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 #2017-09

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 case is an opportunity for the Supreme Environmental Moot Court of Canada to clarify the law by embarking on a comprehensive analysis of Ontario's environmental protection legislation. It is urgent that the application of the spills bill, and its interplay with civil causes of action, be clearly defined.

2 The "spills bill" (Part X) was added to the *Environmental Protection Act,* RSO 1990, c E.19 ("*EPA",* alternatively "the *Act*") in 1979 with the intention to, first, provide the Minister of Environment and Climate Change ("Minister", alternatively the "MOE") with the authority to seek out immediate remediation in the event there is a spill.

> *Environmental Protection Act,* RSO 1990, c E.19
> Bill 24, *An Act to Amend the Environmental Protection Act,* 3rd sess, 31st Leg, Ontario, 1979 (first reading 27 March 1979 at 255) [First Reading].

3 In addition, section 99(2) of the *EPA,* as part of the spills bill, is intended to address compensation for spills under specific circumstances as outlined by its terms.

4 The Respondent, Midwest, purchased 285 Midwest Road ("285 Midwest") without conducting the appropriate environmental audits. They are now attempting to hold the Appellants responsible for their imprudence.

5 At trial, the Respondent failed to establish any of the enumerated grounds required for compensation under section 99(2). In addition to failing to show loss or damage as per section 99(2)(a), the Respondent has not undertaken any efforts to remediate the contamination. Asking the court to order compensation for expenses not incurred is contrary to section 99(2)(b) and the intentions of the Legislature.

> *Midwest v Thordarson,* 2013 ONSC 775, 2013 CarswellOnt 2183, 73 C.E.L.R. (3d) 303 at paras 12, 23 [*Midwest TR*].
>
> *Midwest Properties Ltd. v Thordarson,* 2015 ONCA 819, 128 O.R. (3d) 81, 2015 CarswellOnt 18029 at para 9 [*Midwest CA*].

6 The spills bill is intended for an emergency situation which requires immediate cleanup of a spill. In order to achieve this intended purpose several of its provisions grant the MOE with broad authority to impose orders for such remediation. In support, section 99(2) provides a clear

pathway to compensation for spill victims who have either incurred loss or damage or costs and expenses from following a remediation order pursuant to Part X.

7 The Appellants request this honourable court to reverse the decision of the Court of Appeal on the basis that there is no cause of action under any of the enumerated grounds. The Respondent has not been able to establish loss or damage nor have they been ordered to remediate the contamination. In addition, the contamination does not fall within the class of contamination that Part X of the *EPA* is intended to remedy.

B. Statement of the Facts

(i) Properties of Midwest and Thorco

8 Midwest Properties Ltd. ("Midwest" or the "Respondent") became the owner of 285 Midwest, an industrially-zoned property, in December 2007. Prior to completing the purchase, Midwest acquired a Phase I assessment on the property. On the basis of the Phase I results Midwest did not pursue contamination testing of the soil or groundwater nor did they obtain a Phase II report.

Midwest CA, supra para 5 at para 9.

9 The property at 285 Midwest is adjacent to 1700 Midland Avenue ("1700 Midland"), the place of business for Thorco Contracting and the principle, the principle of which is John Thordarson (collectively, "Thorco" or the "Appellants").

Midwest TR, supra para 5 at para 1.

10 The Respondent, shortly after purchasing 285 Midwest, sought to acquire all or part of 1700 Midland. Midwest obtained a Phase I and II Environmental Assessment report. It was determined that through groundwater movement PHC product had migrated to 285 Midwest.

Midwest CA, supra para 5 at para 11.

Midwest TR, supra para 5 at paras 7 - 8.

(ii) MOE standards and orders

11 From 2001 to 2008, Thorco significantly reduced the volume of waste on site but continued to remain out of compliance with the Certificate of Approval. The MOE issued another order in 2008.

Midwest CA, supra para 5 at paras 12-13, 16-18.

12 As of 2011, Thorco had removed all liquid waste from 1700 Midland. The only concern left at this point was a waste storage pit remaining on the property.

Midwest CA, supra para 5 at para 18.

13 In 2011 the MOE implemented a set of standards for allowable quantities of PHC. When the Respondent obtained a Phase II report on its property at 285 Midwest concentrations of PHC were found to be in excess of the 2011 MOE standards at three monitoring wells located on the property.

Midwest CA, supra para 5 at paras 21-26.

14 The MOE issued an order on January 19, 2012 requiring Thorco to conduct an investigation and to implement and complete a restoration program on both properties.

Midwest CA, supra para 5 at para 33.

(iii) History of the proceedings

15 These proceedings were initiated by the Respondent. At trial, Pollak, J. rejected the claim for compensation under section 99(2) because Midwest failed to show loss or damage as a result of a spill and the Minister had already ordered remediation against Thorco.

16 The trial decision was reversed on appeal on the basis that the evidence indicated the existence of damage as a direct result of a discharge of a pollutant that caused or was likely to cause an adverse effect.

(iv) Position of the Appellants

17 The Appellants submit that a claim under section 99(2) cannot succeed because the statutory equivalent of nuisance was not established and damages are precluded where an order for remediation has been made by the MOE. Finally, should the Respondent's section 99(2) claim stand, the Appellants submit that the appropriate measure of damages is the diminution in property value.

PART II -- QUESTIONS IN ISSUE

18 Respectfully, the Appellants address the following issues as they relate to the case at bar:

(a) Liability under section 99(2) of the *EPA* is dependent on establishing nuisance.

(b) Damages are precluded under section 99(2) of the *EPA* where the Ministry of the Environment and Climate Change has ordered the defendant to remediate the plaintiff's property

(c) The appropriate measure of damages under section 99(2) of the *EPA* is diminution in value as opposed to remediation.

PART III -- ARGUMENT

A. *Liability under section 99(2) of the EPA is dependent on establishing nuisance*

19 The Appellants respectfully submit that, in the context of the case at bar, it is necessary to establish nuisance in order to successfully claim compensation under section 99(2)(a)(i) of the *EPA*. Referring to and properly implementing the principles of statutory interpretation leads to the conclusion that section 99(2)(a)(i) is the statutory equivalent of a nuisance. In the event this Court disagrees the Appellants submit that regardless of whether nuisance is required, the terms of section 99(2)(a)(i) must be satisfied.

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

Mario D. Faieta et al., *Environmental Harm: Civil Actions and Compensation* (Markham, ON: Butterworths, 1996) at 3 [Faieta].

(i) The terms and requirements of section 99(2), in the context of the case at bar, are the statutory equivalent to establishing nuisance

20 The Appellants submit that, in the context of this case, proving loss or damage pursuant to section 99(2) of the *Act* is the statutory equivalent to establishing nuisance.

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

Faieta, *supra* para 19 at 3.

21 The context of this case brings the Respondent's claim specifically within section 99(2)(a)(i) of the *Act*. The provision as a whole allows only those who have suffered "loss or damage" or incurred costs and expenses to seek compensation.

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

22 In order to qualify for compensation under section 99(2)(a)(i) of the *EPA* a plaintiff is required to demonstrate "loss or damage" as enumerated within the confines of section 99(1). Furthermore, "loss or damage" must be incurred as a direct result of the spill of a pollutant that causes or is likely to cause an adverse effect. The adverse effect of the spill must be more than trivial.

EPA, *supra* para 2, ss 99(1) - (2).

Midwest Properties Ltd. v Thordarson, 2015 ONCA 819 (Factum of the Respondent at para 51) [FOR].

Faieta, *supra* para 19 at 3.

R v Castonguay Blasting Ltd., 2013 SCC 52, 3 SCR 323, CarswellOnt 14069 at para 33 [*Castonguay*].

23 In the case at bar, the Respondent's claim falls under the "loss of use or enjoyment" component of the "loss or damage" definition.

FOA at para 51

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

Faieta, *supra* para 19 at 3.

24 In conclusion, the final construction of the Respondent's section 99(2)(a)(i) claim is dependent on establishing loss of use or enjoyment of property as a direct result of a spill of a pollutant that causes or is likely to cause an adverse effect that is more than trivial. This is the statutory equivalent to establishing nuisance.

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

FOA at para 51.

Castonguay, *supra* para 22 at para 33.

Faieta, *supra* para 19 at 3.

(ii) Interpretations of section 99(2) must remain within the confines of its terms

25 The principles of statutory interpretation, as adopted by the Supreme Court of Canada in *Rizzo Shoes*, insist that legislation must be interpretted as remedial and in a fair, large and liberal manner so as to ensure the attainment of its objects. Additionally:

> 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.
>
> *Legislation Act, supra* para 28, s 64(1) [*Legislation Act*].
>
> *Rizzo & Rizzo Shoes Ltd. (Re),* [1998] 1 SCR 27 at paras 21-22, 36 OR (3d) 418 [*Rizzo Shoes*].
>
> Elmer Driedger, *Construction of Statutes*, 2nd edition (Oxford, UK : Butterworth-Heinemann, 1983) [Driedger].

26 Therefore, in order to conform to the principles of statutory interpretation, the purpose of the *EPA* and the construction of the provision in question must be considered in addition to the ordinary meaning of the words.

27 To start, the purpose of the *Act* is to provide for the protection and conservation of the environment. The purpose of Part X, and more specifically section 99(2), can be understood by reviewing the intentions of the Legislature at the time of enactment. The Minister of the Environment, the Hon. Dr. Parrott states the following in regards to the enactment of Part X:

> The amendments concern spills of toxic substances or contaminants into the natural environment. The objective of this legislation is to impose clear responsibility for cleanup and to enable my ministry to take immediate control of the situation if required. This includes directing cleanup in some cases, and then sorting out questions of responsibility and payment after we get the mess cleaned up.
> 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.
>
> *EPA*, *supra* para 2, ss 3(1), 99(2).
>
> Bill 24, *An Act to Amend the Environmental Protection Act*, 2nd sess, 31st Leg, Ontario, 1978 (14 December 1978 at 6178) [1978 Debates].

28 With respect to statutory construction, the words of the statute, Part X and section 99(2) are calculated and are positioned relative to eachother in accordance with the intentions of the Legislature. In essence, the terms of section 99(2) and its position within Part X after the remedial provisions indicates it is only meant to apply to spills post remediation.

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

29 Finally, the importance of the provision's specified terms and their limitations are illustrated by the Hon. Mr. Parrott who went as far as to refuse to amend section 99(2)(a) to include damages indirectly resulting from spills. The Hon. Mr. Parrott stated that there must be a limit to the amount of damage the company, that owned or in control of the spilled material, is responsible for. He also added that it is not the intention of the Ministry to broaden the scope of the provision to such an extent that it would lead to the courts being inundated with questions of what constitutes indirect damage.

> Bill 24, *An Act to Amend the Environmental Protection Act*, 3rd sess, 31st Leg, Ontario, 1979 (second reading 15 May 1979 Ms. Bryden at 1955) [Second Reading].
>
> *EPA*, *supra* para 2, s 99(2).

30 Section 99(2) compensation is, therefore, restricted to the scope of its terms. It is not intended to be a catchall provision as interpreted by Hourigan, J.A. in his reasoning. In the event a claim for compensation fails to satisfy the terms of section 99(2) there are several other causes of action a party may pursue under the common law or other parts of the *Act*.

> *EPA*, *supra* para 2, ss 99(1), (2)(a)(i).
>
> *Castonguay*, *supra* para 22 at para 33.
>
> Faieta, *supra* para 19 at 3.
>
> *EPA*, *supra* para 2, s 47(9).

31 The Court of Appeal interpreted section 99(2) of the *Act* as a means of providing a flexible statutory cause of action in place of common law torts of nuisance and negligence by disposing of the need to show intent, fault, duty of care and foreseeability. As a consequence, the Court of Appeal broadened the scope of section 99(2) beyond that which was intended by the Legislature.

> *Midwest CA*, *supra* para 5 at paras 45, 72-73.
>
> *EPA*, *supra* para 2, s 99(2).

32 While we agree with the spirit of holding polluters accountable, it is important that compensation and the interpretation of section 99(2) remain within the ambit of Part X of the *Act*. Although section 99(2)(a)(i) requires a generous interpretation it must remain restricted to its terms as intended by the Legislature and dictated by the principles of statutory interpretation.

(iii) Carthy, JA's decision in Hollick was misinterpreted

33 The Court of Appeal in *Hollick* correctly stated that a section 99 claim is dependent on proving nuisance. Carthy, JA's reference to several other causes of action in addition to section 99 does not diminish the accuracy of this statement as they are also dependant on proving nuisance in certain contexts.

> *Hollick v Metropolitan Toronto (Municipality)* (1999), 46 OR (3d) 257, 1999 CarswellOnt 4135 para 18 [*Hollick*].
>
> *EPA*, *supra* para 2, s 99(2).

34 Negligence, for example, considers the conduct that led to the spill and whether that conduct constituted reasonable care. The Court in Smith Brothers asserts that the principles of negligence are appropriate to the law of nuisance when the court reviews the question of reasonable care in situations of normal use of property where nuisance results from the use or operation upon the land.

> *Smith Brothers Excavating Windsor Ltd. v Camion Equipment & Leasing Inc. (Trustee of),* 1994 CarswellOnt 931, OJ No. 1380 at para 247 [Smith Brothers].
>
> Faieta, *supra* para 19 at 73.

35 With respect to the principle in *Rylands v Fletcher*, the court in *Smith Brothers* determined the principle to be an extension of the law of nuisance. The court found that in the context of special uses of products brought on the property and the escape of those products the principle of Rylands v Fletcher becomes an extension of the principle of nuisance.

> *Rylands v Fletcher* (1866), [1861-73] All ER Rep 1 at p. 7, LR 1 Exch 265 (Ex. Ch.).
> Smith Brothers, *ibid* at para 225.

36 Hourigan, J.A. attempted to dismiss Carthy, J.A's statement by distinguishing the facts of the case. However, by failing to provide any kind of eveluation or justification, Hourigan, JA's decision amounts to a blatant disregard of the Court of Appeal decision in *Hollick* and their interpretation of the law.

> *Midwest CA*, *supra* para 5 at para 76.

37 The Appellants submit that Carthy, J.A's statement should stand as judicial support to the notion that section 99(2), under certain cricumstances, depends on proving nuisance.

(iv) The PHC contamination at 285 Midwest does not constitute "Loss or Damage"

38 Regardless of whether nuisance is required to satisfy a section 99(2) claim, it is clear that without loss or damage or costs and expenses, the said claim cannot succeed and compensation cannot be granted.

39 More specifically, pursuant to section 99(2)(a)(i), in order to prove compensable loss or damage, Midwest bears the onus to establish the alleged non-trivial adverse effect, the spill causing or likely to cause the adverse effect and loss or damage. The Appellants respectfully submit that the Respondent failed to establish any of the terms enumerated above.

> *EPA*, *supra* para 2, s 99(2).
> FOR, *supra* para 22 at para 51.
> *Castonguay*, *supra* para 22 at para 33.

40 With respect to proving the alleged adverse effects that are more than trivial Midwest relies on the exceedance of MOE standards, their financial losses in property value and potential health risks.

41 In regards to the exceedance of MOE standards it has been established that such standards are set well below levels of concern in order to ensure public safety. The court in *Smith v Inco* found that an exceedance of an MOE standards may not constitute physical damage.

> *Smith v Inco Ltd.*, 2011 ONCA 628, 107 OR (3d) 321, 2011 CarswellOnt 10141at para 61 [*Smith v Inco*].

42 Based on the fact finding of the trial judge, Midwest failed to show proof of financial losses or adverse health effects.

> *Midwest TR*, *supra* para 5 at para 12.

43 A witness for Midwest testified that there was a risk that PHC will enter into the building posing a potential health risk to the occupants.

> *Midwest CA*, *supra* para 5 at para 100.
>
> *Castonguay*, *supra* para 22 at para 33.

44 The Appellants respectfully submit that the PHC contamination has, therefore, not yet caused nor is it likely to cause a non-trivial adverse health effect. There is no risk for adverse health effects, only the potential for such risk.

> *Castonguay*, *supra* para 22 at para 13.

45 With respect to the question of whether the PHC contamination was a spill, a more in depth analysis is required due to the Court of Appeal's failure to provide any justification for concluding it as a spill in their decision.

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

46 According to the *EPA*, a spill, when used with reference to a pollutant, means a discharge (addition, deposit, emission, or leak),

> 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;

EPA, *supra* para 2, ss 1(1), 91(1).

47 In light of the principles of statutory interpretation the Appellants respectfully submit that the discharge at 285 Midwest does not qualify as a spill.

Legislation Act, *supra* para 25, s 64(1).

Rizzo Shoes, *supra* para 25 at paras 21-22.

Driedger, *supra* para 25.

48 Existing jurisprudence related to section 99 of the *EPA* does not define the test for an "abnormal" quality or quantity of discharge. This deficiency creates difficulty in assessing the alleged abnormality in the case at bar.

Kawartha Lakes (City) v. Ontario (Director, Ministry of the Environment), 2013 ONCA 310, 2013 CarswellOnt 5503, 307 OAC 264 [Kawartha Lakes].

Technical Standards and Safety Authority v Kawartha Lakes (City), 2016 OERTD No. 28, CarswellOnt10718.

Gendron v Doug G. Thompson Ltd. (Thompson Fuels), 2016 ONSC 7056 (CanLII).

Ontario (Attorney General) v Tyre King Tyre Recycling Ltd., 9 OR (3d) 318, 1992 CanLII 7479 (ON SC).

United Canadian Malt Ltd. v Outboard Marine Corp., 48 OR (3d) 352, 2000 CanLII 22365 (ON SC).

French v Chrysler, 2016 ONSC 793, 2016 CarswellOnt 1556, 1 C.E.L.R. (4th) 95.

49 The only existing case for comparison purposes is *Smith v Inco* which reports its contamination levels in the judgment.

Smith v Inco, supra para 41.

50 In *Smith v Inco,* the Court of Appeal refused to grant an award for diminution in value to property owners near a nickle factory which had emitted nickel particles onto the surrounding vicinity. In this case, the contamination was evaluated in relation to its risk to human health.

Smith v Inco, supra para 41 at paras10-13, 15-16.

51 In the case at bar, the only risk to human health discovered by the experts and the MOE investigations was the existence of more volatile PHC fractions measured between 2008 and 2012. However, the classification of PHC by different fractions was undertaken by the MOE several years after Midwest purchased the property.

Midwest CA, supra para 5 at paras 22-23, 25, 100, 101, 107.

52 Therefore, the only evidence of an alleged "abnormal" discharge rests on a modification of standards some time after the alleged liability under section 99 took place. The Appellants argue that the discharge occurred prior to the change in MOE standards and prior to when the Appellants began to wind down the business. At the time of its occurrence, this was not an abnormal discharge, but rather part of the natural use of an industrial zone.

53 The retroactive application of the more recent MOE standards would be contrary to the law and the intent of the Legislature.

Midwest CA, supra para 5 at para 17.

Legislation Act, supra para 25, s 22(3).

Second Reading, *supra* para 29 (Hon. Dr. Parrott at 1966).

54 The Appellants respectfully submit that the discharge onto 285 Midwest does not constitute a spill within the meaning of the *EPA.*

EPA, supra para 2, s 91(1).

55 Finally, with respect to loss of use and enjoyment of property, the Respondent's own witness testified that nothing has changed at 285 Midwest in regards to the plaintiff's business operations or uses of the property.

Midwest Properties Ltd. v Thordarson, 2015 ONCA 819 (Factum of the Appellants at para 28) [FOA].

56 In conclusion, Midwest has failed to establish any of the enumerated grounds for compensation. Consequently, The Appellants are not liable to compensate the plaintiff under section 99(2) of the *EPA*.

B. *Damages are precluded under section 99(2) of the EPA where the Ministry of the Environment and Climate Change has ordered the defendant to remediate the plaintiff's property*

57 The Repondents are attempting to obtain compensation for remediation costs they have not yet incurred. However, as per the purpose of the *EPA* and the intentions of the Legislature, Part X is meant to achieve immediate remediation and section 99(2) is meant to further that purpose by providing a clear path to compensation post remediation. Since the Respondents have not established any of the enumerated grounds under section 99(2) their claim must fail. Furthermore, it would be illogical and contrary to the purpose of the *EPA* to award damages under section 99(2) where an MOE remediation order already exists. Should the MOE lose faith in the parties under their current order they have the authority to redirect the order at anytime.

(i) Awarding compensation prior to remediation and concurrently with a remediation order contravenes the purpose of the Act and the intentions of the Legislature

58 The Court of Appeal in *Midwest* misapplied the law as it is intended under Part X of the *Act*.

59 The structure of the *EPA* and the ordinary meaning of section 99(2) are in harmony with the intention of the Legislature. According to the Minister, Part X is intended to impose clear responsibility for contamination and to grant the Ministry with broad authority to order control, cleanup and restoration. The focus on remediation is intended to reduce costs by tackling the discharge before the problem becomes exponentially more complicated and costly. Questions regarding compensation are meant to take place after remediation.

1978 Debates, *supra* para 27 (at 6178).

First Reading, *supra* para 2.

Rizzo Shoes, *supra* para 25 at para 21.

EPA, *supra* para 2, ss 91-102.

60 The specific priorities of Part X are more clearly laid out by Hon. Mr Parrott in the following passage:

> This revised bill [24] is intended, among other objectives:
> 1. To impose a clear responsibility for control, cleanup and restoration on owners and those in charge of pollutants including those involved in their manufacture, handling, transportation and disposal;
> 2. To broaden the authority of the minister to order control and cleanup of spills and restoration of the natural environment by those responsible, and when necessary, by other persons;
> 3. To enable the ministry to take immediate remedial action in the event of a spill and to pursue the question of liability later;
> 4. To establish liability for compensation for damage resulting from a spill and for the cost of cleanup which clarifies and extends the right to compensation at common law;
> 5. To enable a person who has been ordered by the minister to clean up a spill, other than a person already responsible to do so, to recover his reasonable expense from the ministry. The minister subsequently will be able to recover the amount of such expenses from the owner and person in control. This amendment is meant to save the person ordered by the minister to carry out cleanup from having to collect from or sue the owner and person in control;
> 6. To authorize control and cleanup of spills and restoration of the natural environment by municipalities and designated persons and to provide them with the right to recover their reasonable expenses from the owner and the person in control.
>
> First Reading, *supra* para 2.

61 The Court of Appeal's decision to award damages pursuant to section 99(2) concurrently with an existing order for remediation directly contravenes the purpose of the *Act* and the intentions of the Legislature. Remediation delays caused by the Appellant does not justify this violation when the provision provides clear recourse for such circumstances.

> *Midwest CA*, *supra* para 5 at paras 43-55.
>
> *EPA*, *supra* para 2, ss 91-98.
>
> *EPA*, *supra* para 2, ss 3, 97(1).

62 The Court of Appeal, in further support of their determination, drew on authorities which can be distinguished from the case at bar as they deal with issues of ministerial orders and reporting requirements external to Part X.

> Castonguay, *supra* para 22.

R v Consolidated Maybrun Mines Ltd. (1998), 1 SCR 706, 1998 CarswellOnt 1476 [Maybrun Mines].

63 The Court of Appeal in *Midwest* erroneously relied on the Supreme Court decision of *R v Castonguay Blasting Ltd.* to deliver an excessively broad interpretation to all parts of the *EPA.*

Midwest CA, *supra* para 5 at para 51-53.

Castonguay, *supra* para 22 at para 13.

64 *Castonguay* involved rock debris, which propelled into the air from an explosion and crashed through the roof of a home damaging the ceiling, siding and eavesthroughs as well as breaking the windshield of a car and damaging the hood.

Castonguay, *supra* para 27 at para 4.

65 The issue in *Castonguay* concerned the defendant's failure to report the incident to the MOE, contrary to section 15(1) of the *EPA.*

Castonguay, *supra* para 22 at para 13.

66 The defendant's failure to report was found to be a violation of the *Act* because the intent of the reporting requirement is to ensure the Ministry, not the discharger, evaluates any further mitigation measure that may be required. This is to ensure that a qualified party – the MOE – makes the evaluation using their expertise and resources.

Castonguay, *supra* para 22 at para 18.

Legislation Act, *supra* para 25, s 64(1).

67 *Castonguay* is distinguishable from the case at bar on the basis that section 15(1) falls under the General Provisions part of the Act. Section 99(2), on the other hand, is directed at addressing compensation in specific circumstances surrounding a spill as per the intentions of the Legislature. In recognition of the importance of the terms of section 99(2) and the severity of its impact the Legislature resorted to a strict liability scheme for compensating victims of a spill while immediate remediation is an absolute liability offence.

Bill 24, *An Act to Amend the Environmental Protection Act*, 3rd sess, 31st Leg, Ontario, 1979 (third reading 11 December 1979 Ms. Bryden at 5380) [Third Reading].

EPA, *supra* para 2, ss 15(1), 99(2).

68 The same argument can be applied to the decision in Maybrun Mines because once again the Supreme Court of Canada was dealing with the remedial section under the General Provisions part of the Act.

Castonguay, *supra* para 22.

EPA, *supra* para 2.

Mayburn Mines, *supra* para 62.

69 Compared to Part II of the *Act* known as General Provisions, the scope of Part X is narrowed to spills and the scope of section 99(2) of Part X is further narrowed to compensation for spills under certain circumstances. To ensure remediation, the drafters of the legislation provided the Minister with ample recourse by granting the Minister broad authority to impose spill remediation orders.

EPA, *supra* para 2, s 97(1).

Honey Bee Sanitation Inc. v Camion Equipment & Leasing Inc., 1989 CarswellOnt 204, 16 ACWS (3d) 179.

70 Should remediation take place at the cost of a third party who was not in control of or an owner of the spilled polutant, they have the ability to claim compensation under section 99(2)(b) post remediation. Hence, it is completely unnecessary and legally imprudent to award compensation prior to remediation and concurrently with an existing order, in hopes that the compensated party will carry out the remediation program.

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

71 Additionally, to award compensation for future remediation without first redirecting the existing order is to not only create the potential for administrative delay but leave open the possibility for continued contamination over the long term. Parties not named in a remediation order are under no obligation to remediate.

Midwest TR, *supra* para 5 at para 22.

Midwest CA, supra para 5 at para 55.

Harry Dahme, " Nature of the Environmental Problem for Lenders and Investors" in *Negotiating with the Ministry of Environment over Contaminated Property* (Toronto: Insight Press, 1992) at 8.

Denis Wood, *The 1996 Annotated Ontario Environmental Protection Act* (Toronto: Thompson Canada Limited, 1995) at EPA-199.

72 Therefore, damages under section 99(2) should be precluded when there is an extant order in place. Should the Appellants fail to comply with the order for remediation, the MOE has the authority to redirect the order to another party.

C. *The appropriate measure of damages under section 99(2) of the* EPA *is diminution in value as opposed to remediation.*

73 The Appellants respectfully submit that the Respondent is not entitled to any compensation because they have failed to establish that they have suffered any loss or damage, as a direct result of a spill, since their purchase of 285 Midwest.

74 If any compensation is owed under section 99, this award must be calculated in accordance with the diminution in value of the Respondent's property since their purchase of 285 Midwest.

75 In the alternative, if this honourable court finds that remediation is necessary in lieu of diminution in value, only partial remediation to return the land to MOE standards is required.

(i) No Requirement for Payment for Diminution in Value

76 The Appellants respectfully submit that the Respondent is not entitled to an award for diminution in value.

77 The law aims to put the plaintiff in the same position it was in immediately before the loss.

78 The burden rests with the plaintiff to demonstrate that it has suffered such a loss or damage as described in section 99(2). However in the case at bar, based on findings of fact made by the trial judge, there is a lack of evidence, and absent such evidence by Midwest the court may reasonably infer that the plaintiff bought the land in its current state of contamination thereby disentitling Midwest to any compensation from Thorco.

Mortgage Insurance Co. of Canada v Innisfil Landfill Corp. (1996), 3 OTC 44, 1996 CarswellOnt 1843 at 11.

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

79 The legislation offers the MOE broad powers to ensure cleanup when necessary. In the event of contamination, the MOE is entitled to use its discretion to take the appropriate course of action which includes the enlisting of the municipality to ensure immediate remediation.

EPA, *supra* para 2, ss 146, 147, 148.1, 149, 150, 153, 154, 157.1.

Kawartha Lakes, supra para 48 at para 7.

80 Ontario courts in the past have dismissed damages for diminution in value for properties in compliance with MOE standards.

862590 Ontario Ltd. v Petro Canada Inc., 2000 CarswellOnt 937, 33 CELR (NS) 107 (Ont SCJ) [*Petro Canada*].

Smith v Inco, supra 41.

81 In *Smith v Inco,* the Court of Appeal refused to grant an award to the property owners near the nickle factory because all affected areas were remediated to MOE standards which reversed the need for compensation for diminution in value.

Petro Canada, *supra* para 80.

Smith v Inco, *supra* para 41 at paras 16-17, 59.

Katherine M. van Rensburg, "Deconstructing Tridan : A Litigator's Perspective" (2004) 15 J Env L & Prac 85 at 97-98 [Deconstructing Tridan].

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

82 Unfortunately, the Respondent failed to protect itself by completing a Phase II report at the time of purchase. This audit would have provided the court with pertinent information regarding any diminution in value.

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

83 The Appellants respectfully submit that any diminution in value suffered by the Respondent has been caused by the misrepresentation and/or the negligence of the vendor and the original environmental auditor of 285 Midwest Road and not by the Appellants' actions.

(ii) No Requirement for Full Remediation

84 Should this honourable court deem remediation as the appropriate measure of damages, then compensation should only be based on partial remediation.

85 The Court of Appeal in *Midwest* erred in its interpretation of the law in favour of full remediation of the plaintiff's property by relying on four cases.

Midwest CA, *supra* para 5 at paras 61-63.

86 First, *Tridan Developments* does not lend support to full remediation equivalent to a return to the "pristine condition" of the property prior to the contamination by the defendant.

Midwest CA, *supra* para 5 at paras 61-63.

Tridan Developments Ltd. v Shell Canada Products Ltd. (2002), 57 OR (3d) 503, 2002 CarswellOnt 1.

87 Instead, *Tridan Developments* supports the polluter pays principle which is entrenched in Canadian environmental law. This principle is simply intended to assign responsibility for damages in cases of contamination. However, the jurisprudence does not define the appropriate type of damages (full remediation or otherwise).

Tridan Developments, *supra* para 86 at para 12.

Rylands v Fletcher, *supra* para 35 at 7.

Imperial Oil Ltd. v Attorney General of Quebec (2003), 2003 SCC 588, 2 SCR 624, 231 DLR (4th) 577 at paras 23-24 [*Imperial Oil*].

88 Second, *Canadian Tire* does not lend support to full remediation as the default solution under section 99(2) of the *EPA.*

Canadian Tire Real Estate Ltd. v Huron Concrete Supply Ltd., 2014 ONSC 288, 88 C.E.L.R. (3d) 93, 2014 CarswellOnt 6103 [*Canadian Tire*].

Midwest CA, *supra* para 5 at paras 66-68.

89 The objective of the Superior Court in *Canadian Tire* was to remediate to an extent that the plaintiff could once again use the contaminated area; the objective was not full remediation to return the land to its condition prior to any contamination by the defendant.

Canadian Tire, *supra* para 88 at para 305.

90 The court in *Canadian Tire* did not order full remediation for the plaintiff's contaminated property, but rather determined that a variety of remediation methods may be suitable. The Court considered several remediation solutions to determine the "more advantageous" option.

Canadian Tire, *supra* para 88 at para 305.

91 The contaminated area in *Canadian Tire* was divided into several zones and the best option for each zone was prescribed based on the needs of the plaintiff, cost, and timeliness. The consideration of cost and timeliness in the court's evaluation indicates full remediation is not the default solution in such cases.

Canadian Tire, *supra* para 88 at paras 305, 308, 321.

92 The Court of Appeal in *Midwest* erred in its interpretation of *Canadian Tire*. The goal in *Canadian Tire* was to recover from the injury in a way that the plaintiff could carry out their business as usual and have their property back to MOE standards.

Midwest CA, *supra* para 5 at paras 66-67.

Canadian Tire, *supra* para 88 at para 307.

93 Third, *Jens v Mannix Co.* must be distinguished from the case at bar. The Trial Judge found that the house "oozed oil" and the yard "was saturated to a depth of five and one-half feet". Because the house was "uninhabitable" full remediation in the form of rebuilding the home was ordered instead of diminution in value.

Midwest CA, *supra* para 5 at para 61.

Jens v Mannix (1979), 30 DLR (4th) 260, CanLII 259 (BC CA).

94 Fourth, in *Horne v New Glasgow*, the plaintiff was awarded the cost of full remediation when a truck crashed and demolished her home. The court accepted that remediation was "the proper approach," because it, "would be less in amount than the diminution in value caused by the injury."

Midwest CA, *supra* para 5 at para 61.

Horne v New Glasgow, [1954] 1 DLR 832 (NSSC) at 835, 840.

95 As evinced from these authorities, and in support of the Appellants' position, existing jurisprudential authorities do not support the principle that full remediation is the default option. Instead, the extent of injury and the cost of repair relative to payment of diminution in value are important factors in determining the reasonable course of action. Reasonableness will be judged, in part, by the advantages of reinstatement relative to the extra cost to the defendant.

Harvey McGregor, *McGregor on Damages*, 16 ed (London: Sweet & Maxwell Ltd., 1997) at 970.

96 In *Tridan Developments*, the nominal difference between the cost of remediation and diminution in value meant that full remediation was a reasonable option. It was the reasonableness of prescribing full remediation under the circumstances that persuaded the court to order full remediation; otherwise full remediation has not been established as the default option in environmental contamination cases.

Tridan Developments, supra para 86 at para 10.

Canadian Tire, supra para 88.

Deconstructing Tridan, *supra* para 81 at 93.

97 At the time of its enactment, members of the opposition pressed the government to define the appropriate level of remediation for environmental contamination following a spill within Part X, but the government refused to do so.

Second Reading, *supra* para 29 (at 1955).

98 Ordering full remediation in this case runs contrary to the purpose of the *EPA.* The *EPA* aims to protect the environment through regulation rather than outright prohibition of contamination and a certain level of contamination in an industrial zone, such as the one occupied by the Respondent, is permitted by the legislation.

EPA, *supra* para 2, s 168.4.

O Reg 153/04.

99 Therefore, the Appellants submits that section 99(2) does not stand for considering full remediation as the default measure for damages.

Midwest CA, supra para 5 at para 12.

PART IV -- SUBMISSIONS IN SUPPORT OF COSTS

100 The Appellants request costs from the Respondent here, Ontario Superior Court, and the Court of Appeal. Costs from the two courts below can be awarded on a partial indemnity basis.

PART V -- ORDER SOUGHT

101 The Appellants Respectfully request (a) that the decision of Hourigan, J.A be set aside, including his award for damages and costs, (b) reinstatement of Justice Pollak's decision, (c) an award of trial costs on the basis of the cost award by Justice Pollak on 28 February 2013, (d) appeal costs, and (e) an award of costs for this appeal.

102 The Appellants respectfully request in the alternative that damages awarded to the Respondent be limited to the estimated costs for diminution in value.

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

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Kurt Frederick

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Rashin Alizadeh

Counsel for the Appellants
John Thordarson and Thorco Contracting Limited

PART VI -- TABLE OF AUTHORITIES

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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

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