WILLMS & SHIER ENVIRONMENTAL LAW MOOT COURT COMPETITION 2017

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

IN THE SUPREME ENVIRONMENTAL MOOT COURT OF CANADA

(ON APPEAL FROM THE ONTARIO COURT OF APPEAL)

B E T W E E N:

JOHN THORDARSON and THORCO CONTRACTING LIMITED

APPELLANTS
(Respondents)

- and -

MIDWEST PROPERTIES LTD.

RESPONDENT
(Appellant)

FACTUM OF THE RESPONDENT MIDWEST PROPERTIES LTD.

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

TEAM #**2017-10**

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 This case provides this Honourable Court the opportunity to foster public confidence in s. 99(2) of the *Environmental Protection Act* ("*EPA*"). This provision assures each Ontarian whose property is polluted by the spill of a hazardous material that the polluter will be liable for the cost of clean-up and that the natural environment will be restored. By upholding the Ontario Court of Appeal's decision, the public can be confident that the courts will safeguarded this statutory right.

2 At trial, the Court found the Appellants not liable under all causes of action. On appeal, this decision was overturned, and the Appellants were found liable under all causes of action. The Ontario Court of Appeal also held s. 99(2) to be a separate and distinct ground of liability. They awarded $1.3 million in damages and $100,000 in punitive damages. They were correct in doing so.

3 In addressing this assertion before the Court, the Respondent will demonstrate that the facts of the case, binding jurisprudence, and a statutory interpretation analysis of the *EPA* all support the Court of Appeal's findings. This includes the holding that s. 99(2) is not dependent on a finding of common law nuisance, that damages under s. 99(2) are not precluded where an outstanding MOE order exists, and that the cost of remediation of the Respondent's property is the correct measure of damages under s. 99(2).

4 The ineffectuality of the common law torts prompted the creation of this broad and powerful statutory right, and thus requiring an underlying actionable nuisance would frustrate the legislative intent behind s. 99(2). MOE remediation orders made under s. 97 operate concurrently with s. 99, and thus these remedies are not mutually exclusive in law, as well as on the facts, given the MOE's redirection of their order and the Appellant's history of inaction. Section 99(2) codifies the "polluter pays principle", and thus the Appellant is liable for the full cost of remediation, and not simply diminution of value.

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

5 The facts are set out in the Appellant's factum. However, the Respondent respectfully highlights the degree of the Appellants' neglect in storing waste petroleum hydrocarbons ("PHCs") on its property at 1700 Midland Avenue ("1700 Midland"), the severity of contamination caused by the Appellants, and the financial impact of the contamination on the Respondent.

(i) *Thorco's Neglect in Proper Storage of Waste Petroleum Hydrocarbons (PHCs)*

6 Since 1974, the Appellants, John Thordarson and his company Thorco Contracting Limited (collectively, "Thorco") operated a business that resulted in waste petroleum hydrocarbons being stockpiled on 1700 Midland. After applying for a permit to store waste PHCs in 1983, Thorco was issued a Certificate of Approval ("CoA") in 1988 by the Ontario Ministry of the Environment (the "MOE"). For more than two decades (1988-2011), Thorco was in nearly constant breach of its CoA or compliance orders issued by the MOE and the Courts.

7 At its peak in 1999, Thorco was exceeding the volume of waste PHCs it was permitted to store on its property by five times (111,000 gallons instead of 22,520 gallons). Moreover, field observations from MOE enforcement officers found that Thorco's storage practices failed to adhere to MOE guidelines.

8 On numerous occasions (1996, 2008, and 2012), the MOE and the Courts (2000) ordered Thorco to comply with the 1988 CoA. Thorco was also ordered to remove excess PHC waste, store the waste material on its property according to MOE guidelines, immediately cease accepting waste, remediate the contamination to 1700 Midland and any adjacent properties impacted, and restore the natural environment. Thorco consistently disregarded this orders. Instead, Thorco continued to store its hazardous waste properly and became known among MOE enforcement officers as having some of the worst PHC storage practices ever observed.

Midwest Properties Ltd. v Thordarson, 2015 ONCA 819 at para 20, 128 OR (3d) 81 [*Midwest CA*].

9 Notably, in his Ontario Court of Appeal decision, Justice Hourigan found that Throco's conduct displayed "a repeated pattern of what can only be described as utter disregard for the effect that the deficient storage practices of chemical stored on the property [1700 Midland]

could have on the surrounding environment, including 285 Midwest." Justice Hourigan awarded punitive damages to denounce Thorco's reprehensible conduct.

Midwest CA, *supra* para 8 at paras 111.

(ii) ***The Severity of Contamination at 1700 Midland and 285 Midwest***

10 As a result of Thorco's poor handling and storage of waste PHCs, Thorco's property was contaminated. The contamination migrated southward to the property owned by the Respondent ("Midwest") at 285 Midwest Ave (see Figure 1). Environmental Site Assessment ("ESAs") conducted on both properties confirmed that the levels of PHC in the groundwater and soil exceeded the MOE's human and ecological health risk standards. The PHC contamination at 285 Midwest was so concentrated there was pure PHC that it could no longer remain dissolved in groundwater. Inside 285 Midwest, experts detected a particularly volatile and mobile type of PHC that also exceeded the MOE standards. Midwest's experts noted that these elevated levels of volatile PHC pose a human health risk to the building occupants.

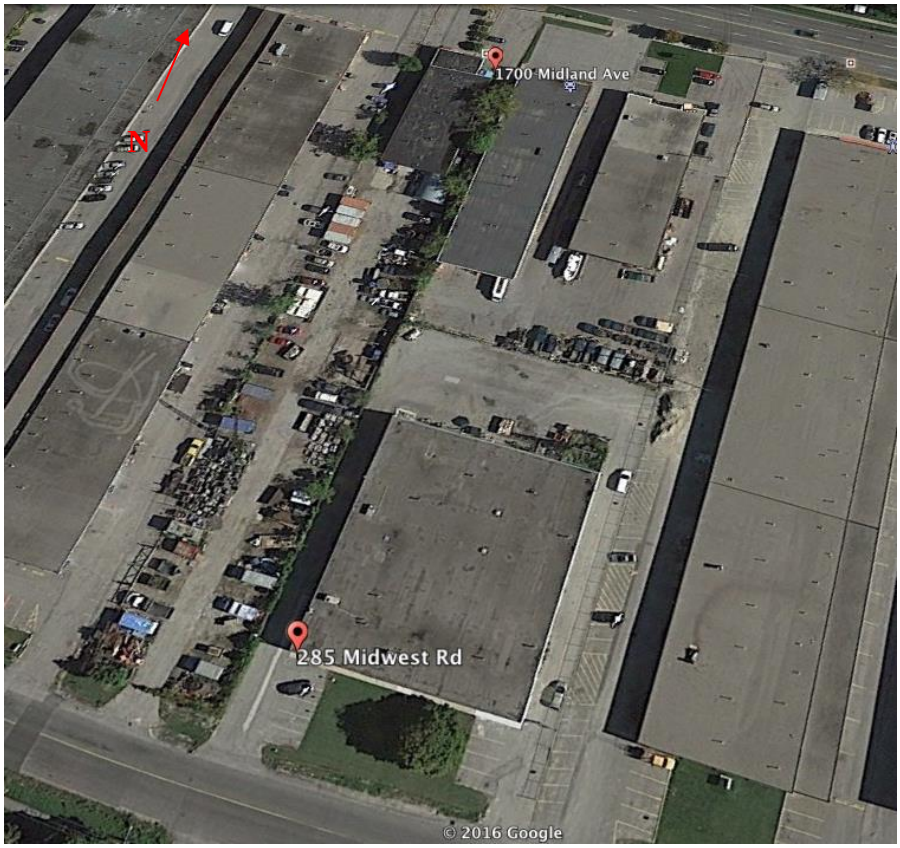

Figure 1. Satellite image of the two neighbouring properties, 1700 Midland Ave. and 285 Midwest Ave., Toronto, ON. The image indicates the nature of the surrounding neighbourhood, the current (2016) condition of the two properties, and their relative proximity to one another.

11 The severity of contamination at 285 Midwest worsened over time. Early testing at 285 Midwest showed that PHC was dissolved in groundwater. However, subsequent testing two years later found pure PHC in the same locations. This indicated that conditions at 285 Midwest were much worse than previously believed.

(iii) ***The Financial Impact of PHC Contamination on Midwest***

12 At trial, Midwest was the only party to provide an estimate of the financial impact of the PHC contamination at 285 Midwest. Experts for Midwest testified that when a property is contaminated with PHC, there are three major financial impacts to the property owner. First, there is potential for third party liability as a result offsite migration through groundwater. Second, there is a loss in property value and the ability to use the property as collateral. Finally, there is the stigma that comes with owning a contaminated property. This can cause complications in obtaining financing from lenders or make the property difficult to sell unless it is remediated.

13 Midwest's experts estimated the remediation costs for their property to be $1.3 million. Although potentially high, Thorco did not provide any contrary estimates for the cost of remediation and damages were awarded accordingly.

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

A. The Respondent's Position

14 *Issue 1:* Liability under s. 99(2) of the *EPA* is not dependent on establishing an actionable nuisance at common law.

15 *Issue 2*: Damages are not precluded under s. 99(2) of the *EPA* where the MOE had ordered the defendant to remediate the plaintiff's property.

16 *Issue 3:* The cost of remediation of Midwest's property is the correct and fair measure of damages under s. 99(2) of the *EPA.*

B. Standard of Review

17 The issues on appeal concern the correct interpretation of s. 99(2) of the *EPA.* Thus, each issue is a question of law. The standard of review on a question of law is that of correctness.

Housen v. Nikolaisen, 2002 SCC 33 at paras 8, 24, [2002] 2 SCR. 235.

PART III -- ARGUMENT

A. Liability Under s. 99(2) of the *EPA* is Not Dependent on Establishing an Actionable Nuisance at Common Law.

18 The objective of environmental legislation is to facilitate preservation of the natural environment for its own sake. Section 99(2) of the *EPA* achieves this by establishing a broad and flexible ground of absolute liability for remediation damages from polluters. In contrast, the common law tort of nuisance facilitates the restitution of parties whose private property rights have been infringed. To conclude that liability under s. 99(2) of the *EPA* depends on establishing an actionable nuisance would frustrate the *EPA's* purpose by conflating it with the patchwork of torts that it aims to supersede. If this court seeks to uphold the intent of the legislature in creating a separate and distinct ground of liability for polluters who may otherwise evade the common law, a finding of liability under s. 99(2) cannot depend on a finding of nuisance.

S. M. Makuch, "The Spills Bill – An Overview", in Stanley M. Makuch, ed, *The Spills Bill: Duties, Rights and Compensation* (Toronto: Butterworths, 1986) at 31 [Makuch].

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

19 Thorco has been in breach of MOE guidelines since 1988 and has allowed the gross escape of toxic PHC chemicals well above MOE standards from their unapproved storage facilities into the natural environment for decades. A polluter of this caliber must not be permitted to avoid liability under s. 99(2) based on failure to meet common law requirements not contained in the statute.

Midwest CA, supra para 8 at paras 12 and 20.

(i) *The Common Law Torts Provide an Insufficient Patchwork of Liability for Polluters*

20 The torts of trespass, nuisance, negligence, and *Rylands v Fletcher* are longstanding heads of damage in the English common law. Their focus is not environmental protection, but the individual's interest in private property as an incident of possession. These torts have been ineffective in imposing liability on polluters where damage to property rights or interests is not apparent. Not all pollution necessarily results in the inability to use or enjoy ones land. In short, "the common law has created a patchwork of liability under which it is uncertain when liability for spills can be found."

Makuch, *supra* para 18 at v.

Ontario (Environment) v Castonguay Blasting Ltd, 2012 ONCA 165 at para 42, [2012] OJ No 1161.

21 Thorco suggests that the tort of nuisance is the prerequisite to liability under s. 99(2). Nuisance is defined as "physical injury to land or the substantial interference with the use and enjoyment of land." Its emphasis is on the extent and nature of damage, which must be substantial and unreasonable, and relates only to injury to private property. Although none of the aforementioned torts sufficiently compensate victims of pollution, nuisance is especially ineffectual due to both the uncertainty and context-specific nature of the "substantial and unreasonable" requirement, as well as the array of available defences. Nuisance is particularly problematic in the environmental context because property remediation is not an available remedy, and thus the damage award need not be used for remediation.

> J.W. Harbell, "Common Law Liability for Spills", in Stanley M. Makuch, ed., *The Spills Bill: Duties, Rights and Compensation* (Toronto: Butterworths, 1986) at 4, 3, 1, 12 [Harbell].

(ii) *A Statutory Interpretation Analysis Supports the Conclusion that s. 99(2) is a Separate and Distinct Ground of Liability for Polluters*

22 Given the inherent limitations of the common law torts to address pollution in a timely and effective manner, the legislature saw the need for updated legislation to reflect widespread societal respect for environmental protection. The following statutory interpretation analysis demonstrates how the inherent limitations of the common law prompted the introduction of the "Spills Bill" and the creation of a separate and distinct ground of liability in s. 99(2).

> Harbell, *supra* para 21 at 2

a. The Interpretive Approach to Environmental Legislation

23 There is one prevailing and preferred approach to statutory interpretation in Canada, articulated by Elmer Driedger and repeatedly cited by the SCC. This modern or "purposive" approach requires that "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 Ltd Partnership v Rex*, 2002 SCC 42 at para 26, [2002] 2 SCR 559 [*Bell ExpressVu*].

24 Binding case law specific to the environmental context has clarified that the *EPA* has a remedial and preventative purpose, which must be considered when interpreting its scheme and procedures. The SCC in *R v Canadian Pacific Ltd* held that remedial legislation must be interpreted generously and expansively. In *R v Castonguay Blasting Ltd*, the SCC held that environmental legislation has a "wide and deep" reach, "because the legislature is pursuing the objective of environmental protection".

R v Consolidated Maybrun Mines Ltd, [1998] 1 SCR 706 at para 54, [1998] SCJ No 32 [*Consolidated Maybrun Mines*].

R v Canadian Pacific Ltd, [1995] 2 SCR 1031 at para 84, [1995] SCJ No 62 [*Canadian Pacific*].

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

b. Plain Language and Legislative Intent

25 In light of the foregoing, a plain language analysis of Part X, entitled "Spills", reveals that s. 99(2) creates a broader right than the common law, and thus cannot depend on the common law.

26 The *EPA* contemplates a broad number of environmental injuries. Section 99(2) of the *EPA* provides that "any 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." "Loss or damage" in s. 99(1) includes "personal injury, loss of life, loss of use or enjoyment of property and pecuniary loss, including loss of income." Subsection 1(1) provides eight definitions of "adverse effect," including "impairment on the quality of the natural environment for any use that can be made of it."

EPA, *supra* para 18 ss. 1(1), 99(1) and 99(2).

27 These provisions provide a complete test. The most important factor in determining the relationship between the legislation and the common law is the court's opinion on what is needed to "ensure a coherent and effective operation of the law." Section 99 has 13 subsections and each key term is defined somewhere in the Act. Part X is clear and unambiguous.

Ruth Sullivan, *Construction of Statutes*, 6th ed (Markham, ON: LexisNexis, 2014) at §17.10 [Sullivan].

28 The test's language also demonstrates its independence from the common law. First, the phrase "likely to cause" broadens the tortious requirement of actual physical damage, making potential damage actionable. Second, the definitions for adverse effect include "injury or damage to property or to plant or animal life." This is an important departure from the common law.

EPA, *supra* para 18 ss. 99(2)(a)(i), 1(1).

29 Third, s. 99(2) is not concerned with intent, reasonable use, escape, foreseeability or due diligence. Instead, it focuses on the ownership and control of the pollutant. Section 99(6) specifically provides that liability under s. 99(2) does not depend upon fault or negligence. The legislation also removes problems with standing and "takes away judicial discretion with respect to the extent of damages required before damages or cleanup is awarded." Foreseeability, neighbourhood character, and other evidentiary issues are also deliberately omitted.

Makuch, *supra* para 18 at 31.

EPA, *supra* para 18 s. 99(6).

Harbell, *supra* para 21 at 25.

30 The plain language of the legislation demonstrates that s. 99(2) is not the statutory equivalent of nuisance. First, "loss of enjoyment of normal use of property," is listed as one of the eight "adverse effects" actionable under s. 99(2). Although this language is similar to nuisance, a plaintiff seeking damages under this ground need not address the evidentiary requirements, judicial discretion, and defences applicable to nuisance. Second, there are seven other "adverse effects" unrelated to "loss of enjoyment of normal use of property" that result in liability. A finding that these grounds depend on a finding of nuisance would render them futile.

EPA, *supra* para 18 s. 1(1).

31 Legislation is paramount over the common law and courts must give effect to the intention of the legislature in changing, adding to, or displacing it. The SCC has held that if the legislature is clear and unambiguous about their intention to do so, courts must give way and allow the provisions of the statute to prevail. The *EPA* is a "public law regime", and thus courts generally decline to revert to private law principles given their differing purposes.

Sullivan, *supra* para 27 at §17.4, 17.5 and 17.10 [Sullivan].

Rawluk v Rawluk, [1990] 1 SCR 70, 65 DLR (4th) 161.

Goodyear Tire & Rubber Co of Canada v T Eaton Co, [1956] SCR 610 at page 614, 4 DLR (2d) 1.

32 The legislature is presumed to know the law. If it intended for this new cause of action to rely on the tort of nuisance, it would have done so. By creating a distinctive test for liability, they have expressly stated the opposite. Imposing additional common law requirements directly contradicts the legislature's intent of imposing absolute liability for clean-up costs.

Midwest CA, supra para 8 at para 74.

Faieta, Mario D et al, *Environmental Harm: Civil Actions and Compensation* (Markham, ON: Butterworths, 1996) at 143.

c. Object and Purpose of the "Spills Bill"

33 An inquiry into the object and purpose of the statute and its historical origins can help resolve any perceived ambiguities regarding legislative intent. This inquiry is guided by sources regarding the context of the statute's enactment, specifically the subject matter of the legislation and context of the subject matter at the time of enactment.

Bell v Grand Truck Railway, (1913) 48 SCR 561 at para 4, 15 DLR 874.

R v Gladue, [1999] 1 SCR 688 at para 25, 171 DLR (4th) 385.

Canadian Pacific Railway v James Bay Railway, (1905) 36 SCR 42 at paras 89-90.

CED 4th (online), *Statutes*, "Interpretation of Statutes: Common Law Rules: Origin and History of Statute: General" (III.3.(j).(i)) at §127.

34 Part X, commonly referred to as the "Spills Bill", was enacted in 1979 and came into force in 1985. On the introduction of the revised Bill 24, then Minister of the Environment the Hon. Dr. Harry Parrot identified the purpose and objectives of the amendments:

> The purpose of the bill is to impose clear responsibility to clean up and provide for more immediate and more effective action in these environmental emergencies and to provide a **<u>better mechanism</u>** for recovering costs and damages from the responsible parties.
>
> [Emphasis added.]

Ontario, Legislative Assembly, *Official Report of Debates (Hansard)*, 31st Parl, 3rd Sess, No 8 (27 March 1979) at 255 (Hon Dr Harry Parrot) [Legislative Assembly 31st Parl, 3rd Sess].

35 On the bill's first reading, the Minister identified that in order to achieve its purpose, the legislation would broaden the Ministry's authority to order clean-up and restoration, and create liability for compensation for spill damage which "clarifies and extends the right to compensation at common law." He also highlighted that the current common law and existing *EPA* provisions are "inadequate in spelling out the necessary procedures to control and clean up spills and restore the natural environment."

Ontario, Legislative Assembly, *Official Report of Debates (Hansard)*, 31st Parl, 2nd Sess, No 151 (14 December 1978) at 6178 (Hon Dr Harry Parrot) [Legislative Assembly 31st Parl, 2nd Sess].

36 Legal commentary consistently supports the conclusion that the Spills Bill "attempts to deal with pollution by fundamentally reforming the common law." Stanley M Makuch, in his text *The Spills Bill: Duties, Rights and Compensation*, writes:

> The [Spills Bill] seeks to prevent a situation where parties involved in a spill are in any way hesitant to clean up a spill because to do so might be an admission of common law liability while the pollution problem from the spill worsens because of the spreading of leaching of the pollutant.
>
> Makuch, *supra* para 18 at 30.

37 Makuch's interpretation aligns with the *EPA*'s purpose and its goal of "the protection and conservation of the natural environment", expressed in s. 3(1). His interpretation also suggests that Part X operates independently from the common law.

> *EPA*, *supra* para 18 s. 3(1).

38 A third commentator, J W Harbell, refers to the purpose of the Spills Bill in relation to the patchwork of common law torts discussed earlier. Harbell also views the common law torts and Part X of the *EPA* to exist concurrently, yet independently:

> Given the choice between often conflicting or unduly narrow common law heads of liability and a statutory scheme that promotes clean-up and provides compensation, claimants will rely on the new scheme, perhaps causing the common law in the area to become obsolete.
>
> Harbell, *supra* para 21 at 25.

(iii) ***Case Law Does Not Support a Finding that Nuisance Underlies s. 99(2)***

39 There is limited case law interpreting s. 99(2). No reported cases have addressed the statutory ground's interaction with the common law. However, Thorco submits that *Hollick* is an authority for the proposition that a common law nuisance is a prerequisite for s. 99(2) liability. This conclusion is misguided.

40 *Hollick* concerned a class action certification motion. The plaintiffs in *Hollick* pleaded nuisance, negligence, *Rylands v Fletcher*, and s. 99 of the *EPA*. They were denied certification as a class action due to a lack of commonality between the class members' claims.

41 Thorco relies on Justice Carthy's statement at paragraph 18 in the Court of Appeal decision that "no 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." This statement may appear to support a nuisance requirement, but certification motions do not consider the merits of a claim.

Hollick v Metropolitan Toronto (Municipality), [1999] OJ No 4747 at para 18, 127 OAC 369 (CA).

42 Class action legislation imposes a procedural rather than merits-based test for certification, as the inquiry does not concern whether the claim is likely to succeed, but whether the suit is appropriately prosecuted as a class action. The denial of certification meant the merits of the claims were never considered. Thus, Justice Carthy's statement does not aid in an interpretation or application of s. 99.

Hollick v Metropolitan Toronto (Municipality), 2001 SCC 68 at para 16, [2001] 3 SCR 158.

43 "Nuisance" was only used as the lowest common denominator to indicate whether each class member had experienced a sufficiently similar irritation at the hands of the defendant. If taken literally, Justice Carthy's statement would also imply that both negligence and *Rylands v Fletcher* are dependent on a finding of nuisance.

44 Section 99(2) of the *EPA* is a distinct ground of liability for polluters separate from the common law. Whether Midwest meets the test for nuisance is therefore irrelevant. Allowing an egregious polluter to avoid liability based on incompatible requirements would prevent the legislative purpose in protecting and preserving the natural environment, and would hamper the progressive advancement of environmental legislation across Canada.

B. Damages are Not Precluded Under s. 99(2) of the *EPA* Where the MOE had Ordered the Defendant to Remediate the Plaintiff's Property.

45 Environmental remediation and compensation to the spill victim are the guiding objectives of both MOE orders under s. 97 and damages under s. 99(2). To conclude that liability under s. 99(2) is precluded where an MOE order is outstanding against the defendant would frustrate these objectives and place these remedies in opposition with one another. These avenues for redress both stem from Part X and must be interpreted concurrently. If this Court wishes to give effect to the intent of the legislature in creating a powerful, no-fault ground of liability for polluters, s. 99(2) damages must not be precluded by an MOE order.

46 A polluter like Thorco must not be permitted to rely on their lack of cooperation with the MOE as a shield from liability for their actions. The environment cannot come to court on its own behalf, and thus legislation governing its protection must be interpreted and applied in such a way that gives effect to its purpose.

(i) *A Statutory Interpretation Analysis Supports the Conclusion that Damages Under s. 99(2) and an MOE Order are not Mutually Exclusive in Law*

47 A modern, purposive and expansive interpretation of both the plain language and purpose of Part X of the *EPA* demonstrate that the remedies provided by s. 99(2) and MOE orders are not mutually exclusive in law.

a. Plain Language and Legislative Intent

48 The plain language of the *EPA* expressly allows for the mutual existence of a damages award under s. 99(2) and an MOE remediation order in s. 99(2)(a)(iii). This provision reads,

> 99(2) Her Majesty in right of Ontario or in right of Canada or any other person has the right to compensation,
>
> (a) for loss or damage incurred as a direct result of,
>
> (iii) neglect or default in carrying out a duty imposed or an **order** or direction made under this Part;
>
> from the owner of the pollutant and the person having control of the pollutant.
>
> [Emphasis added.]

EPA, *supra* para 18 s. 99(2)(a)(iii).

49 The MOE order to remediate 285 Midland was made under s. 97, satisfying the requirement for "an order or direction made under this Part." The continuous leakage of PHC chemicals from 1700 Midland onto 285 Midland constitutes "loss or damage" that was "incurred as a direct result of" Thorco's failure to adhere to the MOE order made five years ago, and several others since 1996.

EPA, *supra* para 18 s. 99(2)(a)(iii).

50 This section not only demonstrates that damages under s. 99(2) are not precluded where an MOE order exists, but that the legislature specifically intended environmental harm caused by the failure to adhere to an MOE order to be one of the three grounds for liability under s. 99(2). A finding that these remedies are complementary is the only reasonable interpretation of the provision and is entirely consistent with the intent of the legislature in creating a powerful, absolute source of liability for polluters. To conclude otherwise would discourage civil proceedings where outstanding MOE orders exist. As demonstrated by s. 99(2)(a)(iii), a civil suit is the next available remedy if regulatory orders fail, and yet victims of pollution would be barred from this option due to the existence of the order. Victims will thus be placed in a catch 22, as the remedies available to them are mutually conflicting yet dependent on one another. Fear of this situation will discourage victims from enforcing their statutory rights in court.

b. Object and Purpose of the "Spills Bill"

51 Both s. 97 and s. 99(2) are both under Part X. As stated by the former Minister of the Environment on the introduction of the Spills Bill, the two broad objectives of Part X are: reducing damage and ensuring compensation, regardless of fault.

Legislative Assembly 31st Parl, 3rd Sess, *supra* para 34 at 255.
Legislative Assembly 31st Parl, 2nd Sess, *supra* para 35 at 6178.
Faieta, *supra* para 32 at 143.

52 Permitting polluters to avoid liability under s. 99(2) on the basis that an MOE order is extant would undermine these objectives. An MOE order has not motivated Thorco to take action to restore the environment, let alone in a timely fashion. Also, an order should not be used as a defence to no-fault liability, especially where the MOE has declared its future redirection. If due diligence is not an acceptable defence to s. 99(2), a preliminary order under the same statute

is not either. A finding that s. 99(2) and an MOE order are mutually exclusive would frustrate the first objective.

53 Without a court order, Midwest is unlikely to receive any compensation at all, and thus the MOE order in this case is unable to satisfy the second objective of the legislation. A finding of liability under s. 99(2) is the next available remedy to ensure the victim of the pollution is compensated. To conclude otherwise would result in fewer MOE remediation orders, particularly in situations where the polluter shows signs of non-compliance with MOE authority. MOE officials will be discouraged from issuing orders for fear of blocking a future civil suit. The MOE should be free to enforce its enacting legislation without fear that its decisions will affect the availability of private remedies to victims of pollution.

(ii) ***Double Recovery is a Non-Issue on the Facts of the Case***

54 At trial, Justice Pollack expressed concern that an award of remediation damages under s. 99(2) would result in double recovery for Midwest, given the outstanding MOE order. The circumstances of this case, specifically Thorco's conduct and the MOE's intervener status in the previous appeal, demonstrate that double recovery is not an issue.

55 Thorco has been the subject of numerous MOE orders since 1996, none of which have been properly complied with to this day. Five years have passed since the specific order to remediate 285 Midland was issued, and no steps have been taken toward investigation or remediation. Thorco's conduct demonstrates that the MOE will not be able to force them to execute a plan for remediation without a court order. Thus, absent a judgment in their favour from this Court, Midwest is likely to receive no recovery, let alone double recovery, for the pollution of their property.

Midwest CA, *supra* para 8 at paras 12, 13, and 32.

56 The MOE was granted intervenor status at the Court of Appeal. They agreed to redirect the order to Midwest in the event they are successful in obtaining damages from Thorco. The redirection of the order makes double recovery a non-issue.

(iii) *MOE Orders Must Not be Used as a Shield by Polluters to Avoid Liability Under the* **EPA**

57 Permitting Thorco to use their outstanding MOE order as a shield from liability under the *EPA* would set a dangerous precedent, as neither plaintiffs nor the environment should have to suffer because an MOE remediation order is ineffective.

58 Thorco has demonstrated for decades their disinclination to cooperate with MOE standards, officials, and orders. The MOE's efforts to bring Thorco into compliance with environmental laws have been ineffectual. In cases like this where regulatory orders are continuously ignored, it is the victim's legal right to seek a court-ordered remedy enforcing their statutory entitlement to damages. As Faieta put it, "the impetus behind Part X of the [*EPA*] was the Ministry of Environment's perceived lack of authority to ensure that spills were cleaned up in a timely fashion." Thus, s. 99(2)(a)(iii) is an express remedy to this problem.

Faieta, *supra* para 32 at 143.

59 Midwest does not submit that a s. 99(2) claim should be the first step in triggering remediation, but that Thorco's conduct has made this necessary in order to achieve a just result. As stated by the Hon. Dr. Harry Parrot, "those who create the risk should pay for restoration as a reasonable condition of doing business; it is not up to an innocent party whose land or property has been damaged." If this Court finds extant MOE orders to be a permissible shield from liability under s. 99(2), the burden of their ineffectuality will fall onto the shoulders of the victim, who will not be compensated, and the environment, which will not be remediated.

Legislative Assembly 31st Parl, 2nd Sess, *supra* para 35 at 6178.

60 To conclude, damages under s. 99(2) of the *EPA* are not precluded where the MOE has ordered the defendant to remediate the plaintiff's property. The facts of the case demonstrate that double recovery is not an issue, given Thorco's history of inaction and the MOE's redirection of the order to Midwest. The Spills Bill's plain language demonstrates that the two remedies are not mutually exclusive in law. The intent of the legislature, clearly expressed in s. 99(2)(a)(iii), was to provide a right of action specifically for situations where environmental damage is caused by a polluter's failure to adhere to an MOE order. To conclude otherwise would frustrate the legislature's intent in creating a flexible, no-fault ground for liability, and set a dangerous precedent that MOE orders can be used as a shield to avoid this liability.

C. The Cost of Remediation of Midwest's Property is the Correct and Fair Measure of Damages Under s. 99(2) of the *EPA*.

61 Under s. 99(2), Thorco must pay the full cost of remediation at 285 Midwest. The Appellants submit that s. 99(2) does not entitle Midwest to any compensation or alternatively to only partial remediation. However, a plain language assessment of s. 99(2) combined with purposive analysis of the *EPA* and Part X of the Act does not support this conclusion.

> *Thorco v Midwest,* 2017. SEMCC File Number: 03-04-2017 (Factum of the Appellant at paras 73 and 75) [FOA].

(i) *Section 99(2) of the* EPA *Codifies the Polluter Pays Principle and Requires Thorco to Pay to Remediate the Pollution it Caused at 285 Midwest*

62 Applying Driedger's modern approach to statutory interpretation leads to the conclusion that s. 99(2) of the *EPA* codifies the polluter pays principle ("PPP") and imposes strict liability on polluters. Thorco, in its substandard care and control of the waste PHCs on its property polluted the property of its neighbour, Midwest. While the PPP is not expressly within the *EPA*, it is embodied within the text and intent of s. 99(2).

> *Bell ExpressVu*, *supra* para 23 at para 26.
>
> Sullivan, *supra* para 27 at §7.

63 The overarching title of s. 99(2) is "Right to Compensation", indicating that this section of the *EPA* grants a statutory right to be compensated for pollutant spills. Section 99(2) specifically states that a plaintiff,

> 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, […..]
>
> (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.

> *EPA*, *supra* para 18 s. 99(2).

64 Although subsections 99(2)(a) and (b) envision two different pollution scenarios, a plain language assessment of s. 99(2) indicates that the legislature intended to require polluters to pay for the "loss or damage" or the "cost and expense" of their pollution. This language is the foundation of the PPP.

65 Applying the plain meaning of s. 99(2)(a) to the facts of this case, Midwest is entitled to compensation in two ways. First, Thorco caused a "spill" of a pollutant as per s. 91(1) that migrated onto the property of Midwest. The pollutant levels at 285 Midwest exceeded the MOE's risk-based guidelines established to protect human and ecological health. This is sufficient evidence to find that the spill likely caused an "adverse effect" as defined in s. 1(1).

EPA, *supra* para 18 ss. 1(1), 91(1).

66 Second, the CoA imposed a duty on Thorco to properly store and manage the quantity of waste PHC at 1700 Midland. Thorco neglected this duty for more than two decades, including the period after Midwest purchased 285 Midwest. Furthermore, the MOE issued multiple orders under Part X requiring Thorco to adequately store, control, and clean up the pollutants on 1700 Midland and anywhere the pollutants had migrated. Two of these orders (2008 and 2012) were issued after Midwest purchased 285 Midwest. Thorco neglected or evaded these orders.

67 Third, it is an undisputed finding from Justice Hourigan's decision that Thorco owned and had exclusive control of the pollutant that was released.

Midwest CA, *supra* para 8 at paras 82 and 89.

68 On these facts Midwest has a right to compensation under s. 99(2). The issue is what type of compensation is Midwest entitled to.

69 The legislature defined several key terms used in s. 99(2) that lead to the finding that Midwest is entitled the future cost of remediation. In particular, "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." This non-exhaustive definition is meant to "emphasize the broad range of general language and to ensure that it is not inappropriately read down so as to exclude something that is meant to be included."

EPA, *supra* para 18 s. 99(1).

Sullivan, *supra* para 27 at §4.39.

70 In this case, there was a pecuniary loss which can be interpreted to include the future cost for remediation. The SCC in *Castonguay* stated that the *EPA* is "remedial legislation" that requires a generous interpretation. This extends to pecuniary loss. The SCC, in detailing the heads of damages in a trilogy of cases from 1978, described pecuniary loss to include past, present and future economic loss. As Midwest has not yet started remediation, there is a future pecuniary loss associated with remediating the contamination caused by Thorco and Midwest has a right to compensation for its pecuniary loss under s. 99(2).

Castonguay Blasting, *supra* para 24 at para 9.

Andrews v Grand & Toy Alberta Ltd. 1978 2 SCR 229, 83 DLR (3d) 452.

Thorton v Board of School Trustees of School District No. 57 (Prince George), 1978 2 SCR 267, 83 DLR (3d) 480 at para 41.

Arnold v Teno, 1978 2 SCR 287, 83 DLR (3d) 609 at para 112.

71 Finally, while the Appellants submit that Midwest may only be entitled to partial remediation costs, this position does not adhere to the plain language used in s. 99(4)(i) and (ii). In qualifying the defences under s. 99(3), the *EPA* is clear that polluters are to:

> (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;

EPA, *supra* para 18 s. 99(4)(i) and (ii).

72 The focus on ameliorating adverse effects and restoration of the natural environment indicates that full remediation is the required form of compensation in this case. This textual analysis is also in harmony with the broader purpose of the *EPA* and Part X of the Act.

(ii) *As the Codification of the Polluter Pays Principle, the Purpose of Part X and s. 99(2) Require the Full Remediation of 285 Midwest*

73 A purposive analysis of the *EPA* and Part X of the Act also leads to the conclusion that the Act codifies the PPP and that Midwest is entitled to compensation for the full cost of remediation. When introducing the "Spills Bill", the Hon. Dr. Harry Parrot, described Part X as having a number important objectives including imposing liability on polluters for the cost of cleanup and restoration and to establish liability for compensation for cleanup costs.

Legislative Assembly 31st Parl, 3rd Sess, *supra* para 34 at 255.

74 The *EPA's* stated purpose is "to provide for the protection and conservation of the natural environment", full remediation is more in line with this goal. This proposition is strengthened by the SCC's and Ontario Court of Appeal's broader summary of the purpose of the *EPA* which is "to protect the natural environment and the people who live, work and play in it."

> *EPA*, *supra* para 18 s. 3(1).
>
> *Castonguay Blasting*, *supra* para 24 at para 11.
>
> *R v Dow Chemical Canada Inc*, 2000 CanLII 5685 (ONCA) at para 49, 47 OR (3d) 577.

75 The *EPA*'s public protection element indicates that the Act is also public welfare legislation. As Justice Dickson stated in *Sault Ste. Marie,* public welfare legislation "involve[s] a shift of emphasis from the protection of individual interest to the protection of the public and social interests." Applying s. 99(2) in accordance with this purpose balances both interests: the public's interest in having a clean environment and the individual's interest in exercising their right to have their immediate environment (i.e. their property) restored by those who may pollute it.

> *R v City of Sault Ste Marie*, 1978 CanLII 11 (SCC), [1978] 85 DLR (3d) 161 at page 172 [*Sault Ste. Marie*]

76 Considering the PPP, Thorco must pay for their pollution under s. 99(2) and compensate Midwest for the full cost to restore the natural environment of 285 Midwest. It would be absurd to limit the assessment of "damage and loss" under s. 99(2) to the diminution of property value or to partial remediation as this would not meet the main purpose of the *EPA* and would fall short of reflecting the PPP, embodied within of Part X.

77 The PPP is an established principle of Canadian environmental law. In *Imperial Oil*, Justice Lebel, noted that the *EPA* is one of the many Canadian environmental statutes which have incorporated the PPP, either expressly or impliedly.

> *Imperial Oil Ltd v Quebec (Minister of the Environment)*, 2003 SCC 58, [2003] 2 SCR 624 at para 23 [*Imperial Oil*].

78 Although the Appellants concede this point, they submit that the PPP does not define the appropriate type of damages. However, the most globally recognized definition of the PPP suggests otherwise. The sixteenth principle of Article 21 of the *Rio Declaration on Environment and Development* states that:

> National authorities should endeavour to promote **the internalization of environmental costs and the use of economic instruments**, taking into account the approach that the polluter should, in principle, bear the cost of pollution, with due regard to the public interest and without distorting international trade and investment. [Emphasis Added]

FOA, *supra* para 61 at para 87.

Rio Declaration on Environment and Development, 14 June 1992, UN Doc. A/Conf. 151/5/Rev. 1, online: United Nation Environment Program <http://www.unep.org/documents.multilingual/default.asp?documentid=78&articleid=1163>.

79 The SCC in *Spraytech* used the "precautionary principle" articulated in Article 21 to aid in interpreting domestic environmental legislation. Likewise, the PPP of Article 21 may be used to interpret s. 99(2) as promoting the internalization of environmental costs. As such, Thorco cannot be permitted to download the negative external costs of its business onto Midwest. Interpreting s. 99(2) as providing compensation for diminution of value or partial remediation would enable the externalization of environmental costs.

114957 Canada Ltée (Spraytech, Société d'arrosage) v Hudon (Ville), 2001 SCC 40, [2001] 2 SCR 241 at para 31 [*Spraytech*].

80 Such an interpretation would also shackle Midwest with the ongoing stigma of owning a contaminated property as well as the potential liability that the contamination which they did not cause may subsequently migrate to other neighbouring properties. The Courts in *Tridan* rejected the partial remediation approach to damage compensation for precisely this reason. Furthermore, diminution of value and partial remediation would require an innocent party to pay for the addition cost of full remediation to avoid possible future litigation. Imposing such a duty was not the intent of s. 99(2) and does not reflect the environmental protection purpose of the *EPA*.

Tridan Developments Ltd v Shell Canada Products Ltd, [2000] OJ No 1741, 35 RPR (3d), aff'd [2002] OJ No 1, [2002] OTC 364 at para 18 [*Tridan*].

81 *Tridan* and other decisions from jurisdictions across Canada highlight the culmination of a progressive trend toward embracing the PPP and requiring polluters to pay to restore the environment. The traditional test for making this determination was based on tort law and the "reasonableness of the plaintiff's desire to reinstate the property" (*Jens*). However, the SCC in *Imperial Oil* found that modern environmental protection statutes "assign polluters the responsibility for remedying contamination for which they are responsible and imposes on them the direct and immediate costs of pollution."

> *Canadian Tire Real Estate Ltd v Huron Concrete Supply Ltd*, 2014 ONSC 288, ACWS (3d) 998 at paras 321 and 322, 242.
>
> *Jens v Mannix Co.*, 1978 CanLII 1962 (BC SC), 89 DLR (3d) 351 at p 354 [*Jens*].
>
> *Imperial Oil Ltd, supra* para 77 at para 24.
>
> *JI Properties Inc v PPG Architectural Coatings Canada Ltd*, 2015 BCCA 472 at para 29.
>
> *R v Northwest Territories Power Corp*, 2011 NWTTC 3, [2011] NWTJ No 7 (QL) .
>
> *Gas Plus Inc. Re*, 2012 CarswellAlta 1834, [2013] AWLD 279 at para 82.
>
> *Boart Longyear Inc v Mudjatilc Enterprise Inc*, 2014 SKQB 410 at para 25, 463 Sask R1.
>
> *Nova Scotia (Attorney General) v Marriot 2008*, NSSC 160, 265 NSR (2d) 314 at paras 39 and 60.

82 Finally, as stated by the Ontario Law Reform Commission, it must be the "ultimate goal" of the courts to impose damages that restore the environment from its pre-contaminated condition. It is of utmost importance that "adequate levels of compensation [are applied]…in order to deter polluters and to ensure the continued existence of our ecosystems." This latter point reiterates the opinion of the Law Reform Commission of Canada, which stated that if penalties are not strict enough it will "result in the erosion of respect for environmental laws and their enforcement" and as such, penalties "must not appear to be a mere licence" to pollute.

> Ontario Law Reform Commission, *Report on Damages for Environmental Harm* (Toronto: Ontario Law Reform Commission, 1990), at pp 55-56.
>
> Law Reform Commission of Canada, *Sentencing in Environmental Cases: Protection of Life Series* (Ottawa: Department of Justice Canada, 1985) at pp 14 and 16.

83 Therefore, Thorco must pay compensation for the full cost of remediation under s. 99(2). This is the only valid interpretation that upholds the EPA's environmental restoration polluter pays objectives, while ensuring that polluters like Thorco are deterred from careless storage and management of pollutants.

PART IV -- SUBMISSIONS IN SUPPORT OF COSTS

84 The Respondent requests an order for costs from the Appellant for this appeal and for the decisions below.

PART V -- ORDER SOUGHT

85 The Respondent respectfully submits that this Honourable Court dismiss the appeal and uphold the decision of the Ontario Court of Appeal.

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

_____
Nina Butz

_____
Myles H Thompson

Counsel for the Respondent
Midwest Properties Ltd.

PART VI -- TABLE OF AUTHORITIES

PART VII -- LEGISLATION AT ISSUE

***Environmental Protection Act*, RSO 1990, c E19, sections 1(1) "adverse effect", 97, 99(1), 99(2), 99(4), 99(6) at paras 18, 26, 28, 29, 30, 37, 48, 49, 63, 65, 69, 74.**

Interpretation

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")

Orders by Minister, spills

97. (1) Where a pollutant is spilled and the Minister is of the opinion that there is or is likely to be an adverse effect 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:

1. The owner of the pollutant.
2. The person having control of the pollutant.
3. The owner or the person having the charge, management or control of any real property or personal property that is affected or that may reasonably be expected to be affected by the pollutant.
4. The municipality within whose boundaries the spill occurred.
5. Any municipality contiguous to the municipality within whose boundaries the spill occurred.
6. Any municipality that is affected or that may reasonably be expected to be affected by the spill of the pollutant.
7. Any public authority.
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. R.S.O. 1990, c. E.19, s. 97 (1); 2002, c. 17, Sched. F, Table.

Compensation, spills

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.

Right to compensation

(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.

...

Qualification

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

(a) from liability for loss or damage that is a direct result of neglect or default of the owner of the pollutant or the person having control of the pollutant in carrying out a duty imposed or an order or direction made under this Part; or

(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.

…

Liability

(6) Liability under subsection (2) does not depend upon fault or negligence.

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 # 2017-10

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