WILLMS & SHIER ENVIRONMENTAL LAW MOOT COURT COMPETITION 2024

S.E.M.C.C. File Number: 02-24-2024

IN THE SUPREME ENVIRONMENTAL MOOT COURT OF CANADA

(ON APPEAL FROM THE BRITISH COLUMBIA COURT OF APPEAL)

B E T W E E N:

VICTORY MOTORS (ABBOTSFORD) LTD. and JANSEN INDUSTRIES 2010 LTD.

APPELLANTS

- and -

ACTTON SUPER-SAVE GAS STATIONS LTD.

RESPONDENT

FACTUM OF THE RESPONDENT
ACTTON SUPER-SAVE GAS STATIONS LTD.

Pursuant to Rule 12 of the
Willms & Shier Environmental Law Moot Official Competition Rules 2024

TEAM #2024-1

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

AND TO: **ALL REGISTERED TEAMS**

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PART I -- OVERVIEW AND STATEMENT OF FACTS

A. Overview of the Respondent's Position

1 Actton Super-Save Gas Stations Ltd. ("Super-Save") (the "Respondents"), request the that the Supreme Environmental Moot Court of Canada (i) accounts for the benefit of the enjoyed by Jansen Industries 2010 Ltd. ("Jansen Ltd.") and Victory Motors (Abbotsford) Ltd. ("Victory Motors") (collectively, the "Appellants") in obtaining a Certificate of Compliance in its fairness analysis; and (ii) determines that legal costs under the *Environmental Management Act*, SBC 2003, c 53 ("*EMA*") are only recoverable by "responsible persons", while dismissing the appeal on the grounds that litigation costs are not recoverable under the *EMA*.

2 On the first issue, The British Columbia Court of Appeal ("BCCA") erred by not considering the benefit in obtaining a Certificate of Compliance when apportioning liability for the costs of remediating a contaminated site under the *EMA*. Accounting for a benefit in obtaining a Certificate of Compliance promotes the foundational principles of the *EMA*, including "polluter-pays," pollution prevention, timely clean-up, and pollution deterrence. When apportioning liability for the costs of remediation among responsible persons, strategically forming a subsidiary corporation to influence the allocation of liability in obtaining a Certificate Compliance demonstrates benefits "relevant to a fair and just allocation" rather than the "price paid for the property by the person seeking cost recovery." Interpreting the purpose of the *EMA* and applying s. 35(2)(f) of the *Contaminated Sites Regulation*, BC Reg 375/96 ("*CSR*") indicates that the Court cannot endorse statutory schemes facilitating the indemnification of responsible parties from future cleanup expenses while simultaneously enabling intricate corporate setups to gain financial advantages through remediation and overcompensation. The BCCA's reasoning frustrates the "polluters pay" principle by incentivizing doing nothing when the total value of the assets is greater than remediation costs, which is especially concerning in the bankruptcy context. The Court does not need to the lift the corporate veil or reject group enterprise liability to consider the benefit of the Certificates of Compliance.

3 On the second issue, the *EMA* separates remediation and litigation provisions and is silent on litigation costs, implying an intentional exclusion. Litigation costs cannot be considered part of remediation costs since recovering legal costs depends on remediation. The *EMA*'s exclusion of the *Supreme Court Civil Rules*, BC Reg 168/09 ("*Supreme Court Civil Rules*") indicates a lack

of intent to duplicate legal frameworks. The statutory framework would be redundant if litigation costs were recoverable under both the *EMA* and the *Supreme Court Civil Rules*.

4 The recovery of legal costs is limited to "responsible persons", which aligns with the plain and ordinary interpretation of s. 47(3)(c). The legal costs in s. 47(3)(c) align with negotiations and apportionment of liability between responsible parties. Allowing any person to recover legal costs contradicts the "polluter pays principle" and may lead to double recovery.

5 The BCCA's interpretation of legal costs under s. 47(3) creates ambiguity. A narrow interpretation promotes judicial economy and aligns with the legislative purpose of remediation.

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

6 The Respondent partially agree with the Appellants statement of facts. However, the Respondents identify essential facts that are absent or require rephrasing.

(i) Background

7 Between 1940 and 1994, various gas stations operated on the Victory Motors property, including Chevron Canada Ltd. ("Chevron"), Shell Canada Ltd. ("Shell") and Super-Save. The Respondent's involvement in the case revolves around the historical operations on the Victory Motors site between 1982 and 1992.

> *Victory Motors (Abbotsford) Ltd v Actton Super-Save Gas Station Ltd*, 2021 BCCA 129, at para 4 [Appeal Reasons].
>
> *Jansen Industries 2010 Ltd. v Victory Motors (Abbotsford) Ltd.*, 2019 BCSC 1621 at para 5 [Trial Reasons].

8 In 1948, Victory Motors became the owner of the Victory Motors site, and continues as its owner to this day.

> Trial Reasons at para 2.

9 The contamination was aggravated by Victory Motors' failure to empty and remove the buried gasoline storage tanks after terminating Gardner Leasing Ltd. operations in 1994. Victory Motors did not remove or stabilize the infrastructure that remained in place.

> Appeal Reasons at para 6.

10 In 2012, the Jansen family incorporated a company called Victory Motors Ltd., to purchase all the shares of Victory Motors, from Anne Webber ("Ms. Webber"). The

consideration paid for the shares was $42,363.24, plus an agreement to indemnify Ms. Webber against any environmental claims against her relating to contamination from the Victory Motors site. Jansen Ltd guaranteed Victory Motors Ltd.'s indemnity obligations to Ms. Webber.

Trial Reasons at para 24.

11 In result, the principals of Jansen Ltd. had indirect control of both sites. Jansen Ltd and Victory Motors are both owned, directly or indirectly, by members of the Jansen family.

Appeal Reasons at para 7.

Trial Reasons at para 4.

12 In 2012, Victory Motors commenced an action against the various gasoline station operators for the contamination. Victory Motors spent approximately $800,000 upgrading the buildings on its site and fully leased the property on advantageous terms.

Appeal Reasons at para 9.

Trial Reasons at para 25.

13 An appraisal report valued the Victory Motors site in 2015, at $2,800,000. A subsequent appraisal valued the Victory Motors site at $3,200,000 in 2018. These appraisals were prepared before the Victory Motors site received a Certificate of Compliance.

Trial Reasons at paras 113-115.

14 In 2016, Jansen Ltd. and Victory Motors entered into the BC Ferries Agreement with Chevron and Shell. The liability of Chevron and Shell was limited to a fixed amount that was not disclosed in the trial. A term of the Agreement was that Jansen Ltd. and Victory Motors would not seek to recover from any other party, including Super-Save, any damages arising from any wrongful act or statutory claim for contribution attributable to Chevron or Shell.

Trial Reasons at paras 26-29.

15 Super-Save made a settlement offer of $450,000 which was rejected by the Appellants.

Appeal Reasons at para 150.

(ii) The Trial Judgement 2019 BCSC 1621

16 When allocating remediation costs, the trial judge rejected the bargain price acquisition of Ms. Webber’s shares as a relevant factor under s. 35(2)(a) of the *CSR*. When applying s.

35(2)(f), the trial judge allocated a substantial portion of the costs to Victory Motors because it obtained the benefit of the Certificate Compliance.

Trial Reasons at paras 110-11, 148-152.

17 The trial judge allocated liability for the Victory Motors site as follows:

(a) Victory Motors: 45%
(b) Super-Save: 35%
(c) Chevron: 15%
(d) Shell: 5%

Trial Reasons at para 171.

18 The trial judge allocated liability for the Jansen Ltd. site as follows:

(a) Super-Save: 50%
(b) Victory Motors 30%
(c) Chevron: 15%
(d) Shell: 5%

Trial Reasons at para 153.

19 The trial judge rejected most remediation cost claims, except those paid to Levelton for the Certificates of Compliance. The trial judge denied Jansen Ltd.'s recovery of legal costs under section 47(3)(c) of the *EMA*, citing that they were not a responsible person.

Trial Reasons at para 166.

(iii) The Appeal Judgement 2021 BCCA 129

20 The Appellants appealed the trial judgement, arguing that the allocation of costs and refusal to award legal fees were contrary to the EMA's "polluter pays" principle.

Appeal Reasons at para 52.

21 The BCCA ruled that the trial judge erred in attributing a benefit in obtaining the Certificate of Compliance. The BCCA found that the benefit cannot be considered under s. 35(2)(f) because the polluters pay principle encourages the timely remediation of contaminated sites and that companies maintain a legal identity from their shareholders. The issue of the allocation of liability was remitted to the trial judge with the benefit of these reasons.

Appeal Reasons at paras 56, 60, 69.

22 The BCCA interpreted legal costs broadly, allowing for the potential recovery of legal costs for various legal services by both responsible and non-responsible persons. However, the BCCA acknowledged that litigation costs could not be recovered under the *EMA*, as litigation cost recovery is subject to the *Supreme Court Civil Rules* cost rules.

Appeal Reasons at paras 99-100.

PART II -- THE RESPONDENT'S POSITION WITH RESPECT TO THE APPELLANTS' QUESTIONS IN ISSUE

23 The Appellants misinterpreted the two issues on appeal, which are:

(a) The BCCA erred in narrowly construing the purpose of the *EMA* when apportioning liability for the costs of remediating a contaminated site among responsible persons by not considering the benefit enjoyed by responsible persons in obtaining the Certificate of Compliance under s. 35(2) of the *CSR*.

(b) Legal costs associated with remediation are recoverable exclusively by "responsible persons" under the *EMA*. Litigation costs are recoverable not under the EMA.

PART III -- ARGUMENT

A. Standard of Review

24 Both issues on appeal are questions of law. The standard of review is correctness.

Housen v Nikolaisen, 2002 SCC 33 at para 8.

B. Allocating Remediation Costs Based on the Benefit of Obtaining a Certificate of Compliance

25 There are two main reasons why the BCCA erred by refusing to account for the benefit of obtaining a Certificate of Compliance when apportioning liability for the remediation costs. First, accounting for a benefit in obtaining a Certificate of Compliance promotes the foundational principles of the *EMA*, including "polluter-pay," pollution prevention, cost internalization and pollution deterrence. Second, the strategic formation of a separate corporation to purchase a responsible person's shares and indemnify them from environmental responsibility when obtaining a Certificate Compliance are "factors relevant to a fair and just allocation" of liability.

(i) The *EMA* Emphasizes Pollution Prevention and Cost Internalization When Allocating Remediation Costs

26 The Court must apply s. 35(2) of the *CSR* when apportioning liability for remediation costs between two or more responsible persons under s. 47 of the *EMA*.

Contaminated Sites Regulation, BC Reg 375/96, s 35(2) [*CSR*].

Environmental Management Act, SBC 2003, c 53, s 47 [*EMA*].

27 The *EMA* legislates the remediation of contaminated sites, the determination of responsible persons, and the allocation of remediation costs. Part 4 of the *EMA* legislates the identification, determination, and remediation of contaminated sites and the scheme for assessing and allocating liability for remediation costs.

EMA, Part 4 — Contaminated Site Remediation.

28 Once a site is deemed contaminated, “responsible persons” must remediate the site and may be liable to anyone who has incurred remediation costs. Cost recovery flows through s. 47(5) of the *EMA*, which creates a cost recovery scheme from responsible persons. Under s. 47(9), apportionment must accord with the principles of liability set out in s. 35(2) of the *CSR*.

EMA, ss 47(5)(9).

CSR, s 35(2).

29 The Appellants correctly identify "polluter pays" as a foundational principle within the *EMA*. However, they incorrectly rely on the BCCA’s narrow interpretation of the principle, as "encouraging the timely cleanup of contaminated sites by current owners."

Willms & Shier Moot Team 2024-10 Appellant Factum at paras 37-38.

Appeal Reasons at para 58.

Workshop Holdings Limited v. CAE Machinery Ltd., 2005 BCSC 631 at para 69.

30 The “polluter pays” principle requires polluters to bear the expense of preventing, controlling, and cleaning up pollution through cost allocation and cost internalization. Internationally, it is reflected in Principle 16 of the United Nations *Rio Declaration of the Environment and Development*:

> "National authorities should endeavour to promote the internalization of environmental costs and the use of economic instruments, taking into account the approach that the polluter should, in principle, bear the cost of pollution with due regard to the public interest and without distorting international trade and investment."
>
> *Rio Declaration on Environment and Development*, UN Doc. A/Conf. 151/5/Rev. 1 (1992).

31 The Supreme Court of Canada views to the "polluter pays" principle as "a well-recognized tenet of Canadian environmental law." Nationally, the Supreme Court of Canada describes the "polluter pays" principle as:

> "To encourage sustainable development, that principle assigns polluters the responsibility for remedying contamination for which they are responsible and imposes on them the direct and immediate costs of pollution. At the same time, polluters are asked to pay more attention to the need to protect ecosystems in the course of their economic activities."
>
> *Imperial Oil v Quebec (Minister of Environment)*, [2003] 2 SCR 624 at para 24 [*Imperial Oil*].
>
> *Orphan Well Association v Grant Thornton Ltd.*, 2019 SCC 5 at para 29 [*Orphan Well*].

32 Pollution prevention and cost internalization is evident when interpreting descriptions of "polluter pays." The *Rio Declaration* emphasizes that the "polluter should, in principle, bear the cost of pollution, with due regard to the public interest and without distorting international trade and investment." The Supreme Court of Canada underscores that "polluters are asked to pay more attention to the need to protect ecosystems in the course of their economic activities."

> *Rio Declaration on Environment and Development*, UN Doc. A/Conf. 151/5/Rev. 1 (1992).
>
> *Imperial Oil* at para 24.

33 Considering the benefit of a Certificate of Compliance in allocating remediation costs aligns with the purpose of the *EMA* since preventing a responsible person from benefiting from remediation without contributing to remediation costs frustrates the "polluter pays" principle.

> *Rolin Resources Inc. v CB Supplies Ltd.*, 2018 BCSC 2018 at para 85 [*Rolin Resources*] citing *J.I. Properties Inc. v PPG Architectural Coatings Canada Inc.*, 2015 BCCA 472 at paras 29-32.

(ii) It is Inappropriate to Consider the Purchase of Shares Under s. 35(2)(a) of the *CSR*

34 S. 35(2)(a) of the *CSR* states that a court must consider prescribed factors when "determining the reasonably incurred costs of remediation", including "the price paid for the property by the person seeking cost recovery."

CSR, s 35(2)(a).

35 When interpreting the *CSR* in its plain and ordinary meaning, the incorporation of a separate entity to purchase shares and to indemnify a responsible person from all environmental liability does not relate to the "price paid for the property by the person seeking cost recovery." This is exactly why s. 35(2)(a) is not the appropriate factor.

Trial Reasons at para 111.

Appeal Reasons at para 55.

(iii) Polluters Pay Principle Requires Considering the Benefits of Obtaining a Certificate of Compliance When Applying s. 35(2)(f) of the *CSR*

36 The share purchase, indemnification, and sophisticated corporate structure are benefits of obtaining a Certificate of Compliance when allocating liability under s. 35(2)(f). S. 35(2)(f) states that a Court must consider prescribed factors when "determining the reasonably incurred costs of remediation", including "other factors relevant to a fair and just allocation". S. 47 of the *EMA* and s. 35(2) of the *CSR* promote "cost recovery" by ensuring responsible persons do not overcompensate remediators. The benefit here is allowing responsible persons to precisely allocate liability through indemnification and overcompensation, which demonstrates factors relevant to a "fair and just allocation" of remediation costs. An alternate interpretation undermines the purpose of the *EMA* by enabling responsible persons to evade accountability.

CSR, s 35(2)(f).

EMA, s 47.

Rolin Resources at para 96.

37 The BCCA erred in determining that a share acquisition is not relevant to s. 35(2)(f) in holding "one cannot do indirectly what one cannot do directly under a delegated legislative discretion". In essence, the BCCA determined that the acquisition of shares cannot be considered

under s. 35(2)(f) because the trial judge held that evaluating the share price contradicts the fundamental principle that companies maintain a distinct legal identity from their shareholders under s. 35(2)(a).

Appeal Reasons at paras 59-60.

Trial Reasons at para 110.

Salomon v Salomon & Co. (1896), [1897] AC 22 (UK HL).

38 The BCCA incorrectly focused on how the remediation of the Victory Motors site did not increase its value beyond the cost of remediation. To achieve a "fair and just allocation of liability", the Court must recognize that the benefit of obtaining the Certificate of Compliance goes further than the value of the property. The benefit is the strategic formation of a separate corporation for the sole purpose of purchasing the shares by allocating liability through an indemnity. Under the "polluter pays" principle, responsible polluters should not be overcompensated and unjustly indemnified.

Appeal Reasons at paras 7, 67.

Environmental Law Centre (Alberta), "The Polluter Pays Principle in Alberta Law: An introduction & Survey" (December 2019), online (pdf): <elc.ab.ca/wp-content/uploads/2019/12/The-Polluter-Pays-Principle-in-Alberta-Law-December-2019.pdf>.

39 The BCCA erred in allowing the Jansen family to benefit from the Certificates of Compliance by operating under the 'guise' of Victory Motors since it might encourage the timely remediation of contaminated sites. This fails to recognize the foundational principles of the *EMA*, which encompass a much broader spectrum, including "polluter-pays," pollution prevention, cost internalization, deterrence, and the timely remediation of contaminated sites.

Appeal Reasons at paras 56-58.

Marie-Ann Bowden, "The Polluter Pays Principle in Canadian Agriculture" (2006) 59:53 Okla L Rev at 61.

Canadian National Railway Company et al. v ABC Recycling Ltd., 2005 BCSC 1559 at 6.

40 Not considering the benefit facilitates intricate corporate setups to gain financial advantages through remediation, indemnification, and overcompensation. The Jansen family, Victory Motors, and Ms. Webber gain a clear benefit in obtaining the Certificates of

Compliance. As stated by the appellants, “the [Jansen] family freed Ms. Webber of her liabilities and provided her a clean escape from the complex and difficult task of remediation.”

> Willms & Shier Moot Team 2024-10 Appellant Factum at para 46.

41 This interpretation benefits a responsible person by shifting the liability for contamination to a separate corporation while seeking overcompensation. Simultaneously, it enables the Jansen family to extract the value of the Certificates of Compliance while freeing Ms. Webber from any accountability from contamination that she benefited from. According to the trial judge, Victory Motors “was at all material times the owner of the Victory Motors site” and “failed to act responsibly from 1994 to 2012” by allowing the “infrastructure to remain unremediated for almost 20 years.”

> Trial Reasons at paras 110, 112, 146.

(iv) Considering the Benefits of the Indemnity and the Share Purchase Promotes Environmental Accountability

42 Pollution prevention and remediation are critical aspects of the “polluter pays” principle. Cost internalization is fundamental aspect to pollution prevention in the context of the *EMA* since the “statutory objective is to require polluters to pay the cost of the cleanup of contamination from which they have benefitted in the past.” To fully implement the polluters, pay principle, responsible polluters must be liable for the costs of preventing pollution, cleaning it up, restoring environmental damage, and compensating for harm.

> *Rolin Resources* at para 85 citing *J.I. Properties Inc. v PPG Architectural Coatings Canada Inc*., 2015 BCCA 472 at paras 29-32.
>
> Environmental Law Centre (Alberta), “The Polluter Pays Principle in Alberta Law: An introduction & Survey” (December 2019), online (pdf): <elc.ab.ca/wp-content/uploads/2019/12/The-Polluter-Pays-Principle-in-Alberta-Law-December-2019.pdf>.

43 The benefit of obtaining the Certificates of Compliance prevents Victory Motors and Ms. Webber from internalizing pollution costs due to the share purchase, the corporate structuring, and the indemnification. Coincidentally, after commencing an action against the various operators, “Victory Motors set about upgrading the buildings on its site and soon fully leased the property on advantageous terms.” This demonstrates a failure to internalize costs, as the Jansen

family was aware of the profits achievable by obtaining Certificates of Compliance through the indemnity and pursuit of overcompensation.

> Appeal Reasons at para 9.

44 The BCCA incorrectly focused on Super-Save's reliance on *J.I. Properties Inc. v PPG Architectural Coatings Canada Inc.* ("*J.I. Properties*") for the proposition that Victory Motors cannot recover its remediation costs while simultaneously enjoying an increase in property value after the purchase of a contaminated property. The issue here is not the increased value after remediation. Through Victory Motors, the Jansen family is undermining cost internalization by using the benefits of the Certificates of Compliance to seek overcompensation and profit from the "bargain" they made in acquiring the shares, while indemnifying a responsible person. This concern is magnified in situations where the cost of remediation surpasses the value of the contaminated assets.

> Appeal Reasons at para 37.
>
> *J.I. Properties Inc. v PPG Architectural Coatings Canada Inc.*, 2014 BCSC 1619 at paras 191-193, aff'd 2015 BCCA 472 (BCCA) [*J.I. Properties*].
>
> Roderick J. Wood, "Environmental Obligations in Insolvency Proceedings: Orphan Well Association v. Grant Thornton Ltd" (2019) 62:2 Can Bus LJ 211 at 226.

45 The most concerning part of this appeal is the indemnity. The Court cannot endorse statutory schemes that facilitate the indemnification of responsible parties from future cleanup expenses, while simultaneously enabling intricate corporate setups to gain financial advantages through remediation and overcompensation. The concept of cost internalization requires that responsible polluters should not be excessively compensated or unjustly indemnified.

> Environmental Law Centre (Alberta), "The Polluter Pays Principle in Alberta Law: An introduction & Survey" (December 2019), online (pdf): <elc.ab.ca/wp-content/uploads/2019/12/The-Polluter-Pays-Principle-in-Alberta-Law-December-2019.pdf>.

46 In *Petro-Canada v. British Columbia (Ministry of Water, Land and Air Protection)*, the British Columbia Environmental Appeal Board held that the Province lacked jurisdiction under the *CSR* to include indemnity clauses in a Certificate of Compliance. Although this case addresses the Province's jurisdiction over indemnity clauses, it underscores that responsible polluters should not receive indemnification.

Petro-Canada v British Columbia (Ministry of Water, Land and Air Protection), [2006] BCEA Nos 2004-WAS-001(a) & 2004-WAS-002(a).

47 Although the evidence does not show whether remediation increased the value of the Victory Motors site, the consideration for the shares is relevant. This appeal involves circumstances where the value of the shares dramatically exceeds remediation costs. The Jansen family paid $42,363.24 for the shares and $259,218 to obtain a Certificate of Compliance for the Victory Motors site. At the same time, appraisal reports estimated the site's value to be between $2,800,000 and $3,200,000 before remediation. This considerable surplus does not even account for the additional benefit that Jansen Ltd. accrues through the Certificates of Compliance.

Appeal Reasons at para 38.

Trial Reasons at paras 24, 32, 112-114.

48 The BCCA failed to consider the outcome of the decision by relying on *J.I. Properties* for the proposition that an owner's motivation is "largely irrelevant" to liability, whether it be to develop the property, sell it, or remediate it. This does not recognize circumstances where the expected remediation costs exceed the value of the environmentally damaged land. According to Professor Roderick J. Wood, the "incentive to do nothing is strongest where the total value of the assets is less than the costs of remediation."

J.I. Properties at para 111.

Appeal Reasons at paras 68-69.

Roderick J. Wood, "Environmental Obligations in Insolvency Proceedings: Orphan Well Association v. Grant Thornton Ltd" (2019) 62:2 Can Bus LJ 211 at 226.

49 It is challenging to envision effective pollution prevention when responsible persons can sidestep cost internalization. The BCCA's reasoning may incentivize present polluters to adopt a cost-benefit approach by either selling contaminated land with indemnification after profiting, or by oping to continue polluting if the associated costs outweigh the benefits of remediation. The scheme of the *EMA* is questioned if the Court incentivizes polluters to take no action and instead indemnify other responsible persons when the remediation costs exceed the total value of assets.

Roderick J. Wood, "Environmental Obligations in Insolvency Proceedings: Orphan Well Association v. Grant Thornton Ltd" (2019) 62:2 Can Bus LJ 211 at 226.

Orphan Wells at paras 289-290, Côté J (dissenting).

(v) Considering the Benefits of a Sophisticated Corporate Structuring Promotes Environmental Accountability

50 The relationship between Jansen Ltd. and Victory Motors is relevant to the benefit obtained from the Certificates of Compliance. The Jansen family is shaping the distribution of liability, while determining who benefits from remediation through sophisticated corporate structuring. Coincidentally, Jansen Ltd and Victory Motors are both owned, directly or indirectly, by members of the Jansen family. The phrasing of the indemnity at trial illustrates this sophisticated structuring: "Jansen Ltd guaranteed Victory Motors Ltd.'s indemnity obligations to Ms. Webber."

> Trial Reasons at paras 4, 24.

51 The Jansen family's corporate structure contradicts the *EMA*'s purpose since encouraging pollution prevention involves ongoing improvements in operational behaviour to avoid environmental costs that might otherwise lead to the application of the "polluter pays" principle.

> *Rolin Resources* at para 85 citing *J.I. Properties Inc. v PPG Architectural Coatings Canada Inc*., 2015 BCCA 472 at paras 29-32.
>
> Environmental Law Centre (Alberta), "The Polluter Pays Principle in Alberta Law: An introduction & Survey" (December 2019), online (pdf): <elc.ab.ca/wp-content/uploads/2019/12/The-Polluter-Pays-Principle-in-Alberta-Law-December-2019.pdf>.

52 The Court does not need to lift the corporate veil or reject group enterprise liability when considering the corporate structure of Jansen Ltd and Victory Motors. The Court may look through corporate structures as needed to achieve their purpose, specifically where an entity is so controlled by another entity that it is merely an instrument or agent of the other entity to evade a statute or modify its intent.

> *Covert v Minister of Finance (NS)*, [1980] 2 SCR 774 at 791-92.
>
> *De Salaberry Realties Ltd. v Minister of National Revenue*, [1974] CTC 295 at paras 43-50, 46 DLR (3d) 100, aff'd [1976] CTC 656, 70 DLR (3d) 706 citing Laurence Cecil Bartlett Gower, *The Principles of Modern Company Law*, 3d ed. (1969) at 194, 200, 203, 213.

53 In the alternative, *Nevsun Resources Ltd v Araya* suggests that a parent corporation can be liable for actions conducted through its subsidiary without piercing the corporate veil, which

should persuade the court to look through the Jansen family's corporate structure. This case involved workers seeking compensation for various torts and breaches of international law related to their work at a mine owned by Bisha Company, in which Nevsun Resources Ltd. held a majority stake. The Supreme Court of Canada rejected Nevsun's attempt to strike the claims. While Nevsun did not assert separate corporate personhood as a reason to strike the claims, the Court emphasized Nevsun's exercise and control over Bisha Company activities. Professor Douglas Sarro argues that the plaintiffs could have successfully relied on the UK decision in *Vendanata Resources PLC v Lungowe* to support the idea that a parent corporation can be liable for the actions of its wholly owned subsidiary.

> *Nevsun Resources Ltd v Araya*, 2020 SCC 5 at para 17.
>
> Douglas Sarro, "Corporate Veil-Piercing and Structures of Canadian Business Law" (2022) 55:1 UBC Law Review 203-50 at 237-238 citing *Choc v Hudbay Minerals Inc*., 2013 ONSC 1414 at para 49 and *Vedanta Resources PLC v Lungowe*, [2019] UKSC 20 at para 51.

54 The facts of this appeal demonstrate sophisticated corporate structuring in the creation of Victory Motors by the Jansen family to allocate liability and profit from the Certificates of Compliance. In *Liebreich v Farmers of North America*, the British Columbia Supreme Court ("BCSC") warned of scenarios where "sophisticated corporate structuring is ... permitted to work an injustice by turning the seeking of proper legal recourse into an elaborate shell game."

> *Liebreich v Farmers of North America*, 2019 BCSC 1074 at para 140.

55 The Jansen family formed a separate entity to purchase all the shares, which included an indemnification agreement for all environmental claims related to the site. As a result, the Jansen Ltd and Victory Motors sites are now owned directly or indirectly by members of the Jansen family. At the same time, Ms. Webber enjoys the benefits from the indemnity after benefiting from the site's pollution.

> Trial Reasons at paras 18-24.
>
> Appeal Reasons at paras 7-9.

56 The *EMA*'s statutory objective is to require polluters to pay the cost of the clean-up of contamination from which they have benefitted in the past. This corporate structure aims to ensure the Jansen family profits from remediation through its parent corporation while allocating

liability through its subsidiary corporation. Neglecting the benefits of acquiring Certificates of Compliance in this corporate structuring undermines the *EMA's* purpose by sidestepping cost internalization through indemnification and overcompensation.

> *Rolin Resources* at para 85 citing *J.I. Properties Inc. v PPG Architectural Coatings Canada Inc*., 2015 BCCA 472 at paras 29-32.

57 Suppose the Court determines it should apply the traditional test of piercing the corporate veil established in *Transamerica Life Insurance Co. of Canada v. Canada Life Assurance Co*. to assess whether it can look through the structures of Jansen Ltd. and Victory Motors. That case held that "courts will disregard the separate legal personality of a corporate entity where it is completely dominated and controlled and being used as a shield for fraudulent or improper conduct." Not piercing the corporate veil would frustrate the statutory scheme of the *EMA* since corporations would be encouraged to establish structures aimed at mitigating environmental accountability.

> *Transamerica Life Insurance Co. of Canada v Canada Life Assurance Co.*, [1996] OJ No 1568 at para 22, aff'd [1997] OJ No 3754.
>
> *Yaiguaje v Chevron Corporation*, 2018 ONCA 472 at para 38, Hourigan JA, leave to appeal to SCC refused, 38183 (4 April 2019).

58 The most significant risk arises in the context of a parent corporation like Jansen Ltd. gaining the benefit of obtaining a Certificate of Compliance, while transferring liability and indemnification for pollution into a subsidiary corporation that later declares bankruptcy or faces insolvency. Following the traditional test from *Transamerica* prevents the enforcement of a corporate parent's obligation to an involuntary creditor against the subsidiary's assets, such as an environmental claim.

> *Rohani v Rohani*, 2004 BCCA 605 at paras 22, 26
>
> Douglas Sarro, "Corporate Veil-Piercing and Structures of Canadian Business Law" (2022) 55:1 UBC Law Review 203-50 at 239-240.

59 *Orphan Wells v Grant Thornton Ltd.* indicates that Alberta's oil and gas licensing regime does not conflict with the federal *Bankruptcy and Insolvency Act*, holding that environmental obligations will not be regarded as provable claims unless the public authority has stepped in. Professor Roderick J. Wood argues this decision creates a "remediation stand-off" when the

expected costs of remediation exceed the value of the environmentally damaged land and any contiguous property.

> *Orphan Wells* at paras 162-164.
>
> Roderick J. Wood, "Environmental Obligations in Insolvency Proceedings: Orphan Well Association v. Grant Thornton Ltd" (2019) 62:2 Can Bus LJ 211 at 222, 224, 226-227.

60 The recent ruling in *Cordy Environmental Inc. v. Obsidian Energy Ltd.* may imply that the cost recovery provisions of the *EMA* enable contractors to reclaim pre-filing amounts associated with environmental remediation from insolvent clients. However, it only establishes a limited exception by offering environmental contractors an avenue to bypass the insolvency process. Notably, it does not address the provisions of the *EMA* regarding liability among responsible parties since Cordy was not deemed as a responsible person. This does not solve the "remediation stand-off" referred to by Professor Wood. Practically, it is unclear how the analysis can be done without the involvement of the party who controlled the overall remediation.

> *Cordy Environmental Inc. v. Obsidian Energy Ltd*., 2023 BCSC 1198 paras 55, 66.
>
> Roderick J. Wood, "Environmental Obligations in Insolvency Proceedings: Orphan Well Association v. Grant Thornton Ltd" (2019) 62:2 Can Bus LJ 211 at 222, 224, 226-227

61 The remaining flaws in the legislative design of the bankruptcy provisions creates a lack of a coherent statutory framework for the treatment of environmental claims insolvency proceedings. By not considering the corporate structure of Jansen Ltd. and Victory Motors, the Court would prevent the *EMA's* application by discouraging the remediation of contaminated sites since a parent can benefit from obtaining the Certificate of Compliance through assigning liability to a subsidiary.

> Roderick J. Wood, "Environmental Obligations in Insolvency Proceedings: Orphan Well Association v. Grant Thornton Ltd" (2019) 62:2 Can Bus LJ 211 at 226.

62 Based on the complex overlap between insolvency law and environmental law, it remains unclear how environmental claims will be prioritized if a subsidiary declares bankruptcy or faces insolvency. This suggests that the BCCA's decision undermines the intent of the *EMA* to promote the remediation of contaminated and that responsible parties bear the costs in cases of bankruptcy and insolvency.

> *Rolin Resources* at para 208.

British Columbia, Legislative Assembly, Hansard, 42nd Leg, 4th Sess, No 325 (8 May 2023) at 1:50pm.

C. Litigation Costs for Remedial Actions are Not Recoverable Under the *EMA*

(i) The *EMA* Separates the Legal Costs Recovery and Litigation Provisions

63 The BCCA is correct in ruling that litigation costs are not recoverable costs of remediation under the *EMA*. The BCCA's distinguishment of remediation legal costs from litigation costs, aligns with *Canadian National Railway Co* ("CNR CA"), where the Court dealt with litigation costs distinct from remediation legal costs. The *EMA* does not address litigation costs. S. 47(3)(c) of the *EMA* states "legal and consultant costs associated with seeking contributions from other responsible persons". This legislative silence rather than an inclusion more precise term like "litigation costs," implies a purposeful exclusion, as the legislature does not speak unnecessarily. Despite this, the prospect of litigation was in the mind of the drafter, as s. 47(5) discusses commencing an action to recover the remediation cost.

Appeal Reasons at paras 100, 104.

Canadian National Railway Co v ABC Recycling Ltd, 2006 BCCA 429 at para 73 [*CNR CA 2006*].

EMA, ss 47(3)(c)(5).

64 Litigation for cost recovery may only commence after a site has been remediated. Therefore, litigation costs cannot reasonably be part of remediation costs. When commencing an action to recover costs of remediation, s. 47(9)(b) states that the courts may consider "whether the costs of remediation of a contaminated site have been reasonably incurred and the amount of the reasonably incurred costs of remediation" to determine the plaintiff's remediation award. The wording of "have been reasonably incurred" implies remediation is complete. However, s. 47(3)(c) recognizes that receiving contributions from other responsible persons during the remediation process may be necessary to afford the remediation. This acknowledges that negotiations with other responsible persons are part of remediation. If completing remediation was optional before recovering costs in a court action, it would create risks where plaintiffs could quote expected expenses, recover those costs, and ultimately never complete the remediation. If the *EMA* allows an action to recover the costs of remediation before undertaking the remediation, it will take years to recover those costs, resulting in consequences contrary to the *EMA's* objective of encouraging "timely and efficient remediation of contaminated sites." Including

litigation costs as recoverable legal remediation costs presumes the plaintiff will always win the litigation before a court hears the matter, thus rendering the litigation redundant.

EMA, ss 47(9)(b).

Seaspan ULC v British Columbia (Director, Environmental Management Act), [2014] BCWLD 6741, at para 9 [*Seaspan*].

(ii) The *Supreme Court Civil Rules* are an Existing Legal Framework for Recovering Litigation Costs

65 The *EMA* does not cover litigation costs as they are already contemplated in the *Supreme Court Civil Rules* costs rules. The BCCA correctly highlighted that redundancy arises if litigation costs are recoverable under both the *EMA* and the *Supreme Court Civil Rules*. Avoiding redundancy is important when the legislature does not state its intention to duplicate an existing legal framework by making litigation costs recoverable under the *EMA*. Recovering litigation costs under the *Supreme Court Civil Rules* framework continues to be available for plaintiffs, while it is not under the *EMA*.

Supreme Court Civil Rules, BC Reg 168/09, s 14-1 [*Supreme Court Civil Rules*].

Appeal Reasons at para 100.

66 The choice of not listing the *Supreme Court Civil Rules* under s. 4 of the *EMA* is evidence that the legislature does not intend for litigation costs to be recoverable legal costs of remediation under s. 47(3)(c). S. 4 explicitly addresses conflicts with other enactments and does not list the *Supreme Court Civil Rules*. The EMA lists other legislation under s. 4 that may conflict with its provision in stating that if a conflict arises, the provisions of the *EMA* will prevail. This intentional exclusion implies that the *EMA* does not intend to duplicate or override the *Supreme Court Civil Rules* existing costs award framework.

EMA, s 4.

D. Only Responsible Persons May Recover the Legal Costs Referred to in s. 47(3)(c) of the *EMA*

(i) The Language of "other responsible party" in s. 47(3)(c) Limits Recovery of Legal Costs to Responsible Parties Only

67 S. 47 of the *EMA* states that legal costs are recoverable only by responsible persons. A plain and ordinary interpretation indicates that cost recovery is as narrow as what is stated in s. 47(3)(c): "legal and consultant costs associated with seeking contributions from other responsible persons." The legislative choice of this language restricts the recovery of the legal costs to those falling within the definition of a responsible person. A plain and ordinary interpretation aligns with the judgement in CNR CA, where the court stated that only a responsible person can recover under s. 47(3)(c).

EMA, s 47(3)(c).

CNR CA 2006 at para 73.

(ii) The Cost of Remediation Under s. 47(3) Generally Apply to Responsible Persons

68 The wording of ss. 47(3)(a-d) implies that all costs of remediation are only recoverable by responsible persons - for example, s. 47(3)(a), covers the "costs of preparing a site disclosure statement." Site disclosure statements are used for investigative purposes to identify whether land used for industrial or commercial purposes is deemed a contaminated site. S. 47(3)(b) states that the "costs of carrying out a site investigation and preparing a report, whether or not there has been a determination under s. 44 *[determination of contaminated sites]* as to whether or not the site is a contaminated site" is a recoverable cost of remediation. However, to commence an action to recover the remediation costs under s. 47(5), the site must be deemed contaminated according to s. 47(7). This suggests that only responsible persons can recover the costs of investigating if the site is not deemed a contaminated site. A category of cost recovery that would not be available to non-responsible persons if "any person" under section 47(5) indeed includes non-responsible persons.

EMA, ss 47(3)(a-b)(5)(7).

69 S. 47(3)(d) states "fees imposed by a director, a municipality, an approving officer or the regulator under this part." Fees include fees payable to an allocation panel for apportioning

liability, which is only necessary for apportioning liability between responsible persons. This can include “fees for assessing or reviewing site disclosure statements, site investigation reports and remediation plans and reports, whether or not prepared under a remediation order.” The costs of remediation outlined in s. 47(3)(a-d) relate to remediation costs incurred by responsible persons. The costs of remediation listed under s. 47(3) are explicitly stated because it is not obvious they are considered remediation costs, since most the enumerated costs are incurred before remediation has officially begun or after remediation has completed. However, responsible persons are required to incur the costs outlined under s. 47(3) when receiving a remediation order. It is more likely that the use of the words “any person” under s. 47(5) suggests leaving the door open for any person that has authority to order or may be forced to incur remediation costs in accordance with the principles of liability, such as a minor contributor, director, or delegated governmental authority.

EMA, ss 47(3)(d), 62(1)(b)(h-i).

70 Given that persons not responsible for remediating are explicitly exempt from liability directly above, in s 46, the legislature would have clearly included them in the liability cost recovery regime provision, however, they did not. Whether legal costs are recoverable depends on whether the person seeking cost recovery is a “responsible person” under s. 47(1) of the *EMA* and does not apply to “any person” under section 47(5).

EMA, s 46.

(iii) The BCCA Erred in Interpreting a Distinction Between Responsible Person Status and Liability

71 The *EMA*'s status-based, absolute, and joint liability regime supports the interpretation that only responsible persons are entitled to recover general legal costs associated with remediation under the *EMA*. The title and structure of Part 4, Division 3 of the *EMA*, titled "Liability for Remediation," indicates that liability and costs for remediation are status-based rather than the party's fault. Therefore, contrary to the BCCA’s ruling that "there is a distinction to be drawn between being a 'responsible person' and being liable (that is responsible) for the remediation of a contaminated site," there is no distinction between responsibility and liability for the remediation of a contaminated site.

Appeal Reasons at para 113.

72 The *EMA*'s adoption of liability based on the meaning of "responsible person" under s. 45 holds responsible persons accountable regardless of negligence or fault. The status-based regime is evident in the legislature's intentional use of the "responsible persons" and "persons not responsible" as opposed to "responsible persons" and "innocent persons." This choice emphasizes the broad application of liability. Because s. 47(1) indicates that liability is absolute, which imposes liability irrespective of fault and imposes a cost recovery regime. Failing to implement this system could result in unfair consequences, especially if non-responsible persons voluntarily undertake remediation for personal benefit before seeking cost recovery from faultless yet responsible parties. This aligns with the overarching principles of environmental protection and promotes a fair and equitable distribution of liability among responsible persons.

EMA, ss 45, 47(1).

73 Since Jansen is not a responsible person by virtue of s. 46(1)(d), and non-responsible persons cannot recover legal costs associated with remedial actions, non-responsible persons are not liable. Therefore, non-responsible persons do not need to incur legal expenses. The *EMA* protects non-responsible persons from bearing remediation costs. S. 48(7) of the *EMA* compensates non-responsible persons who receive a remediation order by asserting that the government will compensate non-responsible persons who receive a remediation order: "If a person named in an order referred to in subsection (6) is determined not to be a responsible person, the government must compensate the person, in accordance with the regulations, for any costs directly incurred by the person in complying with the order." This cost recovery remedy, which is unavailable to responsible parties irrespective of fault, highlights that the *EMA* does not require a non-responsible person to incur legal expenses to recover remediation costs. However, the legislation does not prevent non-responsible responsible persons from voluntarily remediating lands at their own expense.

Appeal Reasons at para 27.

EMA, ss 46(1)(d), 48(7).

74 Although responsible persons can recover the legal costs from other responsible persons under s. 47(3)(c), this is not an appropriate case. As a responsible person, Victory Motors is liable for remediation costs. Super-Save does not dispute being liable for the reasonably incurred

costs of remediation but contends that it is not liable for Victory Motors' legal costs. Victory Motors argues that Super-Save's apportionment of liability is higher than the amount determined by the trial judge, which forces Super-Save to incur additional legal costs. Victory Motors should bear their own legal costs for seeking contributions from Super-Save.

E. Any Legal "Costs of Remediation" that are Recoverable Under the EMA Should be Narrowly Construed

(i) Promotes Judicial Economy

75 Alternatively, if legal costs of remediation may be recoverable by "any person" under the *EMA*, those costs must be narrowly construed to promote judicial economy. S. 47(3)(c) indicates that the legal costs of remediation may be recovered, such as the legal costs associated with settlement negotiations between responsible persons. However, narrowly interpreting recoverable legal costs related to remediation avoids ambiguity. A narrow interpretation is essential since only reasonably incurred remediation costs are recoverable, and parties are entitled to know which costs are reasonable.

EMA, s. 47(3)(c).

76 The BCCA's interpretation of legal costs risks endorsing the inefficient use of judicial resources by requiring reasonably incurred legal costs to be determined at trial. The BCCA interprets legal costs as a non-exhaustive number of potential legal services, including "advising the remediating client, negotiating with governmental authorities, and navigating the client through the creation of an acceptable remediation plan, its execution, and obtaining final regulatory approval." The BCCA's interpretation infers the type of legal costs that should be covered under s. 47(3), which differs from the explicit wording of the *EMA*. A broad interpretation introduces ambiguity and makes determining which legal fees are reasonably incurred challenging before going to trial. Disagreement regarding which reasonable legal fees risks discouraging settlements and delaying remediation. This constrains the legislative purpose of "encouraging timely and effective remediation of contaminated sites" and is contrary to the overarching objective of promoting judicial economy. A broad interpretation that provides a non-exhaustive list of reasonable legal services in carrying out remediation cannot reasonably cannot the legislature's intention. It is essential to clearly define which legal resources are both

reasonable and recoverable under s. 47(3) of the *EMA* to promote the efficient use of legal resources and encourage timely remediation.

Appeal Reasons at para 94

Seaspan at para 9.

PART IV -- SUBMISSIONS IN SUPPORT OF COSTS

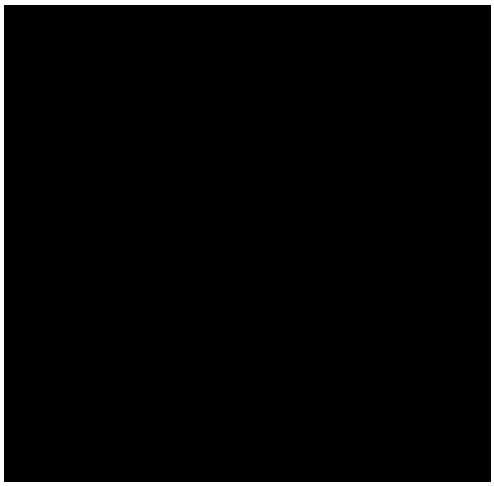
77 Pursuant to the proper interpretation of section 47(3)(c) of the *EMA*, the appellants should be denied all reasonable costs incurred in the litigation.

PART V -- ORDER SOUGHT

78 The Respondents seek an order that the appeal be allowed in part to allocate liability in a manner that accounts for the benefit in obtaining the Certificates of Compliance. At a minimum, apporting 70% of the liability to Victory Motors for both sites accurately reflects the benefit the Appellants received.

79 The Respondents seek an order upholding the BCCA's interpretation that litigation costs are not recoverable under the *EMA* and reinstate the trial judge's determination that legal costs under s. 47(3)(c) are exclusively recoverable by other "responsible persons" when such legal cost recovery is fair and just in the circumstances.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 24 day of January, 2024.



Counsel for the Respondent

Actton Super-Save Gas Stations Ltd.

PART VI -- TABLE OF AUTHORITIES

Paragraph No.

Supreme Court Civil Rules, BC Reg 168/09.	14, 65
Transamerica Life Insurance Co. of Canada v Canada Life Assurance Co., [1996] OJ No 1568 at para 22, aff'd [1997] OJ No 3754.	56
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Workshop Holdings Limited v. CAE Machinery Ltd., 2005 BCSC 631.	28
Yaiguaje v Chevron Corporation, 2018 ONCA 472, Hourigan JA, leave to appeal to SCC refused, 38183 (4 April 2019).	56

PART VII -- LEGISLATION AT ISSUE

***Environmental Management Act*, SBC 2003, c 53, ss. 1, 45-47.**

Part 1 — Introductory Provisions

Conflicts with other enactments

4 If there is a conflict between this Act or its regulations or an approval, a licence, an order, a permit or an approved waste management plan under this Act and

(a)the *Geothermal Resources Act* or the regulations under that Act, or a permit, a licence, a lease, an authorization, an order or an agreement under that Act, or

(b)the *Transport of Dangerous Goods Act* or the regulations under that Act,

this Act, its regulations and an approval, a licence, an order, a permit or an approved waste management plan subsisting under this Act prevail.

Part 4 – Contaminated Site Remediation

Division 3 — Liability for Remediation

Persons responsible for remediation of contaminated sites

45 (1) Subject to section 46 [persons not responsible for remediation], the following persons are responsible for remediation of a contaminated site:

(a) a current owner or operator of the site;

(b) a previous owner or operator of the site;

(c) a person who

(i) produced a substance, and

(ii) by contract, agreement or otherwise caused the substance to be disposed of, handled or treated in a manner that, in whole or in part, caused the site to become a contaminated site;

(d) a person who

(i) transported or arranged for transport of a substance, and

(ii) by contract, agreement or otherwise caused the substance to be disposed of, handled or treated in a manner that, in whole or in part, caused the site to become a contaminated site;

(e) a person who is in a class designated in the regulations as responsible for remediation.

(2) In addition to the persons referred to in subsection (1), the following persons are responsible for remediation of a contaminated site that was contaminated by migration of a substance to the contaminated site:

(a) a current owner or operator of the site from which the substance migrated;

(b) a previous owner or operator of the site from which the substance migrated;

(c) a person who

(i) produced the substance, and

(ii) by contract, agreement or otherwise caused the substance to be disposed of, handled or treated in a manner that, in whole or in part, caused the substance to migrate to the contaminated site;

(d) a person who

(i) transported or arranged for transport of the substance, and

(ii) by contract, agreement or otherwise caused the substance to be disposed of, handled or treated in a manner that, in whole or in part, caused the substance to migrate to the contaminated site.

Persons not responsible for remediation

46 (1) The following persons are not responsible for remediation of a contaminated site:

(a) a person who would become a responsible person only because of an act of God that occurred before April 1, 1997, if the person exercised due diligence with respect to any substance that, in whole or in part, caused the site to become a contaminated site;

(b) a person who would become a responsible person only because of an act of war if the person exercised due diligence with respect to any substance that, in whole or in part, caused the site to become a contaminated site;

(c) a person who would become a responsible person only because of an act or omission of a third party, other than

(i) an employee,

(ii) an agent, or

(iii) a party with whom the person has a contractual relationship, if the person exercised due diligence with respect to any substance that, in whole or in part, caused the site to become a contaminated site;

(e) an owner or operator who establishes that

(i) at the time the person became an owner or operator of the site,

(A) the site was a contaminated site,

(B) the person had no knowledge or reason to know or suspect that the site was a contaminated site, and

(C) the person undertook all appropriate inquiries into the previous ownership and uses of the site and undertook other investigations, consistent with good commercial or customary practice at that time, in an effort to minimize potential liability,

(ii) if the person was an owner of the site, the person did not transfer any interest in the site without first disclosing any known contamination to the transferee, and

(iii) the owner or operator did not, by any act or omission, cause or contribute to the contamination of the site;

(f) an owner or operator who

(i) owned or occupied a site that at the time of acquisition was not a contaminated site, and

(ii) during the ownership or operation, did not dispose of, handle or treat a substance in a manner that, in whole or in part, caused the site to become a contaminated site;

(f) a person described in section 45 (1) (c) or (d) or (2) (c) or (d) *[persons responsible for remediation of contaminated sites]* who

(i) transported or arranged to transport the substance to the site, if the owner or operator of the site was authorized under an Act to accept the substance at the time of its deposit, and

(ii) received permission from the owner or operator described in subparagraph (i) to deposit the substance;

(g) a government body that involuntarily acquires an ownership interest in the contaminated site, other than by government restructuring or expropriation, unless the government body caused or contributed to the contamination of the site;

(g.1) a government body that takes possession of or acquires an ownership interest in the contaminated site under an order of the court under section 5, 8 (3) or 14 of the *Civil Forfeiture Act* or a delegate under section 21 (2) of that Act who is exercising powers or performing functions and duties of the director, as defined in that Act, in relation to the contaminated site;

(h) a person who provides assistance respecting remediation work at a contaminated site, unless the assistance is carried out in a negligent fashion;

(i) a person who provides advice respecting remediation work at a contaminated site unless the advice is negligent;

(j) a person who owns or operates a contaminated site that was contaminated only by the migration of a substance from other real property not owned or operated by the person;
(k) an owner or operator of a contaminated site containing substances that are present only as natural occurrences not assisted by human activity and if those substances alone caused the site to be a contaminated site;

(l) subject to subsection (2), a government body that possesses, owns or operates a roadway, highway or right of way for sewerage or waterworks on a contaminated site, to the extent of the possession, ownership or operation;

(m) a person who was a responsible person for a contaminated site for which a certificate of compliance was issued and for which another person subsequently proposes or undertakes to

(i) change the use of the contaminated site, and

(ii) provide additional remediation;

(n) a person who is in a class designated in the regulations as not responsible for remediation.

(2) Subsection (1) (l) does not apply with respect to contamination placed or deposited below a roadway, highway or right of way for sewerage or waterworks by the government body that possesses, owns or operates the roadway, highway or right of way for sewerage or waterworks.

(2.1) Subsection (1) (g.1) does not apply with respect to contamination if the government body or delegate referred to in that provision caused or contributed to the contamination of the site.

(3) A person seeking to establish that he or she is not a responsible person under subsection (1) has the burden to prove all elements of the exemption on a balance of probabilities.

General principles of liability for remediation

47 (1) A person who is responsible for remediation of a contaminated site is absolutely, retroactively and jointly and separately liable to any person or government body for reasonably incurred costs of remediation of the contaminated site, whether incurred on or off the contaminated site.

(2) Subsection (1) must not be construed as prohibiting the apportionment of a share of liability to one or more responsible persons by the court in an action or proceeding under subsection (5) or by a director in an order under section 48 [remediation orders].

(3) For the purpose of this section, "costs of remediation" means all costs of remediation and includes, without limitation,

(a) costs of preparing a site profile,

(b) costs of carrying out a site investigation and preparing a report, whether or not there has been a determination under section 44 [determination of contaminated sites] as to whether or not the site is a contaminated site,

(c) legal and consultant costs associated with seeking contributions from other responsible persons, and

(d) fees imposed by a director, a municipality, an approving officer or the commission under this Part.

(4) Liability under this Part applies

(a) even though the introduction of a substance into the environment is or was not prohibited by any legislation if the introduction contributed in whole or in part to the site becoming a contaminated site, and

(b) despite the terms of any cancelled, expired, abandoned or current permit or approval or waste management plan and its associated operational certificate that authorizes the discharge of waste into the environment.

(5) Subject to section 50 (3) [minor contributors], any person, including, but not limited to, a responsible person and a director, who incurs costs in carrying out remediation of a contaminated site may commence an action or a proceeding to recover the reasonably incurred costs of remediation from one or more responsible persons in accordance with the principles of liability set out in this Part.

(6) Subject to subsections (7) and (8), a person is not required to obtain, as a condition of an action or proceeding under subsection (5) being heard by a court,

(a) a decision, determination, opinion or apportionment of liability for remediation from a director, or

(b) an opinion respecting liability from an allocation panel.

(7) In all cases, the site that is the subject of an action or proceeding must be determined or considered under section 44 [determination of contaminated sites] to be or to have been a contaminated site before the court can hear the matter.

(8) Despite subsection (7), if independent remediation has been carried out at a site and the site has not been determined or considered under section 44 [determination of contaminated sites] to be or to have been a contaminated site, the court must determine whether the site is or was a contaminated site.

(9) The court may determine in accordance with the regulations, unless otherwise determined or established under this Part, any of the following:

(a) whether a person is responsible for remediation of a contaminated site;

(b) whether the costs of remediation of a contaminated site have been reasonably incurred and the amount of the reasonably incurred costs of remediation;

(c) the apportionment of the reasonably incurred costs of remediation of a contaminated site among one or more responsible persons in accordance with the principles of liability set out in this Part;

(d) such other determinations as are necessary to a fair and just disposition of these matters.

Remediation orders

48 (7) If a person named in an order referred to in subsection (6) is determined not to be a responsible person, the government must compensate the person, in accordance with the regulations, for any costs directly incurred by the person in complying with the order.

Division 7 — General Provision Respecting Contaminated Sites

Contaminated site regulations

62 (1) Without limiting section 138 (1) *[general authority to make regulations]*, the Lieutenant Governor in Council may make regulations as follows:

(a) requiring disclosures by persons not specified in section 40 *[site disclosure statements]*, including, without limitation, disclosures by lessors and lessees;

(b) prescribing fees for the purposes of this Part and Part 5 *[Remediation of Mineral Exploration Sites and Mines]* including, without limitation, fees for assessing or reviewing site disclosure statements, site investigation reports and remediation plans and reports, whether or not prepared under a remediation order;

(h) respecting allocation panels, including, without limitation,

(i) governing the procedures and deliberations of an allocation panel, and

(ii) establishing the fees payable to allocation panel members;

***Contaminated Sites Regulation*, BC Reg 375/96, ss. 35(1), 39(1), 49.**

Application of risk-based standards for remediation

18 (1) The remediation standards have been met for a specific contaminated site if a responsible person satisfies a director that

(a) for any non-threshold carcinogenic substance, the calculated human lifetime cancer risk due to exposure to that substance at the site is less than or equal to a risk value recommended by a medical health officer for the site, and

(b) for any substance for which a hazard index is calculated, the hazard index due to exposure of a human to that substance at the site is less than a maximum hazard index recommended by a medical health officer for that site.

(2) A responsible person who asks a director for a decision that the standards in subsection (1) have been met for a contaminated site must

(a) provide information to support and justify the basis for the request, and

(b) participate in and pay for a public community based consultation process facilitated by a medical health officer which

(i)is for the purpose of developing a recommendation on the acceptable level of human health risk for the site,

(ii)will consider remediation options in relation to levels of resulting human health risk at the site,

(iii)will be conducted in conjunction with any requirement under section 52 of the Act and section 55 (1) of this regulation, and

(iv)is carried out over a time period not exceeding 3 months from the date of the request under subsection (1) unless the person making the request, a medical health officer and the director agree to an alternate time period.

(3) Despite subsections (1) and (2), a director must consider a contaminated site to have been satisfactorily remediated without review and recommendation by a medical health officer if

(a) for each non-threshold carcinogenic substance, the calculated human lifetime cancer risk due to exposure to that substance at the site is less than or equal to one in 100 000, and

(b) for each substance for which a hazard index is calculated, the hazard index due to exposure of a human to that substance at the site is less than or equal to one.

(4) A director must not decide that the standards in subsection (1) have been met before receiving written recommendations with supporting rationale from a medical health officer respecting the matters described in subsection (1) (a) and (b).

(5) If a person demonstrates to the satisfaction of a director that the local background concentration of any substance at a particular site results in the standards required by subsection (1) or (3) being exceeded, the remediation standards for that substance must be the calculated lifetime cancer risk and calculated hazard index which results from exposure of a human to the local background concentration of that substance at the site.

(6) A person who applies the risk-based standards of this section must also prepare an environmental risk assessment report which identifies

(a) the potential onsite and offsite environmental risks of any substances causing contamination before and after remediation, and

(b) procedures, including monitoring, designed to mitigate any significant potential risks identified in paragraph (a).

(7) A director may impose requirements on a responsible person to prevent or mitigate risks Identified

(a) in the environmental risk assessment report required under subsection (6), or

(b) by the director using other available data.

Determining compensation under section 47(5) of the Act

35 (1) For the purposes of determining compensation payable under section 47 (5) of the Act, a defendant named in a cost recovery action under that section may assert all legal and equitable defences, including any right to obtain relief under an agreement, other legislation or the common law.

(2) In an action between 2 or more responsible persons under section 47 (5) of the Act, the following factors must be considered when determining the reasonably incurred costs of remediation:

(a) the price paid for the property by the person seeking cost recovery;

(b) the relative due diligence of the responsible persons involved in the action;

(c) the amount of contaminating substances and the toxicity attributable to the persons involved in the action;

(d) the relative degree of involvement, by each of the persons in the action, in the generation, transportation, treatment, storage or disposal of the substances that caused the site to become contaminated;

(e) any remediation measures implemented and paid for by each of the persons in the action;

(f) other factors relevant to a fair and just allocation.

(3) For the purpose of section 47 of the Act, any compensation payable by a defendant in an action under section 47 (5) of the Act is a reasonably incurred cost of remediation for that responsible person and the defendant may seek contribution from any other responsible person in accordance with the procedures under section 4 of the Negligence Act.

(4) In an action under section 47 (5) of the Act against a director, officer, employee or agent of a person or government body, the plaintiff must prove that the director, officer, employee or agent authorized, permitted or acquiesced in the activity which gave rise to the cost of remediation.

(5) In an action under section 47 (5) of the Act, a corporation is not liable for the costs of remediation arising from the actions of a subsidiary corporation unless the plaintiff can prove that the corporation authorized, permitted or acquiesced in the activity of the subsidiary corporation which gave rise to the costs of remediation.

Voluntary remediation agreements

39 (1) A responsible person requesting a voluntary remediation agreement in respect of a contaminated site, including an environmental management area, must provide all of the

following information to a director:

(a) a detailed site investigation;

(b) a remediation plan;

(c) a detailed description of the responsible person's past and present activities on the site, including the amount and characteristics of contamination at the site attributable to that person's activities;

(c) an estimate of the total cost of remediation;

(e) an estimate of the responsible person's share of the total cost of remediation and justification for the estimate;

(f) the name and address of any other person who the responsible person has reason to believe may, with respect to the subject contaminated site, be a responsible person;

(g) a statement describing the responsible person's ability and plans to conduct and finance the remediation.

(2) Repealed. [B.C. Regs. 322/2004 and 324/2004, s. 39 (c).]

(3) Before a director enters into a voluntary remediation agreement with a responsible person, the director must notify any persons identified as other potential responsible persons under subsection (1) (f) and allow those persons not less than 15 days to give notice if they wish to review or make representations to the director about the proposed voluntary remediation agreement.

Requests for certificates

49 (1) A person may apply for a certificate of compliance under section 53 (3) of the Act by submitting a request in writing to a director.

(2) In support of the application referred to in subsection (1), the person requesting the certificate of compliance must provide to the director the reports described in paragraphs (a) and (b) and ensure that the director has information on the items described in paragraphs (c) and (d):

(a) preliminary and detailed site investigation reports;

(b) a confirmation of remediation report which describes sampling and analyses carried out after remediation of the contamination including

(i) a description of sampling locations and methods used,

(ii) a schedule of sampling conducted, and

(iii) a summary and evaluation of results of field observations and of field and laboratory analyses of samples;

(c) compliance with all conditions set by a director under section 47 (3) if an approval in principle was issued prior to remediation;

(d) the quality and performance of remediation measures on completion of remediation, including compliance with the remediation standards, criteria or conditions prescribed in this regulation.

(3) A person making an application described in subsection (1) respecting a site classified under a director's protocol as a low or moderate risk site must specify in writing whether the application shall be processed

(a) in the manner for low or moderate risk sites, or

(b) in the manner for medium, intermediate or high risk sites.

(4) A person making an application described in subsection (1) respecting a site classified under a director's protocol as a medium, intermediate or high risk site, or not classified under a director's protocol, may specify in writing that the application be processed in the manner for low or moderate risk sites.

(5) A director may reject an application for which a written specification is made under subsection (3) (a) or (4) if the director is satisfied that, for the likely human health and environmental risks to be properly assessed, a site covered by the application must be processed in the manner for a medium, intermediate or high risk site before a decision can properly be made whether or not to issue a certificate under section 53 (3) of the Act.

(6) A director may require that an application described in subsection (1) for a certificate of compliance in relation to a contaminated site that is classified under a director's protocol as a low or moderate risk site include a report and the recommendation of an approved professional that the application be approved.

(7) If the director does not impose a requirement under subsection (6), the application may include a report and the recommendation of an approved professional in respect of whether the application should be approved and, if so, section 49.1 applies.

(8) If a director rejects the recommendation of an approved professional provided under subsection (6) or (7), the director, within 15 days of the rejection, must provide written reasons to

(a) the applicant, and

(b) the professional association, in the Province, of which the approved professional is a member.

***Supreme Court Civil Rules*, BC Reg 168/09, s. 14(1)-(3).**

Rule 14-1 — Costs

How costs assessed generally

(1) If costs are payable to a party under these Supreme Court Civil Rules or by order, those costs must be assessed as party and party costs in accordance with Appendix B unless any of the following circumstances exist:

a) the parties consent to the amount of costs and file a certificate of costs setting out that amount;

b) the court orders that

(i) the costs of the proceeding be assessed as special costs, or

(ii) the costs of an application, a step or any other matter in the proceeding be assessed as special costs in which event, subject to subrule (10), costs in relation to all other applications, steps and matters in the proceeding must be determined and assessed under this rule in accordance with this subrule;

c) the court awards lump sum costs for the proceeding and fixes those costs under subrule (15) in an amount the court considers appropriate;

d) the court awards lump sum costs in relation to an application, a step or any other matter in the proceeding and fixes those costs under subrule (15), in which event, subject to subrule (10), costs in relation to all other applications, steps and matters in the proceeding must be determined and assessed under this rule in accordance with this subrule;

e) a notice of fast track action in Form 61 has been filed in relation to the action under Rule 15-1, in which event Rule 15-1 (15) to (17) applies;

f) subject to subrule (10) of this rule,

(i) the only relief granted in the action is one or more of money, real property, a builder's lien and personal property and the plaintiff recovers a judgment in which the total value of the relief granted is $100 000 or less, exclusive of interest and costs, or

(ii) the trial of the action was completed within 3 days or less,

in which event, Rule 15-1 (15) to (17) applies to the action unless the court orders otherwise.

Assessment of party and party costs

2) On an assessment of party and party costs under Appendix B, a registrar must

(a) allow those fees under Appendix B that were proper or reasonably necessary to conduct the proceeding, and

(b) consider Rule 1-3 and any case plan order.

Assessment of special costs

3) On an assessment of special costs, a registrar must

(a) allow those fees that were proper or reasonably necessary to conduct the proceeding, and

(b) consider all of the circumstances, including the following:

(i) the complexity of the proceeding and the difficulty or the novelty of the issues involved;

(ii) the skill, specialized knowledge and responsibility required of the lawyer;

(iii) the amount involved in the proceeding;

(iv) the time reasonably spent in conducting the proceeding;

(v) the conduct of any party that tended to shorten, or to unnecessarily lengthen, the duration of the proceeding;

(vi) the importance of the proceeding to the party whose bill is being assessed, and the result obtained;

(vii) the benefit to the party whose bill is being assessed of the services rendered by the lawyer;

(viii) Rule 1-3 and any case plan order.

VICTORY MOTORS (ABBOTSFORD) LTD. and JANSEN INDUSTRIES 2010 LTD.
APPELLANTS

-and-

ACTTON SUPER-SAVE GAS STATIONS LTD.
RESPONDENT

S.E.M.C.C. File Number: 02-24-2024

SUPREME ENVIRONMENTAL MOOT
COURT OF CANADA

FACTUM OF THE RESPONDENT ACTTON SUPER-SAVE GAS STATIONS LTD.

TEAM #2024-01

Counsel for the Respondent,
Actton Super-Save Gas Stations Ltd.

Document #:1384-7330-9704, v. 1