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 # 2017-12

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

AND TO: ALL REGISTERED TEAMS

TABLE OF CONTENTS

Page No.

PART I -- OVERVIEW AND STATEMENT OF FACTS

A. Overview of the Respondent's Position

1 There are three central issues in this appeal. First, the Respondent ("Midwest") submits that s 99(2) of the *Environmental Protection Act* ("*EPA*") establishes a statutory cause of action which does not require an actionable nuisance be proven. A plain reading of Part X, and the *EPA* more generally, illustrates that the common law was not meant to be incorporated into s 99(2). Whilst some similarities may exist between s 99(2) and a number of common law torts, the intent behind Part X of the *EPA* was to transcend tort law's limitations in the environmental sphere. Moreover, even if an actionable nuisance were required, Midwest can prove damages based on the risks waste petroleum hydrocarbons ("PHCs") pose to human health and the need for restoration costs.

Environmental Protection Act, RSO 1990, c E 19, s 99(2) [*EPA*].

2 Second, the Respondent submits that recovery should not be precluded simply because there is an outstanding Ministry of the Environment and Climate Change ("MOE") order for remediation against the Appellants ("Thorco"). Nothing in the *EPA* indicates that an action under s 99 and MOE orders are mutually exclusive.

3 Although the Appellants raise concerns about double recovery, the real risk in this case is no recovery. A mere risk of double recovery should not preclude an award. The record of evidence demonstrates that the risk is very remote, and there are numerous safeguards to prevent double recovery from occurring.

4 Third, the Respondent submits that restoration costs are a more appropriate measure of damages than compensation for a diminution in property value. Because the *EPA* is an environmental statute, which has as its core purpose protection and conservation of the environment, remediation costs to clean up the pollution are most consistent with the Act. Jurisprudence suggests a trend in favour of remediation costs. Moreover, principles of environmental law such as polluter pays and intergenerational equity which are nestled in the

foundation of the *EPA*, would not be satisfied by any award which provides inadequate funds for restoration.

5 The Respondent requests that the Honourable Supreme Environmental Moot Court of Canada ("SEMCC") uphold the ruling of the Court of Appeal in its entirety, and preserve the integrity of this statutory cause of action for future victims of environmental harm.

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

(i) *Statement of Facts*

6 The Respondent takes issue with the presentation of many of the facts as set out by the Appellants.

7 The case at bar deals with a severe case of environmental contamination, persisting over decades. In the words of Ministry of Environment Officer Mitchell, the Appellants' storage of spent refinery catalyst and other PHCs was "probably some of the worst I have ever seen."

> *Midwest Properties Ltd v Thordarson*, 2015 ONCA 819 at para 9, 128 OR (3d) 81 Hourigan JA [*Midwest* CA].

8 The Respondent, Midwest Properties ("Midwest") purchased the property located at 285 Midwest Road in an industrial area in Toronto in 2007. The adjoining property at 1700 Midland Avenue is owned by the Appellants, Thorco Contracting Ltd ("Thorco") and its owner, Mr. Thordarson. Prior to purchasing the land, Midwest conducted a Phase I Environmental Audit on the property, which suggested further inspection was not required.

> *Midwest* CA, *supra* para 7 at para 9.

9 For decades, Thorco has stored large volumes of petroleum hydrocarbons (PHCs) on its property in excess of the Certificate of Approval granted by the MOE. Refuse furnace oil and other PHCs were kept on the property in near-constant breach of the standards set out in the *EPA.*

> *Midwest* CA, *supra* para 7 at paras 2, 20.

10 Additionally, Thorco was convicted in 2000 for *EPA*-related offences including improper storage of PHCs. Thorco was ordered to remove "significant quantities" of oil sludge from its property, and to comply with the Certificate of Approval granted in 1988. Decades later, Thorco

continues to fall short of its legal obligations. As of 2008, waste present on site was still being stored incorrectly.

Midwest CA, *supra* para 7 at paras 16-17.

11 Groundwater flows from Thorco's property onto Midwest's property. As a result of Thorco's storage practices, the soil and groundwater on its property has become contaminated in alarming concentrations. Monitoring wells were set up to monitor contamination on Midwest's property. Concentrations of volatile PHCs were so high that it was observed as "free product" and posed a health risk to occupants on the property. In comparing tests from 2008, 2011, and 2012, Midwest's expert found that the conditions on Midwest's property were deteriorating. Midwest's experts valued the cost of remediation of Midwest's property at approximately $1.3 million.

Midwest CA, *supra* para 7, at paras 12-15, 25-26.

12 Mr. Vanin, an expert on environmental site assessment, testified for Midwest at trial. He identified three concerns with contaminated property: potential third-party liability as a result of offsite contaminant migration, diminution of the value of the property, and the ability to use property as collateral. Mr. Tossell, an expert in environmental assessment and rehabilitation, testified that contaminated property carries a stigma that results in reduced interest from prospective buyers.

Midwest CA, *supra* para 7 at paras 28-30.

13 At the time of the trial, Thorco had completed some work pursuant to the January 19, 2012 MOE, but they were not complying with the specified timeframes. As a result, Thorco was in breach of the order. On the date of the appeal, no work had been undertaken to remediate Midwest's property.

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

(ii) ***Procedural History***

14 Pollak J (the "trial judge") held that Thorco and Mr. Thordarson were not liable under nuisance, negligence, or s 99(2) of the *EPA*. The trial judge found that Midwest failed to prove that it had suffered damages. She also ruled that because the MOE had already ordered Thorco to remediate Midwest's property, Midwest was barred from pursuing a remedy under s 99(2) so as to avoid double recovery.

Midwest v Thordarson, 2013 ONSC 775 at paras 20, 23, 31, 41, 73 CELR (3d) 303 Pollak J [*Midwest* Sup Ct].

15 The Ontario Court of Appeal set aside the trial court's decision, and found Thorco to be liable under s 99(2) of the *EPA*, nuisance, and negligence. He reasoned that the spills section of the *EPA* has two main goals:

1) to minimize harm to the environment from spills through a "no fault clean-up" scheme; and
2) to give a statutory right to recovery to parties that suffer damage as a result of the spill.

The legislative intent was to create a separate, distinct ground of liability for polluters; therefore use of s 99(2) cannot be barred simply because the MOE has already ordered remediation.

Midwest CA, *supra* para 7 at paras 44-45, 111.

16 The Court of Appeal also determined that the quantum of damages paid should be the cost of remediating 285 Midwest. Hourigan JA held that restricting damages to the diminution in value of the property contradicts the wording of the Act, a trend in the common law towards restoration cost awards, the polluter pays principle, and the purpose of Part X of the *EPA*.

Midwest CA, *supra* para 7 at para 70.

17 Hourigan JA also determined that Midwest did suffer damage for two reasons. First, concentrations of PHCs increased after they purchased the land. Second, these PHCs posed a human health risk. Therefore, damages were awarded based on the nuisance and negligence claims, holding the Appellants jointly and severally liable. Punitive damages were also awarded to Midwest on the basis that Thorco demonstrated "a wanton disregard for its environmental obligations."

Midwest CA, *supra* para 7 at paras 98, 104, 116, 112.

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

18 The Respondent submits:

(a) that the Court of Appeal is correct in finding that liability under s 99(2) is not dependent on establishing an actionable nuisance at common law;

(b) that the Court of Appeal is correct in finding that damages are not precluded under s 99(2) where the MOE had ordered the defendant to remediate the plaintiff's property; and

(c) that the Court of Appeal is correct in finding that the appropriate measure of damages under s 99(2) was the cost of remediation of the plaintiff's property as opposed to diminution in value.

A. The applicable standard of review for all three issues is correctness

19 The questions raised before this Court are questions of law and therefore should be reviewed on a correctness standard, as set out by the Supreme Court of Canada ("SCC") in *Housen v Nikolaisen*. "On a question of pure law, the basic rule with respect to the review of a trial judge's findings is that an appellate court is free to replace the opinion of the trial judge with its own. Thus the standard of review on a question of law is that of correctness."

Housen v Nikolaisen, 2002 SCC 33 at para 8, [2002] 2 SCR 235 [*Housen v Nikolaisen*].

PART III – ARGUMENT

A. Section 99(2) establishes a statutory cause of action, and nuisance need not be proven

(i) *Basic Principles of Statutory Interpretation in the Environmental Context*

20 Legislation, case law, and rules of statutory interpretation demand that the *EPA* be given a robust and remedial interpretation. Section 99 of the *EPA*, and Part X more generally, must be considered with the following principles in mind.

21 According to s 64(1) of the *Legislation Act, 2006*, all legislation in Ontario is deemed to be remedial, and must "be given such fair, large and liberal interpretation as best ensures the attainment of its objects."

Legislation Act, 2006, SO 2006, c 26 Sch F, s 64 [*Legislation Act, 2006*].

22 The modern approach to statutory interpretation establishes 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*].

23 In order to understand and interpret s 99 of the *EPA*, it is necessary to look at the provision in its entire context, including the entire Act itself, its placement within the act, and the purposes behind the legislation's enactment.

24 Hansard is a valuable resource to understand the purposes behind the legislation. According to Ruth Sullivan, the idea that extrinsic aids need be excluded "should be abandoned" as an archaic vestige of the plain meaning rule. Sullivan explains that one can only deem a provision clear at the end of the interpretation exercise, after examining *all* of the relevant evidence. This includes legal context, evidence of legislative intent, and evidence of "external context."

> Ruth Sullivan, *Sullivan on the Construction of Statutes*, 6th ed (Markham, Ontario: LexisNexis, 2014) at 660 [Sullivan].

25 Scholarly opinion, another helpful extrinsic aid, is "an authoritative source in the interpretation of statutes." It will typically not be given precisely the same weight as jurisprudence, but the Court of Appeal made no error in relying upon it.

> Sullivan, *supra* para 24 at 703.

26 Jurisprudence favours an expansive interpretation of environmental legislation. In *Castonguay Blasting*, the SCC analyzed the *EPA*, determining that environmental legislation must be interpreted broadly. It held that "environmental legislation embraces an expansive approach to ensure it can adequately respond to a wide variety of environmentally harmful scenarios … [b]ecause the legislature is pursuing the objective of environmental protection, its intended reach is wide and deep." The SCC has been remarkably consistent on this point. Jerry DeMarco points out that the SCC "has consistently underlined the importance of environmental protection."

> *Castonguay Blasting Ltd v Ontario*, 2013 SCC 52 at para 9, 3 SCR 323 [*Castonguay Blasting*].
> Jerry V DeMarco, "The Supreme Court of Canada's Recognition of Fundamental Environmental Values: What Could Be Next in Canadian Environmental Law?" (2007) 17 J Entvl L & Prac 159 at 161 [DeMarco].

(ii) ***In the greater scheme of the EPA, the purpose of Part X is to ensure rapid clean-up of spills***

27 The Court of Appeal identified two central purposes of Part X of the *EPA*. First, the statute minimizes harm caused by the spill of pollutants by demanding rapid clean-up, with no determination of fault. Second, Part X provides parties who suffer damage at the hands of a polluter be compensated using s 99(2), a statutory cause of action. Section 99(2) was intended to "superimpose liability over the common law." This design is to avoid prolonging clean-up efforts and having the state of the environment unduly worsened due to squabbling over fault.

Midwest CA, *supra* para 7 at paras 45, 46.

28 Section 3(1) establishes that the *EPA*'s objective is to "provide for the protection and conservation of the natural environment. Any interpretation or application of any part of the Act needs to further this goal.

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

29 The Respondent submits the Court of Appeal's interpretation of Part X is correct because it accords with this overall objective. By requiring rapid clean-up, regardless of fault, Part X prioritizes environmental protection and conservation. In passing Part X of the *EPA*, the Legislature intended to bring an end to the era of injustice for victims of toxic spills.

30 As the Appellants do not refute the Court of Appeal's characterization of the purpose of Part X, it is presumed that the Appellants concede that it is correct.

31 Conservation is defined in *Black's Law Dictionary* as "[t]he supervision, management, and maintenance of natural resources … to prevent them from being spoiled or destroyed; the protection, improvement, and use of natural resources in a way that ensures the highest social as well as economic benefits." *Webster's English Dictionary* defines protection as: "to cover or shield from that which would injure, destroy, or detrimentally affect; secure or preserve."

Black's Law Dictionary, 10th ed, *sub verbo* "conservation" [*Black's Law Dictionary*].
Webster's English Dictionary, 3rd ed, *sub verbo* "protect" [*Webster's English Dictionary*].

32 The plain text of Part X demonstrates that restoring the natural environment after a spill is a central goal. The phrase "restore the natural environment" is used throughout the section. It is mentioned in ss 93(1), 99(4)(b), and 99.1(1) with regard to duties and liabilities of a polluter.

It's also central to the powers of the Minister and Municipalities under Part X, being mentioned in ss 94(3), 97(1-2), 100(1), and 100.1(1).

EPA, *supra* para 1 at ss 93(1), 94(3), 97(1)-(2), 99(4)(b), 99.1(1), 100(1), 100.1(1).

33 Hansard evidence suggests that the Legislature intended Part X to protect the environment and victims of toxic spills, exceeding relief available under the common law. As the Minister of the Environment noted at the time, the "common law and the existing provision of the *Environmental Protection Act* 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 p 6178 [*Hansard* 1978].

34 This interpretation of Part X is strongly supported by academic opinion. Commentators like Stanley Makuch have noted that the purpose of Part X is to "encourage the prompt and complete clean-up of spills." A secondary purpose is to compensate individuals who have suffered because of a spill.

Stanley Makuch, *The Spills Bill: Duties, Rights and Compensation* (Toronto: Butterworths, 1986) at 27 [Makuch].

35 Section 99(2) is a cornerstone of Part X. It is a statutory cause of action which provides victims of pollution a powerful tool to expedite remediation efforts. It allows no-fault recovery to speed up response to toxic spills, minimizing squabbles. Section 99(2) imposes clear responsibility for clean-up of spills. It "clarifies and extends the right to compensation at common law" (Makuch). It provides the compensation for environmental harms that the common law of tort cannot. If s 99(2) is to function effectively, it must not be hampered by the same common law limitations that it was supposed to patch over.

EPA, *supra* para 1 at s 99(2).
Midwest CA, *supra* para 7 at paras 34-36.
Makuch, *supra* para 34 at 25.

(iii) ***Nuisance is not required to establish a claim under s 99(2)***

36 According to the Court of Appeal, actionable nuisance is not required to succeed under s 99(2) of the *EPA*. Hourigan JA reasoned that the cause of action created by s 99(2) is "flexible" and "powerful," removing many traditional tort law requirements "in a stroke." The Court of Appeal held that requiring nuisance be proven at common law "undermines the legislative

objective of establishing a separate, distinct ground of liability for polluters." Hourigan JA also stated that interpreting s 99(2) narrowly is an error of law and that such an interpretation violated the "plain language" of the provision.

Midwest CA, *supra* para 7 at paras 49, 50, 73.

37 The Respondent submits that the Court of Appeal correctly decided that s 99(2) of the *EPA* is a separate cause of action which does not require nuisance be proven. First, a plain reading of the provision gives no indication that the Legislature intended for actionable nuisance to be proved under s 99(2). Second, Hansard and scholarship reveal that s 99(2) is indeed a distinct statutory cause of action which defines damage broadly and transcends the boundaries of the common law. Third, the common law of nuisance should not be read in. Had the Legislature intended it to be a component of 99(2), it would have said so.

38 First, the text of s 99(2) does not support the assertion that the common law tort of actionable nuisance is a component of the statute. A comparison to private nuisance reveals this. In *Antrim Truck*, the SCC defined nuisance as an interference with the owner's use and enjoyment of land that is both substantial and unreasonable. Contrastingly, s 99 of the *EPA* makes no mention of the magnitude of the interference, a central element of the common law action.

Antrim Truck Centre Ltd v Ontario (Ministry of Transportation), 2013 SCC 13 at para 19, [2013] 1 SCR 594 [*Antrim Truck*].

39 Furthermore, s 99(1) provides an expansive conception of "loss or damage," unlike the common law of nuisance. It lists what can be *included* under the section: "loss or damage *includes* personal injury, loss of life, loss of use or enjoyment of property and pecuniary loss, including loss of income" (*emphasis added*). This is a deliberate choice. If the Legislature did not intend for a broad conception of loss or damage, it would not have chosen the word "include."

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

40 In *National Bank of Greece*, La Forest J comments that in legal drafting, the term "including" is used as a term of extension, "designed to enlarge the meaning of preceding words, and not to limit them." Similarly, in *United Taxi Drivers'*, the SCC held that the "use of the word "including" indicates that the list is non-exhaustive."

National Bank of Greece (Canada) v Katsikonouris, [1990] 2 SCR 1029 at para 13, 74 DLR (4th) 197 [*National Bank of Greece*].
United Taxi Drivers' Fellowship of Southern Alberta v Calgary (City), 2004 SCC 19 at para 14, [2004] 1 SCR 485 [*United Taxi Drivers'*].

41 The Appellants claim that "loss of use or enjoyment of property" is all that is relevant under "loss or damage." This narrow reading of "loss or damage" contradicts the plain wording of the legislation. The Legislature chose to characterize "loss or damage" expansively to best serve claimants.

Appellants' Factum at para 31.
EPA, supra para 1 at ss 99(1)-(2).

42 Second, Hansard evidence and academic commentary demonstrate that s 99(2) is broader and distinct from the tort of private nuisance. The Legislature had the inadequate common law squarely in its crosshairs when it enacted Part X of the *EPA*. Makuch, an early commentator on Part X, notes the type of "damage recoverable is very broad," going far beyond the common law.

Hansard 1978, *supra* para 33 at p 6178.
Makuch, *supra* para 34 at 33, 32.

43 Third, nuisance should not be read into the statute. Part X is not integrated into or modified by the common law as the Appellants suggest. According to Sullivan, Courts will not resort to the common law to analyze large-scale regulatory regimes like the *EPA* unless it is necessary. Section 99(2) is clear and does not require the common law of nuisance to be understood.

Sullivan, *supra* para 24 at 540.
Appellants' Factum at para 42.

44 Coincidentally, Sullivan actually uses Part X of the *EPA* as the premier example of a "comprehensive regulatory scheme" where the common law should not be integrated into the statute. When interpreting these public law schemes, "courts generally decline to revert to private law principles." Sullivan cites the *EPA* as the leading example of such a scheme.

Sullivan, *supra* para 24 at 539-541.

45 Moreover, as the Court of Appeal noted, "[i]f the Legislature wanted to define the new cause of action in a manner consistent with the existing common law of nuisance it could have done so. It did not." Part X reveals no intention to codify nuisance, even if language reminiscent

of the common law is present. This has been done elsewhere. For example, the *Perpetuities Act* stipulates at s 2 that "the rule of law known as the rule against perpetuities continues to have full effect," notwithstanding the legislative modifications to the rule made in this piece of legislation.

Midwest CA, *supra* para 7 at para 74.
Perpetuities Act, RSO 1990, c P 9, s 2 [*Perpetuities Act*].

46 This interpretation accords with the presumption that the Legislature has expert understanding of the common law and all requisite knowledge to craft cogent and functional legislation. This "presumption is very far-reaching."

Sullivan, *supra* para 24 at 205.

47 The Appellants reference *Hollick v Toronto (City)* as authority for requiring nuisance to be established to make a claim under s 99(2). This is in error for multiple reasons. First, *Hollick* is not a binding decision and therefore the Court of Appeal, nor the SEMCC, are required to follow its reasoning. Secondly, the Appellants stake their claim on the following tenuous statement:

> "The statement of claim alleges negligence, nuisance, a claim based on *Rylands v Fletcher* and s 99 of the *Environmental Protection Act. Not one of these claims* can be established unless a nuisance is proved and thus the search for a common issue can be confined to the claim of nuisance." (*emphasis added*; citations removed).

Appellants' Factum at paras 51-53.
Hollick v Toronto (City) (1999), 46 OR (3rd) 257 (CA) at para 18, 181 DLR (4th) 426 [*Hollick v Toronto (City)*].

48 At the Court of Appeal, Hourigan JA dismissed this statement. He reasoned that the term "nuisance" was used because the plaintiff was searching for common issues to certify a class action.

Midwest CA, *supra* para 7 at paras 75-76.

49 Furthermore, this statement was made without any apparent legal discussion or analysis of s 99 of the *EPA* limiting discussion of the provision to a single paragraph. The statement also contains legal errors. A claim under the rule in *Rylands v Fletcher* certainly does not require nuisance be proven. This contradictory statement can hardly be relied upon as proof that s 99(2) requires actionable nuisance be established.

Hollick v Toronto (City), supra para 47 at para 18.
Appellants' Factum at paras 51-53.

50 Thorco also cites the presumption against changing the common law in support of their assertion that actionable nuisance must be proven. However, s 99(2) sidesteps the common law and creates a new cause of action: it does not change the common law.

Appellants' Factum at para 39.

51 Lastly, Thorco purports to rely on partisan mudslinging in order to undermine the Hansard evidence. The Appellants point to statements made by a member of the opposition to ground the argument. They argue the legislation underwent a number of substantial changes before it became law. Supposedly, this resulted in the initial intent behind Part X being defeated.

Appellants' Factum at paras 45-47.

52 This argument is baseless. It ignores Minister Parrott's subsequent statement that the bill had not been "watered down as [Ms. Bryden] said." Introducing partisan wrangling into evidence serves only to embroil the SEMCC in a fruitless exercise of finger-pointing and political archeology. It is difficult to imagine how Ms. Bryden's statements, as an opposition member, offer insight into the intent behind Part X.

Appellants' Factum at para 46.
Ontario, Legislative Assembly, *Official Report of Debates (Hansard)*, 31st Parl, 3rd Sess, Vol 5, No 134 (11 December 1979) at 4:15.

(iv) ***Health risks and remediation of land constitute damage not only per s 99, but at common law as well***

53 The Court of Appeal held that Midwest proved damage even under the more restrictive common law. According to the Court, human health risks from PHC contamination which constitute "physical and material harm or injury to the property." Furthermore, the property value of 285 Midwest was clearly lowered, regardless of whether or not it could be properly quantified. Lastly, Hourigan JA held that there was "uncontradicted evidence" that PHC contamination worsened after Midwest purchased the property.

Midwest CA, *supra* para 7 at paras 100-101, 104.

54 Midwest submits that this interpretation is correct. Moreover, given that s 99 of the *EPA* takes a much more inclusive view of damage than the common law of nuisance, proving damage based on these environmental harms is fairly straightforward.

55 The Court took a broad view of loss or damage in *Tridan Developments*. *Tridan* is similar to the case at bar, in that the property was contaminated by a neighboring spill but there was no effect on business. Still, the Court found that Tridan was entitled to damages for the cost of "pristine" remediation.

> *Tridan Developments Ltd v Shell Canada Products Ltd*, 2002 ONCA 57 at para 11, OR (3rd) 503 [*Tridan Developments* CA].

56 The Appellants make an error in interpreting health risks. First, the nickel contamination in *Smith v Inco* did not generate actual health concerns as the Appellants contend. In that case, the nuisance action failed specifically because the claimants could not prove a health risk. In *Palmer v Nova Scotia Forest Industries*, it was held that health risks do amount to a nuisance as they interfere the owner's enjoyment of land.

> *Smith v Inco Ltd*, 2011 ONCA 628 at paras 58, 67, 107 OR (3rd) 321 [*Smith v Inco*].
> *Midwest* CA, *supra* para 7 at para 98.
> *Palmer v Nova Scotia Forest Industries* (1983), 60 NSR (2d) 271, 2 DLR (4th) 397 at 492-493 [*Palmer v Nova Scotia Forest Industries*].

57 The case at bar is distinguishable from *Smith v Inco* in that the PHC contamination poses *actual* health concerns. Midwest requires remediation for their property to be environmentally sound and to be safe for human occupation.

> *Midwest* CA, *supra* para 7 at para 26.

58 Lastly, the Appellants strangely cite the doctrine of *caveat emptor* in an attempt to shield themselves from liability. However, *caveat emptor* only applies between a buyer and seller of real property. There is no evidence to suggest that Thorco and Midwest were ever in such a relationship. The doctrine of *caveat emptor* is inappropriate. Even if the doctrine were applicable, Midwest had a Phase I Environmental Audit completed on the property before purchasing it.

> *Appellants' factum* at paras 61-62.
> *Iatomasi v Conciatori*, 2011 ONSC 3819 at para 29, 203 ACWS (3d) 661 [*Iatomasi v Conciatori*].

B. An Outstanding MOE Order Does Not Preclude Recovery Under s 99(2)

(i) *Section 99(2) does not conflict with an outstanding MOE order*

59 The Ontario Court of Appeal held that nothing in the *EPA* precludes a claim under s 99(2) simply because an MOE order is outstanding against a defendant. Hourigan JA pointed to s

92(2)(a)(iii) of the *EPA* as support, noting that it "specifically provides for recovery of loss or damage incurred as a result of a defendant's neglect or default in carrying out its obligations under the *EPA*." The Court reasoned that "these 'obligations under the *EPA*' must include obligations imposed under a remediation order," concluding that MOE orders and s 99(2) recovery are not "mutually exclusive." Ultimately, the Hourigan JA held that "[t]he purposes of the *EPA* would be frustrated if a defendant could use an MOE order as a shield."

Midwest CA, *supra* para 7 at paras 52, 53, 49.
EPA, *supra* para 1 at s 92(2)(a)(iii).

60 Midwest submits that the Court of Appeal was correct. Reading Part X plainly, considering the purposes of environmental protection and financial compensation, reveals that an MOE order cannot be used as a "shield." Section 99(2) is flexible, providing a party like Midwest the opportunity to seek damages and conduct remediation on their own terms. The statute does not handcuff itself by barring recovery under s 99(2) simply because there is an outstanding remediation order.

Midwest CA, *supra* para 7 at para 49.

61 As Thorco did not comment on this point in their written materials, it can only be assumed that they concede this point as well.

62 A plain reading of the *EPA* shows that an injured party can seek damages from a polluter subject to an MOE order, and even *pursuant* to that order. Section 99(2)(b) allows a party to seek compensation "for all reasonable cost and expense incurred in respect of carrying out or attempting to carry out an order or direction" under Part X. Nothing in this provision demands that the MOE order be issued to Midwest in order for them to seek recovery from Thorco. All that is required is that an injured party conducts, or attempts to conduct, work pursuant to "an order." If s 99(2) actions were precluded simply because an MOE order is outstanding against a defendant, this provision would be frustrated.

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

63 Allowing recovery under s 99(2) despite the MOE order will fulfill the *EPA*'s purposes of environmental protection and restoration. Thorco has demonstrated its unwillingness to do remediation. Thorco has failed to act, for decades, and has proven that it will only act when it has no other option. Any claim that Thorco will turn a corner and begin complying with MOE orders

now is unconvincing. For many years, the MOE has been unable to bring Thorco into compliance.

(ii) ***The true risk is not double recovery, but no recovery***

64 According to the Court of Appeal, "the possibility of double recovery should not prevent an order for damages for the remediation of contaminated property under s. 99(2)." The Court noted that the MOE would be "forced" to change the named party from Thorco to Midwest in the event that remediation damages would be paid to Midwest. This virtually eliminates the potential for double recovery.

> *Midwest* CA, *supra* para 7 at para 55.

65 Midwest argues that the Court of Appeal was correct for three reasons. First, the mere risk of double recovery is not enough to preclude a right of recovery. Second, the actual risk of double recovery is extremely remote. Third, a failure by the MOE to shift the remediation order in the event that Midwest is successful could be judicially reviewed with relative ease. Ultimately, the real risk is not double recovery - it is *no* recovery.

66 First, Ontario courts have recently found that the mere risk of double recovery is not enough to preclude a deserving plaintiff the right to recover. In *Gilbert v South*, the Court held that:

> prevention of such double-recovery is balanced by concern that a plaintiff should receive full compensation and not recover less than that to which he or she is entitled; i.e., by being subjected unfairly to deductions based on collateral benefit entitlements that are in doubt and/or which may not truly overlap with sums recovered in a tort judgment.
>
> *Gilbert v South*, 2014 ONSC 3485 at para 9, 120 OR (3d) 703, aff'd 2015 ONCA 712, 127 OR (3d) 526 [*Gilbert v South*].

67 Second, the MOE has indicated that it would be willing to shift the remediation order to Midwest in the event that the Respondent is successful. As the Court of Appeal noted, Thorco seems entirely unprepared and unwilling to begin remediation work, minimizing any risk of double recovery.

> *Midwest* CA, *supra* para 7 at para 55.

68 In the unlikely event that the MOE does not remain true to its word, the Appellants have a number of options, including judicial review (*Apotex Inc*). Relief could be granted through *mandamus* to compel the Minister to review the decision to keep the order against Thorco.

Apotex Inc v Canada (AG) (1993), [1994] 1 FCR 742, 44 ACWS (3d) 349 at para 55 [*Apotex Inc*].

69 Finally, the SEMCC has broad discretion to order remedies as it sees fit. To avoid double recovery, the SEMCC could hold the damages in trust. Alternatively, it could make an order directing that the damages paid to Midwest be used for remediation and nothing else, and request that records of this work be submitted to the Court for assurance. Katherine M van Rensburg, discussing concerns that environmental damages might not be invested in remediation, endorses such creative sentencing.

Supreme Court Act, RSC 1985, c S-26, s 45 [*Supreme Court Act*].
Katherine M van Rensburg, "Deconstructing Tridan: A Litigator's Perspective" (2004) 15 J Env L & Prac 85 at 103 [van Rensburg].

C. Restoration Costs are the Correct Measure of Damages

70 The Court of Appeal strongly favoured an award of remediation costs instead of compensation for diminution in value of the property. According to Hourigan JA, a "plain reading" of s 99 favours restoration costs, which are "more consistent" with the intent of Part X. The Court identified a trend in the jurisprudence towards restoration cost, even if such an award would exceed the value of the property. Remediation costs are the superior environmental choice as they ensure adequate funds to clean up spills. Moreover, the Court referenced the "polluter pays" principle in support of this approach to environmental damage awards, calling s 99(2) a "codification of this principle."

Midwest CA, *supra* para 7 at paras 61-64, 67-70.

71 Midwest submits that an award of restoration costs is the correct measure of damages in this instance. Restoration costs are the most consistent with the *EPA*'s purposes of environmental protection and conservation, are in harmony with the trend in Canadian environmental jurisprudence, and accord with principles of environmental law including "polluter pays" and intergenerational equity.

(i) ***Restoration costs coincide with the purpose of the EPA***

72 A plain reading of the statutory scheme demonstrates that the Court of Appeal correctly chose to award restoration costs rather than the diminution of value. As previously established, the overall purpose of the *EPA* is to "provide for the protection and conservation of the natural environment." Furthermore, s 93 of the *EPA* states that "the owner of a pollutant … that is spilled and that causes or is likely to cause an adverse effect shall forthwith do everything practicable to prevent, eliminate and ameliorate the adverse effect and to restore the natural environment." "Adverse effects" are defined very broadly in s 1(1)(a) of the *EPA*, including "impairment of the quality of the natural environment for any use that can be made of it." Moreover, the phrase "restore the natural environment" is used no less than 8 times throughout Part X.

EPA, *supra* para 1 at ss 3(1), 93.

73 In light of these statutory statements, it is difficult to imagine how an award for diminution in value would better fulfill the purposes of the *EPA* than an award for restoration costs. Words and phrases such as "forthwith," "do everything practical," and "restore the natural environment" indicate that the Legislature intended that damages awarded under s 99(2) be used to clean up toxic spills, and quickly. Hourigan JA was correct when he held that "[i]t would be a remarkable result if legislation enacted to provide a new statutory cause of action to innocent parties who have suffered contamination of their property did not permit the party to recover the costs of remediating their property."

Midwest CA, *supra* para 7 at para 70.

74 An award for anything less than remediation costs will likely cause confusion as to who is responsible for clean-up. It should not be forgotten that the 2012 MOE order demands that the property be remediated. A damages award for diminution in value may be insufficient to properly account for the costs of remediation. If the damages paid are insufficient to fund the remediation of 285 Midwest, the MOE could refuse to shift the 2012 order. It might also be forced to split the order between the two parties. The simplest and most efficient option for this Honourable Court is to order remediation costs be awarded to Midwest.

Midwest CA, *supra* para 7 at paras 32, 63.

75 The Appellants assert that remediation costs are not available under s 99(2). Whilst the *EPA*'s objectives are referenced by the Appellants, the Appellants do not explain what those objectives are or how they suggest an award for diminution in value. Part X is not analyzed, the Appellants apparently staking their claim almost entirely on jurisprudence. Given that we are dealing with a statutory cause of action, the statute should be given primary consideration.

Appellants' Factum, paras 83-85.

76 Moreover, the Appellants attempt to saddle the MOE with responsibility for not acting swiftly enough, arguing that the Ministry itself ought to have conducted remediation of 285 Midwest and subsequently recovered costs from Thorco under s 101.1 of the *EPA*. It is important to keep in mind that Thorco was chased down by the MOE for decades, and ultimately prosecuted, only to continue to avoid compliance. Regardless of what the MOE could or should have done in the past, s 99(2) offers another option for parties like Midwest to recover remediation costs.

Appellants' Factum, paras 83-85.

(ii) ***The Trend is Towards Restoration Costs, Not Diminution in Value***

77 As the Court of Appeal observed, there is a trend in Canadian environmental jurisprudence in favour of an award for remediation costs. As Martin ZP Olszynski points out, restoration costs are considered "the presumptive measure of environmental damages" in Canada. *Tridan Developments,* both at trial and on appeal, is emblematic of this trend. The Court held that the plaintiffs were "entitled to damages in an amount that would put them in the same position they would have been in had the spill not occurred." *Canadian Tire* was also cited by the Court of Appeal, in which a $3.6 million award for environmental remediation of PHC contamination was ordered.

Martin ZP Olszynski, "Environmental Damages after the Federal Environmental Enforcement Act: Bringing Ecosystem Services to Canadian Environmental Law?" (2012) 50 Osgoode Hall LJ 129 at 148.
Tridan Developments Ltd v Shell Canada Products Ltd (2000), 353 RPR (3d) 141 at para 69, aff'd 57 OR (3d) 503, 110 ACWS (3d) 1045 (CA) [*Tridan Developments* Sup Ct].
Canadian Tire Real Estate Ltd v Huron Concrete Supply Ltd, 2014 ONSC 288 at para 321, 88 CELR (3d) 93 [*Canadian Tire*]

78 The Ontario Law Reform Commission argued that for environmental damages, "a rebuttable presumption ought to exist in favour of restoration cost, replacement cost, and

contingent valuation." Moreover, the Commission suggested that "market valuation ... ought to be employed only in the narrowly circumscribed situations."

> Ontario Law Reform Commission, *Report on Damages for Environmental Harm* (Toronto: Ontario Law Reform Commission, 1990) at 35.

79 The Appellants mischaracterize the holding in *Tridan Developments* on appeal. Restoration costs were to be awarded either way. The issue was whether the land was to be remediated to MOE guidelines, or to "pristine" condition. If the land were remediated only to MOE guidelines, the Court was prepared to also award stigma damages corresponding to diminution in value of the property. The Court of Appeal chose damages to remediate the land to "pristine" condition, because it was less expensive than remediating to MOE guidelines *and* including stigma damages. If the land is "pristine," the Court held, there can be no stigma. Nevertheless, it must not be misunderstood: both the trial court and the Court of Appeal awarded remediation damages to Tridan.

> *Appellants' Factum*, para 80.
> *Tridan Developments* Sup Ct, *supra* para 77 at paras 26-28.
> *Tridan Developments* CA, *supra* para 55 at paras 16-18.

(iii) ***Restoration costs are consistent with 'Polluter Pays' and intergenerational equity***

80 Environmental law concepts such as the polluter pays principle and intergenerational equity are best served by an award of remediation costs. This principle demands that the individual who creates the environmental damage ought to be the person who deals with the economic consequences of that damage. According to the Supreme Court of Canada in *Imperial Oil v Quebec*, the polluter pays principle is "firmly entrenched in environmental law in Canada."

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

81 Polluter pays is also a central aspect of the *EPA*, weaved throughout various provisions in the Act. Sections 99(2), 100(1), and 101(4) establish that the polluter will ultimately pay for the cost of the damage they created. As the Court of Appeal held, s 99(2) "is effectively a statutory codification of this principle." Moreover, the legislative record indicates the importance of polluter pays. Whilst discussing Part X of the Act, the then Minister of the Environment stated:

> I believe 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.
> *EPA*, *supra* para 1 at ss 99(2), 100(1), 101(4).
> *Midwest* CA, *supra* para 7 at para 68.
> *Hansard* 1978, *supra* para 33 at 6178.

82 Remediation costs are the only award in keeping with the "firmly entrenched" polluter pays principle. If a polluter only covers a drop in property values, it has not paid for the environmental damage it wrought. It is "polluter pays," not "polluter evades," after all.

83 Intergenerational equity, the idea that every generation owes an obligation to future generations to protect the natural environment, should also inform any environmental damage award. The concept has become increasingly important in environmental litigation in recent years.

> Edith Brown Weiss, *In Fairness to Future Generations: International Law, Common Patrimony, and Intergenerational Equity* (Tokyo: United Nations University, 1989) at 37-38.
> DeMarco, *supra* para 26 at 191.

84 The central purposes of the *EPA*, to "protect" and "conserve" the environment, reflect intergenerational equity. This suggests that the Legislature intended that environmental harms will be mitigated with an eye to long-term sustainability and environmental stewardship.

> *EPA*, *supra* para 7 at s 3(1).

85 The SCC made a number of pronouncements on the importance of intergenerational equity in its decision in *Imperial Oil v Quebec*, using the concept in its interpretation of the Quebec environmental legislation. This concept also arose in the *Spraytech* decision, where L'Heureux Dube J framed the Court's judgment by noting that "our common future, that of every Canadian community, depends on a healthy environment."

> *Imperial Oil*, *supra* para 85 at para 19.
> *114957 Canada Ltée (Spraytech, Société d'arrosage) v Hudson (Town)*, 2001 SCC 40 at para 1, [2001] 2 SCR 241 [*Spraytech*].

86 Katherine M van Rensburg notes that "land exists in perpetuity … contamination today, and decisions respecting remediation, will affect future generations of owners, tenants, and lenders." 285 Midwest will, eventually, change hands. Without ordering remediation, the future buyer will receive contaminated lands.

van Rensburg, *supra* para 69 at 92.

87 In order to best give effect to the purpose and principles of the *EPA*, the Respondent asks that the order for restoration costs be upheld.

PART IV -- SUBMISSIONS IN SUPPORT OF COSTS

88 The Respondent requests its costs for this appeal and the courts below it.

PART V -- ORDER SOUGHT

89 The Respondent respectfully requests, for the reasons above, that this Honourable Court affirm the Ontario Court of Appeal's decision in favour of the Respondent.

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

_____

Jordyn Dryden

_____

Paul Maas

Counsel for the Respondent
Midwest Properties Ltd.

PART VI -- TABLE OF AUTHORITIES

A. Legislation	**Paragraphs Cited**
Environmental Protection Act, RSO 1990, c E 19.	1, 28, 32, 35, 39, 41, 59, 62, 72, 81, 84
Legislation Act, 2006, SO 2006, c 26 Sch F.	21
Perpetuities Act, RSO 1990, c P 9, s 2.	45
Supreme Court Act, RSC 1985, c S-26, s 45.	69

B. Jurisprudence

114957 Canada Ltée (Spraytech, Société d'arrosage) v Hudson (Town), 2001 SCC 40, [2001] 2 SCR 241.	85
Antrim Truck Centre Ltd v Ontario (Ministry of Transportation), 2013 SCC 13, [2013] 1 SCR 594.	38
Apotex Inc v Canada (AG) (1993), [1994] 1 FCR 742, 44 ACWS (3d) 349.	68
Bell ExpressVu Ltd Partnership v Rex, 2002 SCC 42, [2002] 2 SCR 559.	22
Canadian Tire Real Estate Ltd v Huron Concrete Supply Ltd, 2014 ONSC 288, 88 CELR (3d) 93.	77
Castonguay Blasting Ltd v Ontario, 2013 SCC 52, 3 SCR 323.	26
Gilbert v South, 2014 ONSC 3485, 120 OR (3d) 703, aff'd 2015 ONCA 712, 127 OR (3d) 526.	66
Hollick v Toronto (City) (1999), 46 OR (3rd) 257 (CA), 181 DLR (4th) 426.	47, 49
Housen v Nikolaisen, 2002 SCC 33, [2002] 2 SCR 235.	19
Imperial Oil Ltd v Quebec (Minister of the Environment), 2003 SCC 58, 2 SCR 624.	80, 85
Iatomasi v Conciatori, 2011 ONSC 3819, 203 ACWS (3d) 661.	58
Midwest Properties Ltd v Thordarson, 2015 ONCA 819, 128 OR (3d) 81.	7, 8, 9, 10, 11, 12, 13, 15, 16, 17, 27, 35, 36, 45, 48, 53, 56, 57, 59, 60, 64, 67, 70, 73, 74, 81

C. Secondary Sources

D. Hansard	**Paragraphs Cited**
Ontario, Legislative Assembly, *Official Report of Debates (Hansard)*, 31st Parl, 2nd Sess, No 151 (14 December 1978).	33, 42, 81
Ontario, Legislative Assembly, *Official Report of Debates (Hansard)*, 31st Parl, 2nd Sess, No 8 (27 March 1979).	
Ontario, Legislative Assembly, *Official Report of Debates (Hansard)*, 31st Parl, 3rd sess, Vol 5, No 134 (11 December 1979).	52

E. Other Sources	**Paragraphs Cited**
Appellants' Factum.	41, 43, 47, 49, 50, 51, 52, 58, 75, 76, 79
Black's Law Dictionary, 10th ed.	31
Webster's Dictionary, 3rd ed.	31

PART VII -- LEGISLATION AT ISSUE

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

Purpose of Act

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

…

Duty to mitigate and restore

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

When duty effective

(2) The duty imposed by subsection (1) comes into force in respect of each of the owner of the pollutant and the person having control of the pollutant immediately when the owner or person, as the case may be, knows or ought to know that the pollutant is spilled and is causing or is likely to cause an adverse effect. R.S.O. 1990, c. E.19, s. 93.

…

Directions by Minister, spills

94. (1) Where a pollutant is spilled and the Minister is of the opinion that there is or is likely to be an adverse effect as a result of the spill, the Minister, in the circumstances specified in subsection (2), may give directions in accordance with subsection (3) to the employees in and agents of the Ministry. R.S.O. 1990, c. E.19, s. 94 (1); 2006, c. 35, Sched. C, s. 36 (2).

Where Minister may give directions

(2) The Minister may give directions in accordance with subsection (3) where the Minister is of the opinion that it is in the best interest of the public to do so and,

(a) the Minister is of the opinion that neither the person having control of the pollutant nor the owner of the pollutant will carry out promptly the duty imposed by section 93;

(b) the Minister is of the opinion that the person having control of the pollutant or the owner of the pollutant cannot be readily identified or located and that as a result the duty imposed by section 93 will not be carried out promptly; or

(c) the person having control of the pollutant or the owner of the pollutant requests the assistance of the

Minister in order to carry out the duty imposed by section 93. R.S.O. 1990, c. E.19, s. 94 (2).

Contents of directions

(3) Under this section, the Minister may direct the employees in and agents of the Ministry to do everything practicable or to take such action as may be specified in the directions in respect of the prevention, elimination and amelioration of the adverse effect and the restoration of the natural environment. R.S.O. 1990, c. E.19, s. 94 (3); 2006, c. 35, Sched. C, s. 36 (3).

…

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.

…

99. (1) In this section,

“loss or damage” includes personal injury, loss of life, loss of use or enjoyment of property and pecuniary loss, including loss of income. R.S.O. 1990, c. E.19, s. 99 (1).

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. R.S.O. 1990, c. E.19, s. 99 (2).

Exception

(3) An owner of a pollutant or a person having control of a pollutant is not liable under subsection (2) if they establish that they took all reasonable steps to prevent the spill of the pollutant or if they establish that the spill of the pollutant was wholly caused by,

(a) an act of war, civil war, insurrection, an act of terrorism or an act of hostility by the government of a foreign country;

(b) a natural phenomenon of an exceptional, inevitable and irresistible character; or

(c) an act or omission with intent to cause harm by a person other than a person for whose wrongful act or omission the owner of the pollutant or the person having control of the pollutant is by law responsible,

or any combination thereof. R.S.O. 1990, c. E.19, s. 99 (3).

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. R.S.O. 1990, c. E.19, s. 99 (4).

Enforcement of right

(5) The right to compensation under subsection (2) may be enforced by action in a court of competent jurisdiction. R.S.O. 1990, c. E.19, s. 99 (5).

Liability

(6) Liability under subsection (2) does not depend upon fault or negligence. R.S.O. 1990, c. E.19, s. 99

(6).

…

Director's order for costs and expenses 99.1 (1) If a pollutant is spilled, the Director may issue an order requiring the owner of the pollutant or the person having control

of the pollutant to pay to the Minister of Finance any reasonable costs or expenses incurred by Her Majesty in right of Ontario for the following purposes:

1. To prevent, eliminate or ameliorate any adverse effects or to restore the natural environment.

2. To prevent or reduce the risk of future discharges into the natural environment of any pollutant owned by or under the charge, management or control of the person against whom the order is made. 2005, c. 12, s. 1 (19).

…

Action by municipality or designated persons, spills

100. (1) Where a pollutant is spilled, (a) a municipality; and (b) Repealed: 2002, c. 17, Sched. F, Table. (c) a person or a member of a class of persons designated by the regulations,

or any one or more of them, may do everything practicable to prevent, eliminate and ameliorate any adverse effects and to restore the natural environment. R.S.O. 1990, c. E.19, s. 100 (1); 2002, c. 17, Sched. F, Table; 2005, c. 12, s. 1 (20).

…

Right to compensation from Crown

101. (1) A person, other than a person referred to in subsection (2), entitled under clause 99 (2) (b) to compensation for reasonable cost and expense has the right, subject to the conditions prescribed by the regulations, to payment of such compensation from Her Majesty in right of Ontario

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 - 12

Jordyn Dryden
Paul Maas

Counsel for the Respondent,
Midwest Properties Ltd.

Document #: 1121661