WILLMS & SHIER ENVIRONMENTAL LAW MOOT COURT COMPETITION 2017

S.E.M.C.C. File Number: 03-04-2017

IN THE SUPREME ENVIRONMENTAL MOOT COURT OF CANADA

(ON APPEAL FROM THE ONTARIO COURT OF APPEAL)

B E T W E E N:

JOHN THORDARSON and THORCO CONTRACTING LIMITED

APPELLANTS
(Respondents)

- and -

MIDWEST PROPERTIES LTD.

RESPONDENT
(Appellant)

FACTUM OF THE APPELLANTS JOHN THORDARSON and THORCO CONTRACTING LIMITED

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

TEAM # **2017-07**

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 Appellants' position

1 This appeal addresses a critical concern for property owners across Ontario. To what extent is a party already under an order to remediate land also liable in damages for that remediation under the statutory cause of action created by subsection 99(2) of the *Environmental Protection Act*, RSO 1990, c E 19 (the "*EPA*")?

2 Midwest Properties Ltd. (the "Respondent") owns an industrial property ("285 Midwest") located adjacent to property owned jointly by John Thordarson and Thorco Contracting Limited **(**the "Appellants"). The Respondent commenced this action against the Appellants for the estimated costs of remediating 285 Midwest despite the fact that the Appellants were already under a Ministry of Environment and Climate Change ("MOECC") order to remediate the land in question.

3 The Ontario Superior Court (the "Superior Court") dismissed the claim on grounds that it had not produced any evidence of loss or damage as required under subsection 99(2) of the *EPA*. The learned trial judge held that awarding damages where there is already an order to remediate creates the possibility for double recovery. The Respondent appealed.

4 The Ontario Court of Appeal (the "Court of Appeal") overturned the trial judgement and awarded the Respondent $1,328,000 in damages for the estimated cost of remediating 285 Midwest. The Court of Appeal held that the contamination caused a diminution in the property value of 285 Midwest and a risk to human health despite the fact that there was no credible evidence of such loss or damage actually being incurred. The court also rejected the notion that an award for damages creates the potential for double recovery.

5 In rendering its decision, the Court of Appeal created a precedent for indeterminate liability under subsection 99(2) of the *EPA* and uncertainty for property owners with outstanding MOECC remediation orders.

6 The Appellants challenge the Court of Appeal's decision on the grounds that recovery under subsection 99(2) of the *EPA* requires that the Respondent actually incur some loss or damage and that awarding damages for remediation costs in this case is contrary to the rule against double recovery.

7 In the event that this honourable court finds that an award for damages is warranted, the

Appellants submit that damages should be awarded based on what is reasonable in the circumstances. In the case at bar, an award based on diminution in property value is more reasonable than one based on remediation costs that have yet to be incurred.

B. Statement of the facts

(i) Background

8 The Appellants purchased the property located at 1700 Midland Avenue ("1700 Midland") in 1973 for the storage of materials and wastes, which commenced in 1974. In 1983, the Appellants applied for approval to store petroleum hydrocarbon ("PHC") waste onsite at 1700 Midland. The MOECC issued this certificate in 1988.

Midwest Properties Ltd. v Thordarson, 2015 ONCA 819, ("*Midwest* ONCA*"*) at paras 9, 10, 12.

9 The Respondent acquired the adjacent industrial property located at 285 Midwest Road in 2007. Prior to this purchase, the Respondent obtained a Phase I environmental assessment, consisting of a visual inspection of the property to identify potential contamination. The Respondent did not pursue a Phase II environmental assessment, leaving the soil and groundwater at the property untested. The Phase I assessment should have indicated that a Phase II assessment was warranted. The Respondent has not pursued any claim against the former owner of 285 Midwest or the environmental consultant who provided the Phase I report.

Midwest ONCA, *supra* para 8 at para 9.
Ontario, Ministry of the Environment, *Guide for Completing Phase One Environmental Site Assessments under Ontario Regulation 153/04*, (June 2011) at 16.

10 The Respondent became interested in acquiring 1700 Midland. As it was aware of PHC waste being stored on the property, the Respondent conducted Phase I and Phase II assessments on 1700 Midland in 2008. These assessments revealed PHC levels in excess of certain MOECC guidelines in some soil and groundwater samples. The Respondent proceeded to obtain a Phase II assessment on 285 Midwest in response to these findings.

Midwest ONCA, *supra* para 8 at paras 11, 21, 24.

(ii) Order to remediate

11 In 1996 and 1997, the Appellants were found to be in breach of the 1988 storage certificate. In 2000, the Appellants were convicted of certain offences under the *EPA* for failing to ensure proper storage and disposal of PHC waste at 1700 Midland.

Midwest ONCA, *supra* para 8 at paras 13, 14, 16.

12 In 2008, inspections revealed that the Appellants had significantly reduced the volume of PHC waste at 1700 Midland. However, a new MOECC order was issued for failure to ensure proper storage.

Midwest ONCA, *supra* para 8 at para 17.

13 In 2012, the MOECC issued an order to undertake an environmental subsurface investigation and restoration program for both 1700 Midland and 285 Midwest. The Appellants have undertaken, but have not yet completed all of the measures set out in the order. Neither party has begun to remediate 285 Midwest to date.

Midwest ONCA, *supra* para 8 paras 33-36.

(iii) Ontario Superior Court

14 The Respondent sought damages for breach of subsection 99(2) of the *EPA*, nuisance, and negligence.

Midwest Properties Ltd v John Thordarson and Thorco Contracting Limited, 2013 ONSC 775 ("*Midwest* ONSC") at para 2.

15 Three witnesses gave evidence at trial. The witnesses were all qualified as experts in "environmental assessment" but had limited expertise in property valuation and financing. The Respondent's experts testified that PHC contamination has the potential to cause a diminution of property value and create a stigma that reduces the interest of prospective purchasers and lenders. The Appellants' expert testified that a party's willingness to acquire a contaminated property depends on its risk tolerance. The experts disagreed on the estimated costs to remediate 285 Midwest.

Midwest ONCA, *supra* para 8 at paras 27, 28, 29, 32.

16 The court dismissed the Respondent's claims. The court found that the Respondent had failed to introduce evidence of damage or loss pursuant to subsection 99(2)(a)(i) of the *EPA* such as actual loss in property value, inability to use the property or operate the business, or business losses. The court held that awarding damages for remediation costs where there is already an order to remediate 285 Midwest creates the possibility for double recovery.

Midwest ONSC, *supra* para 14 at paras 20, 22, 23.

(iv) Ontario Court of Appeal

17 The Respondent appealed. The MOECC intervened to contest the Superior Court's finding that a remediation order precludes recovery under subsection 99(2).The Court of Appeal

allowed the appeal and awarded the Respondent $1,328,000 in damages for the estimated cost of remediating 285 Midwest.

Midwest ONCA, *supra* para 8 at para 80.

18 The court accepted that the PHC contamination at 285 Midwest caused a diminution in the property value and a risk to human health despite the fact that there was no credible evidence of such loss or damage actually being incurred. In doing so, the court rejected the notion that compensation under subsection 99(2) is dependent upon establishing an actionable nuisance.

Midwest ONCA, *supra* para 8 at para 73.

19 The Court rejected the learned trial judge's concern that awarding damages for remediation costs where the Appellants are already subject to an MOECC remediation order creates the potential for double recovery.

Midwest ONCA, *supra* para 8 at para 55.

20 Finally, the court concluded that damages awarded under subsection 99(2) should not be restricted to diminution in property value. In its view, an award based on restoration costs is superior from an environmental perspective.

Midwest ONCA, *supra* para 8 at para 62.

PART II – ISSUES

21 Whether the Court of Appeal erred in finding that liability under subsection 99(2) of the *EPA* is not dependent on establishing an actionable nuisance at common law.

22 Whether the Court of Appeal erred in finding that damages are not precluded under subsection 99(2) of the *EPA* where the MOECC has already ordered the Appellants to remediate the Respondent's property.

23 Whether the Court of Appeal erred in finding that the appropriate measure of damages under subsection 99(2) of the *EPA* is the cost of remediation of the Respondent's property as opposed to diminution in property value.

PART III – ARGUMENT

A. The Court of Appeal erred in finding that liability under subsection 99(2) of the *EPA* is not dependent on establishing an actionable nuisance at common law.

24 One of the key objectives of subsection 99(2) is to ensure that parties who "bear cost or suffer damage" through the discharge of a pollutant receive fair and just compensation. This

central objective mirrors that of tort law, which aims to compensate victims for loss or damage caused by the actions of another party.

> Ontario, Legislative Assembly, *Official Report of Debates (Hansard)*, No 1 (5 July 1985) at 494.
> Philip H Osborne, *The Law of Torts*, 5th ed (Toronto: Irwin Law Inc., 2015) ("*Law of Torts*") at 13-14, 488.

25 If a plaintiff is unable to point to some form of loss or damage suffered, both in tort law and under subsection 99(2), there is nothing to compensate for and the action must fail. This point of law was overlooked by the Court of Appeal in considering whether liability under subsection 99(2) of the *EPA* is dependent on establishing an actionable nuisance at common law.

(i) The principle of compensation in tort law requires proof of damages to permit recovery

26 In order to succeed in a civil suit, a plaintiff is obliged to prove his or her damages. A plaintiff is not permitted to recover for losses which he or she has not actually incurred.

> *Ratych v Bloomer*, [1990] 1 SCR 940 at 964, 973.

27 For both negligence and nuisance, proving damages serves as a threshold for advancing the action. Where a plaintiff successfully proves damages, it must then be determined whether the plaintiff should be compensated for those damages.

> *Law of Torts, supra* para 24 at 68.

28 These fundamental tort principles apply to environmental cases. In *British Columbia v Canadian Forest Products Ltd.*, 2004 SCC 38 ("*Canadian Forest*") at para 12, the Supreme Court of Canada held that, "[a] claim for environmental loss, as in the case of any loss, must be put forward based on a coherent theory of damages, a methodology suitable for their assessment, and supporting evidence." Subsection 99(2) of the *EPA* does not displace those requirements.

(ii) Subsection 99(2) of the *EPA* requires that the plaintiff actually incur costs or suffer damage to permit recovery

29 The principle that liability is dependent on proof of damages is codified in the statutory cause of action created by subsection 99(2), which states:

> (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.
>
> [emphasis added]

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

30 "Loss or damage" is defined to include "personal injury, loss of life, loss of use or enjoyment of property and pecuniary loss, including loss of income."

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

31 Requiring that the loss or damage be incurred as a "direct result" of a spill eliminates the concept of foreseeability, making a defendant liable in damages for all "direct consequences" of the spill.

Mario D Faieta *et al*., *Environmental Harm: Civil Actions and Compensation* (Markham, ON: Butterworths, 1996) at 144 ("*Environmental Harm*").
Re Polemis & Furness, Withy & Co. [1921] 3 KB 560 (CA).

32 The spill must also cause or be likely to cause an "adverse effect", which is defined to include:

> ...
> (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,
> ...
> (h) interference with the normal conduct of business;

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

33 The notion that a plaintiff must incur costs or suffer damage in order to advance an action under subsection 99(2) is supported by *Mortgage Insurance Co. of Canada v Innisfil Landfill Corp.* (1996), 30 CBR (3d) 100 (Ont Ct J) ("*Innisfil*").

34 In *Innisfil*, a leachate plume from the defendant's garbage dump escaped into the adjacent properties. One of the adjacent property owners, the Hodgsons, applied for leave to bring an action against PWL, the receiver controlling the garbage dump, under section 99 of the *EPA* despite the fact that an investigation report found that there was no evidence of physical damage to the property or to the aquifer used for drinking water on the property.

Innisfil, *supra* para 33 at para 9.

35 In considering the application, the court held that, "[p]ursuant to s. 99(2) the Hodgsons would still have to show loss or damage as a direct result of the spill", and that "[t]he difficulty

for the Hodgsons here will be in identifying where and how much of the PWL generated leachate penetrates their border and then by how much that PWL generated spill will further reduce their property value from what it is said to have already been decreased by virtue of the pre-PWL generated leachate."

Innisfil, supra para 33 at para 11.

36 The court granted the Hodgsons' application on a restricted basis, holding:

> The Hodgsons should only be allowed leave to sue for loss caused by the PWL generated leachate. … . If and when that happens then it would appear appropriate to allow the Hodgsons to sue for spill liability of PWL generated leachate <u>if they can then demonstrate that they have suffered a loss over and above</u> what they say is now the problem created by pre-PWL generated leachate.
>
> [emphasis added]
>
> *Innisfil, supra* para 33 at para 11.

37 Taken together, the plain language and context of subsection 99(2), the intention of the legislature, and the interpretation utilized in *Innisfil* all support the notion that a victim must actually incur costs or suffer damage to be entitled to compensation under subsection 99(2). Subsection 99(2) does not provide for compensation for costs or damage which might be incurred in the future.

(iii) <u>The Court of Appeal failed to have regard to the fact that an actionable nuisance at common law requires proof of loss or damage</u>

38 In considering the Appellants' argument that compensation under subsection 99(2) is dependent upon the establishment of a nuisance, the Court of Appeal held that the statutory cause of action eliminated such issues as "intent, fault, duty of care, and foreseeability" and granted plaintiffs a "new and powerful tool" with which to seek compensation.

Midwest ONCA, *supra* para 8 at para 73.

39 The Appellants acknowledge that compensation under subsection 99(2) does not require proof of intent or fault on the part of the party responsible for the discharge of a pollutant. However, the lack of a requirement for proof of intent or fault does not eliminate the requirement that the victim must actually incurs costs or suffer damage in order to advance a claim.

40 In dismissing the Appellants' argument, the Court of Appeal held that:

> The interpretation urged upon us by the respondents, that under this new cause of action a plaintiff could only recover if it could first prove that the defendant's conduct constituted a nuisance at common law, is entirely incongruous with the purpose of the enactment of

s. 99(2).

Midwest ONCA, *supra* para 8 at para 74.

41 With respect, this is not a correct characterization of the argument advanced by the Appellants or accepted by the learned trial judge. The "nuisance" referred to by the Appellants echoes that referenced by the Court of Appeal in *Hollick v Metropolitan Toronto (City)* (1999), 46 OR (3d) 257, 181 DLR (4th) 426 ("*Hollick*").

42 In *Hollick*, the plaintiff alleged nuisance, negligence, *Rylands v Fletcher*, and section 99 of the *EPA*. In considering these allegations, the Court of Appeal held 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." Directly following that statement, the court held that, "liability for nuisance in the present case in favour of any individual property owner or resident, can only be established by evidence that the particular individual personally suffered sensible discomfort or evidence that emissions from the defendant's premises have interfered with the reasonable enjoyment of their properties." This statement reinforces the need for evidence of some actionable loss or damage in order to advance a claim under section 99 of the *EPA*.

Hollick, *supra* para 41 at paras 18, 20.

43 In asking itself whether liability under subsection 99(2) is dependent on establishing an actionable nuisance at common law, the Court of Appeal asked itself the wrong question.

44 The Appellants do not contend that liability under subsection 99(2) is dependent on proving all elements of a private nuisance at common law. For example, unlike proving a private nuisance, there is no need to consider whether the loss or damage suffered by the plaintiff amounts to an "unreasonable" interference under subsection 99(2).

Environmental Harm, *supra* para 31 at 158.

45 However, like a claim in nuisance, liability under subsection 99(2) is dependent on the plaintiff establishing actionable costs or damages in order to advance a claim. A nuisance is actionable at common law where it causes physical injury to, or substantially interferes with, the use or enjoyment of or an interest in the land in question.

St. Pierre v Ontario (Minister of Transportation and Communications), [1987] 1 SCR 906 at para 10.

(iv) <u>There is no evidence that the Respondent actually incurred costs or suffered damage in the case at bar</u>

46 As discussed above, there must be evidence that the plaintiff actually incurred costs or

suffered damage in order to commence an action under subsection 99(2) of the *EPA*.

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

47 The Court of Appeal identified the following as evidence of loss or damage incurred by the Respondent:

i. The concentrations of several PHC fractions exceeded MOECC guidelines at 285 Midwest, thereby creating a risk that volatile PHC could enter the building and pose a health risk to the occupants.
ii. Concentrations of "free product" PHC increased from 2008-2012.
iii. The Respondent's environmental assessment experts, who were not qualified as experts in property valuation or mortgages, testified that the PHC contamination at 285 Midwest has the "potential" to devalue the property and make it less desirable to prospective purchasers and lenders. However, the experts did not tender an estimate as to the value of the diminution and the Respondent did not attempt to list its property to confirm these speculations.
iv. The Respondent's experts estimated that the cost of remediating 285 Midwest would be $1,328,000.

Midwest ONCA, *supra* para 8 at paras 24-31.

48 The Court of Appeal held that there was "uncontradicted evidence at trial that established a diminution in the value of the appellant's property and a human health risk." In effect, the court rejected the evidentiary findings of the learned trial judge and substituted its own without the benefit of witnessing the examinations of the parties and their experts.

Midwest ONCA, *supra* para 8 at para 98.

49 With respect, the Court of Appeal's finding that any of the above issues constitute some form of loss, damage, or expense as contemplated by subsection 99(2) of the *EPA* is an error in law.

50 There is no evidence that the contamination of 285 Midwest caused any personal injury, loss of life, loss of use or enjoyment of property, or pecuniary loss such as loss of income to the Respondent. The only tangible evidence of damages offered by the Respondent was the estimated cost of remediation, which has yet to be undertaken and is merely an estimate tendered by the Respondent's experts. Subsection 99(2) does not provide for compensation for costs or damage which might be incurred in the future.

Midwest ONSC, *supra* para 14 at para 23.

51 Despite the Court of Appeal's distinguishing of the case on its facts, it is submitted that the legal principles established in *Smith v Inco Limited*, 2011 ONCA 628, leave to appeal refused, [2012] 1 SCR xii (note) ("*Inco*") are applicable to the case at bar.

52 In *Inco*, the plaintiffs brought an action for nuisance against the defendant for contaminating the land surrounding the defendant's nickel factories. In finding that the plaintiffs failed to establish any actionable loss or damage, the Court of Appeal held that "[e]vidence that the existence of the nickel particles in the soil generated concerns about potential health risks does not … amount to evidence that the presence of the particles in the soil caused actual, substantial harm or damage to the property."

Inco, *supra* para 51 at para 67.

53 *Inco* established the now widely accepted principle that "a mere chemical alteration in the content of soil, without more, does not amount to physical harm or damage to the property."

Inco, *supra* para 51 at para 55.

54 In light of the principles outlined in *Inco*, it is clear that the Court of Appeal wrongly equated the mere elevation of PHC levels in the Respondent's soil above MOECC guidelines with actual loss or damage recoverable under subsection 99(2).

55 The Court of Appeal's interpretation of subsection 99(2) threatens to extend the right to compensation to parties who have not actually suffered any loss or damage. This interpretation runs contrary to the basic principle of compensation in tort law and is incompatible with *EPA*'s objective of fair and just compensation.

B. The Court of Appeal erred in finding that damages are not precluded under subsection 99(2) of the *EPA* where the MOECC has already ordered the defendant to remediate the plaintiff's property

56 The Court of Appeal's award of damages for the cost of remediation in the face of an outstanding MOECC remediation order is contrary to the rule against double recovery and incompatible with the overall purpose of the *EPA*.

(i) Awarding the Respondent damages under subsection 99(2) of the *EPA* is contrary to the rule against double recovery

57 A key principle in the recovery of damages in tort law is *restitutio in integrum*, the aim of which is to restore victims to the position that they would have been in had the tort not been

committed. Under this principle, victims are entitled to fair compensation for proven losses, but are not entitled to "turn an injury into a windfall."

> *Law of Torts*, *supra* para 24 at 13-14, 488.
> *Canadian Forest*, *supra* para 28 at paras 94, 118.

58 While the Appellants acknowledge that an award for damages under subsection 99(2) is not explicitly precluded where the MOECC has already ordered the remediation of the Respondent's property, the question is whether such an award is reasonable in the circumstances.

59 As with any award of damages, the $1,328,000 awarded by the Court of Appeal comes without a corresponding obligation. The Respondent is free to do whatever it wishes with the funds received under the judgment; it is not obliged to actually use the funds to remediate 285 Midwest.

> *Tridan Developments Ltd. v Shell Canada Products Ltd. (2000), 35 RPR (3d) 141 (ONSC), aff'd (2002), 57 OR (3d) 503 (CA), leave to appeal refused, 177 OAC 399 (note)* ("*Tridan*") at 509.

60 Given the Respondent is unable to show that it has expended any amount on remediation and is unable to show that it suffered any loss in property value, inability to use its property or operate its business, or business losses, the Respondent could forgo the remediation and keep the $1,328,000 award as a windfall.

> *Midwest* ONSC, *supra* para 14 at para 23.

61 If 285 Midwest remains contaminated, there is the potential for ongoing statutory and civil liability for the Appellants despite the fact that they have already paid for the remediation. Given that the MOECC order was made against the Appellants rather than the Respondent, the Appellants may be called upon by the government, the Respondent, or a third party to complete the remediation in the future.

> Katherine M. van Rensburg, "Deconstructing *Tridan*: A Litigator's Perspective" (2004) 15 Envtl L & Prac 85 ("Deconstructing *Tridan*") at 101.

62 This scenario creates a dangerous precedent for awarding damages under subsection 99(2). It is possible that buyers could acquire contaminated properties, sue adjacent property owners for damages under subsection 99(2), and then sell the contaminated land back to unsuspecting purchasers, keeping the damages awarded for compensation as pure profit from the sale.

63 It is clear that given the potential for double recovery, an award for damages for remediation costs under subsection 99(2) is unreasonable in the case at bar.

64 The Court of Appeal rejected the argument against double recovery on two grounds. The

first is that the chances of the Appellants "moving with alacrity" to remediate 285 Midwest before the Respondent undertakes its remediation is remote. The second is that the MOECC intervened in the appeal and agreed that it would be "forced to redirect its remediation order" thereby eliminating the possibility of double recovery.

Midwest ONCA, *supra* para 8 at para 55.

65 In response to the first ground, the notion that double recovery is prevented in this case due to the fact that the Appellants have yet to remediate 285 Midwest is purely speculative and should not have been factored into the Court of Appeal's legal analysis. It is plausible that the Appellants delayed their remediation efforts due to the existence of this lawsuit. The Appellants' response to the MOECC order is admissible as evidence and could have been used by the Respondent to aid in establishing liability in this action.

Sandhu (Litigation Guardian of) v Wellington Place Apartments, 2008 ONCA 215 at para 63.

66 In response to the second ground, the MOECC's position that it would be "forced to redirect its remediation order" is convenient for the MOECC and beneficial for the Respondent, but is not grounded in law. The MOECC may take into account certain "fairness" factors in deciding whether to make an order under the *EPA*, but it is not bound by these factors or even obligated to consider them. As a result, there is no legal rule that would force the MOECC to redirect its remediation to prevent against double recovery. The court merely took the MOECC at its word that the Appellants would not be subject to the remediation order if damages were awarded, and there is no mechanism that guarantees such intervention in future cases.

The Corporation of The City of Kawartha Lakes v Director, Ministry of the Environment, 2012 ONSC 2708 at para 58, aff'd 2013 ONCA 310.

(ii) <u>Awarding the Respondent damages under subsection 99(2) undermines the *EPA*'s purpose and the duty of the MOECC to further that purpose</u>

67 The overarching purpose of the *EPA* is "to provide for the protection and conservation of the natural environment."

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

68 In pursuit of this objective, the mandate of the MOECC is to ensure that significant environmental harm is rehabilitated to a feasible extent.

Ontario, Ministry of the Environment and Climate Change, *Statement of Environmental Values* (Toronto: Ministry of the Environment and Climate Change, 2017) <https://www.ebr.gov.on.ca/ERS-WEB-External/content/sev.jsp?pageName=sevList&subPageName=10001> accessed 20 January 2017.

69 Since the Respondent has not actually incurred costs or suffered damage in this case, the

primary concern of this court and the MOECC should be the restoration of 285 Midwest. Awarding the Respondent damages under subsection 99(2) significantly undermines this objective.

70 The Appellants have been under an order to undertake an environmental subsurface investigation and restoration program since 2012. There is no evidence of the Appellants challenging the order, and there is little doubt that this lawsuit has delayed the restoration process significantly.

Midwest ONCA, *supra* note 8 at para 32.

71 If the MOECC is truly concerned that the Appellants are not acting in accordance with the remediation order, it has the remedial power to "cause to be done any thing required" to ensure that the order is followed. This includes undertaking to perform the restoration itself and making an order for costs to pay for the restoration.

EPA, *supra* para 1 at ss 146, 147, 150.

72 In awarding damages under subsection 99(2), the Court of Appeal has effectively relieved the MOECC of its obligation to enforce the order and passed it onto the Respondent. In doing so, the court awarded $1,328,000 to a party that is under no legal obligation to actually use the funds for remediation.

73 This is an alarming precedent to set for spill cases involving private parties. If the MOECC will not act to enforce remediation orders itself, restoration will take a back seat to litigation; thereby increasing costs and prolonging the restoration process significantly.

74 Even if the plaintiff is successful in seeking an award for damages, there is no guarantee that the contaminated land in question will actually be remediated. This runs contrary to the ultimate purpose of the *EPA*, which is to protect and conserve the natural environment.

75 Where damages are awarded for remediation costs, some academics have argued that such issues could easily be addressed by requiring courts to hold damages in trust until plaintiffs are able to reasonably demonstrate the intention to use the funds for remediation. There is precedent for courts taking on such a supervisory role where it is in the public interest to do so.

Deconstructing *Tridan*, *supra* para 61 at 101-104.
See: *Doucet-Boudreau v Nova Scotia (Minister of Education)*, 2003 SCC 62.

C. The Court of Appeal erred in finding that the appropriate measure of damages under subsection 99(2) of the *EPA* was the cost of remediation of the plaintiff's property as opposed to diminution in value.

76 The Court of Appeal's conclusion that awarding a higher measure of damages better fulfills the purpose of the *EPA* fails to account for the fundamental principles of damage awards and the fact that a higher award based on restoration costs only benefits the plaintiff, not the environment.

77 The Court of Appeal should have utilized a more flexible approach that considered the reasonableness of each damage assessment. Alternatively, the court should have employed a more creative remedial approach by requiring that the Appellants pay damages directly to the court to ensure that the funds are actually spent on remediating 285 Midwest.

(i) Awarding damages for remediation costs does not further the purpose of the *EPA*

78 The Court of Appeal found an award for damages based on remediation costs to be superior, stating "….since the cost of restoration may exceed the value of the property, an award based on diminution of value may not adequately fund clean-up". Properly funding the restoration of 285 Midwest is important because "the goal of the court should be to ensure that the environment is put in the same position after the mishap as it was before the injury."

> *Midwest* ONCA, *supra* note 8 at paras 62-63.
> Ontario Law Reform Commission, *Report on Damages for Environmental Harm,* (Toronto: Ontario Law Reform Commission, 1990) at 55.

79 The Court of Appeal's award for damages is based on an estimation of the cost of a remediation that has yet to be undertaken. There is no assurance that the Respondent will actually remediate 285 Midwest. While in tort, damages are generally awarded based on the principle of *restitutio in integrum,* the nature of the *EPA* demands that courts should consider the larger public interest purpose and implications of its damages award.

> Lewis Klar *et al*, *Remedies in Tort*, (Toronto: Carswell, 1987 2016-Rel 11) (loose-leaf, 2016-rel 11) ("*Remedies*") vol 4, ch 27 at para 30.
> Deconstructing *Tridan*, *supra* para 61 at 101.

80 The award of $1,328,000 is simply an estimate. Even if the Respondent does undertake the remediation, there is no guarantee as to its cost. The Respondent is incentivized to spend as little as possible on the remediation in order to maximize its potential windfall. This highlights the unreliability of using the estimated cost of remediation as a proper measure of damages.

81 The award for damages in the case at bar does not guarantee that 285 Midwest will be

restored to its original state, but merely guarantees compensation to a party who has not suffered any actionable loss or damage.

82 These principles are supported by the definition of "loss or damage" in the *EPA*. The Respondent uses 285 Midwest solely for commercial purposes and is unable to produce evidence that its operations have been affected by the PHC contamination. The only possible loss or damage in this case is financial loss resulting from the diminution in property value of 285 Midwest.

83 Subsection 99(2)(a) provides for compensation for loss or damage incurred as a direct result of a spill. The Respondents have not directly incurred any costs or expenses from remediation. As a result, any claim for speculative remediation costs is not actionable under subsection 99(2)(a).

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

(ii) Awarding damages for remediation costs does not fulfil the polluter pays principle

84 The Court of Appeal held that damages awarded based on remediation costs reflects the polluter pays principle. The polluter pays principle "…assigns polluters the responsibility for remedying contamination for which they are responsible and imposes on them the direct and immediate costs of pollution."

Midwest ONCA, *supra* note 8 at para 68.
Imperial Oil Ltd v Quebec (Ministry of the Environment), 2003 SCC 58 at para 24.

85 The Appellants acknowledge that the polluter pays principle is an integral and important part of Canadian environmental law; however, awarding damages for the estimated cost of remediation is in no way superior or more consistent with the polluter pays principle than awarding for diminution in property value.

86 While the Appellants are technically paying for the estimated cost of remediation, there is no guarantee that remediation will actually occur. The Appellants are simply compensating the Respondent rather than paying to remediate the contamination.

(iii) The common law 'trend' identified by the Court of Appeal is illusory

87 While the Court of Appeal acknowledged that there are no reported cases where a court has awarded damages for the cost of remediation under subsection 99(2) of the *EPA*, the court concluded that there is a 'trend' in the common law where courts have awarded damages based on remediation costs, even if those costs exceed diminution in property value. This was an error

in law.

Midwest ONCA, *supra* note 8 at para 67.

88 Traditionally for torts involving harm to property, a successful plaintiff has always been entitled to recovery for the value of the harmed property. While courts have debated the merits of awarding damages based on diminution in property value versus the cost of remediation, the cases that the Court of Appeal relied upon to identify the "trend" toward remediation did not definitively conclude the debate one way or the other. Rather, they awarded damages based on what was reasonable in the given circumstances.

Hosking v Phillips (1848), 154 ER 801, 3 Exch Rep 168 (Eng Ex Ct).
Remedies, supra para 79 at vol 4, ch 27 at para 134.
Midwest ONCA, *supra* note 8 at para 60.

89 The court relied on four cases to justify this trend: *Jens v Mannix Co.* (1978), 89 DLR (3d) (BCSC), aff'd (1979), 30 DLR (4th) (BCCA) ("*Jens*"); *351 Horne v New Glasgow*, [1954] 1 DLR 832 (NSSC) ("*Horne*"); *Canadian Tire Real Estate Ltd. v Huron Concrete Supply Ltd* 2014 ONSC 288 ("*Canadian Tire*"); and *Tridan, supra* para 59.

90 While these cases may have awarded damages based on remediation costs, they do not support the conclusion that remediation costs are a superior measure of damages. Rather, the cases speak to how courts must be flexible in their approach to awarding damages.

91 Both *Jens* and *Horne* dealt with residential homes and not commercial properties. Residential properties are different from commercial properties, in that they often carry more sentimental value and are not as readily replaceable. As such, awarding remediation costs in excess of a residential property's value may be justifiable. In *Jens*, the court held that the plaintiffs should be awarded damages to replace their uninhabitable house as the property carried a special practical and sentimental value. The same cannot be said for 285 Midwest.

Jens, supra para 89 at paras 5, 17, 18.
Horne, supra para 89.

92 In *Canadian Tire*, the issue of whether to award damages based on remediation costs or diminution in value was not contentious. An award for remediation costs was granted as the Plaintiff had already undertaken interim remediation measures and incurred costs as a result.

Canadian Tire, supra para 89 at paras 6, 318.

93 Instead of relying on a purported common law "trend" in its application of subsection 99(2), the Court of Appeal should have focused on how courts assess damages based on what is reasonable in the circumstances.

94 In *Tridan*, the court focussed on what damages were "reasonable" in the circumstances. The court awarded damages based on remediation, however, the cost of remediation was less than the value of the plaintiff's property and therefore reflected the most economical remedial approach. Therefore, an award for remediation costs was the more reasonable option in the given circumstances. The same cannot be said for the case at bar.

Tridan, *supra* para 59 at para 12.

95 In *Jens* BCSC, the court awarded the plaintiffs damages for the replacement of their home on the basis that their desire for restoration was, in all the circumstances, reasonable.

Jens, supra para 89 at para 16.

96 As Katherine M. van Rensburg (now Justice van Rensburg of the Ontario Court of Appeal) states in her article, Deconstructing *Tridan*, "....the cost of reinstatement or repair is rejected where it is clear that the plaintiff has no intention to effect repairs or where the cost of reinstatement is grossly disproportionate to the diminution in property value. The courts must consider whether the damages sought by the plaintiff are, in all the circumstances, reasonable." This reasonability analysis includes a consideration of the cogency and persuasiveness of the evidence presented.

Deconstructing *Tridan*, *supra* para 61 at 89-90, 96.
Biskey v Chatham-Kent (Municipality), 2012 ONCA 802 at para 19.

97 The Court of Appeal also failed to consider *Cousins v McColl Frontenac Inc*., 2006 NBQB 406 ("*McColl* NBQB"), aff'd 2007 NBCA 83, where the court found that a reasonable award for damages in the circumstances was the loss in market value of the plaintiff's property rather than remediation costs.

98 The court held that the key concept in awarding damages is reasonability. The court emphasized that "it would not be reasonable to assess damages on the basis of speculative remediation expenses" [emphasis added] and awarded damages for diminution in property value as a result. This decision undermines the Court of Appeal's purported "trend" and reinforces the idea that an award for damages should be based on reasonability rather than speculation.

McColl NBQB, supra para 97 at paras 12, 14.

99 The Court of Appeal's conclusion that the estimated cost of remediation is the appropriate measure of damages under subsection 99(2) does not, in fact, reflect a trend. Rather, the cases cited by the Court of Appeal emphasize that when it comes to awarding damages for contamination, courts must be reasonable and flexible. As a matter of principle under the *EPA*,

the higher award is not necessary the correct one.

(iv) A reasonable award for damages in the case at bar is diminution in property value

100 The appropriate measure of damages under subsection 99(2) should be based on what is reasonable in the circumstances. Given that the Respondent is unable to establish that is has actually incurred some actionable loss or damage and has not undertaken to remediate 285 Midwest, it is unreasonable to award higher damages based solely on the assumption that it benefits the environment.

101 A plaintiff is required to take reasonable steps to mitigate its damages. In cases involving contaminated land, courts have found that a failure to remediate despite knowledge of contamination can lead to a lower award for damages for the plaintiff. The Court of Appeal failed to consider these principles in awarding the Respondent $1,328,000 in damages for the estimated cost of remediating 285 Midwest.

Remedies, *supra* para 79 at vol 4, ch 27 at para 3.
618369 Alberta Ltd. v Canadian Turbo (1993) Inc., 2004 ABQB 283 at paras 36-38.

102 The Respondent has not taken any steps toward mitigation; nor has it entered into any binding remediation agreements. Taking these steps would indicate that the Respondent has actually suffered some loss or damage and that it intends to use the funds awarded to remediate 285 Midwest.

103 As found by the learned trial judge, the Appellant cannot prove when the PHC contamination at 285 Midwest actually occurred. While the contamination was increasing over time, the Respondent cannot show that 285 Midwest was not already contaminated when it purchased the property in 2007.

Midwest ONSC, *supra* para 14 at para 8.
Midwest ONCA, *supra* para 8 at para 26.

104 Allowing an award for the cost of fully remediating 285 Midwest is contrary to the principle of *caveat emptor*. This principle requires property owners to undertake adequate due diligence prior to purchasing a property if they wish to advance a claim for prior contamination.

Fraser-Reid v Droumtsekas (1979), [1980] 1 SCR 720 at 723.

105 The Phase I environmental assessment performed by the Respondent upon acquiring 285 Midwest was clearly deficient in the circumstances. Absent the Respondent's proper due diligence in this regard, the court has no information pertaining to the prior contamination at 285 Midwest and therefore has no baseline from which to properly assess damages. Diminution in

property value is easier to ascertain and therefore more reasonable in the circumstances.

106 Further, diminution in property value fairly compensates the Respondent while serving the ultimate purpose of the *EPA*. The Appellants will remain under an MOECC order to remediate 285 Midwest, which the MOECC can enforce as necessary.

107 Courts have rejected requests that plaintiffs be required to use damage awards to actually remediate damaged properties on grounds that it is beyond the role of the courts and that they lack the resources to adequately supervise plaintiffs. Academics have argued that courts should use more creative remedies for cases involving contaminated land, as there is a public interest in ensuring that the land in question is actually remediated.

> *Tridan*, *supra* para 59 at para 21
> Deconstructing *Tridan*, *supra* para 61 at 101.

108 In the event that this honourable court finds that the cost of remediation is the most reasonable award of damages in the case at bar, the Appellants respectfully request that the damages be paid into court and held in trust until it can be reasonably demonstrated that the Respondent intends to use the award for remediating 285 Midwest.

PART IV – SUBMISSIONS IN SUPPORT OF COSTS

109 The Appellants respectfully request that should the appeal be granted, it should be granted with costs throughout awarded to the Appellants. Should the appeal be denied, it should be denied without an award for costs against the Appellants for this appeal.

PART V – ORDER SOUGHT

110 The Appellants respectfully request that the decision of the Court of Appeal be set aside with a judgement in favour of the Appellants, with costs awarded throughout.

111 In the alternative, should this honourable court find that an award for damages is warranted, the Appellants respectfully request that such an award be based on diminution in property value rather than remediation costs.

112 In the further alternative, should this honourable court find that the appropriate award for damages is one based on remediation costs, the Appellants respectfully request that this court hold such an award in trust until it can be reasonably demonstrated that the Respondent intends to use the award for remediating 285 Midwest.

113 Should the appeal be denied, the Appellants respectfully request that it be denied without

costs for this appeal.

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

_____
Austin Ward

_____
David Rennie

Counsel for the Appellants
John Thordarson and Thorco Contracting Limited

PART VI – TABLE OF AUTHORITIES

Paragraph No.

Cases

Secondary Sources

Katherine M. van Rensburg, "Deconstructing *Tridan*: A Litigator's Perspective" (2004) 15 Envtl L & Prac 85 **61**

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Ontario, Ministry of the Environment, *Guide for Completing Phase One Environmental Site Assessments under Ontario Regulation 153/04*, (June 2011) **9**

Statutes

Environmental Protection Act, RSO 1990, c E 19 **1**

PART VII – LEGISLATION AT ISSUE

Environmental Protection Act, RSO 1990, c E 19, s 1(1):

In this Act,

"adverse effect" means one or more of,

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

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

(c) harm or material discomfort to any person,

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

(e) impairment of the safety of any person,

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

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

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

Environmental Protection Act, RSO 1990, c E 19, s 3(1):

The purpose of this Act is to provide for the protection and conservation of the natural environment. R.S.O. 1990, c. E.19, s. 3.

Environmental Protection Act, RSO 1990, c E 19, s 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. R.S.O. 1990, c. E.19, s. 99 (1).

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

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

(a) for loss or damage incurred as a direct result of,

(i) the spill of a pollutant that causes or is likely to cause an adverse effect,

(ii) the exercise of any authority under subsection 100(1) or the carrying out of or attempting to carry out a duty imposed or an order or direction made under this Part, or

(iii) neglect or default in carrying out a duty imposed or an order or direction made under this Part;

(b) for all reasonable cost and expense incurred in respect of carrying out or attempting to carry out an order or direction under this Part,

from the owner of the pollutant and the person having control of the pollutant.

JOHN THORDARSON and THORCO CONTRACTING LIMIED
APPELLANTS
(Respondents)

-and-

MIDWEST PROPERTIES LTD.
RESPONDENT
(Appellant)

S.E.M.C.C. File Number: 03-04-2017

SUPREME ENVIRONMENTAL MOOT
COURT OF CANADA

FACTUM OF THE APPELLANTS JOHN THORDARSON and THORCO CONTRACTING LIMITED

TEAM # 2017-07

Austin Ward
David Rennie

Counsel for the Appellants,
John Thordarson and
Thorco Contracting Limited