WILLMS & SHIER ENVIRONMENTAL LAW MOOT COURT COMPETITION 2017

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

IN THE SUPREME ENVIRONMENTAL MOOT COURT OF CANADA

(ON APPEAL FROM THE ONTARIO COURT OF APPEAL)

B E T W E E N:

JOHN THORDARSON and THORCO CONTRACTING LIMITED

APPELLANTS
(Respondents)

- and -

MIDWEST PROPERTIES LTD.

RESPONDENT
(Appellant)

FACTUM OF THE APPELLANTS JOHN THORDARSON and THORCO CONTRACTING LIMITED

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

TEAM #2017-13

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

AND TO: **ALL REGISTERED TEAMS**

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PART I -- OVERVIEW AND STATEMENT OF FACTS

A. Overview of the Appellants' position

1 The purpose of Ontario's *Environmental Protection Act* ("*EPA*") is straightforward: it exists to protect and conserve Ontario's environment. However, as the law currently stands, the interpretation of one provision of the *EPA*, s 99(2), actively works against the *EPA's* animating purpose.

2 The Appellants respectfully submit that the Ontario Court of Appeal ("Court of Appeal," or "the Court") erred in its interpretation of s 99(2). The Court of Appeal did not give sufficient weight to the plain wording of the provision, its context, or its purpose, and misconstrued its legislative history.

3 Section 99(2) is intended to provide eligible parties a limited right to compensation from polluters in the event of an environmentally harmful spill. Under s 99(2), innocent parties can claim compensation for loss or damage caused by the spill, as well as recover the costs of any completed remediation work the Minister of Environment ("the Minister") ordered them to undertake. The Court of Appeal, however, greatly expanded this right. They interpreted the provision as permitting parties to collect pre-emptive remediation costs for work others have been ordered to perform. This expansive interpretation is against the plain text of the provision, prevents the *EPA* from fulfilling its purpose, and can cause conflicts between the Minister's orders and the courts.

4 The Appellants respectfully submit that the Court of Appeal erred in three ways in awarding the Respondent costs under s 99(2). First, the Court did not require the Respondent to show evidence of actual loss or damage contrary to the text of s 99(2). Second the Court allowed the Respondent to bring an action while the Appellants were subject to a remediation order, contrary to the legislative intent behind s 99(2). Finally, the Court erred in awarding pre-emptive remediation costs to the Respondent under s 99(2), because these costs are not available to them under this provision.

5 The Appellants request that the Honourable Supreme Environmental Moot Court of Canada ("SEMCC") reinstate the ruling of the trial judge in full, and find that the remedy of pre-emptive remediation costs are not available to the Respondent under s 99(2).

B. Statement of the Facts

6 John Thordarson owns Thorco Contracting Limited ("Thorco," collectively "the Appellants"). Thorco owns and operates from 1700 Midland Avenue, Toronto, Ontario ("1700 Midland"). Thorco is involved in the business of servicing petroleum handling equipment, which requires Thorco to store petroleum hydrocarbon waste ("PHC") onsite. The Appellants hold a Certificate of Approval from the Ministry of the Environment and Climate Change ("MOE") allowing them to store waste on their property.

Midwest Properties Ltd v Thordarson, 2015 ONCA 819 at paras 10, 12, 128 OR (3d) 81 [*Midwest Appeal*], rev'g 2013 ONSC 775, 73 CELR (3d) 303 [*Midwest Trial*]

7 The Appellants admittedly struggled to stay in compliance with the terms of its Certificate of Approval, and in 2003, they were convicted of offenses under the *EPA* for failing to comply with their Certificate of Approval. Since that point, however, Thorco has worked to be in compliance, reducing the amount of waste stored on the property. By January of 2011, Thorco had removed all liquid waste from its property.

Midwest Appeal, *supra* para 6 at paras 16-19.
Environmental Protection Act, RSO 1990, c E-19 [*EPA*].

8 In December 2007, Midwest Properties Ltd ("Midwest" or "the Respondent"), purchased land adjoining Thorco's property. The Respondent elected to forgo a thorough environmental assessment of the land before purchasing it.

Midwest Appeal, *supra* para 6 at para 9.

9 The Respondent was successful enough at 285 Midwest that it eventually approached Mr. Thordarson with a view to purchase 1700 Midland in order to expand its operations. Mr. Thordarson provided the Respondent with previous environmental assessments conducted on 1700 Midland, and permitted the Respondent access to 1700 Midland to conduct further environmental testing. After viewing the assessments, the Respondent conducted environmental

testing on its property. These tests showed that PHC levels in groundwater and soil exceeded MOE standards at some locations on 285 Midwest.

Midwest Appeal, *supra* para 6 at paras 8, 11.

10 On January 19, 2010, the MOE issued an order under Part X of the *EPA* to the Appellants. This order directed the Appellants to remediate both 1700 Midland and 285 Midwest. Pursuant to the order, the MOE retained oversight over the remediation process. The Appellants began the work set out in the MOE's order, but have not yet completed it.

Midwest Appeal, *supra* para 6 at para 35.

11 The Respondent, although suffering no loss of business or harm from the elevated PHC levels, became concerned about the rate at which remediation might occur. The Respondent brought an action against the Appellants on the grounds of nuisance, negligence, and the statutory cause of action under *EPA* s 99(2) in an attempt to collect pre-emptive remediation costs. The Respondent also sought punitive damages.

Midwest Trial, *supra* para 6 at paras 2, 21.

(i) *The courts below*

12 At trial, Pollak J. found that the Respondent failed to make out any of its claims against the Appellants. Although Pollak J. did find it was likely that the contamination of the Respondent's property was caused by the migration of PHC from 1700 Midland, the Respondent did not show that the contamination had caused them any damage. As s 99(2) requires a plaintiff to show actual loss or damage, Pollak J. held that the Respondent had not made their claim out. Furthermore, Pollak J. ruled that s 99(2) should not be interpreted in a manner that allowed the Respondent the prospect of "double recovery." Permitting the Respondent to collect pre-emptive remediation costs while the Appellants remained obligated to remediate the Respondent's property would create the possibility of double recovery. The claims of nuisance and negligence also failed because the Respondent did not show that it had suffered damage of any kind. Finally, Pollak J. did not award the Respondent any punitive damages.

Midwest Trial, *supra* para 6 at para 23.

13 The Court of Appeal overturned the trial decision, and permitted the Respondent to collect compensation for its prospective remediation costs under s 99(2) of the *EPA*. The Court concluded that the Respondent's evidence that elevated PHC levels could have a negative impact on human health was sufficient for the purposes of s 99(2). Further, the Court of Appeal determined that double recovery would not occur, as the MOE would redirect the order. The Court of Appeal would have also found the Appellants liable under nuisance and negligence, and awarded punitive damages against them.

Midwest Appeal, *supra* para 6 at para 55.

14 Leave to appeal this decision was granted by the SEMCC on three issues: whether s 99(2) requires a claimant to prove actionable nuisance, whether an outstanding remediation order should bar a claim for pre-emptive remediation costs under s 99(2), and the proper measure of damages under s 99(2).

PART II -- QUESTIONS IN ISSUE

15 The Appellant submits:

(a) that the Court of Appeal erred in law 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 erred in law in finding that damages are not precluded under s 99(2) where the defendant is subject to an order to remediate the plaintiff's property, and
(c) that the Court of Appeal erred in finding that the appropriate measure of damages under s 99(2) was the cost of the remediation of property.

PART III -- ARGUMENT

A. The Court of Appeal Misapprehended the Intention of the Legislature

(i) *The Court of Appeal did not use the proper approach to statutory interpretation*

16 Section 99(2) of the *EPA* states:

> 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.

17 This appeal, at its base, is simply a question of statutory interpretation.

18 Under the modern approach to statutory interpretation, there is "only one principle or approach, namely, 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*).

> *Bell ExpressVu Limited Partnership v Rex*, 2002 SCC 42 at para 26, [2002] 2 SCR 559 [*Bell ExpressVu*].

19 Respectfully, the Court of Appeal did not follow this approach. Instead, the Court interpreted s 99(2) by focusing predominantly on the provision's legislative history, while largely disregarding the provision's wording and context.

> *Midwest Appeal*, *supra* para 6 at paras 44-47.

20 The Court of Appeal erred in turning to the provision's legislative history so early in the interpretation process, and in giving the history so much weight. Appeals to legislative history and Hansard should generally be limited to instances where the provision is ambiguous, or to confirm the intention created by the provision's plain words (*DAI*). The Court of Appeal never suggested that the provision was ambiguous, and actually appeared to suggest the opposite.

> *R v DAI*, 2012 SCC 5 at para 26, [2012] 1 SCR 149 [*DAI*].
> *Midwest Appeal*, *supra* para 6 at paras 44, 53.

21 The Court of Appeal's focus on the legislative history of Part X and s 99(2) led the Court to conclude that the legislative objective in enacting s 99(2) was to "establish[] a separate, distinct ground of liability for polluters" via a private right of action.

Midwest Appeal, *supra* para 6 at para 49.

22 While this is not incorrect, by disregarding the provision's context, the Court of Appeal overemphasized the role this private right of compensation was intended to play within Part X. This overemphasis led to an interpretation of s 99(2) which allows claims under this section to overtake the purposes of Part X. Respectfully, this is incorrect. Section 99(2) is only a small part of Part X, and its function must exist within purpose of Part X as a whole.

(ii) *The SMECC should consider the intention of Part X as a whole*

23 Following the modern approach to statutory interpretation, the intention of the legislature in enacting Part X must be determined. The legislature's intentions are found, first and foremost, from the words actually used in the legislation (*Collier*).

Collier v. Canada (Minister of Citizenship & Immigration), 2004 FC 1209 at para 33, 43 Imm LR (3d) 53 [*Collier*].

24 The purpose of the *EPA* is given in s 3. Its purpose is "to provide for the protection and conservation of the natural environment." Every interpretation of the *EPA* should further this purpose.

EPA, *supra* para 7 at s 3.

25 Part X of the *EPA*, which contains s 99(2), reflects the legislature's intention to protect and conserve the environment in response to harmful spills. The primary way the legislature chose to accomplish this goal is by granting the Minister, and the MOE, powerful administrative tools to respond to spills. The Minister can issue orders to parties to prevent and clean up spills, direct the MOE to take over remediation efforts, and collect compensation from polluters. The *EPA* makes it an offence to not comply with Ministerial orders, and parties risk steep fines, or even jail sentences, for non-compliance.

EPA, *supra* para 7 at ss 94, 97, 186, 187.

26 Part X's provisions emphasize the need to respond to spills as quickly as possible. As seen in the present appeal, the longer spills remain unremediated, the further they can spread (*Midwest Appeal*). Under Part X, individuals have the duty to immediately report spills to the MOE. Ministerial orders issued under Part X do not have to be preceded by notice to the recipients, or require the Minister to hold hearings. This lack of required notice or hearings makes these orders different than other orders issued under the *EPA*. Orders can contain time limitations in which work must be completed, forcing remediation work to happen quickly. Orders can be issued to individuals other than the polluter, removing the need for the Minister to first ascertain who is responsible before issuing an order, and instead issue it to the party best placed to remediate the land.

Midwest Appeal, *supra* para 6 at para 26.
EPA at para 7 at ss 92(2), 97, 127

27 Section 99(2)'s purpose and operation must be considered in respect to the purpose of Part X as a whole. Section 99(2) provides innocent parties a right to compensation, and while courts must give effect to this right, the legislature could not have intended this private right to trump the purpose of Part X. As the Appellants address in each of the three grounds of appeal below, the Court of Appeal's interpretation of s 99(2) does just that.

B. Section 99(2) Requires Proving Actionable Nuisance

(i) *The provision's plain words mirror the elements of nuisance*

28 The Court of Appeal did not specify under which branch of s 99(2) it awarded the Respondent pre-emptive remediation costs. However, it appears the Court relied on s 99(2)(a)(i), as the Court discussed "adverse effects," which is required by this section.

Midwest Appeal, *supra* at para 6 at para 58.

29 The plain wording of s 99(2)(a)(i) requires a claimant to prove actionable nuisance. This interpretation is supported by the provision's context and legislative history.

30 Nuisance at common law has two elements: (1) an interference with use or enjoyment of land, which is (2) substantial or unreasonable (*Antrim Truck*). Section 99(2)(a)(i) requires these same elements.

> *Antrim Truck Centre Ltd. v. Ontario (Transportation)*, 2013 SCC 13 at para 18, [2013] 1 SCR 594 [*Antrim Truck*].

31 The plain wording of s 99(2)(a)(i) makes it clear that two things are required in order to claim compensation: (1) a spill that causes, or is likely to cause, an "adverse effect", which (2) results in "loss or damage."

32 "Adverse effect" is defined under *EPA* s 1 as being one or more of a set list of harms. Examples of these harms include "harm or material discomfort to any person," "loss of enjoyment of normal use of property," and "interference with the normal conduct of business." The harms listed under the definition of "adverse effect" are harms that Canadian courts have recognized as types of damage that can constitute a nuisance at common law (*Antrim Truck, Palmer, Portage, Pun*). "Adverse effects" under the *EPA* thus overlap completely with harms that can constitute "an interference with use or enjoyment of land" under common law nuisance.

> *Antrim Truck, supra* para 30 at paras 1, 57.
> *Palmer v Nova Scotia Forest Industries*, 2 DLR (4th) 397 at 485, 12 CELR 157 [*Palmer*].
> *Portage La Prairie (City of) v BC Pea Growers Ltd*, [1966] SCR 150 at 152, 54 DLR (2d) 503 [*Portage*].
> Gregory S Pun, Margaret I. Hall & Ian M. Knapp, *The Law of Nuisance in Canada*, 2nd ed (Markham: LexisNexis Canada, 2015) [*Pun*].

33 Similarly, requiring a party to have suffered "loss or damage" under s 99(2)(a) in order to claim compensation is analogous to requiring that a nuisance cause a "substantial interference" with one's use or enjoyment of land. A "substantial interference" is, per *Antrim Truck*, one that is non-trivial, i.e., causes actual measurable damage. The purpose of requiring the interference to be "non-trivial" is to screen out weak or meritless claims. Requiring a party to demonstrate "loss or damage" serves the same purpose here.

> *Antrim Truck, supra* at para 30 at para 19.

34 Loss or damage is defined under the *EPA* as including "personal injury, loss of life, loss of use or enjoyment of property and pecuniary loss, including loss of income." These are all non-trivial harms representing actual damage. In requiring a plaintiff to show loss or damage, the legislature intended to screen out claims where no harm was evident.

EPA, *supra* para 7 at s 99(1).

35 A court should give effect to the words of the statute (*Placer Dome*). To read s 99(2)(a) as not requiring loss or damage, as the Court of Appeal did, goes against the plain words of the provision. Giving effect to its words, however, and requiring a claimant to prove an adverse effect causing loss or damage, makes it clear that s 99(2) has the same requirements as common law nuisance.

Placer Dome Canada Ltd v Ontario (Minister of Finance), 2006 SCC 20 at para 45, [2006] 1 SCR 715 [*Placer Dome*].

36 As recognized by the trial judge, the Respondent has not shown any evidence of any kind of "loss or damage" as required by s 99(2) (*Midwest Trial*). In fact, far from suffering any losses, the Respondent was actually successful enough at its present location that it had planned to expand onto the Appellants' property.

Midwest Trial, *supra* para 6 at para 23.

37 Although PHC levels at some locations on the Respondent's property are higher than MOE standards, as recognized by Pollak J. at trial, this alone does not constitute "loss or damage" as required under s 99(2) (*Midwest Trial*). As established in *Inco*, for contamination above MOE standards to constitute physical harm or damage there must be a "detrimental effect on the land itself or rights associated with the use of land" (*Inco*). The Respondent has not shown that the elevated PHC levels have caused them any loss or has affected how they use the land.

Midwest Trial, *supra* para 6 at para 23.
Smith v Inco Ltd, 2011 ONCA 628 at para 55, 107 OR (3d) 321 [*Inco*].

(ii) *The legislature did not intend to remove s 99(2)(a)'s requirement of nuisance*

38 The Court of Appeal erred in its application of legislative history to show that nuisance was not required under s 99(2)(a). Reliance on Hansard evidence should be done cautiously, as

Hansard suffers from concerns about reliability and should generally be given limited weight (*Morgentaler*). However, even if the SEMCC overlooks these concerns and considers the provision's legislative history, it is evident that the legislature did not intend to do away with requiring a claimant to prove nuisance under s 99(2)(a).

R v Morgentaler, [1993] 3 SCR 463 at 484, 107 DLR (4th) 537 [*Morgentaler*].

39 The comments of the then-Minister of Environment relied on by the Court of Appeal do not actually reveal a legislative intention to remove all common law aspects from s 99(2). As noted by the then-Minister, and quoted in the Court of Appeal's judgment, the purpose of s 99(2) was to "clarif[y] and extend[] the right to compensation at common law," not to oust the common law completely.

Midwest Appeal, *supra* para 6 at para 46.
Ontario, Legislative Assembly, *Official Report of Debates (Hansard)*, 31st Parl, 2nd Sess, No 8 (27 March 1979) at 255.

40 Similarly, where the Court of Appeal quoted the then-Minister as saying that the existing common law was "inadequate," it is important to note that the Minister was identifying the common law as inadequate in "spelling out the necessary procedures to *control and clean up spills and restore the natural environment*." The comment has nothing to do with any intention to remove the requirement that plaintiffs prove that they experienced a nuisance under s 99(2)(a).

Midwest Appeal, *supra* para 6 at para 47.
Ontario, Legislative Assembly, *Official Report of Debates (Hansard)*, 31st Parl, 2nd Sess, No 151 (14 December 1978) at 6178 [*emphasis added*].

41 The clearest evidence that the legislature intended to remove some aspects of the common law in regards to s 99(2)(a) comes from Part X itself. Under s 99(6), the legislature explicitly removed the need for a plaintiff to show negligence or fault to receive compensation under s 99(2). As noted by the Court of Appeal, the legislature is presumed to know the law. Had the legislature intended to remove the requirement of nuisance, it would have removed it along with the requirements of negligence and fault. It also would not have constructed s 99(2) in a manner that mirrors common law nuisance.

EPA, *supra* para 7 at s 99(6).
Midwest Appeal, *supra* para 6 at para 74.

(iii) *Conclusion*

42 The SEMCC should interpret s 99(2) in accordance with its plain text and the legislature's intent in enacting it. Section 99(2) requires plaintiffs to prove actionable nuisance and to show that they experienced loss or damage. The Respondent has done neither. The rights granted under section 99(2) should not be available to them.

C. Outstanding Remediation Orders Bar Pre-Emptive Remediation Costs

(i) *The issuance of an order achieves the EPA's purpose*

43 The Court of Appeal voiced concern that barring the Respondent's claim for pre-emptive remediation costs where an outstanding remediation order existed would frustrate the purpose of the *EPA*. However, the *EPA's* purpose is achieved when an order to remediate property is issued: the party subject to the order will remediate the property, or it will face sanctions. The legislature designed the *EPA* generally, and created Part X specifically, to function in this manner. A claim for pre-emptive remediation costs where the defendant is already subject to an order to remediate is thus at best unnecessary, as it replicates what a remediation order already accomplishes, and at worst it will actively impede the remediation order's function.

> *Midwest Appeal*, *supra* para 7 at para 49.
> *EPA*, *supra* para 6 at ss 186, 187.

(ii) *The Court of Appeal's interpretation frustrates the purpose of the Part X*

44 As discussed above, the purpose of Part X of the *EPA* is to give the Minister the tools to respond to environmentally harmful spills quickly. Ministers are experts in their fields (*Mount Sinai*). Their decisions are based on the expertise of their department, and their weighing of public policy considerations. Here, the Minister determined that the Appellants were best placed to undertake remediation of the Respondent's property and issued them the remediation order. Under s 97(1), it was open to the Minister to issue the order to the Respondent, but the Minister chose not to.

> *Mount Sinai Hospital Center v. Quebec (Minister of Health and Social Services)*, 2001 SCC 41 at para 58, [2001] 2 SCR 281 [*Mount Sinai*].

45 Allowing parties to bring claims under s 99(2) while remediation efforts are ongoing will create situations where the Minister's expertise and mandate to protect the environment is placed in direct conflict with a private party's wish for pre-emptive compensation. The concern that

courts may undermine the Minister's ability to control and manage spills is real: in the appeal judgement below the MOE stated that, if the Respondent was successful on appeal, the MOE would be "forced to redirect its remediation order" to the Respondent. It is clear, based on this statement, this is not how the MOE would have chosen to proceed had they not been forced to do so.

Midwest Appeal, *supra* para 6 at para 55.

46 Relatedly, the Court of Appeal was concerned that if they interpreted s 99(2) as barring claimants from bringing actions against parties subject to remediation orders, it could prevent the MOE from being willing to issue remediation orders at all. Respectfully, the Court's concerns are misplaced. Under the *EPA*, the MOE's concern should be, first and foremost, protecting the environment, not whether a civil suit should be brought. In cases of spills, that means the MOE should focus on which party is best placed to carry out remediation efforts. Instead, under the current interpretation of s 99(2), the MOE's predominant consideration will be how litigious the party whose land will be remediated is likely to be.

Midwest Appeal, *supra* para 6 at para 49.

47 Actions for pre-emptive remediation costs under s 99(2) will also slow, or halt altogether, remediation efforts. Cases involving environmental harm, such as the present appeal, can take years to reach their conclusion. A rational defendant, faced with both an order to remediate and a lawsuit for remediation costs, will not begin the remediation process until litigation is settled; parties will not invest money on remediation efforts that they may then have to pay another party to perform again.

(iii) *The Court of Appeal's interpretation wrongly creates a punitive aspect in s 99(2)*

48 The wording of s 99(2) makes it clear that compensation under s 99(2) is meant only to make injured parties whole again. The section compensates eligible parties for "loss or damage" caused by spills and "all reasonable cost and expense" incurred in cleaning up spills after being ordered to do so. The provision does not intend to be punitive, nor to impart a windfall on a plaintiff.

49 The Court of Appeal's interpretation of s 99(2) improperly creates the potential for the Respondent to experience double recovery. The Respondent will collect pre-emptive remediation costs, but be under no obligation to actually effect remediation. Conversely, the Appellants will remain obligated to undertake remediation of the Respondent's land. This result, in effect, punishes the Appellants, and gives a windfall to the Respondent. This concern was precisely why Pollak J. interpreted s 99(2) as preventing parties from claiming pre-emptive remediation costs where there is an outstanding remediation order.

Midwest Trial, supra para 6 at para 22.

50 The Court of Appeal discounted the possibility that the Respondent could experience double recovery because the MOE would redirect which party was subject to the order. Respectfully, this approach to s 99(2) is mistaken. Insofar as it is possible, courts should always favour an interpretation which removes the possibility of double recovery (*Multiple Access*).

Midwest Appeal, supra para 6 at para 55.
Multiple Access Ltd v McCutcheon, [1982] 2 SCR 161 at 191, 138 DLR (3d) 1 [*Multiple Access*].

51 In the present case, there is no guarantee that the MOE will actually switch which party is subject to the order, nor is there any guarantee that the MOE will always switch who is subject to orders in similar future cases. The *EPA* provides no protection for defendants in such circumstances. Courts, however, can provide this protection by interpreting the statute as removing the possibility of double recovery.

(iv) *Conclusion*

52 Interpreting s 99(2) in a way that bars claims for pre-emptive remediation costs when there are outstanding remediation orders accords better with the purpose of Part X. Such an approach allows the Minister to fulfill its role in environmental protection, prevents potential conflict between the Minister and the courts, while still recognizing an individual's right to compensation where no outstanding order exists.

D. Section 99(2) Does Not Permit Midwest to Collect Pre-Emptive Remediation Costs

53 Though the Court of Appeal awarded the Respondent pre-emptive remediation costs under s 99(2), it did not specify under which branch of the provision it did so. The Court did

state, however, that "under either part of s 99(2), polluters must reimburse other parties for costs they incur in remediating contamination."

Midwest Appeal, *supra* para 6 at para 69.

54 Pre-emptive remediation costs cannot be available to plaintiffs under both parts of s 99(2). The two branches of s 99(2) are unambiguous in that each is intended to compensate for different things: loss and damages under (a), and the reasonable costs of work completed pursuant to an order or direction under (b). In the present appeal, by considering each provision in turn, and then together, it becomes clear that the Respondent cannot collect pre-emptive remediation costs under either branch.

(i) *Midwest does not fit within s 99(2)(b)*

55 As noted by McLachlin CJ in *DAI*, "The first and cardinal principle of statutory interpretation is that one must look to the plain words of the provision."

DAI, *supra* para 20 at para 26.

56 The plain words of s 99(2)(b) make its purpose apparent: it is to give eligible parties a right to compensation for remediation costs. Under s 99(2)(b), parties receive compensation for "all reasonable cost and expense incurred in respect of carrying out, or attempting to carry out an order or direction." Orders and directions require the recipient to take actions to prevent, eliminate, or ameliorate any adverse effects caused by a spill, and to restore the natural environment to what existed before the spill. These actions describe the process of remediation.

EPA, *supra* para 7 at ss 91(1), 93(3), 97(2).

57 The section's wording also makes clear, however, that the right of compensation is limited both in terms of what class of individuals can exercise the right, and what costs are compensable. The Respondent neither belongs to the class described in s 99(2)(b), nor has it incurred the type of costs the section compensates.

58 It is a basic principle of statutory interpretation that "[e]very word in a statute is presumed to make sense and to have a specific role to play in advancing the legislative purpose" (*Placer Dome*). Section 99(2)(b) compensates for costs incurred "in respect of… an order or direction." These words are not meaningless. Instead, the words "in respect of… an order or

direction" act to limit the class of individuals that can claim compensation under s 99(2)(b). Only parties subject to an order or direction can carry out work or incur costs "in respect of an order or direction." The Respondent is subject to neither. It cannot claim compensation under s 99(2)(b).

Placer Dome, *supra* para 35 at para 45.

59 The legislature's use of the past tense in s 99(2)(b) also serves to limit what costs are compensable. Compensation is available for *incurred* costs, not costs that *will be* incurred. As the Respondent has not started any remediation, it has not incurred any remediation costs. Allowing parties to collect pre-emptive remediation costs creates the real risk that a party will choose not to spend the awarded compensation on remediation, but instead abandon the land, leaving it unremediated. Pre-emptive compensation also encourages relitigation of issues: if the awarded remediation costs do not cover the actual remediation costs, parties may bring more actions to make up the shortfall.

60 The plain text interpretation, that s 99(2)(b) is limited to parties subject to an order or direction who have actually incurred remediation costs, is supported when the *EPA* is considered as a whole. Section 99(2)(b) interacts with s 101. Section 101(1) states:

> 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. (emphasis added)

Parties excepted under s 101(2) are limited to the owner/controller of the spilled pollutant, their employees or agents, and people who are otherwise liable for damages arising from the spill.

61 Parties eligible to collect compensation from the Crown under s 101 are intended to mirror the parties eligible to collect compensation under s 99(2)(b), subject to those few exceptions. As such, the limitations suggested by the plain text of s 99(2)(b), that a claimant must have incurred their expenses complying with an order issued to them, should also apply to claimants under s 101. This is exactly the case. The associated regulations outlining s 101's claim process require that applicants submit a copy of the order or direction they incurred costs in respect of, that applicants must have "followed every lawful order or direction that relates to the applicant," and that applicants cannot apply more than two years "*after* the time that the cost and expense were incurred."

Spills, O Reg 360/90, ss 2.1-2, emphasis added.

62 As the Respondent is not subject to any order or direction, nor have they actually carried out any remediation work, they cannot fall within the ambit of s 99(2)(b). Allowing them to do so is contrary to the plain words of the statute.

(ii) *Section 99(2)(a) does not permit compensation for remediation costs*

63 The legislature drafted s 99(2)(a) to compensate parties for "loss or damage." "Loss or damage" is defined in the *EPA* as "includ[ing] personal injury, loss of life, loss of use or enjoyment of property and pecuniary loss, including loss of income." While the use of the word "including" suggests that the list is non-exhaustive, the legislature could not have intended for all types of loss to be compensable. If it had, the legislation would simply state that.

EPA, *supra* para 7 at s 99(1).

64 To determine whether remediation costs could be considered "loss or damage," a court must determine what unites the items the legislature listed (*Aquasource*). The items listed under "loss or damage" are united by all being actual losses or damages forced on a party by the wrongdoing of another. A spill causing a reduction in property value would clearly fall within the scope of s 99(2)(a), because this represents an actual monetary loss forced on a party by another's wrongdoing. Remediation work, however, is not properly characterized as a "loss" or as "damage." Remediation work is a cost. Furthermore, remediation work is generally not forced on an innocent party, but is undertaken voluntarily. The only times where such work is forced on an innocent party is when it is ordered by the Minister. In such cases, that work is compensable under s 99(2)(b).

Aquasource Ltd v British Columbia (Freedom of Information and Protection of Privacy Commissioner), 58 BCLR (3d) 61 at para 39, [1999] 6 WWR 1 [*Aquasource*].

65 Reading s 99(2)(a) in the context of s 99(2) as a whole reinforces that (a) cannot cover remediation costs because it would have the effect of rendering the right created in (b) redundant. Legislation is meant to be read so that every word is given effect, and interpretations that create redundancy should thus be avoided (*Placer Dome*). As discussed above, the legislature has created a right to compensation for the costs of remediation under (b), but limited the class of

people that can claim it. It does not make sense that the legislature would have duplicated this right to compensation under (a), especially where it does not have the corresponding limitation as to who can claim it.

Placer Dome, *supra* para 35 at para 45.

66 Relatedly, the legislature's use of different terms in describing what is compensable under s 99(2)(a) and (b) is significant. Compensation for "reasonable cost and expense" is available under (b), while "loss or damage" is compensable under (a). Different words are intended to have different meanings in legislation (*Sullivan*). By using different terminology, and not including "reasonable cost and expense" as an item under "loss or damage," s 99(2)(a) implicitly excludes remediation costs.

Ruth Sullivan, *Statutory Interpretation*, 2nd ed (Toronto: Irwin Law, 2007) at 185 [*Sullivan*].

(iii) *Trends in the common law cannot usurp the legislature's written words*

67 Relying on two cases decided over the past two decades, the Court of Appeal identified a trend in the common law to award the costs of restoration or remediation to plaintiffs. Any common law trend, even if it did exist, is not relevant to the issues on appeal.

Midwest Appeal, *supra* para 6 at paras 64-66.

68 The precedential value of the cases identified by the Court of Appeal is greatly limited because the plaintiffs in those cases did not bring a claim under s 99(2). Instead, the claims were brought under common law torts, including nuisance, negligence, and strict liability (*Tridan*, *Canadian Tire*). A court's ability to assess damages under those torts is broad, and can encompass a variety of considerations.

Tridan Developments Ltd v Shell Canada Products Ltd, 35 RPR (3d) 141 at 143, 2000 CarswellOnt 1969 (*ONSC*) [*Tridan*].
Canadian Tire Real Estate Ltd v Huron Concrete Supply Ltd, 2014 ONSC 288 at para 4, 88 CELR (3d) 93 [*Canadian Tire*].

69 Under s 99(2), however, the legislature has explicitly defined what damages are available to claimants, and under what circumstances. Prospective remediation costs are not available to the Respondent under s 99(2), even if they may be available under common law. As noted by

Charron J, a court "cannot disregard the actual words chosen by Parliament and rewrite the legislation to accord with its own view of how the legislative purpose could be better promoted" (*Information Commissioner*). Any damages assessed by a court under s 99(2) must accord with the legislation's text.

> *Canada (Information Commissioner) v Canada (Minister of National Defence)*, 2011 SCC 25 at para 40, [2011] 2 SCR 306 [*Information Commissioner*].

70 The cases relied on by the Court of Appeal differ in a second fundamental way from the present appeal. In those cases, the defendants were under no obligation to remediate the plaintiff's property. Without a court's intervention, the plaintiffs' properties would have remained contaminated. Here, the Appellants are subject to an order to remediate the Respondent's property. The MOE has a variety of administrative penalties, including imprisonment, available to it to ensure that the Appellants comply with the order. As evidenced by the Appellants bringing themselves into compliance with their Certificate of Approval after being sanctioned in the early 2000s, these punishments work (*Midwest Appeal)*. The Respondent's property will be remediated, in accordance with the order given to it by the Minister.

> *Midwest Appeal*, *supra* para 6 at paras 16-19.
> *EPA*, *supra* para 7 at s 186, 187.

(iv) *Conclusion*

71 The SEMCC should interpret s 99(2) in a manner that is consistent with the plain text of the provision, its context, and the legislative intent that animates it. The Respondent should not be able to collect pre-emptive remediation costs for work is has not been ordered to do.

PART IV -- SUBMISSIONS IN SUPPORT OF COSTS

72 The Appellants request that their costs in this appeal, and courts below it, be awarded to them.

73 In the alternative, the Appellants request that each party bear its own costs. Given that the Appellant was already obligated under law to remediate the Respondent's property, the result sought by the Respondent would have been accomplished more efficiently, and at less cost to all parties involved, by not resorting to litigation that has spanned more than four years and cost hundreds of thousands of dollars.

PART V -- ORDER SOUGHT

74 The Appellants respectfully submit

(a) an order by this Court to allow the appeal, and restore the original judgment of the Ontario Superior Court of Justice in its entirety, and

(b) the costs of this appeal, and costs from the courts below.

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

_____
Pavin Takhar

_____
Adam Cembrowski

Counsel for the Appellants
John Thordarson and Thorco Contracting Limited

PART VI -- TABLE OF AUTHORITIES

A. Jurisprudence

Paragraph No.

B. Legislation

C. Secondary Sources

PART VII -- LEGISLATION AT ISSUE

Environmental Protection Act, RSO 1990, c E 19

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")

…

99. (1) In this section,

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

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

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

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

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

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

(b) for all reasonable cost and expense incurred in respect of carrying out or attempting to carry out an order or direction under this Part, from the owner of the pollutant and the person having control of the pollutant.

…

JOHN THORDARSON and
THORCO CONTRACTING LIMIED
APPELLANTS
(Respondents)

-and-

MIDWEST PROPERTIES LTD.

RESPONDENT
(Appellant)

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

SUPREME ENVIRONMENTAL MOOT
COURT OF CANADA

FACTUM OF THE APPELLANTS JOHN THORDARSON and THORCO CONTRACTING LIMITED

TEAM #2017 - 13

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