss. 17, 93, 94, 97, 99.1, 100, 100.1, 101.

48. If the MOECC had to transfer the Order in every case under s. 99(2), it would have a chilling effect on future claims. Being awarded costs of future remediation under the section would necessarily come at the price of incurring the burden of a mandatory MOECC order. Rather than simply receiving damages, the plaintiff would also be exposed to legal liability for non-compliance with the transferred order. This spectre of liability would deter future claimants from reporting contamination or bringing cases under s. 99(2). This runs contrary to the purposes of the section and the Act – the protection of the environment and the effective clean-up of contamination.

EPA, supra para 16 at ss. 147 and 150.
Midwest CA, supra para 5 at para 45.

ii. Damages under the EPA must be compensatory for actual harm suffered

49. Allowing Midwest to receive both a compensatory award from Thorco and to enjoy the remediation of their property under the Order would result in a windfall profit for Midwest. This outcome is inconsistent with the purpose of the compensatory damages contemplated by s. 99(2),

which is to ensure that culpable parties compensate innocent parties for their losses as a result of a spill, not to overcompensate them – this would result in double recovery.

Ratych, supra para 46 at para 71.
Demers, supra para 46 at para 11.
Cunningham v Wheeler, [1994] 1 SCR 3591 at paras 5 and 6, 113 DLR (4th) [*Cunningham*].

50. Midwest should not be allowed to recover damages for losses that have not been incurred, particularly when Thorco is already subject to a mandatory order for the same costs. Midwest has undertaken no expense and has made no effort to remediate the property. They adduced no evidence of physical damage to the property or to their ability to use the property for any purpose. In fact, the evidence demonstrates that the contamination has made no impact on their use of the property. Because it has failed to demonstrate any harm, Midwest has no basis for claiming compensation.

Midwest Trial, supra para 13 at para 12.

iii. The rule against double recovery prohibits an award of damages under s. 99(2)

51. When Midwest launched its claim against Thorco, Thorco was already legally mandated to comply with an order to remediate both properties at its own expense. Permitting the appeal judgment to stand in addition to the Order would allow Midwest to profit from the damage award. Such an outcome contravenes the statutory scheme, and is unjust.

Midwest Trial, supra para 13 at paras 20-22.

52. Double recovery is a concern in this case for the following three reasons:

53. First, Thorco may still be responsible to clean up the contamination. Given that the MOECC is under no legal obligation to transfer the Order, there is no guarantee that the award of damages to Midwest would absolve Thorco of its legal duty to remediate both properties. Under

such circumstances, Thorco would be responsible to pay the costs of remediation twice – once as compensation to Midwest, and again under the Order. This amounts to double payment for Thorco and double recovery for Midwest.

Ratych, supra para 46 at para 71.
Appletex, supra para 45.
Kawartha Lakes, supra para 45 at para 25.

54. Even if the MOECC transfers the order, there is no guarantee the spill will be cleaned up. The burden for remediation simply shifts to a new party. The MOECC would be in the same position of seeking the remediation of this property requiring the use of their statutory powers.

55. At the same time, there is nothing to stop the MOECC from issuing a new order to Thorco to undertake remediation. In this way, the ONCA decision permits double recovery to occur, and still does nothing to further the purpose of s. 99(2) or the EPA.

EPA, supra para 16.

56. Second, The MOECC may reissue a remediation order at any point. The EPA grants broad powers to the MOECC to undertake remediation itself and to issue an order to pay the costs to any person who could have been required to remediate under the Act (ss. 99.1, 147, and 150). If Midwest failed to remediate the property after being awarded damages, there would be nothing prohibiting the Ministry from undertaking remediation themselves and ordering Thorco to pay the costs. This would result in unacceptable double payment by Thorco, and double recovery by Midwest.

EPA, supra para 16 at ss. 99(1), 99(2), 147, and 150.
Demers, supra para 49 at para 11.
Cunningham, supra para 49 at paras 5 and 6.

57. Third, Midwest stands to profit by not using the damage award to remediate the property. Damages awarded under s. 99(2) are intended to compensate only for actual loss or expenses incurred. Such damages do not come with any mandatory obligation to remedy the contamination. Midwest could simply collect damages from Thorco and walk away with windfall profits. For this reason, the Appeal Court's decision provides perverse incentives to plaintiffs under s. 99(2).

EPA, supra para 16 at ss. 3(1) and 99(2).
Ratych, supra, para 46 at para 71.
Livingstone v. Raywards Coal Co, [1911] A.C. 301 at 307 [*Livingstone*].

58. Midwest has not shown, nor adduced any evidence, that the PHC had any impact on the value or use of the property. It has not incurred any "costs or expenses" or "loss and damage" under s.99(2) because it has not taken any steps to remediate the property. Nor has it made any tangible commitment to do so in the future. Because the PHC contamination has caused no harm Midwest, there is little incentive to use the damage award to actually remediate the property. The risk of overcompensation is magnified in cases where the cost of remediation exceeds the diminution in value of the property. In such circumstances, the claimant has even less incentive to clean up the spill and is more likely to inappropriately profit from compensatory damages. This outcome contradicts the environmental protection purpose of the EPA, and violates the rule against double recovery.

Midwest Trial, supra para 13 at para 12.
EPA, supra para 16 at ss. 3(1), 99(1), 99(2)(a), and 99(2)(b).
Ratych, supra para 46 at para 71.
Demers, supra para 49 at para 11.
Cunningham, supra para 49 at paras 5 and 6.

iv. Alternative approaches better satisfy the purpose of the EPA

59. The Appeal Court erred in failing to consider numerous options available to Midwest under the EPA. Each of these options would better reflect the purpose and intention of the Act, and would avoid the risks of double recovery and windfall profits.

60. First, the MOECC could undertake the remediation itself, issuing an order to Thorco for costs, under s. 99.1(1) or ss. 147 and 150 of the EPA. This would be most consistent with the goals of expedient remediation and environmental protection. This approach eliminates the risks of inappropriate profit for Midwest and for double liability for Thorco and it ensures the contamination is cleaned up effectively and in a timely manner.

EPA, *supra* para 16 at ss. 99.1(1), 147, and 150.

61. Second, under s. 99(2)(b) Midwest could remediate its own land, and later seek compensation from Thorco for costs and expenses incurred after the work is completed. Under this approach, Midwest would likely succeed in their claim because they would be able to demonstrate actual loss to justify the compensation.

EPA, *supra* para 16 at s. 99(2)(b).

62. Third, even if Thorco failed to pay compensation under the previous scenario, Midwest could still recover costs from the Crown. S.101(1) entitles a person who has incurred loss or damage as a result of a spill to fair compensation from the government in the event that the responsible party is insolvent or recalcitrant.

EPA, *supra* pars 16 at s. 101(1).

63. Each of these alternatives would avoid the problem of having redundant orders, each would resolve the risks of double recovery and windfall profits, and each would better

accomplish the goals of the EPA. However, none of these options were pursued by Midwest. They chose instead to pursue an award under s.99(2) in a way that would allow them to profit disproportionately from the damages. This Court should not reward Midwest its opportunism.

EPA, *supra* para 16 at s. 99(2).

C. Issue 3: The Cost of Remediation is Not the Appropriate Measure of Damages Under s. 99(2) of the EPA

64. The Court erred in using the cost of remediation as the measure of damages because such an award is inconsistent with the specific purpose of s. 99(2) and the express wording of the EPA. By incorrectly adopting a tort law damages analysis in the fact of a contrary statutory scheme, the Court erred. Damages awards under s. 99(2) should compensate for contaminated property using the diminution in property value.

i. Section 99(2) of the EPA does not provide for the cost of future remediation

65. The types of loss and damage to be compensated under s. 99 are health impacts or financial damages that have *already* been suffered due to contaminated land. The Legislature's use of "incurred" in s. 99(2)(a) implies a compensatory scheme designed for recovery of damages already suffered. Recovery for the cost of future remediation is inconsistent with this compensatory purpose as the expenses have not yet been incurred and are speculative in nature.

66. Section 99(2)(a) does not refer to the cost of future remediation. Rather, it provides a "right to compensation, … for loss or damage". The types of "loss and damage" to be compensated for are defined in s. 99(1) to include "personal injury, loss of life, loss of use or enjoyment of property and pecuniary loss, including loss of income."

EPA, *supra* para 16 at s. 99(2)(a), 99(1).

67. The statutory interpretation principle of implied exclusion applies to this case. The Supreme Court recently stated "that the mention of one or more things of a particular class excludes, by implication, all other members of the class" (*Re Supreme Court*). The Legislature did not include the type of loss associated with future remediation in the definition of "loss and damage". Instead, the Legislature purposely excluded this type of loss from the definition.

Reference re Supreme Court Act, ss. 5 and 6 , 2014 SCC 21, at para 42, [2014] 1 S.C.R. 433, [*Re Supreme Court*]

See also, Ruth Sullivan, *Sullivan on the Construction of Statutes*, 5th ed. (Markham, Ont: LexisNexis, 2008) at 243-244 [*Sullivan Construction*].

68. Section 99(2)(b) provides compensation for remediation work done in response to an order or direction from the Minister. This section does not apply in this case because Midwest has not been issued an order or direction from the Minister. Further, this right to compensation is similarly limited to expenses already incurred. It does not allow the recovery of anticipated expenses for future remediation of a property.

EPA, *supra* para 16 at s.99(2)(b).

ii. The Appeal Court erred in relying on the common law to inform the quantum of damages

69. The Appeal Court incorrectly relied on the common law to award the cost of future remediation because s. 99(1) provides clear statutory guidance to the contrary. As such, resorting to the common law is both redundant and unnecessary.

70. Section 99(1) establishes that loss and damage applies to financial or personal harms that have already occurred. These losses are best compensated by way of diminution in value rather than a speculative award of the cost of future remediation. Diminution in value more precisely

targets the damages suffered and does not compensate for future losses that may never be realized.

> Harvey McGregor, *McGregor on Damages*, (London : Sweet & Maxwell, 2009) at 1258 [*McGregor*].
> S.M. Waddams, *Law of Damages*, (Toronto : Canada Law Book, c2012) at 1-105 [*Waddams*].
> *EPA*, *supra* para 16 at s. 99(1).

71. The Appeal Court relied on both *Tridan Development Ltd. v Shell Canada Products Ltd* and *Canadian Tire Real Estate Ltd. v Huron Concrete Supply Ltd.* to demonstrate that the cost of remediation was an acceptable measure of damages (*Midwest*). However, both these cases deal with liability under tort law rather than s. 99(2). The choice between diminution in value and the cost of remediation was justified in these cases because there was no guidance from statute as to the proper measure of damages. Here, in contrast, s. 99(1) provides significant guidance to the court and strongly suggests measuring damages by diminution in value.

> *Tridan Development Ltd. v Shell Canada Products Ltd.*, 57 O.R. (3d) 503, [2002] O.J. No. 1. [*Tridan*].
> *Canadian Tire Real Estate Ltd. v Huron Concrete Supply Ltd*, 2014 ONC 288, [2014] OJ No. 2237 [*Canadian Tire*].
> *Midwest CA*, *supra* para 5 at paras 64-67.

iii. The Court erred in its purposive analysis of s. 99

72. The Appeal Court erroneously conflated the specific function of s. 99 with the overall purposes of Part X and the EPA. The Appeal Court held that, in order to further the environmental protection purpose of the EPA, s. 99 must allow for the cost of future remediation. This however, ignores the specific and unique role s. 99 plays within the EPA – providing innocent third parties with compensation for existing loss or damage from a contamination.

73. The modern principle of statutory interpretation requires the reading of statutory provisions "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*). The challenge is "to identify the objects to be implemented, understand the scheme designed to implement them, and determine how the provision to be interpreted fits into the overall scheme" (*Sullivan Statutory*).

> Elmer A. Driedger, *The Construction of Statutes*, 2nd ed., (Toronto, Butterworths, 1983) at 87 [*Driedger*].
> *Sullivan Statutory*, *supra* para 26 at 129.

74. The Appeal Court failed to consider the harmonious role s. 99 plays in achieving the larger objective of Part X and the EPA. S.99 exists to ensure compensation for innocent parties who are harmed physically or economically by a spill. It is not the role of s. 99 to restore property to the condition it was in prior to the spill. Such remediation work is to be achieved through numerous other provisions within the EPA; specifically, sections 17, 93, 94, 97, 99.1, 100, 100.1, and 101. Requiring every provision in the EPA to push solely towards the objective of remediation threatens to undermine the harmony of the Act, the structure of its regulatory framework, and the efficiency of its implementation.

> *EPA*, *supra* para 16 at s. 3(1), 45, 17, 93, 94, 99.1, 100, 100.1, 101.

iv. It is unreasonable to award the cost of future remediation

75. In the alternative, if the court finds that tort law damage considerations do apply to s. 99, it is unreasonable to award the cost of future remediation in this case.

76. In tort law, when the cost of remediation is higher than the diminution of value, the test for determining the quantum of damages is whether it is reasonable for Midwest to desire to remediate the property.

> *McGregor, supra* para 70 at 1260-1261.

77. Here, Midwest's desire to remediate the property is unreasonable. There is insufficient evidence of harm being sustained by Midwest, substantial concerns about the work actually being completed, and significant factual differences from previous case law.

78. Midwest has failed to demonstrate it has suffered any harm from the contamination. While Midwest's property does exceed some Ministry guidelines, according to *Smith v Inco* "mere exceedance of Ministry of Environment guidelines is insufficient to merit damages."

> *Midwest Trial, supra* para 13 at paras 8, 23.
> *Inco, supra* para 37 at paras 55-57.

79. The Trial Judge ruled that Midwest had not submitted any evidence of "actual loss in property value or its inability to use its property or operate its business on its property, or business losses." Two environmental experts tendered by Midwest gave opinions on diminution of value but had no expertise to do so. Neither witness was qualified as an expert on property valuation, appraisals, or mortgages. Finally, because there is no evidence of the state of 285 Midwest at the time of purchase, there is no way to determine if contamination even occurred during the time of ownership.

80. Midwest has failed to demonstrate harm stemming from the contamination. Because of this, its desire to remediate is unreasonable.

> *Midwest Trial, supra* para 13, at para 23.
> *Midwest CA, supra* para 5 at para 28-29.

81. Midwest has failed to take meaningful steps towards remediation and according to Professor Waddams, "[t]he likelihood of the plaintiff actually performing the restoration is an important factor." The contamination was discovered in 2008. In the intervening 8 years, Midwest has taken no proactive steps to remediate the property. If Midwest were to have taken

any steps toward remediation it may have had claims under tort law and the EPA. This lack of action would suggest limited urgency and little desire to complete this remediation.

> *Waddams, supra* para 70, at 1-112.
> *Midwest CA, supra* para 5 at paras 25-26.

82. While it is acknowledged that the MOECC *may* redirect the Order to Midwest, this action would also not ensure prompt remediation. As discussed above, the MOECC would be left in a similar position; attempting to enforce an environmental remediation order against a party who has made no undertakings or efforts to begin such work.

83. In *Canadian Tire*, Leitch J. awarded the cost of remediation because of

> the nature of damage to the Canadian Tire Property, its potential for serious harm to public health and safety, the fact that MOE guidelines exist and must be complied with, and that Canadian Tire has been proactive since the contamination was first discovered.

> *Canadian Tire, supra* para 71 at para 321.

84. These same factors do not exist in the present appeal. There is no harm to public health or safety. MOECC guidelines have been applied but Thorco is working to comply with them. Midwest has not been proactive since the contamination was discovered.

85. Awarding the cost of future remediation in this case would be inappropriate, contrary to legislative intent, and provides the opportunity for unjust profits.

PART IV -- SUBMISSIONS ON COSTS

86. If this appeal is allowed, the Appellants respectfully seek their costs of this appeal and the proceedings below.

PART V -- ORDER SOUGHT

87. The Appellants seek an order overturning the decision of the Appeal Court and affirming the decision of the Trial Judge.

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

_____
Susan Fridlyand

_____
Scott Dallen

_____
Graham Henry

Counsel for the Appellants
John Thordarson and Thorco Contracting Limited

PART VI -- TABLE OF AUTHORITIES

Jurisprudence	**Paragraph No.**
Antorisa Investments Ltd v 172965 Canada Ltd 20 BLR (4th) 211, 41 CCLT (3d) 275 [*Antorisa*].	43
Antrim Truck Centre Ltd v Ontario (Ministry of Transportation), 2013 SCC 13 [*Antrim*].	24, 40
Barrette c. Ciment du St-Laurent inc, 2008 SCC 64 [*Barrette*].	35
Canadian Tire Real Estate Ltd. v Huron Concrete Supply Ltd, 2014 ONSC 288 [*Canadian Tire*].	71, 83
Cunningham v Wheeler, [1994] 1 SCR 3591, 113 DLR (4th) [*Cunningham*].	49, 56, 58
Demers v BR Davidson Mining and Development Ltd, 2012 ONCA 384, ACWS (3d) 200 [*Demers*].	46, 49, 56, 58
Hollick v Metropolitan Toronto (Municipality), 127 OAC 369, 181 DLR (4th) 426 [*Hollick*].	27, 29, 30
Housen v. Nikolaisen, 2002 SCC 33 [*Housen*].	22
Kawartha Lakes (City) v. Ontario (Director, Ministry of the Environment), 2013 ONCA 310 [*Kawartha Lakes*].	45, 46, 53
Livingstone v. Raywards Coal Co, [1911] A.C. 301 [*Livingstone*]	57
Midwest Properties Ltd v Thordarson, 2015 ONCA 819 [*Midwest CA*].	5-16, 20, 23, 28, 34, 35, 37-39, 41, 42, 45, 48, 71, 80, 81
Midwest Properties Ltd v Thordarson, 2013 ONSC 775 [*Midwest Trial*].	13, 14, 17-19, 50, 51, 58, 78, 80
R v Kelly [1992] 2 SCR 170, [1992] 4 WWR 640 [*Kelly*].	26
Ratych v Bloomer, [1990] 1 SCR 940, 1990 Carswell Ont 644 [*Ratych*].	46, 49, 53, 57, 58
Re 724597 Ontario Ltd. [1994] O.E.A.B. No. 17, 13 CELR (NS) 257 [*Appletex*].	45, 46, 53
Reference re Supreme Court Act, ss. 5 and 6 , 2014 SCC 21 [*Re*	

Secondary Materials

Legislation

JOHN THORDARSON and- MIDWEST PROPERTIES LTD.
THORCO CONTRACTING LIMIED

APPELLANTS
(Respondents)

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

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