

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

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

TEAM #2024-02

**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

1 This appeal concerns questions involving the proper allocation of liability as well as the proper allocation of responsibility for reasonably incurred remediation costs among “responsible persons” under British Columbia’s *Environmental Management Act* [SBC 2003] (“*EMA*”) and *Contaminated Sites Regulation*, B.C Reg. 375/96 (“*CSR*”).

2 This appeal also addresses the importance and necessity of adducing evidence which may prove the reasonably incurred remediation costs that result in the issuance of a Certificate of Compliance (“Certificate”) and how such evidence relates to the proper allocation of reasonably incurred remediation costs among “responsible persons.”

3 At issue is whether the *EMA* precludes a court from considering a “benefit” derived from bringing a site into *EMA* compliance as represented by the issuance of such a Certificate when allocating liability among all “responsible persons” and whether any such “benefit” may be considered when allocating reasonably incurred remediation costs among “responsible persons.”

4 While this case is based in British Columbia, the outcome of this appeal will likely have an impact on how jurisdictions across Canada, which similarly promote the “polluter pays” principle, operate under provincial land remediation legislation.

A. Overview of the Appellants’ Position

5 It is the Appellant’s position that the remediation regime created by the *EMA* involves two separate and discrete inquiries by a trial court. The first inquiry is one into the proportional *liability* for the contamination at a given site for which a Certificate may have been issued or obtained. The second inquiry is one into the proportional responsibility for the reasonably incurred remediation *costs* which ultimately result in a Certificate being issued or obtained for that site.

6 This appeal is therefore concerned with the proper conduction of these inquiries as they relate to Victory Motors (Abbotsford) LTD. (“Victory Motors”) site, not the Jansen Industries 2010 LTD. (“Jansen”) site.

7 Any apportionment of liability undertaken by a court respecting the Victory Motors site (and future sites), the Appellants submit, would be incomplete without the fulsome consideration and examination of *all* reasonably incurred remediation costs, including reasonably incurred remediation *legal costs*.

8 It is the Appellants’ position, however, that the Certificate which they obtained for the Victory Motors site is not in itself, a “benefit.” All that this Certificate did was provide evidence

that the Victory Motors site was brought into compliance with and conformed to the requirements of the *EMA*.

9 Any possible economic enrichment following the issuance of a Certificate in respect of a given site is typically secondary and not *causally* related to the *EMA* compliance process undertaken by a party to obtain that Certificate.

10 It is the Appellants' respectful submission that a party bringing itself into legal conformity with legislation is not, therefore, itself a "benefit." Based on the facts of the case before the court, the Certificate issued to the Appellants cannot amount to a "benefit" under the liability inquiry or the costs inquiry referred to above.

11 The Appellants thus agree with the decision rendered by the British Columbia Court of Appeal ("BCCA") in *Victory Motors (Abbotsford) Ltd. v. Acton Super-Save Gas Stations Ltd.* ("VM-BCCA appeal decision") that any alleged "benefit" they derived in obtaining a Certificate was not to be considered when apportioning *liability* among "responsible persons" respecting the Victory Motors site.

Victory Motors (Abbotsford) Ltd. v. Acton Super-Save Gas Stations Ltd., [2021 BCCA 129](#) (CanLII) at para 56 [*VM-BCCA Appeal Decision*].

12 It is the Appellant's position, however, that if any alleged "benefit" derived from the issuance of a Certificate is to be considered by a trial court, it is only when apportioning or allocating responsibility for all reasonably incurred remediation *costs* (in which remediation legal costs are included) under section 35 of the *CSR*.

13 The Appellants also submit that the VM-BCCA appeal decision does not, in any event, sufficiently articulate what such a "benefit" might be and that such a chasm ought to be filled by this Honourable Court by articulating what is meant by a "benefit."

14 The Appellants further submit that remediation legal costs, which are a part of their total reasonably incurred remediation costs for the Victory Motors site, are recoverable under section 47 of the *EMA*—specifically, under subsections 47(1) and (3) as held by the BCCA in the VM-BCCA appeal decision. Furthermore, any party can seek remediation legal costs, not "just responsible persons."

VM-BCCA Appeal Decision, supra at para 91-103.

15 It is also the Appellants' position that litigation costs are those legal costs involved in pursuing, against "responsible persons," reasonably incurred remediation costs (which includes remediation legal costs) and that such litigation costs are recoverable under the *Supreme Court*

Civil Rules (the “*Rules*”), BC Reg 168/2009. All reasonably incurred remediation costs, including remediation legal costs, are not, however, recoverable under the *Rules*.

16 Thus, the Appellants have appealed to this Honourable Court not because the VM-BCCA appeal decision properly remitted the re-calculation of *liability* among “responsible persons” in this case back to the trial court but rather, because it is not fully correct at law without sufficiently instructing the trial court as to how to make a re-calculation of the reasonably incurred *remediation costs* under section 35 of the *CSR* once *liability* has been apportioned or re-apportioned.

17 The Appellants respectfully submit that the decision is also not fully correct because they should have been given the opportunity to submit evidence related to all reasonably incurred remediation *legal costs* to the trial court when it undertakes anew its apportionment of *liability* for contamination of the Victory Motors site and its apportionment of *responsibility* for remediation costs at the Victory Motors site.

(i) *Relief Sought*

18 The Appellants thus respectfully seek the following:

- a) An order from this Honourable Court which reduces the Appellants’ liability for the contamination of the Victory Motors site and increases the Respondent’s, or, in the alternative, an order which orders the trial court to do the same; and,
- b) An order from this Honourable Court which proportionally reduces the Appellants share of the remediation costs for the Victory Motors site and increases the Respondent’s, or, in the alternative, an order which orders the trial court to do the same.
- c) An order from this Honourable Court allowing the Appellants to present evidence of their reasonably incurred remediation legal costs to the trial court.
- d) An order for costs; and
- e) Such further relief as counsel for the Appellants may request and this Honourable Court may deem just.

B. Statement of Facts

(i) Background

19 Various gasoline distributors operated on the Victory Motors site, the land in issue in this appeal, from the 1940s until 1994.

20 Over the decades in which these distributors operated, contaminants migrated from the Victory Motors site onto a neighbouring property, namely the Jansen site, thereby contaminating the Jansen site. Both the Jansen and Victory Motors sites were determined to be contaminated sites pursuant to provisions of the *EMA* in or about 2010.

21 Jansen commenced an action against Victory Motors on August 2, 2011 for the contamination of the Jansen site.

22 At this time, the shares of Victory Motors (which held the Victory Motors site) were solely owned by a woman named Ms. Webber. The Jansen principals incorporated a separate company to purchase the shares from Ms. Webber in 2012. These shares were purchased for a total of \$42,363.24.

23 Currently, the Jansen site and Victory Motors site are both owned, directly or indirectly, by members of the Jansen family, namely the Appellants.

24 On October 31, 2012, Victory Motors commenced a separate action against all previous gasoline station operators for the historic and continuing contamination of the Victory Motors site (“Action S127599”).

25 At the time Action S127599 was initiated, Victory Motors (the newly formed corporation that acquired the shares of Victory Motors from Ms. Webber) upgraded the buildings on the property. Following the upgrades, Victory Motors successfully leased the Victory Motors site.

26 Jansen and Victory Motors, the Appellants, engaged the services of Levelton Engineering Consultants Ltd. (“Levelton”) to remediate both the Jansen and Victory Motors sites.

27 In October 2012, Levelton supervised the removal of underground gasoline storage tanks, which contained residual amounts of gasoline in what was described as mixed fuel waste and transported the fuel for recycling.

28 Entering into a *BC Ferries* Agreement, so-called in *British Columbia Ferry Corp. v. T & N*, 1995 CanLII 1810 (BCCA), [1996] 4 WWR 161, the amount of which was undisclosed at trial, the Appellants settled their claims against Chevron and Shell.

British Columbia Ferry Corp. v. T & N, [1995 CanLII 1810 \(BCCA\)](#), [\[1996\] 4 WWR 161](#)

29 Following the completion of Levelton’s remediation services, in 2018 Certificates for both the Victory Motors and Jansen sites were issued pursuant to the *EMA*.

30 The Certificates issued permitted all contaminated soil on the properties to remain in place while imposing the principal limitations that the current commercial land use be maintained and that any new commercial structure have a basement constructed of no more than two metres below the grade as it existed in 2017.

31 The Appellants successfully recovered these remediation costs, named the “Levelton Costs” at trial, but not the *legal* costs associated with or related to these remediation costs.

32 The BCCA allowed the Appellants’ appeal on liability but upheld the trial court’s decision that the Appellants’ failure to adduce evidence which supported the Appellants’ reasonably incurred remediation legal costs precluded recovery of such reasonably incurred remediation legal costs.

(ii) *The Parties*

33 The co-appellant, Victory Motors, owns a former gas station site on South Fraser Way across from the Jansen site. This is the Victory Motors site.

34 The co-appellant, Jansen, owns two contiguous parcels of land with commercial-use buildings on South Fraser Way and Old Yale Road in Abbotsford, British Columbia. This is the Jansen site.

35 The respondents, Actton Super-Save Gas Stations LTD. (“Super-Save”), operated a gas station on the Victory Motors site from 1982 to 1994.

(iii) *Procedural history*

36 Pursuant to section 45 of the *EMA*, liability for the contamination of the Victory Motors site was assessed as follows by the trial court:

- Victory Motors 45%
- Super-Save 35%
- Chevron 15%

- Shell 5%

Jansen Industries 2010 Ltd. v Victory Motors (Abbotsford) Ltd., [\(2019\) BCSC 6121 \(CanLII\)](#) at para 153 [*BCSC Decision*].

37 The BCCA did not disturb this assessment.

38 In the VM-BCCA appeal decision, however, the BCCA held that remediation legal costs are recoverable as a part of all reasonably incurred costs of remediation under the *EMA*. As noted above, the BCCA upheld the trial court’s finding that the Appellants’ failure to adduce evidence in support of their remediation legal costs barred recovery of such costs. But it also made no order providing them the opportunity to do so when the trial court reconsiders liability.

VM-BCCA Appeal Decision, supra at para 56.

39 Liability for the contamination costs at the Jansen site is not at issue in this appeal.

(iv) Relevant legislation

40 As noted earlier, the relevant legislation in this case is the *EMA* and the *CSR* enacted pursuant to the *EMA*.

41 The *EMA* is the governing legislation for remediation of contaminated sites in British Columbia. The *EMA* enables and authorizes regulations that govern the remediation of contaminated sites, assigns responsibility for remediation, and distributes remediation costs amongst “responsible persons.”

42 The *EMA* allows parties or “persons responsible for remediation” to recover “reasonably incurred costs from one or more responsible persons.”

Environmental Management Act, SBC 2003, c 53, s 47(1) [*EMA*].

43 In the Appellants’ submission, the relevant subsections of section 47 of the *EMA* deals with liability amongst “responsible persons” for the remediation of contaminated sites.

44 The trial court judge considered the so-called “benefit” the Appellants enjoyed by acquiring the Certificate, pursuant to section 35(2)(f) of the *CSR*, which provides as follows:

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.

Contaminated Sites Regulation, BC Reg. 375/96 at s 35 [CSR].

PART II -- QUESTIONS IN ISSUE

45 This appeal raises the following questions:

- a. May a court take into account the benefit enjoyed by a party in obtaining a Certificate when apportioning liability for the costs of remediating a contaminated site among “responsible persons” under the BC *EMA*?**
 - i. The Appellants will refer to this as the “Benefit Issue.” Any benefit enjoyed through the issuance of a Certificate may only be considered by a court when apportioning responsibility for remediation costs under section 35(2) of the *CSR*. A court may not consider any alleged benefit enjoyed through the issuance of a Certificate when apportioning liability pursuant to the *EMA*.
- b. Are legal costs associated with remediation or with pursuing litigation recoverable under the BC *EMA*, and does the answer differ depending upon whether the person seeking cost recovery is a “responsible person” under the BC *EMA*, section 47(1) or “any person” under the BC *EMA*, section 47(5).**
 - i. The Appellants will refer to this as the “Costs Issue.” Litigation costs are recoverable under the *Supreme Court Civil Rules*, BC Reg 168/2009 (*Rules*), not under the *EMA*. Litigation costs are those legal costs involved in pursuing, against “responsible persons,” their remediation costs. Remediation costs include remediation *legal* costs. All reasonably

incurred remediation costs are recoverable under subsections 47(1) and (3) of the *EMA*. Any party can seek remediation legal costs, not “just responsible persons.”

PART III -- STANDARD OF REVIEW

46 In *Housen v. Nikolaisen*, the Supreme Court of Canada held that:

On a pure question of law, the basic rule with respect to the review of a trial judge’s findings is that an appellate court is free to replace the opinion of the trial judge with its own. Thus the standard of review on a question of law is that of correctness...while the primary role of trial courts is to resolve individual disputes based on the facts before them and settled law, the primary role of appellate courts is to delineate and refine legal rules and ensure their universal application. In order to fulfill the above functions, appellate courts require a broad scope of review with respect to matters of law.

Housen v. Nikolaisen, [2002 SCC 33 \(CanLII\)](#), [2002] 2 SCR 235 at paras 8-9.

47 This appeal engages questions of law. Therefore, the appropriate standard of review is correctness.

PART IV -- ARGUMENT

A. Issue: The Benefit Issue

A court may *not* take into account the benefit enjoyed by a party in obtaining a Certificate when apportioning liability among “responsible persons” under the BC EMA.

48 The VM-BCCA appeal decision correctly found that the trial court erred in its determination that the Appellant’s acquisition of a Certificate resulted in a “benefit” which could be used to (unfairly) increase the Appellants’ apportioned liability, and ultimately, responsibility for the remediation costs of the Victory Motors site.

VM-BCCA Appeal Decision, *supra* at para 56.

49 The Appellants respectfully agree with the VM-BCCA appeal decision that the issuance of a Certificate pursuant to the *EMA* is not to be considered a “benefit” when apportioning—namely *increasing—liability* for contamination under sections 45 or 47 of the *EMA*.

VM-BCCA Appeal Decision, *supra* at para 56-57.

50 The Appellants submit that no “benefit” accrued to them by bringing the Victory Motors site into compliance with the *EMA* that can be considered under the liability inquiry or the costs inquiry that a trial court should undertake.

51 Any alleged “benefit” derived from obtaining a Certificate may, if at all, be considered by a court under section 35 of the *CSR* with respect to apportioning responsibility for remediation *costs* associated with obtaining such a Certificate, but not in respect of *liability*.

52 Any and all consideration to alleged “benefits” derived from a Certificate—the manifestation of which was not articulated by either the trial court or the Court of Appeal—may be considered in limited circumstances. It was, however, an error of law by the BCCA not to articulate those circumstances.

53 An analysis in such circumstances may, the Appellants submit, be conducted pursuant to section 35 of the *CSR* in assigning responsibility for reasonably incurred remediation costs amongst “responsible persons” as defined in the *EMA*, but not in respect of *liability*.

54 Given the VM-BCCA’s appeal decision that remediation legal costs are included within remediation costs, the Appellants submit that they should be given the opportunity to present evidence to the trial court related to their remediation legal costs in respect of the Victory Motors site. Until such time that liability for contamination and responsibility for reasonably incurred remediation costs is reconsidered under the two lines of inquiry submitted by the Appellants, the apportionment of responsibility for reasonably incurred remediation costs among “responsible persons” will remain wrongfully apportioned and incorrect at law.

(i) “Benefit” considerations in this case

55 As stated earlier, the Appellants submit that the Court may *not* take into account any “benefit” derived by a party in obtaining a Certificate when apportioning *liability* under the *EMA*.

56 Any “benefit” derived from the issuance of the Certificate may only, if at all, be considered during the allocation of responsibility for *reasonably incurred remediation costs* pursuant to section 35 of the *CSR*.

57 The Appellants submit that obtaining a Certificate is not in itself a “benefit.” As noted earlier, all that the Certificate which the Appellants acquired did was provide evidence that the Victory Motors site conformed to the *EMA*.

58 While the *EMA*-compliant status of the Victory Motors site led to other “benefits” that occurred following the issuance of the Certificate, these were dependent on market forces beyond the scope of control of the parties and not upon the issuance of the Certificate. Any such “benefit” alleged in this case is not solely *caused* by or attributable to the *remediation* of the property or the issue of the Certificate. As such, obtaining the Certificate (which, again, acts as a recognition of the property’s conformity with the *EMA*) itself is not a “benefit.”

59 Thus, any so-called “benefits” of obtaining a Certificate and later developing the land to which the Certificate pertains, such as here the Victory Motors site, does not have a *cause-effect* relationship with the remediation. While the Certificate and later benefits derived from land use may in some way be correlated, the development or leasing of the property is not an effect *caused* by the issuance of a Certificate.

60 As such, any alleged “benefit” obtained by a “responsible person” by bringing a contaminated site into conformity with the *EMA* in the remediation of land cannot be considered in the allocation of *liability*.

(ii) *Benefit can be applied in limited circumstances*

61 The issuance of a Certificate cannot change the amount or degree of contamination a “responsible person” has contributed to a particular site—it cannot change their *liability*.

62 There are limited circumstances, perhaps, where a court may consider an alleged benefit derived from obtaining a Certificate in determining *responsibility for* reasonably incurred *remediation costs*, but not *liability*.

VM-BCCA Appeal Decision, supra, citing Waldemar Brul, “New Directions for Regulating Contaminated Sites: A Discussion Paper” (1991) *Environmental Protection Division B.C. Ministry of Environment* at 16-21.

63 For example, when the total remediation costs are an amount less than the increased value of the land or site after remediation or a certificate is issued (as one need not necessarily remediate land to bring the land into conformity with the *EMA*), a court may consider the “windfall” obtained by the “responsible person” who remediated the land—but such a consideration should go to the allocation of reasonably incurred remediation costs, not *liability*.

J.I. Properties Inc. v PPG Architectural Coatings Canada Inc., [2014 BCSC 1619 \(CanLII\)](#) at para 192 [*J.I. Properties*].

64 The Appellants reiterate their position that obtaining a Certificate for the Victory Motors site cannot be considered a “benefit” under the liability. Below, the Appellants adopt the same position with respect to the reasonably incurred remediation costs inquiry because they have not derived a “benefit” from the issuance of a Certificate respecting the Victory Motors site..

65 However, the VM-BCCA appeal decision, the Appellants respectfully submit, provides an incomplete analysis of how and where such a “benefit”—however constituted—may be considered by a court under an action pursuant to the *EMA*. Stated differently, the BCCA erred by not articulating what such a “benefit” consists of and how it arises or how it may manifest.

66 Section 35(2) of the *CSR* provides guidance on determining responsibility for remediation costs under section 47(5) of the *EMA*, and ultimately remediation legal costs under subsections 47(1) and (3) of the *EMA*.

67 Furthermore, there is no direction in the legislation that would lead a trial court to conclude that they “must” consider the factors in section 35(2) of the *CSR* in assessing or apportioning liability.

BCSC Decision, supra at para 105.

68 As already noted, the BCCA in this case found that the trial court judge “fell into a reversible error” by considering the benefit enjoyed by Victory Motors in obtaining the Certificate when apportioning *liability*. The BCCA further held that the court “...cannot properly conduct the allocation task on appeal afresh and would remit the issue to the trial court judge to do so with the benefit of these reasons.”

VM-BCCA Appeal Decision, supra at para 69.

69 With respect, while the BCCA is clear that that a “benefit” derived from the issuance of Certificate pursuant to the *EMA* is not a consideration in the allocation of liability, the VM-BCCA appeal decision does not provide sufficient clarity for a trial court on the circumstances where a Certificate can be taken into consideration under section 35(2) of the *CSR* when apportioning responsibility for reasonably incurred remediation costs. It is incorrect for this reason.

70 The Appellants respectfully ask this Honourable to clarify how a “benefit” or “windfall” is to be properly included in a calculation by a trial court judge under section 35(2) of the *CSR* when apportioning responsibility for reasonably incurred remediation costs.

(iii) Betterment principle and remediation

71 The courts have been shown to apply the betterment principle to land remediation cases. While the VM-BCCA appeal decision did not resolve the issue of betterment in this case, an opportunity exists for the Supreme Environmental Moot Court of Canada (“SEMCC”) to settle the law in this area. The decision of *J.I. Properties Inc. v. PPG Architectural Coatings Canada Inc.* is instructive of this opportunity:

...if the remediation generates betterment in the sense of increased utility or value of the property in an amount that exceeds the remediation costs, then a basis *may exist* for requiring a landowner such as JIP (the plaintiff) to bear the burden of at least some of the remediation costs, and maybe even all of those costs in an appropriate case.

J.I. Properties, supra at para 192. [emphasis added]

72 The court’s treatment of remediation in *J.I. Properties* reveals that betterment principles or “benefits” while apportioning remediation costs among responsible persons when contamination requires remediation may be a consideration in some cases.

73 In this case, however, the Appellants submit that the Certificate they acquired did not itself increase the property value of the Victory Motors site; following the remediation, the Victory Motors site returned to its proportionate value prior to its contamination. While the Victory Motors site was suitable to lease following the remediation, any financial or economic “benefit” derived from such development is not a “benefit” attributable to the Certificate’s acquisition.

74 Stated differently, if the Appellants never *developed* the Victory Motors site after acquiring the Certificate there would still be no identifiable “benefit” which could be considered under the costs inquiry performed pursuant to section 35(2) of the *CSR*. There would still, however, be liability and remediation costs questions for a court to answer. This case presents an opportunity for this Honourable Court to articulate what these “benefits” might be and how they might manifest.

75 The *EMA* advances not only a “polluter pays” principle, but also contemplates a successful and transactional marketplace in contaminated properties. This marketplace promotes the goals of the *EMA* in encouraging timely remediation and utility of property. The ability to recover reasonably incurred remediation costs from “responsible persons” reduces risks associated with purchasing contaminated property and provides a means for addressing the recovery of remediation costs on the basis of the “polluter pays” principle.

British Columbia Hydro and Power Authority v. British Columbia (Environmental Appeal Board), 2003 BCCA 436 (CanLII) at para 30-24.

Imperial Oil Ltd. v. Quebec (Minister of the Environment), 2003 SCC 58 (CanLII), [2003] 2 SCR 624) at para 31.

Orphan Well Association v Grant Thornton Ltd., [2019] 1 SCR 150, 2019 SCC 5 at para 29.

Seaspan ULC (formerly Seaspan International Ltd.) v. Vancouver Fraser Port Authority, 2014 BCEAB 21 (CanLII) at para 8-10.

76 In *First National Properties Ltd. v. Northland Road Services Ltd.* the British Columbia Supreme Court held:

Section 47 [of the *EMA*] creates a new statutory cause of action that is status based, not fault based. The object of the legislation is to encourage prompt remediation of contaminated sites. It does not impose a statutory obligation to remediate a contaminated site but rather provides a right to recover reasonable remediation costs from a "responsible person"....

First National Properties Ltd. v. Northland Road Services Ltd., 2008 BCSC 569 (CanLII) at para 55 [*First National Properties*].

77 *First National Properties* emphasizes the importance of promoting remediation activities in the province of British Columbia, confirming that one of the goals of the *EMA* is to increase the utility of otherwise contaminated properties, not necessarily to restore contaminated lands and properties to pristine uncontaminated or pre-contaminated states.

78 Further, *First National Properties* distinguishes between being liable for contamination and being held responsible for costs associated with remediation by distinguishing between “status” and “fault.”

79 Thus, *liability* for contamination, on its own, does not determine remediation costs awards. Liability is assessed and determined through the *EMA* and responsibility for costs is later apportioned through section 35 of the *CSR*. Section 35(2) of the *CSR* takes into account a variety of factors that may affect the remediation costs (in which remediation legal costs are included) a person(s) is responsible for paying, but it does not change their liability for the contamination of land or a site.

(iv) *Bargains and the EMA*

80 Given that the *EMA* contemplates the development of a marketplace for remediated lands or ones that have been issued a Certificate, the Appellants submit that the *EMA* is not concerned with policing the bargains people make over the sale of property, contaminated or otherwise. Any alleged benefit “enjoyed” through obtaining a Certificate may be considered in section 35 of the

CSR, not the *EMA*. However, the VM-BCCA appeal decision provided little clarity on how any alleged benefit should be computed.

(v) *Total remediation costs in the determination of liability*

81 The Appellants agree with the BCCA that a “proper evidentiary” basis in which evidence is plead is required to determine reasonably incurred remediation costs of the Victory Motors site.

82 Given that they have already recovered some of their remediation costs, but not all, the Appellants request the opportunity to present evidence related to their remediation *legal* costs. Without this evidence, the trial court cannot, afresh, properly determine the appropriate allocation of remediation costs once it has re-apportioned or re-allocated liability among the responsible persons of the Victory Motors site.

83 Decisions regarding the allocation of *liability* and the allocation of *responsibility for remediation costs* cannot be decided in a vacuum. While they are two separate inquiries, they inform one another. They should be analyzed separately but in tandem with one another to arrive at proper conclusions and assessments based on complete evidence.

84 In that vein, the BCCA held the following in the VM-BCCA appeal decision:

The wording of s. 47(1) contemplates the liability “for reasonably incurred costs of remediation”; and s. 47(3) defines “costs of remediation” as “all costs of remediation”. On its face, the section allows recovery for reasonably incurred legal costs. I will take the Legislature at its word. In my view, “reasonably incurred remediation legal costs” should be assessed by the trial judge on a *proper evidentiary basis*. The considerations informing the reasonableness assessment of remediation legal costs will vary based on the circumstances and are at the discretion of the trial judge....

VM-BCCA Appeal Decision, supra at para 107.

85 Based on the Court’s reasoning, reasonably incurred remediation costs include the subsidiary categories of remediation legal costs and other general remediation costs, which altogether, are to be determined on a proper evidentiary basis, the facts of the case, and the trial court’s discretion.

VM-BCCA Appeal Decision, supra para 11 at para 107.

86 Should this Honourable Court not re-apportion liability among responsible persons in this case, once the trial court re-allocates *liability* amongst “responsible persons” (including the Appellants) by “deducting” the amount previously used to “bolster” the Appellants’ “fair share”

of the liability, it stands to reason that the liability of the Respondent(s) may singularly or collectively increase (which is to say, including Chevron and Shell), along with the Respondent(s)'s responsibility for reasonably incurred costs of remediation.

87 As there is no “benefit” to be considered when re-apportioning liability among responsible persons in this case, the Appellants’ previously apportioned and overall liability will inevitably decrease. Similarly, the Appellants’ responsibility for reasonably incurred remediation costs will likely change, i.e. decrease, based on the evidence submitted in respect of those remediation legal costs. This is necessary because the trial court apportioned responsibility for reasonably incurred remediation costs in exactly the same proportion as liability.

88 Should this Honourable Court choose not to reapportion liability among “responsible persons” for the Victory Motors site, the Appellants would need to lead remediation legal costs evidence so that when the trial court re-allocates liability and responsibility for reasonably incurred remediation costs, the trial court is doing so on the basis of *total remediation costs* expended by the Appellants. The failure of the BCCA to so order the Appellants to provide such evidence constitutes a reversible error of law.

B. Issue 2: The Costs Issue

Legal costs associated with remediation are recoverable under the BC EMA, and the answer does *not* differ depending upon whether the person seeking cost recovery is a “responsible person” under the BC EMA, section 47(1) or “any person” under the BC EMA, section 47(5). Litigation costs may be recoverable under the *Rules*.

89 Total remediation costs include “reasonably incurred costs of remediation of the contaminated site,” pursuant to section 47 of the *EMA*.

EMA, supra at s 47.

(i) Remediation costs are recoverable

90 The Appellants respectfully agree with the VM-BCCA appeal decision regarding remediation legal costs, which held that “costs of remediation” in section 47(1) and (3) of the *EMA* include legal costs associated with remediation.

VM-BCCA Appeal Decision, supra at para 104.

91 The Appellants further agree that the *EMA* does not provide recovery of a party’s *litigation* costs. Rather, these *litigation* costs are appropriately recoverable under the *Rules*.

(ii) “Any person” can recover remediation costs

92 Thus, the Appellants agree with the BCCA that “any person” under section 47(5) of the *EMA*, can recover remediation legal costs. Section 47(5) of the *EMA* states that:

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.

EMA, *supra* at s 47(5) [emphasis added].

93 The *EMA* allows for “any person” to commence an action for reasonably incurred remediation costs from one or more “responsible persons.”

EMA, *supra* at s 47(5).

94 Remediation legal costs are thus recoverable under the *EMA*. Pursuant to the *EMA*, any party can seek remediation legal costs, not “just responsible persons.”

EMA, *supra* at s 47(5).

(iii) Costs must be determined

95 All costs must be disclosed and understood for a trial court to make appropriate determinations under the *EMA*. In this instance, the trial court did not have the benefit of evidence which disclosed the Appellants’ remediation *legal* costs. The trial judge awarded reasonably incurred remediation costs on the basis of the Levelton Costs alone.

96 The VM-BCCA appeal decision allows for the remediation legal costs to be included within the overall remediation costs.

Rolin Resources Inc v CB Supplies Ltd, 2018 BCSC 2018 (CanLII) at para 191 [*Rolin*].

97 For the Appellants to properly recover their reasonably incurred remediation legal costs under the the *EMA* regime, they respectfully need to lead evidence of their reasonably incurred remediation *legal* costs. The failure of the BCCA to so order is a reversible error of law.

98 The importance and necessity of leading such evidence is illustrated well in *Rolin Resources Inc v CB Supplies Ltd* where it was held:

It is only once all such [remediation] costs are known and quantified that this evidence can be put before the Court in order to determine the issues arising under the *EMA*, such as: the extent and cause of the contamination; who are the “responsible persons” liable for the remediation; whether the costs have been reasonably incurred; *and, any apportionment or allocation of those costs.*

Rolin, supra at para 191 [emphasis added].

99 The Appellants agree with the BCCA that the reasonably incurred remediation legal costs matter should not be sent to the Registrar. The Registrar is only suited to deal with litigation and special costs. Remediation costs, including remediation legal costs, must be proven with evidence before a trial court.

100 The Appellants respectfully submit that an order is required to allow the Appellants the opportunity to submit new evidence at the trial level related to all reasonably incurred remediation costs, specifically their remediation *legal* costs.

PART V -- CONCLUSION

101 The Appellants respectfully submit:

- a) Any benefit enjoyed through the issuance of a Certificate may only be considered by a court when apportioning responsibility for remediation costs under section 35(2) of the *CSR*. A court may not consider any alleged benefit enjoyed through the issuance of a Certificate when apportioning liability pursuant to the *EMA*. This Honourable Court ought to determine what is meant by “benefit.”
- b) Litigation costs are recoverable under the *Rules*, not under the *EMA*. Litigation costs are those legal costs involved in pursuing, against “responsible persons,” their remediation costs. Remediation costs include remediation *legal* costs. All reasonably incurred remediation costs are recoverable under subsections 47(1) and (3) of the *EMA*. Any party can seek remediation legal costs, not “just responsible persons.” It was reversible error of law for the BCCA not to make an order that permitted the Appellants to provide evidence to the trial court upon remittance of the matter back to the trial court.

PART VI -- SUBMISSIONS IN SUPPORT OF COSTS

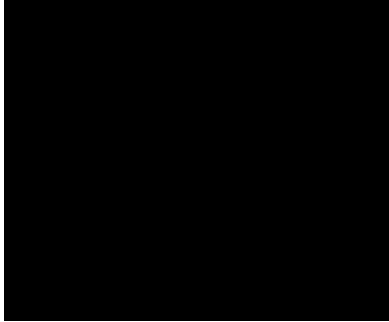
102 The Appellant asks for its costs in this appeal to be awarded in accordance with the *Rules* of the SEMCC.

PART VII -- ORDER SOUGHT

103 The Appellants seek:

- a) An order from this Honourable Court which reduces the Appellants' liability for the contamination of the Victory Motors site and increases the Respondent's, or, in the alternative, an order which orders the trial court to do the same; and,
- b) An order from this Honourable Court which proportionally reduces the Appellants share of the remediation costs for the Victory Motors site and increases the Respondent's, or, in the alternative, an order which orders the trial court to do the same.
- c) An order from this Honourable Court allowing the Appellants to present evidence of their reasonably incurred remediation legal costs to the trial court.
- d) An order for costs; and
- e) Such further relief as counsel for the Appellants may request and this Honourable Court may deem just.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 10th day of January 2024.



Counsel for the
Appellants Victory Motors
(Abbotsford) Ltd. and Jansen
Industries 2010 Ltd.

PART VIII -- TABLE OF AUTHORITIES

	Paragraph No.
Case Law	
<i>British Columbia Ferry Corp. v. T & N</i> , 1995 CanLII 1810 (BCCA) , [1996] 4 WWR 161	28
<i>British Columbia Hydro and Power Authority v. British Columbia (Environmental Appeal Board)</i> , 2003 BCCA 436 (CanLII)	75
<i>First National Properties Ltd. v Northland Road Services Ltd.</i> , 2008 BCSC 569 (CanLII)	73
<i>Housen v. Nikolaisen</i> , 2002 SCC 33 (CanLii) , [2002] 2 SCR 235	46
<i>Imperial Oil Ltd. v. Quebec (Minister of the Environment)</i> , 2003 SCC 58 (CanLII), [2003] 2 SCR 624)	75
<i>Jansen Industries 2010 Ltd. v Victory Motors (Abbotsford) Ltd.</i> (2019 BCSC 6121)	37
<i>J.I. Properties Inc. v PPG Architectural Coatings Canada Inc.</i> , 2014 BCSC 1619 (CanLII) ...	60
<i>Orphan Well Association v Grant Thornton Ltd</i> , [2019] 1 SCR 150 , 2019 SCC 5	75
<i>Rolin Resources Inc v CB Supplies Ltd</i> , 2018 BCSC 2018 (CanLII)	94
<i>Seaspan ULC (formerly Seaspan International Ltd.) v. Vancouver Fraser Port Authority</i> , 2014 BCEAB 21 (CanLII)	75
<i>Victory Motors (Abbotsford) Ltd. v. Acton Super-Save Gas Stations Ltd.</i> , 2021 BCCA 129	11
Legislation	
<i>Environmental Management Act</i> [SBC 2003, c 53]	1
<i>Contaminated Sites Regulation</i> , B.C Reg. 375/96	1
<i>Supreme Court Civil Rules</i> (the “Rules”), BC Reg 168/2009	15
Secondary Sources	
Waldemar Braul, “New Directions for Regulating Contaminated Sites: A Discussion Paper” (1991) <i>Environmental Protection Division B.C. Ministry of Environment</i>	62

PART IX -- LEGISLATION AT ISSUE

Environmental Management Act, SBC 2003, c 53

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 disclosure statement,
- (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 regulator 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.

Contaminated Sites Regulation, B.C Reg. 375/96

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.

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

-and-

ACTTON SUPER-SAVE GAS STATIONS LTD.

APPELLANTS

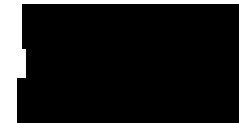
RESPONDENT

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

SUPREME ENVIRONMENTAL MOOT
COURT OF CANADA

**FACTUM OF THE APPELLANTS
VICTORY MOTORS (ABBOTSFORD)
LTD. and JANSEN INDUSTRIES 2010
LTD.**

TEAM #2024-02



Counsel for the Appellants,
Victory Motors (Abbotsford) Ltd. and
Jansen Industries 2010 Ltd.