

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 2017-06

**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. As Canadians we are interconnected with our neighbours, communities, and the surrounding environment. The issue at the heart of this appeal draws on this connection. Central to the purpose of Part X of the *Environmental Protection Act* (“EPA”) is the value Canadians have in preserving the environment, and making whole those who have suffered injury as a result of pollution.

Environmental Protection Act, [RSO 1990, c E19](#), s 99(1), 99(2), 99(5) [EPA].

2. The Ontario Court of Appeal (“ONCA”) correctly applied s. 99(2) of the *EPA* as an independent cause of action not reliant on nuisance or other common law torts. As a statutory right, s. 99(2) extends the right to recovery beyond the common law. The ONCA’s interpretation upholds the purpose of Part X of the *EPA*: to minimize environmental harms and ensure polluters compensate harmed parties.

3. The ONCA’s expansive interpretation of s. 99(2) of the *EPA*, which permits an award of damages when a remediation order is in place, should be upheld. Where there is a remote possibility of double recovery, judicial discretion in rendering orders can effectively prevent windfall judgments.

4. The damages awarded by the ONCA should be upheld. Compensating parties for remediation best reflects the purpose of s. 99(2) by giving individuals the ability to address environmental harm. Midwest is committed to carrying out remediation. This compensation will make them whole and ensure restoration of the natural environment.

5. The Supreme Environmental Moot Court of Canada (“SEMCC”) must confirm that concerned citizens can use s. 99 as a tool to remediate and prevent further loss or damage to the environment. Upholding the Court of Appeal decision reinforces the fundamental importance of the environment for all Canadians.

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

6. The Respondent accepts the facts outlined by the Appellants subject to the additions below.

(i) Thorco operates at Midland Avenue

7. Thorco Contracting Ltd and John Thordarson (collectively "Thorco" or "Appellants") had been storing "waste PHC, among other things" on their property since 1983. However, they did not apply for and receive a Ministry of Environment and Climate Change ("MOE") Certificate of Approval ("COA") to store waste until 1988 which set a storage limit of 22 520 gallons of waste. However, in 1988 the amount of petroleum hydrocarbons ("PHC") stored on 1700 Midland Avenue ("1700 Midland") "well exceeded 22 520 gallons". Profit was a motivating factor for Thorco's noncompliance.

Midwest Properties Ltd v Thordarson, 2015 ONCA 819 at paras 12, 122, 128 OR (3d) 81 Hourigan J [*Midwest CA*].

8. In 1996, Thorco received an MOE Field Order to remove excess waste, store waste material as per MOE guidelines, and immediately cease accepting waste until in compliance with the COA. The MOE issued four additional orders against Thorco in 1997, 2000, 2008 and 2012, requiring them comply with the COA.

Midwest CA, *supra* para 7 at paras 12–14, 16, 18, 33.

9. Although Thorco had removed all liquid waste by 2011, they had not removed a waste storage pit on the property, which continued to be of concern as the pit was a source of the PHC contamination. A report from the MOE stated:

Many years of processing oily waste in this unapproved manner has resulted in ongoing petroleum hydrocarbon spills to the surrounding soils... Soil samples collected outside the pit confirm the presence of petroleum hydrocarbons

Another MOE report explained that spills of this manner "may cause an adverse effect".

Midwest CA, *supra* para 7 at paras 18, 20.

(ii) Midwest Purchases 285 Midwest Road

10. Midwest relied on a TS Environmental Services' Phase I Environmental Assessment, which indicated a Phase II Environmental Assessment to analyze soil and groundwater was

not required. As such, Midwest did not commission a Phase II audit of 285 Midwest Road (“285 Midwest”) at that time.

Midwest CA, supra para 7 at paras 1.

(iii) Contamination is Discovered

11. Between 2008 and 2012, the contamination on Midwest’s property was monitored. Evidence indicated the presence of “free product” on 285 Midwest in 2011 and 2012. “Free product” indicates a PHC concentration so high that PHC can no longer remain dissolved in groundwater. Monitoring wells located on 285 Midwest indicated the following:

- Well 101: In 2011, PHC was present but still dissolved in groundwater. In 2012, monitoring revealed “free product”;
- Well 102: In 2008, PHC was present but still dissolved in groundwater. In 2011, monitoring revealed “free product”; and
- Well 106: Installed inside Midwest’s building, indicated a F2 fraction exceeding MOE standards.

Midwest CA, supra para 7 at para 25.

12. The 2011 MOE standards categorize PHC into different “fractions”, ranging from F1 to F4, which indicated the volatility and mobility of the PHC. F1 is volatile and mobile, whereas F4 is not. Volatile PHC can get into the air and pose a risk to human health.

Midwest CA, supra para 7 at para 22.

(iv) Impacts of the Contamination

13. In addition to concerns about PHC entering the building and posing a health risk to occupants, Mr. Vanin, an expert on environmental site assessment with “expertise in whether a mortgage lender would finance a contaminated property,” noted two additional concerns resulting from the contamination: third-party liability and diminution of property value.

Midwest CA, supra para 7 at para 25.

(v) The MOE issues an order to remediate

14. On January 19th, 2012, the MOE made an order against Thorco to remediate both 1700 Midland and 285 Midwest. There is no evidence Thorco has attempted remediation since the order came into effect.

Midwest CA, supra para 7 at paras 33, 36.

(vi) Judicial history

15. The Ontario Superior Court of Justice (“ONSC”) found in favour of Thorco, dismissing Midwest’s claims under nuisance, negligence and s. 99(2) of the *EPA*.

Midwest Properties Ltd v Thordarson, [2013 ONSC 775](#) at para 21, 73 CELR (3d) 303 [Midwest SC].

16. The ONCA reversed the ONSC finding and held Thorco liable under nuisance, negligence and s. 99(2). The ONCA awarded Midwest \$1 328 000 for cost of remediation, and \$100 000 in punitive damages. Thorco is appealing the ONCA decision.

PART II -- THE RESPONDENT’S POSITION WITH RESPECT TO THE APPELLANTS’ QUESTIONS

17. Issue #1: The ONCA was correct in finding liability under s. 99(2) is independent from an actionable nuisance at common law.

18. Issue #2: The ONCA was correct in finding damages are not precluded under s. 99(2) when the MOE has ordered Thorco to remediate.

19. Issue #3: The ONCA was correct in finding remediation the appropriate measure of damages under s. 99(2).

PART III -- ARGUMENT

Standard of review

20. This appeal focuses on the interpretation of s. 99(2) and finding harm to Midwest. Statutory interpretation is a question of law; accordingly, the standard of review is correctness. Questions of fact are reviewable where the Trial Judge has made a “palpable and overriding error.”

Housen v Nikolaisen, 2002 SCC 33 at paras 8, 10, [2002] 2 SCR 235, Iacobucci & Major JJ [Housen]

A. Section 99(2) of the *EPA* establishes an independent statutory cause of action

21. A primary focus of this appeal is on the statutory interpretation of s. 99 of the *EPA*. Reading s. 99(2) in its entire context, while being mindful of the object of the *EPA* and intention of the Legislative Assembly of Ontario (the “Legislature”), follows the Supreme Court of Canada’s (“SCC”) foundational principle of statutory interpretation:

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.

Bell ExpressVu Partnership v Rex, 2002 SCC 42 at para 26, [2002] 2 SCR 559 Iacobucci J [Bell ExpressVu].

22. Section 99(2) creates a separate cause of action apart from nuisance for the following reasons:

- (i) The words of s. 99(2), read in their entire context and in the ordinary grammatical sense, express a clear cause of action separate from nuisance; and
- (ii) Section 99(2), as an independent cause of action, is harmonious with the scheme and object of the *EPA*, and the intention of Parliament.
- (iii) The Appeal Court was correct in finding Thorco liable under s. 99 of the *EPA*.

(i) The words of s. 99(2) read in their entire context and in the ordinary grammatical sense express a clear cause of action separate from nuisance

23. There is nothing in s. 99(2) to indicate that the plaintiff must establish an action in nuisance; to interpret otherwise is inconsistent with the plain language and context of the provision.

24. If the Legislature intended for s. 99(2) to depend on an action in nuisance or any other common law tort, the legislation would have expressly required nuisance.

25. Section 99 of the *EPA* provides a right to compensation for spills. It states:

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

(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.

...

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

EPA, supra para 1 s 99(1), 99(2), 99(5).

26. Section 99(2) is a distinct test on which a cause of action can arise. If the claimant meets the five elements of the test, they are entitled to compensation from the owner or controller of the pollutant. The test requires:

(a) loss or damage,

(b) as a direct result,

(c) of a “spill,”

(d) of a “pollutant,”

(e) that causes or is likely to cause an “adverse effect”.

EPA, supra para 1 s 99(2).

27. Other courts have also interpreted s. 99(2) as a separate cause of action. In *Mortgage Insurance Co of Canada v Innisfil Landfill Corp*, the defendant corporation faced claims in trespass, nuisance, strict liability, negligence, and a breach of the *EPA* after leachate migrated from their dump to surrounding properties. The Court regarded s. 99(2) as a separate statutory cause of action, stating, “s. 99 of the *EPA* is not a statutory codification of the negligence provisions... but rather that there is a statutory cause of action afforded by this section.” The Court concluded that the plaintiffs, upon showing loss from the leachate, should be allowed leave to sue for “spill liability.”

Mortgage Insurance Co of Canada v Innisfil Landfill Corp (1996), 20 CELR (NS) 37 at paras 10–11, 63 ACWS (3d) 470 (ONCJ (Gen Div)) Farley J [*Innisfil*] [emphasis added].

28. 1301578 *Ontario Inc v Director, Ministry of the Environment* is a decision from the Ontario Environmental Rights Tribunal (“OERT”) in which an applicant challenged the reopening of a mine. The Tribunal stated, “Section 99 of the *EPA* establishes an entitlement to compensation for the Crown and others who suffer loss or damage as the direct result of a spill that causes an adverse effect without proof of fault... that right is expressly enforceable by way of court action.”

1301578 *Ontario Inc v Director, Ministry of Environment* (2014), 85 CELR (3d) 256 at para 78, 2014 CarswellOnt 3808 (OERT) [1301578] [emphasis added].

29. Both *Innisfil* and 1301578 apply s. 99 as an independent statutory right to compensation empowering private individuals to seek damages from polluters.

30. Starting at paragraph 27 of the Appellants’ factum, they cite *Hollick v Metropolitan Toronto (Municipality)* as authority for s. 99 requiring a finding of nuisance. The ONCA in *Hollick* stated claims in negligence, nuisance, *Rylands v Fletcher*, and s. 99 of the *EPA* could not succeed “unless a nuisance is proved”. However, such a conclusion would mean negligence and *Rylands v Fletcher* would also require a finding in nuisance. The ONCA would not have suggested such a significant alteration of those established causes of action. Rather, in discussing a nuisance, as opposed to a claim in nuisance, the Court was establishing a common issue to justify class certification.

Hollick v Metropolitan Toronto (Municipality) (1999), 46 OR (3d) 257 at para 18, 181 DLR (4th) 426, aff’d 2001 SCC 68, [2001] 3 SCR 158.

31. Statutory causes of action are not uncommon in Canada. In *Director of Civil Forfeiture v Hells Angels Motorcycle Corp* the British Columbia Court of Appeal referenced

the *Canadian Environmental Protection Act* (“*CEPA*”) as an example of legislation that created a “civil right of action”.

Director of Civil Forfeiture v Hells Angels Motorcycle Corp, 2014 BCCA 330 at para 159, 2014 BCCA 330 Frankel JA.

Canadian Environmental Protection Act, 1999, SC 1999 c 33, s 40 [*CEPA*].

32. Section 99(2) of the *EPA* and s. 40 of *CEPA* share common language, further supporting that s. 99(2) is a civil right of action apart from the common law. Both provisions empower any person who experiences a loss or damage to recover from the person who caused it.

(ii) Section 99(2) as an independent cause of action is harmonious with the scheme and object of the *EPA*, and the intention of the Legislature

33. Reading s. 99(2) in the context of the statute as a whole supports the conclusion that the provision creates a cause of action independent of nuisance and other torts.

34. The legislative context and history of s. 99 provides guidance on its application. In 1978, the Legislature introduced Bill 24 in an effort to better protect the environment immediately after a spill. This amendment was in response to a chemical spill in northern Ontario. The responsible party did not address clean-up for several years, resulting in a million dollar procedure and preventable damage.

“Bill 24, An Act to Amend the Environmental Protection Act, 1971”, Ontario, Legislative Assembly, *Official Report of Debates (Hansard)*, 31st Parl, 3rd Sess, (11 December 1979) (Marion Bryden) [Bryden].

Paul G. Murray, “The (Ontario) Part IX- ‘The Spills Bill’” 30 MPLR -ART 138 at 1 [Murray].

35. As a solution, the government created statutory liability for spills. They intended to “fully embody the principle that the polluter must pay, and that there would be strong incentives in the bill for those who use hazardous substances to take responsibility for their use and liability for the risks that accompany such substances.” Polluters will have the incentive to prevent and immediately clean up spills to reduce negative environmental effects.

Bryden, *supra* para 34.

36. The Legislature expressly tied their intent to create a separate cause of action to the purpose of the Bill:

The objective of this legislation is to impose clear responsibility for cleanup...To achieve this, I want to broaden the authority of the ministry to order control, cleanup and restoration, and *to create liability for compensation for damage resulting from a spill which clarifies and extends the right to compensation at common law.*”

“Bill 209, An Act to Amend the Environmental Protection Act, 1971”, Ontario, Legislative Assembly, *Official Report of Debates (Hansard)*, [31st Parl, 3rd Sess, \(14 December 1978\)](#) (Harry Parrott) [Parrott] [emphasis added].

37. The nature of environmental damage makes common law actions difficult to establish. An independent statutory cause of action better supports the *EPA*’s purpose by overcoming many barriers in establishing liability at common law, including issues of “intent, fault, duty of care, and foreseeability”.

Midwest CA, supra para 7 at para 73.

38. Nuisance cannot be read into s. 99(2) for the following reasons:

- Nuisance requires a balancing of competing interests in determining if the interference with use or enjoyment of property is “both substantial and unreasonable”, which the section does not contemplate (*Antrim*); and
- Section 99(1) when read with section 99(2) extends the right to compensation through nuisance, including damage incurred as a direct result of the spill of a pollutant likely to cause an adverse effect (*EPA*).

Antrim Truck Centre Ltd v Ontario (Ministry of Transportation), [2013 SCC 13](#) at para 19, 1 SCR 594 Cromwell J [*Antrim*].
EPA, supra para 1 ss 99(1)–(2).

39. Importing nuisance into s. 99(2) undermines the express purpose of the *EPA*: to protect and conserve the natural environment. A nuisance claim requires the court to balance the competing property interests of two parties (*Inco*). The purpose of nuisance is not to protect and restore the natural environment, rather to ensure the plaintiff’s property rights are not substantially and unreasonably affected (*Antrim*).

EPA, supra para 1 s 3(1).
Smith v Inco Ltd, [2011 ONCA 628](#) at para 39, 107 OR (3d) 321 [*Inco*].
Antrim, supra para 38 at para 19.

40. Nuisance is not always sufficient in environmental damage cases, as it requires damage or harm to have already occurred. Substantial and unreasonable environmental damage might manifest only after chemicals have accumulated, but claimants should not

have to wait for that to happen before bringing an action for immediate and preventative remediation. This is consistent with the precautionary principle. Nuisance also limits standing to those who have sufficient property interests, while Section 99 allows anyone who has suffered loss or harm under s. 99(1) from a spill to bring an action.

EPA, supra para 1 ss 99(1)–(2).

41. Enforcement of environmental legislation is limited by the MOE’s finances, but with s. 99(2), private parties can help enforce and further the purpose of the *EPA*. The Ontario Law Reform Commission identifies private enforcement as being practical and complementary to the MOE, and recognizes the crucial role private actors have in detecting and resolving environmental issues.

Ontario, The Ontario Law Reform Commission, *Report on Damages for Environmental Harm*, (Toronto: The Ontario Law Reform Commission, 1990) book 139 at 3 [Law Reform Commission].

42. Further reinforcing the above interpretation, s. 99(2) is consistent with well-established environmental principles such as the polluter pays and precautionary principles. In *Imperial Oil Ltd v Quebec (Minister of the Environment)*, the SCC endorsed the polluter pays principle which “assigns polluters the responsibility for remedying contamination for which they are responsible and imposes on them the direct and immediate costs of pollution.” In this case, the ONCA’s interpretation holds Thorco, the polluter, accountable.

Imperial Oil Ltd v Quebec (Minister of the Environment), 2003 SCC 58 at para 24, 2 SCR 624 LeBel J [*Imperial Oil*].

43. The SCC recently stated: “The *EPA* is Ontario’s principal environmental protection statute. Its status as remedial legislation entitles it to a generous interpretation.” A separate cause of action not dependent on nuisance therefore enshrines both the spirit and practicality of s. 99(2), as shown by a plain reading of the text, the object and context of the Act, and the express intent of the Legislature.

R v Castonguay Blasting Ltd, 2013 SCC 52 at para 9, 3 SCR 323 Abella J [*Castonguay*].

(iii) The Appeal Court was correct in finding Thorco liable under s. 99 of the *EPA*

44. Section 99(2) requires the plaintiff to incur a “loss or damage” as defined by s. 99(1). As cited in *Innisfil* under s. 99(2), “the loss or damage can arise because the spill ‘causes or is likely to cause an adverse effect.’”

Innisfil, supra para 27 at para 11 Farley J.

45. Midwest experienced a loss or damage under s. 99(2) for the following reasons:

- The PHC on Midwest's property worsened over time and reached such a high concentration it could no longer dissolve in groundwater and posed a risk to human health.

Midwest CA, supra para 7 at paras 104, 107.

- The MOE remediation order on Thorco, which extended 285 Midwest, is an encumbrance on the use and enjoyment of the property, as Thorco may enter 285 Midwest to carry out the remediation order.

EPA, supra para 1 s 95(1).

- Stigma exists for 285 Midwest for the reasons outlined above, and potential third party liability from off-site migration.

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

46. Therefore, Midwest is entitled to compensation from Thorco, the owner of the pollutant, and for experiencing:

- 1) loss or damage (as outlined in paragraph 45);
- 2) as a direct result;
- 3) of a spill;
- 4) of a pollutant (PHC);
- 5) that causes or is likely to cause an adverse effect.

47. Upholding the ONCA's decision is in line with the principles of statutory interpretation and does not open the floodgates. Part X of the *EPA* has been in effect since 1979, and only six cases have been brought under s. 99(2). The ONCA does not diverge from the previous courts' approaches in applying s. 99(2), and the provision maintains a loss or damage threshold as defined by the Act. Additionally, the Court has jurisdiction to prevent frivolous or vexatious claims (*Rules of Civil Procedure*).

Rules of Civil Procedure, RRO 1990, Reg 194, s 2.1 [Rules of Civil Procedure].

B. The *EPA* does not preclude an award of damages where the contaminated property is subject to a MOE remediation order

48. Based on a plain reading of the text and the Legislative purpose of s. 99, the ONCA's decision granting an award for damages in the amount of remediation costs should be upheld. Section 99 of the *EPA* does not prevent a court from awarding damages when a contaminated property is subject to a remediation order for the following reasons:

(i) Section 99 of the *EPA* allows for damages to be awarded when a remediation order is in place; and

(ii) The potential of double recovery is remote and should not impede a remedy.

(i) Section 99 of the *EPA* allows for damages to be awarded when a remediation order is in place

49. An order to remediate does not prevent damages because:

1) The *EPA* does not expressly exclude an award of damages in such a circumstance; and

2) The *EPA* should be interpreted expansively to best achieve its purpose.

1) The *EPA* does not expressly exclude an award of damages in such a circumstance

50. If the Legislature intended to preclude damages when a remediation order is in place they would have done so expressly. Rather, s. 99 provides a broad range of compensation, and expressly considers actions taken by a party affected by a spill to execute a MOE order.

EPA, supra para 1 at s 99.

51. Damages available in s. 99(2) serve a broader purpose than remediation, and address losses, such as "personal injury, loss of life, loss of use or enjoyment of property and pecuniary loss". Precluding damages in their entirety will deny compensation to plaintiffs who have suffered losses remediation cannot rectify.

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

52. Section 99 contemplates circumstances where a remediation order may be in effect, but a plaintiff retains a right to compensation (*Midwest CA*). For instance, s. 99(2)(a)(ii) allows someone other than an owner or person in control of a pollutant to carry out an MOE

order, but nothing in s. 99 prevents that innocent person from also receiving compensation from the polluter. Furthermore, a party can enforce their right to recovery from a polluter who is in “neglect or default” of an order pursuant to subsection 99(2)(a)(iii).

Midwest CA, supra para 7 at para 53.
EPA, supra para 1 at ss 99(2)(a), 99(2)(b), 99(2)(a)(iii).

53. In the event of a spill, a person may be subject to civil liability, fines, restitution, *and* remedial or preventative orders (*MOE Factum; EPA*). The ONCA expressly recognized that such “consequences are complementary, not exclusive of one another” (*Midwest CA*). In the absence of any provisions indicating that orders and damages cannot exist at the same time, the ONCA’s decision should be upheld.

Midwest Properties Ltd v Thordarson, [2015 ONCA 819](#), (Factum of the Intervener at para 19) [*MOE Factum*].
EPA, supra para 1, at ss 17, 18, 97, 157, 157.1, 157.3, 99, 187, 190.
Midwest CA, supra para 7 at para 52.

2) The *EPA* should be interpreted expansively in order to best achieve its purpose

54. Interpretation of s. 99 should not result in outcomes contrary to its purpose or environmental jurisprudence. The SCC endorses an expansive interpretation of the *EPA*: “Because the legislature is pursuing the objective of environmental protection, its intended reach is wide and deep” (*Castonguay*). Allowing damages while an order is in place under s. 99(2) is in line with the ONCA’s expansive interpretation of this provision as a broad right of recovery (*Midwest CA*).

Castonguay, supra para 43 at para 9 Abella J.
Midwest CA, supra para 7 at para 53.

55. The SCC has recognized the importance of protecting the environment as a “fundamental value in Canadian Society” (*Canadian Pacific*), and acknowledged that protection of the environment is “one of the major challenges of our time” (*Friends of the Oldman River*).

R v Canadian Pacific Ltd, [\[1995\] 2 SCR 1031](#) at para 55, 24 OR (3d) 454 Lamer J [*Canadian Pacific*].
Friends of the Oldman River Society v Canada (Minister of Transport), [\[1992\] 1 SCR 3](#), at para 1, 88 DLR (4th) 1 La Forest J [*Friends of the Oldman River*].

56. Interpreting the damages outlined in s. 99 to include remediation costs, even where the defendant has been ordered to remediate the plaintiff’s property, best protects the environment. An individual willing to undertake remediation efforts will be deterred from

doing so if uncertainty exists around compensation. Expecting innocent parties to remedy environmental damage upfront without compensation from the polluter is also inconsistent with the polluter pays principle (*Imperial Oil*).

Imperial Oil, supra para 42 at para 24.

57. Undesirable outcomes result if the courts interpret s. 99(2) to preclude damages while an order is in effect, as it allows recalcitrant polluters to use remediation orders as a shield. It is inconceivable that an outstanding remediation order could bar the right to compensation for a plaintiff who has suffered harm as a result of a spill. Such an interpretation is contrary to the purpose of the *EPA* and s. 99.

EPA, supra para 1 at ss 3(1), 99.

(ii) The potential of double recovery is remote and should not impede a remedy when harm has occurred

58. The principle of double recovery should not prevent Midwest from receiving an award of damages for the cost of remediation as Midwest has not received compensation for the harm suffered (*Pro-Sys*). If double recovery ceases to be remote the courts are able to modify the quantum of liability to ensure Midwest only recovers damages once (*Multiple Access*).

Pro-Sys Consultants Ltd v Microsoft Corporation, 2013 SCC 57 at paras 37, 41, 3 SCR 477 [*Pro-Sys*].

Multiple Access Ltd v McCutcheon [1982] 2 SCR 161 at paras 190, 191, 1982 CanLII 55 [*Multiple Access*].

59. The rule against double recovery has been applied in a diversity of contexts, including: tort and statutory regulation (*Canadian Forest Products*), tort and wage compensation (*Ratych*), federal and provincial legislation regarding insider trading (*Multiple Access*), federal and provincial environmental legislation regulating spills (*National Railway*) and class actions (*Pro-Sys*). Although such cases are distinguishable on the facts, the rule against double recovery operates to ensure defendants are only responsible to pay for the harm caused once, and the plaintiff is only able to recover to the extent of the harm endured.

British Columbia v Canadian Forest Products Ltd, 2004 SCC 38, 2 SCR 74 [*Canadian Forest Products*].

Ratych v Bloomer [1990] 1 SCR 940, 1990 CanLII 97 [*Ratych*].

Multiple Access, supra para 58.

Canadian National Railway v Ontario (Director appointed under Environmental Protection Act) (1991), 3 OR (3d) 609, 1991 CanLII 7169 [*National Railway*].

Pro-Sys, supra para 58.

60. Double recovery is remote in this case as Thorco has not invested in the remediation of 1700 Midland, nor of 285 Midwest. Evidence of Thorco in violation of the COA from its date of issuance in 1988 demonstrates a reluctance to rectify the contamination caused by their business ventures.

Midwest CA, supra para 7 at paras 12, 55.

61. The SEMCC can prevent double recovery by ordering Midwest to remediate the contaminated property. Additionally, this Court, and lower courts, have the jurisdiction to prevent windfall judgements by ordering money be paid into and out of the court in accordance with a court order through just terms and directions.

Rules of Civil Procedure, supra para 47 at ss 1.05, 60.05, 72.01, 72.03.

62. The MOE's ability to redirect the remediation order to Midwest further reduces the potential for double recovery. Part X of the *EPA* gives the minister the power to, in the best interest of the public, order an owner of affected real property to restore the natural environment (*EPA*). Midwest owns 285 Midwest a property affected by the PHC spilled by Thorco (*Midwest CA*).

EPA, supra para 1 at s 97(1).
Midwest CA, supra para 7 at para 107.

63. While the MOE is not legally required to redirect the remediation order, they have committed to redirect the order if damages for the cost of remediation are awarded. The Appellants are correct, a potential for double recovery exists; however, the possibility is remote and should not impede a claim for compensation where the court is able to prevent such an outcome.

Midwest CA, supra para 7 at para 55.

C. The damages available pursuant to s. 99 of the *EPA* include the cost to remediate environmental contamination

64. Section 99 establishes a right to compensation for any person who has experienced loss or damage as the result of a spill (*EPA*). Midwest's property incurred damage through the migration of PHC from 1700 Midland (*Midwest CA*). The resulting F1 concentration of PHC on Midwest's property is volatile, interferes with Midwest's use and enjoyment of the

land, and poses a risk to human health (*Midwest CA*). In order to address this damage, the contamination must be removed.

EPA, supra para 1 at s 99.

Midwest CA, supra para 7 at paras 37, 22, 98, 107.

65. The Respondent asserts that the cost of remediation is the appropriate measure of damages as:

(i) Remediation best meets the legislative purpose and objectives of environmental protection, restoration and compensation under the *EPA*;

(ii) Remediation best values the environment and is the dominant trend in modern common law; and

(iii) An award of damages to remediate 285 Midwest is reasonable.

(i) Remediation best meets the legislative purpose and objectives of environmental protection, restoration and compensation under the *EPA*

66. In *R v Consolidated Maybrun Mines Ltd*, the SCC held the purpose of the *EPA* - protection and conservation of the environment - must be borne in mind when interpreting the scheme and procedures under the Act. Moreover, in *114957 Canada Ltée (Spray-Tech Société d'arrosage) v Hudson (Ville)* the Court reinforced the continued relevance of our shared responsibility for the environment:

...our common future, that of every Canadian community, depends on a healthy environment.... This Court has recognized that "[e]veryone is aware that individually and collectively, we are responsible for preserving the natural environment... (*Spray-Tech*)

R v Consolidated Maybrun Mines Ltd [1998] 1 SCR 706 at paras 54, 38 OR (3d) 576 [*Consolidated*].

114957 Canada Ltée (Spray-Tech Société d'arrosage) v Hudson (Ville), 2001 SCC 40 at para 1, 2 SCR 241 L'Heureux-Dube J [*Spray-Tech*].

67. The Appellants' assertion at para 66 of their factum that the purpose of Part X of the *EPA* is limited to providing compensation is incorrect. Rather, Part X is intended to address a variety of interests that may be adversely affected when a spilled contaminant causes or are likely to cause harm.

EPA, supra para 1 at ss 91-123 .

68. Prioritization of environmental restoration throughout Part X is evidence that an award of damages furthering remedial endeavours is one of many options available to the court in advancing the interests of the environment and compensating those directly affected by a spill.

69. Part X of the *EPA* expressly defines “restore the natural environment” in s. 91 and refers to such efforts in multiple provisions; including, s. 93(1) duty to mitigate and restore; s. 97(1)8. orders by minister, spills; s. 99(4)(b) compensation, spills; s. 99.1(1) director’s order for costs and expenses; s. 100(1) action by municipality or designated persons, spills; and s. 101.1(1) right to compensation from crown. Section 91 reads:

“restore the natural environment”, when used with reference to a spill of a pollutant, means restore all forms of life, physical conditions, the natural environment and things existing immediately before the spill of the pollutant that are affected or that may reasonably be expected to be affected by the pollutant...

EPA, supra para 1 at ss 91, 93(1), 97(1)8., 99(4)(b), 99.1(1), 100(1), 101.1(1).

70. A remedial award of damages will enable Midwest to carry out the duty imposed on Thorco pursuant to s. 93. Such compensation is expressly considered under ss. 99(2)(a)(ii) and (iii), which read:

- (a) for loss or damage incurred as a direct result of,
 - (ii) ... 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;

Remediation costs are the appropriate measure of damages where a statutory duty to restore the natural environment is imposed on the defendant, the defendant has neglected to do so and an affected innocent party is willing to undertake remedial actions.

EPA, supra para 1 at ss 93, 99.

71. A remedy based on diminution of property value is also available to the court pursuant to s. 99(2). However, such an award is often inadequate to facilitate environmental clean-up, and its use in the environmental law context has been widely criticized (Pardy). An award based on diminution of value is unlikely to enable Midwest to undertake remediation, nor further Thorco’s ability to do the same. As a result, the environment is likely to remain contaminated and the health risks posed by the contamination unresolved.

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

Bruce Pardy, *Environmental Law: A Guide to Concepts* (Markham, ON: Butterworths, 1996) at 233 [Pardy].

(ii) Remediation best values the environment and is the dominant trend in modern common law

72. Remediation alleviates ongoing harms to the injured party and is consistent with the precautionary principle, as it eliminates the possibility for unanticipated environmental harms, while restoring the natural environment.

73. The SCC in *Castonguay* endorses the precautionary principle as a tool of statutory interpretation, and uses it in reference to the *EPA*:

This emerging international law principle recognizes that since there are inherent limits in being able to determine and predict environmental impacts with scientific certainty, environmental policies must anticipate and prevent environmental degradation.

The *EPA* should be interpreted broadly and in concert with the precautionary principle, in order to best achieve its legislative purpose.

Castonguay, *supra* para 43 at para 20.

74. The precautionary principle is endorsed in various federal and provincial statutes, including:

- *Canadian Environmental Protection Act, 1999*, [SC 1999, c 33](#), s 2(1)(a);
- *Ontario Water Resources Act*, [RSO 1990, c O 40](#), ss 16.1, 32, 84, 91;
- *Oceans Act*, [SC 1996, c 31](#), Preamble (para. 6);
- *Species at Risk Act*, [SC 2002, c 29](#), s 38; and
- *Canadian Environmental Assessment Act, 2012*, [SC 2012, c 19](#), s 4(2).

75. In *Tridan Developments Ltd v Shell Canada Products Ltd*, the ONCA confirmed a plaintiff has the right to compensation based on the cost of restoring the plaintiff's commercial property to pristine condition. Justice Carthy stated:

This is a commercial property ... It might be concluded that in a practical sense Tridan is not likely to need or want to clean its soil at depth of every particle of pollutant. However, ... I cannot say the trial judge erred in deciding that Tridan was entitled to reparation to a pristine state. Where a product that may cause mischief escapes to a neighbour's

property there is responsibility "for all the damage which is the natural consequence of its escape." (*Tridan*)

In ordering remediation costs, the ONCA implicitly endorsed the lower Court's reasoning to prioritize remediation over diminution of property value (*Tridan*; *Tridan SC*).

Tridan Developments Ltd v Shell Canada Products Ltd (2002), 57 OR (3d) 503 at para 12, 154 2002 CanLII 20789 (ONCA) leave to appeal to SCC refused, C34404 (3 January 2002) [*Tridan*].

Tridan Developments Ltd v Shell Canada Products Ltd (2000), 97 ACWS (3d) 246 at paras 21, 22, 26, 27, 2000 CarswellOnt 1969 (ONSC), rev'd in part on other grounds (2002), 57 OR (3d) 503, 154 OAC 1 (ONCA) [*Tridan SC*].

76. Similarly, in *Canadian Tire Real Estate Ltd v Huron Concrete Supply Ltd* the ONSC ordered remediation as the plaintiff was entitled to an award sufficient to allow it to be in the same position it was in prior to the release of contaminants.

Canadian Tire Real Estate Ltd v Huron Concrete Supply Ltd, 2014 ONSC 288 at para 321, 88 CELR (3d) 93 [*Canadian Tire*].

77. In *Corporation of the Borough of Scarborough v REF Homes Ltd*, the court held diminution of value failed to account for the intrinsic value of the affected property (*REF Homes*). The Court in *Chappell v Barati* relied on *REF Homes*, finding it common sense that an absence of diminution in land value does not imply an absence of compensable damage.

Corporation of the Borough of Scarborough v REF Homes Ltd (1979), 10 CELR 40, 1979 CarswellOnt 1588 (ONCA) [*REF Homes*].
Chappell v Barati (1982) 30 CCLT 137, 1982 CarswellOnt 711 (Ont HCJ) [*Chappell*].

78. The main focus when determining the appropriate measure of damages should be to restore the natural environment. The Ontario Law Reform Commission asserted methods for valuation based on remediation "measure both intrinsic value and use value; this enables the court to measure the full economic value of the asset." The Commission stressed "the ultimate goal of the courts should be to ensure that the environment is put in the same position after the injury as it was before."

Law Reform Commission, *supra* para 41 at 56.

79. The precautionary principle, in concert with modern common law, demonstrate it is not necessary to wait until human illness and unanticipated environmental damage occur. Midwest, a party injured by a spill, is entitled to the costs to remediate the resulting harm in order to best protect the health of those occupying 285 Midwest and the environment.

(iii) An award of damages to remediate 285 Midwest is reasonable

80. An award for the costs of remediation in this case is reasonable as it facilitates the restoration of the natural environment and is required to eliminate the risk posed to human health. The ONCA found: “The invasion of PHC onto Midwest’s property, to the point that the product is of such a concentration that it can no longer dissolve in groundwater and is found to pose a risk to human health, cannot be classified as trivial, insubstantial, or unreasonable.” Furthermore, ongoing monitoring demonstrates the level of contamination continues to worsen and may threaten nearby bodies of water, including Lake Ontario, and neighbouring properties.

Midwest CA, supra para 7 at paras 107, 28, 122.

81. The Court in *Jens v Mannix Co* clarified, a plaintiff can claim damages based on remediation costs in excess of property value having regard to the type of loss and the reasonableness of the request. Katherine van Rensburg suggests the cost of remediation may be rejected where it is clear the plaintiff has no intention to bring about the repairs.

Jens v Mannix Co (1978), 89 DLR (3d) 351, 5 WWR 486 (BCSC), rev’d in part on other grounds [1986] 30 DLR (4th) 260, 5 WWR 563 [*Jens*].

Katherine van Rensburg, "Deconstructing Tridan: A Litigator's Perspective" (2004) 15 J Envtl L & Prac 85, at 89 [van Rensburg].

82. Windfall damages are not a risk in this case. Where the costs of remediation exceed diminution in property value, courts are to consider whether the claimant has a genuine interest in carrying out the repairs (*Safe Step*). The ONSC recognized Midwest’s interest in executing the remediation of 285 Midwest, as such an award facilitating remediation will not amount to a windfall (*Midwest SC*).

Safe Step Building Treatments Inc v 1382680 Ontario Inc (2004), 37 CLR (3d) 281, 2004 CarswellOnt 4060 (ONSC) at para 66, add’l reasons 134 ACWS (3d) 772, 2004 Carswell Ont 4508 (ONSC) [*Safe Step*].

Midwest SC, supra para 15 at para 21.

83. In *Technical Standards and Safety Authority v Kawartha Lakes (City)* the OERT explained reasonableness is based on “whether the level of expense falls within a range of reasonable cost alternatives ... available to fully accomplish the purposes of the work being done” and that evidence is required to support assertions of unreasonableness. Expert evidence examined at trial identified that remediation of 285 Midwest will cost \$1 328 000

(*Midwest CA*). Although, the Appellants disagreed with this estimate they failed to provide an alternative.

Technical Standards and Safety Authority v Kawartha Lakes (City) (2016), 3 CELR (4th) 1 at para 114, 2016 CarswellOnt 10718 (OERT) [*Kawartha Lakes*].
Midwest CA, *supra* para 7 at para 80.

84. At paragraphs 81 to 83 of the Appellants' factum they assert remediation is not reasonable because Midwest has not taken proactive steps since discovering the contamination. They rely on the authority of *Canadian Tire* in claiming that such proactive steps are required to award damages in the amount of remediation. The remedial efforts commended in *Canadian Tire* are distinguishable from this case as the contamination was present within structures on the property and such efforts were undertaken to mitigate pecuniary losses.

Canadian Tire, *supra* para 76, at paras 114, 115.

85. Midwest has taken positive steps in discovering the contamination at 285 Midwest and monitoring the levels of PHC present on their property. In 2012, through monitoring processes funded by Midwest, it was discovered that the situation was much worse than originally expected and posed a risk to human health. Shortly thereafter, Midwest commenced action against Thorco (*Midwest CA*).

Midwest CA, *supra* para 7 at paras 25, 26.

86. Thorco is in breach of the MOE order requiring them to remediate 285 Midwest and have not taken steps to do so (*Midwest CA*). Midwest should be enabled to pursue the immediate remediation of their property and awarded the costs to do so.

Midwest CA, *supra* para 7 at para 34.

87. Contaminated land cases are unique because of the dynamic nature of the interests involved and the potential exponential nature of environmental harm if not address with precision and speed. When considering such harms courts must look beyond those suffered only by the affected party, and consider how best to protect and conserve the natural environment. Decisions respecting remediation today will affect the collective future of all Canadians and the generations to come.

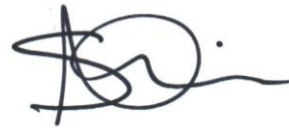
Part IV -- SUBMISSIONS IN SUPPORT OF COSTS

88. The Respondent requests affirmation of the Court of Appeal award for costs in regard to the trial and appeal below and that the Supreme Environmental Moot Court of Canada award costs for this appeal.

Part V -- ORDER SOUGHT

89. The Respondent requests an order affirming the decision of the Court of Appeal and an award of costs in the amount of \$1 328 000.

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



Sarah Nordin



Taylor-Anne Yee



Krista Cossar

Counsel for the Respondent

Midwest Properties Ltd.

PART VI -- TABLE OF AUTHORITIES

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PART VII -- LEGISLATION AT ISSUE

Canadian Environmental Protection Act, 1999, [SC 1999 c 33](#), s. 40.

40 Civil Cause of Action

Any person who has suffered loss or damage as a result of conduct that contravenes any provision of this Act or the regulations may, in any court of competent jurisdiction, bring an action to recover from the person who engaged in the conduct

- (a) an amount equal to the loss or damage proved to have been suffered by the person; and
- (b) an amount to compensate for the costs that the person incurs in connection with the matter and proceedings under this section.

Environmental Protection Act [R.S.O 1990, c. E. 19](#), s. 1.

1(1) In this Act,

“adverse effect” means one or more of,

- (a) impairment of the quality of the natural environment for any use that can be made of it,
- (b) injury or damage to property or to plant or animal life,
- (c) harm or material discomfort to any person,
- (d) an adverse effect on the health of any person,
- (e) impairment of the safety of any person,
- (f) rendering any property or plant or animal life unfit for human use,
- (g) loss of enjoyment of normal use of property, and
- (h) interference with the normal conduct of business;

Environmental Protection Act [R.S.O 1990, c. E. 19](#), s. 3.

3. (1) Purpose of Act

The purpose of this Act is to provide for the protection and conservation of the natural environment.

Environmental Protection Act [R.S.O 1990, c. E. 19](#), s. 17.

17. Remedial Orders

Where any person causes or permits the discharge of a contaminant into the natural environment, so that land, water, property, animal life, plant life, or human health or safety is injured, damaged or endangered, or is likely to be injured, damaged or endangered, the Director may order the person to,

- (a) repair the injury or damage;
- (b) prevent the injury or damage; or

- (c) where the discharge has damaged or endangered or is likely to damage or endanger existing water supplies, provide temporary or permanent alternate water supplies.

Environmental Protection Act R.S.O 1990, c. E. 19, s. 18.

18 Order by Director re preventive measures

The Director, in the circumstances mentioned in subsection (2), by a written order may require a person who owns or owned or who has or had management or control of an undertaking or property to do any one or more of the following:

1. To have available at all times, or during such periods of time as are specified in the order, the equipment, material and personnel specified in the order at the locations specified in the order.
2. To obtain, construct and install or modify the devices, equipment and facilities specified in the order at the locations and in the manner specified in the order.
3. To implement procedures specified in the order.
4. To take all steps necessary so that procedures specified in the order will be implemented in the event that a contaminant is discharged into the natural environment from the undertaking or property.
5. To monitor and record the presence or discharge of a contaminant specified in the order and to report thereon to the Director.
6. To study and to report to the Director on,
 - i. the presence or discharge of a contaminant specified in the order,
 - ii. the effects of the presence or discharge of a contaminant specified in the order,
 - iii. measures to control the presence or discharge of a contaminant specified in the order,
 - iv. the natural environment into which a contaminant specified in the order may be discharged.
7. To develop and implement plans to,
 - i. reduce the amount of a contaminant that is discharged into the natural environment,
 - ii. prevent or reduce the risk of a spill of a pollutant within the meaning of Part X, or
 - iii. prevent, decrease or eliminate any adverse effects that result or may result from a spill of a pollutant within the meaning of Part X or from any other discharge of a contaminant into the natural environment, including,
 - A. plans to notify the Ministry, other public authorities and members of the public who may be affected by a discharge, and
 - B. plans to ensure that appropriate equipment, material and personnel are available to respond to a discharge.
8. To amend a plan developed under paragraph 7 or section 91.1 in the manner specified in the order.

Environmental Protection Act R.S.O 1990, c. E. 19, s. 91.

91. (1) In this Part,

“spill”, when used with reference to a pollutant, means a discharge,

- (a) into the natural environment,
- (b) from or out of a structure, vehicle or other container, and
- (c) that is abnormal in quality or quantity in light of all the circumstances of the discharge,

and when used as a verb has a corresponding meaning;

“pollutant” means a contaminant other than heat, sound, vibration or radiation, and includes any substance from which a pollutant is derived;

Environmental Protection Act R.S.O 1990, c. E. 19, s. 93.

93. (1) Duty to mitigate and restore

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

Environmental Protection Act R.S.O 1990, c. E. 19, s. 95

95.(1) Entry and Removal

For the purpose of carrying out the duty imposed by section 93 or an order or direction made or given under this Part, any person subject to the duty or to whom the order or direction is made or given and that person’s employees and agents may,

- (a) enter any place;
- (b) construct structures and use machinery, structures, materials and equipment therein or thereon; and
- (c) remove therefrom the pollutant or any matter, thing, plant or animal or any part of the natural environment that is affected or that may reasonably be expected to be affected by the pollutant.

Environmental Protection Act R.S.O 1990, c. E. 19, s. 97.

97. (1) Orders by Minister, spills

Where a pollutant is spilled and the Minister is of the opinion that there is or is likely to be an adverse effect and that it is in the best interest of the public to make an order under this section, the Minister may make an order directed to one or more of the following:

- 8. Any person who is or may be adversely affected by the pollutant or whose assistance is necessary, in the opinion of the Minister, to prevent, eliminate or ameliorate the adverse effects or to restore the natural environment.

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

99(1) Definition

In this section,

"loss or damage" includes personal injury, loss of life, loss of use or enjoyment of property and pecuniary loss, including loss of income.

99(2) Right to Compensation

Her Majesty in right of Ontario or in right of Canada or any other person has the right to compensation,

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

99(4) Qualification

Subsection (3) does not relieve the owner of the pollutant or the person having control of the pollutant.

- (b) from liability, under clause (2) (a), for cost and expense incurred or, under clause (2) (b), for all reasonable cost and expense incurred,
 - (i) to do everything practicable to prevent, eliminate and ameliorate the adverse effect, or
 - (ii) to do everything practicable to restore the natural environment,
or both.

99(5) Enforcement of Right

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

Environmental Protection Act R.S.O 1990, c. E. 19, s. 99.1(1).

99.1 (1) Director's order for costs and expenses

If a pollutant is spilled, the Director may issue an order requiring the owner of the pollutant or the person having control of the pollutant to pay to the Minister of Finance any reasonable costs or expenses incurred by Her Majesty in right of Ontario for the following purposes:

1. To prevent, eliminate or ameliorate any adverse effects or to restore the natural environment.
2. To prevent or reduce the risk of future discharges into the natural environment of any pollutant owned by or under the charge, management or control of the person against whom the order is made.

Environmental Protection Act R.S.O 1990, c. E. 19, s. 100.

100. (1) Action by municipality or designated persons, spills

Where a pollutant is spilled,

- (a) a municipality; and
- (b) Repealed: 2002, c. 17, Sched. F, Table.
- (c) a person or a member of a class of persons designated by the regulations,

or any one or more of them, may do everything practicable to prevent, eliminate and ameliorate any adverse effects and to restore the natural environment.

Environmental Protection Act R.S.O 1990, c. E. 19, s. 100.1.

100.1(1) Municipality's order for costs and expenses

If a pollutant is spilled, a municipality may issue an order requiring the owner of the pollutant or the person having control of the pollutant to pay to the municipality any reasonable costs or expenses incurred by the municipality, or a local board of the municipality within the meaning of the Municipal Affairs Act, to prevent, eliminate or ameliorate any adverse effects or to restore the natural environment.

Environmental Protection Act R.S.O 1990, c. E. 19, s. 157.

157. Order by provincial officer: contraventions

157. (1) A provincial officer may issue an order to any person that the provincial officer reasonably believes is contravening or has contravened,

- (a) a provision of this Act or the regulations;
- (b) a provision of an order under this Act, other than an order under section 99.1, 100.1, 150 or 182.1 or an order of a court; or
- (c) a term or condition of an environmental compliance approval, certificate of property use, renewable energy approval, licence or permit under this Act.

157.1 Contravention of s. 14

(1.1) Subsection (1) does not apply to a contravention of section 14 unless,

- (a) an order to pay an environmental penalty could be issued in respect of the contravention; or
- (b) the contravention involves a discharge that causes or is likely to cause an adverse effect.

157.3 What order may require

- (3) The order may require the person to whom it is directed to comply with any directions set out in the order within the time specified relating to,
- (a) achieving compliance with the provision, term or condition;
 - (b) preventing the continuation or repetition of the contravention;
 - (c) securing, whether through locks, gates, fences, security guards or other means, any land, place or thing;
 - (d) where the contravention is related to the deposit of waste, removing the waste;
 - (e) where the contravention has injured, damaged or endangered animal life, plant life, human health or safety, or the natural environment or is likely to injure, damage or endanger animal life, plant life, human health or safety, or the natural environment,
 - (i) repairing the injury or damage,
 - (ii) preventing the injury or damage,
 - (iii) decreasing, eliminating or ameliorating the effects of the damage, and
 - (iv) restoring the natural environment;
 - (f) where the contravention has caused damage to or endangered or is likely to cause damage to or endanger existing water supplies, providing temporary or permanent alternate water supplies;
 - (g) submitting a plan for achieving compliance with the provision, term or condition, including the engagement of contractors or consultants satisfactory to a provincial officer;
 - (h) submitting an application for an environmental compliance approval, renewable energy approval, licence or permit;
 - (h.1) registering an activity under Part II.2;
 - (i) monitoring and recording in relation to the natural environment and reporting on the monitoring and recording;
 - (j) posting notice of the order; and
 - (k) if the provincial officer reasonably believes that a term or condition of a renewable energy approval is being or has been contravened, doing any other thing referred to in subsection 16 (3) of the *Ontario Water Resources Act*.

Environmental Protection Act R.S.O 1990, c. E. 19, s. 187.1.

187.(1) Penalties

Every individual convicted of an offence under section 186, other than an offence described in subsection (3), is liable,

- (a) on a first conviction, for each day or part of a day on which the offence occurs or continues, to a fine of not more than \$50,000; and
- (b) on each subsequent conviction,

- (i) for each day or part of a day on which the offence occurs or continues, to a fine of not more than \$100,000,
- (ii) to imprisonment for a term of not more than one year, or
- (iii) to both such fine and imprisonment.

Environmental Protection Act [R.S.O 1990, c. E. 19](#), s. 190.1.

190.1 Order to prevent damage, etc.

On its own initiative or on the request of the prosecutor, the court that convicts a person of an offence under this Act, in addition to any other penalty imposed by the court, may order the person,

- (a) to take such action, including but not limited to providing a temporary or permanent alternate water supply, as the court directs within the time specified in the order to prevent, eliminate or ameliorate damage that results from or is in any way connected to the commission of the offence;
- (b) where the offence is in relation to a waste management system or waste disposal site, to take such action as is required to bring the system or site into conformity with Part V or the regulations within the time specified in the order; and
- (c) to comply with any order issued under this Act to the person in relation to damage that results from or is in any way connected to the commission of the offence.

Rules of Civil Procedure, [R.R.O 1990, Reg 194](#), s. 1.05.

1.05 Orders on Terms

When making an order under these rules the court may impose such terms and give such directions as are just.

Rules of Civil Procedure, [R.R.O 1990, Reg 194](#), s. 2.1.

2.1.01 (1) Order to Stay, Dismiss Proceeding

The court may, on its own initiative, stay or dismiss a proceeding if the proceeding appears on its face to be frivolous or vexatious or otherwise an abuse of the process of the court.

Rules of Civil Procedure, [R.R.O 1990, Reg 194](#), s. 60.05.

60.05 Enforcement of Order to Do or Abstain from Doing Any Act

An order requiring a person to do an act, other than the payment of money, or to abstain from doing an act, may be enforced against the person refusing or neglecting to obey the order by a contempt order under rule 60.11.

Rules of Civil Procedure, [R.R.O 1990, Reg 194](#), s.72.

72.01 Definitions

In rules 72.02 to 72.05,

“Accountant” means the Accountant of the Superior Court of Justice; (“comptable”)

“registrar” means the registrar in the location where the proceeding was commenced.
 (“greffier”)

72.03 Direction

On receiving the documents filed under subrule (2), the Accountant or registrar shall give the person a direction to receive the money, addressed to a bank listed in Schedule I or II to the *Bank Act*(Canada) and specifying the account in the Accountant’s name into which the money is to be paid.

**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 #2017-06

**Krista Cossar
Sarah Nordin
Taylor-Anne Yee**

Counsel for the Respondent,
Midwest Properties Ltd.