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 #2024-05

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 The British Columbia ("BC") Legislature developed the *Environmental Management Act* ("EMA") to ensure that a fair and just allocation of liability and responsibility for the costs of remediating contaminated land in BC is achieved. The British Columbia Supreme Court ("BCSC") accomplished this objective of the *EMA* through a discretionary analysis of the circumstances surrounding the contamination of the Victory Motors and Jansen sites.

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

2 The BCSC in *Jansen Industries 2010 Ltd v Victory Motors (Abbotsford Ltd)* fairly evaluated each party's role in the contamination, assigning liability to the responsible parties. The British Columbia Court of Appeal ("BCCA") held that the BCSC improperly considered the benefit of the Certificate of Compliance while apportioning liability. However, when the benefit of the Certificate of Compliance is properly characterized, considering such a benefit is within the court's discretion to ensure a fair and just allocation of liability.

2019 BCSC 1621 [*Trial Decision*].

3 The Respondent asks the Supreme Environmental Moot Court of Canada to recognize the error in the BCCA's analysis and reinstate the trial judge's allocation of liability. The judicial discretion to apportion liability and award costs should be respected by this court, as the trier of fact is in the best position to make these determinations.

4 The BCCA correctly held that litigation legal costs are not recoverable under the *EMA*. Litigation legal costs are distinct from remediation legal costs, and these litigation legal costs are managed under the *Supreme Court Civil Rules.* Limiting recovery of litigation legal costs is not contrary to the "polluter-pays" principle because in the case at the bar, the polluters did pay.

Victory Motors (Abbotsford) Ltd. v Actton Super-Save Gas Stations Ltd., 2021 BCCA 129 at para 104 [*Appeal Decision*].

5 The distinction between "responsible person" under the *EMA* section 47(1) and "any person" under the *EMA* section 47(5) does not affect the determination that litigation legal costs are not recoverable under the *EMA*.

6 While the case at bar concerns allocation of liability and the apportionment of costs between multiple parties, this appeal has larger implications regarding the scope of judicial discretion and the distinct role of the legislature and the courts. The Respondent asks the Supreme

Environmental Moot Court of Canada overturn the BCCA regarding the first issue and affirm the BCCA regarding the second issue.

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

7 The Respondent raises no issue with the Appellants' statement of facts. However, the Respondent emphasizes the time periods in which each party had control over the Victory Motors site.

Trial Decision, supra para 2 at para 16.

8 In 1948, Victory Motors became the owner of the Victory Motors site, and remains the owner of the site to this day. From approximately 1950-1982, various companies operated gas stations on the Victory Motors site.

Trial Decision, supra para 2 at para 16.

9 In 1982, the Respondent Super-Save leased the Victory Motors site from Victory Motors and operated a gas station there until 1992. From 1992 to 1994, a gas station was operated by Gardner Leasing Ltd. under the name of Super-Save.

Trial Decision, supra para 2 at para 16.

10 From 1994 to 2012, the BCSC did not indicate that the property was leased, which suggests that Victory Motors was solely in charge of the site during this time. Remediation of the site did not occur until 2012. The Certificate of Compliance was issued for the Victory Motors site on March 22, 2018.

Trial Decision, supra para 2 at para 16.

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

11 The Appellants raised the following questions in issue:

1. Should the benefit enjoyed by a party in obtaining a Certificate of Compliance be considered when apportioning liability for the remediation costs amongst responsible persons?
2. Are the legal costs associated with remediation or with pursuing litigation recoverable? And if yes, does recovery differ depending upon whether the person seeking cost recovery is a "responsible person" or "any person"?

Appellant factum at para 17.

12 In response to the first question, the Respondent's position is that the BCCA erred in characterizing the BCSC's decision. Furthermore, courts should be able to consider the benefit of a Certificate of Compliance in pursuit of a fair and just allocation of liability.

13 In response to the second question, the Respondent's position is that while remediation legal costs are available per the *EMA*, these legal costs do not include litigation legal costs. Further, the distinction between a "responsible person" and "any person" does not alter the determination that litigation legal costs are unrecoverable.

PART III - ARGUMENT

A. Standard of Review

14 The standard of review for questions of law in appellate courts is correctness, as decided in *Housen v Nikolaisen.* Both issues on appeal are questions of law, therefore the standard of review for the two questions raised in this appeal is correctness.

Housen v Nikolaisen 2002 SCC 33 at para 8 [*Housen*].

15 The Appellants asked that this court to reallocate liability to reflect the apportionment of liability that they have suggested. Reapportioning liability is a question of mixed fact and law, and therefore this analysis is subject to the standard of palpable and overriding error. The trier of fact is in the best position to apportion liability and unless it is "clear that the trial judge made some extricable error in principle," the judgment of the BCSC should not be disturbed.

Appellant factum at para 69.
Housen, supra para 14 at para 37.

B. Courts May Take into Account the Benefit of a Certificate of Compliance When Apportioning Liability under the *EMA*

16 While the BCSC did account for the benefit of a Certificate of Compliance while allocating liability, the BCCA mischaracterized the nature of this benefit.

Trial Decision, supra para 2 at para 152.

17 Section 35(2) of the *Contaminated Site Regulations* ("*CSR*") provides a list of factors that the court must consider when allocating responsibility for contaminated site remediation. These factors provide a guide that the court must use in allocating liability while also giving courts the opportunity to exercise discretion through section 35(2)(f) of the *CSR.* The BCSC conducted a

fulsome analysis of section 35(2) *CSR* factors which led to a fair apportionment of liability between the polluters whose liability remained at issue at trial – Victory Motors and Super-Save.

BC Reg 375/96, s 35(2) [*CSR*].
Trial Decision, supra para 2 at para 45

18 The consideration of the benefit of the Certificate of Compliance does not conflict with the "polluter-pays" principle. Rather, considering this factor in concert with the other factors outlined in section 35(2)(f) of the *CSR* resulted in the exact outcome the legislation envisioned: the polluters paid.

(i) The BCCA Mischaracterized the Trial Judge's Position in Relation to the Benefit of the Certificate of Compliance

19 The BCCA found that the BCSC improperly considered the benefit of the Certificate of Compliance when allocating responsibility, stating that "to the extent the judge allocated a higher percentage or responsibility to Victory Motors because it obtained the benefit of the Certificate of Compliance, [the trial judge] erred."

Appeal Decision, supra para 4 at para 56.

20 This finding arose from the following statement by the trial judge: "[i]n the context of Victory Motors' failure to act responsibly I also do not consider it to be fair for it to obtain the benefit of the Certificate of Compliance without bearing a substantial portion of the costs of obtaining it."

Trial Decision, supra para 2 at para 152.

21 While the BCSC did not explicitly define what the benefit of the Certificate of Compliance was, the BCCA determined that the BCSC was referring to the price paid for Victory Motors shares by Jansen and the resultant financial gain from this purchase. The BCCA characterized the trial judge's consideration of the benefit of the Certificate of Compliance as an attempt to "claw back a portion of the alleged windfall enjoyed by the purchaser of the Victory Motors shares at a bargain price" in order to indirectly address the advantageous acquisition of Victory Motors' shares. Essentially, the BCCA held that the BCSC was covertly penalizing Jansen for the advantageous acquisition of the Victory Motors shares.

Appeal Decision, supra para 4 at paras 67, 59.

22 The Appellants echo this concern, stating that the BCSC's stance on the advantageous acquisitions of Victory Motors share prices by Jansen is what led to the increased allocation of remediation costs under section 35(2)(f) of the *CSR*.

Appellant factum at para 35.

23 The Respondent respectfully disagrees with this interpretation of the BCSC's decision and argues that this was a mischaracterization of the benefit of the Certificate of Compliance that the BCSC described.

Appeal Decision, supra para 4 at para 60.

24 The trial judge clearly stated that the court *would not* consider the profit gained from the acquisition of the Victory Motors shares. While the BCSC considered the idea that the purchase price of the shares should be taken into account, the argument was ultimately dismissed. The Court stated "the historical price it paid to acquire the site in 1948 is of no value in allocating responsibility" and that doing so would violate the principle that "companies are a separate legal entity from their shareholders."

Trial Decision, supra para 2 at paras 110, 117.
Kosmopoulos v Constitution Insurance Co.,1987 CanLII 75 at para 12 (SCC) [*Kosmopoulos*] citing *Salomon v Salomon & Co.*, [1897] AC 22 (HL).

25 Further, the BCSC specifically found that any profit made by the Jansen family in the acquisition of the Victory Motors shares was "attributable to the bargain made with Ms. Webber, the renovation of the existing building and the obtaining of high-quality tenants for that building. Those improvements were not dependant on the remediation of the site." Therefore, the BCCA misinterpreted the benefit of the Certificate of Compliance referenced by the BCSC as the financial benefit gained from the acquisition of the shares.

Trial Decision, supra para 2 at paras 112, 117.

26 The benefit of the Certificate of Compliance discussed by the BCSC must therefore refer to something other than the financial windfall the Appellants gained from the acquisition of Victory Motors shares. The holder of a Certificate of Compliance is able to show that they have a remediated property and gains the recognition that the site meets the standards outlined by the *EMA*. Further, the Certificate of Compliance protects the party who has undertaken remediation from liability if a future owner changes how the property is used. These are clear benefits that an owner of a remediated site gains if they acquire a Certificate of Compliance.

EMA, supra para 1, ss 53(3), 46(1)(m).
J.I. Properties Inc. v PPG Architectural Coatings Canada Ltd., 2015 BCCA 472 at para 50 [*JI*].

27 This interpretation of the benefit of obtaining a Certificate of Compliance is not contrary to the purpose of the *EMA*. By accounting for these factors, courts are simply acknowledging the innate benefits that accompany a Certificate of Compliance. By ensuring that contaminated sites are remediated and limiting adverse effects on the environment, the intention of the legislation is met.

EMA, *supra* para 1, s 2 "remediation".

28 The BCCA misidentified the benefit the BCSC referred to, improperly characterizing this benefit as an advantageous acquisition of Victory Motors shares. Properly characterized, a Certificate of Compliance is beneficial because it gives owners the assurance that their property has been sufficiently remediated.

(ii) Courts can Consider the Benefit of a Certificate of Compliance under Section 35(2)(f) in Pursuit of a Fair and Just Allocation of Liability

29 Section 35(2) of the *CSR* lists the factors that courts must consider when "determining the reasonably incurred costs of remediation." While the *EMA* contains five specific factors (section 35(2)(a) – section 35(2)(e)) that must be taken into account by courts in allocating costs of remediation between polluters, section 35(2)(f) gives the courts the ability to use their discretion to evaluate any "other factors relevant to a fair and just allocation." The benefit one gains through a Certificate of Compliance is a factor that courts can consider under this discretionary provision.

CSR, *supra* para 17 at ss 35(2), 35(2)(f).
Trial Decision, *supra* para 2 at para 45.

30 This discretion is reiterated in case law, with the court in *Rolin Resources Inc. v CB Supplies Ltd* stating that "[s]ection 35(2) of the *CSR* governs the exercise of this allocation discretion." Further, in *JI Properties* the BCCA noted that there has been little or no consideration regarding what "fair and just" means in the context of the regulatory scheme. This lack of definition surrounding section 35(2)(f) of the *CSR* gives courts the opportunity to exercise their discretion and ensure a fair and just allocation of liability.

Rolin Resources Inc. v CB Supplies Ltd., 2018 BCSC 2018, at para 97 [emphasis added] [*Rolin*].
JI, *supra* para 26 at para 78.

31 Limiting this allocation discretion would counter the legislative intention of the *CSR* and would intrude upon the ability of the court to make discretionary decisions. This discretion gives the court the ability to consider the specific context and circumstances surrounding remediation

and determine whether the benefit of the Certificate of Compliance ought to affect the allocation of liability.

CSR, supra para 17 at s 35(2)(f).

32 The Appellants suggest that the relative risk each party took on in their attempts to remediate is another consideration the courts should consider under section 35(2)(f). The Appellants state that this factor affects the fair and just allocation of remediation costs, arguing that a "portion received by each party should be proportional to the risk assumed." While risk is certainly a factor which courts can consider under section 35(2)(f) in pursuit of a fair and just allocation of liability, the Respondent disagrees with the Appellants' characterization of the "risk" they assumed in remediating the Victory Motors site.

Appellant factum at para 36.
CSR, supra para 17 at s 35(2)(f).

33 The interpretation of Victory Motors as a selfless party who put their business on the line to remediate the land overlooks the fact that Victory Motors did not make any attempts to remediate their property from 1992 to 2012. The trial judge clearly found that Victory Motors demonstrated a "complete lack of due diligence," especially at a time in which the risk of sub-soil contamination was more widely understood.

Trial Decision, supra para 2 at paras 122, 146.

34 While the Appellants characterized their actions as "assuming risk," the Respondent respectfully argues that by remediating their property Victory Motors actually *reduced risk*. Further, the Appellants are now in possession of a Certificate of Compliance allowing them to sell their property absent any contamination.

Appellant factum at para 37.

35 The benefit of a Certificate of Compliance and the relative risk that a party undertook in remediating the property are both factors that can be considered by a court under section 35(2)(f). A proper interpretation of the BCSC decision will show that the BCSC made a "fair and just allocation" of liability based on the factors outlined in the *CSR* and within the discretion provided by section 35(2)(f).

CSR, supra para 17 at s 35(2)(f).

(iii) The BCSC Completed a Thorough Analysis of Section 35(2)

36 Section 35(2) of the *CSR* outlines a list of mandatory factors that a court must consider when allocating liability and determining reasonably incurred costs of remediation. The BCSC performed a balanced analysis of these factors, resulting in a fair and just allocation of responsibility.

CSR, supra para 17 at s 35(2).

37 The Respondent agrees with the BCSC's determination that when considering section 35(2)(a) of the *CSR*, this court should not account for Jansen's acquisition of Victory Motors shares. Victory Motors should be considered a separate and distinct entity from Jansen because "as a general rule a corporation is a legal entity distinct from its shareholders."

Appellant factum at para 25.
Kosmopoulos, supra para 24 at para 12.

38 The BCSC found that Victory Motors demonstrated a significant lack of due diligence and weighed this factor heavily in their determination of liability. It was a finding of fact that Victory Motors was "primarily responsible for the continuing contamination from 1994 to 2012."

Trial Decision, supra para 2 at paras 122,126.

39 Further, the BCSC specifically highlighted that "the level of awareness of the tendency of gasoline stations to leak contaminants into the environment has greatly increased during the period that the gasoline station was being operated on the site." The BCSC accounted for this changing level of understanding when allocating responsibility, increasing the Appellants' responsibility because they controlled the Victory Motors site over a long period of time in which "the risk of subsoil contamination from gasoline stations became much more widely known and understood." While more active contamination may have taken place during the period in which the Respondent had control over the Victory Motor site, this factor must be balanced with the fact that the Appellants were more likely to understand the significance of their inaction.

Trial Decision, supra para 2 at paras 119, 146.

40 While the Appellants attempted to conduct a section 35(2) analysis anew, this court should instead rely on the BCSC's fair and balanced analysis of the section 35(2) factors. The BCSC's finding of fact should be given a high degree of deference by this court.

(iv) The BCSC is Best Situated to Allocate Liability

41 As the trier of fact, the BCSC is in the best position to allocate liability for the remediation of the Victory Motors site. The allocation of liability is a process of applying a legal standard to a set of facts and therefore this process is considered a question of mixed fact and law. The standard of review for such determinations is palpable and overriding error.

Housen, supra para 14 at para 26.

42 This court should be hesitant to intervene with determinations of mixed fact and law, and appellate courts should defer to determinations based on mixed fact in law "in the absence of a legal or palpable and overriding error." The judicial discretion of trial courts in these determinations should be respected "unless it is clear that the trial judge made some extricable error in principle with respect to the characterization of the standard or its application, in which case the error may amount to an error of law."

Housen, supra para 14 at paras 37, 31.

43 In *Heller v Martens*, this standard of review was applied specifically to apportionment of liability, and the Alberta Court of Appeal reiterated that "if the trial judge apportioned liability based on the comparative blameworthiness of the parties, an appellate court could only intervene if the trial judge made a palpable and overriding error."

Heller v Martens, 2002 ABCA 122 at para 49.

44 The Respondent forwards that no palpable and overriding error was made in the determinations of the BCSC, and therefore this court should defer to their findings on allocation of liability. While the Appellants ask this court to reallocate liability based on their analysis, they have not identified a palpable overriding error in the BCSC decision. As the trier of fact, the BCSC was in the best position to make this determination and their decision is entitled to deference.

(v) Considering the Benefit of a Certificate of Compliance Does Not Conflict with the "Polluter-Pays" Principle

45 The *EMA's* foundational objective is the "polluter-pays" principle. The purpose of the principle is to "require polluters to pay the cost of contamination cleanup, even if their polluting activities had not been prohibited or had been authorized at the time that they occurred." This is precisely what occurred in this case.

Rolin, supra para 30 at para 85 citing *JI, supra* para 27 at paras 29-32.

46 The BCCA found that allowing courts to consider the benefit enjoyed by a party in obtaining the Certificate of Compliance "could discourage an owner who was also a 'responsible person' from remediating its lands in a timely way." The Appellants echo this argument, stating that allowing a court to take into account the benefit enjoyed by a party in obtaining the Certificate of Compliance contradicts the purpose of the *EMA*.

Appellant factum at para 32.
Appeal Decision, supra para 4 at para 56.

47 However, the reasoning of the BCSC must be construed within the facts of this case. The BCSC was analyzing the conduct of a party claiming for remediation costs when the party in question was a significant contributor to the pollution and had shown a clear lack of due diligence. The threat to the "polluter-pays" principle envisioned by the Appellants simply does not arise in this situation.

Appeal Decision, supra para 4 at para 148, 122.

48 Had the BCSC reasoned that the simple act of acquiring a Certificate of Compliance resulted in an *automatic* apportionment of liability for the applying party regardless of the facts of the case, the Respondent agrees that this would be a threat to the "polluter-pays" principle. Respectfully, such a scenario would be an absurd interpretation of the *EMA* and is distinct from the case at hand in which the claiming party is partially responsible for the pollution. The BCSC's analysis in this case cannot be interpreted to stand for the proposition that a judge would automatically apportion liability to a recipient of a Certificate of Compliance, and instead must be construed by this court within the facts of the case.

49 Accounting for the benefit of the Certificate of Compliance and supporting the "polluter-pays" principle are not mutually exclusive objectives. In the case at bar, the BCSC was able to identify the polluters and allocate their respective remediation costs, while simultaneously considering the benefit of a Certificate of Compliance to ensure that this allocation was fair and just.

50 While it is important to ensure that the "polluter-pays" principle is upheld, the BCCA erred by responding to an error that was not present on the facts of the case. The *EMA* operated exactly as intended and the BCSC performed a balanced evaluation of the role of all the parties involved. The Respondent agrees that it is important to ensure that polluters are held responsible for their role in contamination, and that is exactly what happened in this case: the polluters paid.

C. Litigation Legal Costs are not Recoverable under the *EMA*

51 The BCSC and the BCCA's correctly determined that in order for reasonably incurred remediation legal costs to be awarded to a party, evidence of these costs must be provided.

> *Trial Decision, supra* para 2 at para 62.
> *Appeal Decision, supra* para 4 at paras 51, 49.

52 While remediation legal costs are recoverable under section 47(3)(c) of the *EMA*, the meaning of "legal and consultant costs" under section 47(3)(c) cannot be stretched to include costs of litigation. If the Legislature had intended for litigation legal costs to be recoverable under the *EMA*, thereby superseding the well-established *Supreme Court Civil Rules* ("*SCCR*"), they would have done so explicitly.

> *EMA, supra* para 1, s 47(3)(c).
> BC Reg 168/2009 [*SCCR*].

53 Per the BCCA, litigation legal costs are not recoverable under the *EMA*. This exclusion does not differ whether the party seeking costs is a "responsible person" under section 47(1) of the *EMA* or "any person" under section 47(5) of the *EMA*.

> *EMA, supra* para 1, ss 47(1), 47(5).

54 The "polluter-pays" principle is met through the recovery of remediation legal costs, and allowing the recovery of litigation legal costs would simply result in a situation of "polluter-punish."

(i) Evidence of Costs is Required to Ensure Reasonableness

55 The party claiming remediation costs has the onus of proving these costs were incurred and that the "choices…made in remediat[ion] were reasonable." This requirement is supported by subsections 47(1) and (5) of the *EMA*, which specifically refer to "reasonably incurred costs of remediation".

> *Trial Decision, supra* para 2 at para 58.
> *Canadian National Railway Company v A.B.C. Recycling Ltd.*, 2005 BCSC 647 at para 81[*CNR SC*].
> *EMA, supra* para 1, ss 47(1), 47(5).

56 The BCCA clarified that reasonably incurred remediation legal costs should be assessed on an evidentiary basis. The BCCA held that "a claim for legal expenses recoverable under section 47(3) must be established at trial to be remediation costs by evidence in the same way that any other professional fees incurred as remediation costs are proven."

Trial Decision, supra para 2 at para 64.
Appeal Decision, supra para 4 at para 107.

57 The Appellants claimed $150,000 of legal fees; however, they provided no evidence to explain how this sum was arrived at. To recover their "reasonably incurred costs of remediation," the Appellants were required to provide evidence of these costs.

Appeal Decision, supra para 4 at para 49, 144.
EMA, supra para 1, s 47(1).

(ii) Remediation Legal Costs are Distinct from Litigation Legal Costs which are Not Recoverable under the EMA

58 Under the *EMA*, a party responsible for remediation of a contaminated site is liable for "reasonably incurred costs of remediation." The *EMA* states that "'costs of remediation' means all costs of remediation and includes, without limitation … legal and consultant costs associated with seeking contributions from other responsible persons." The BCCA was correct in finding that, although remediation legal costs are recoverable under section 47(3)(c) of the *EMA*, litigation legal costs are excluded from this category.

Appeal Decision, supra para 4 at para 95, 141.
EMA, supra para 1, s 47(3)(c).

59 In *Canadian National Railways Co. v A.B.C. Recycling Ltd* ("*CNR*"), the court distinguished between "legal costs incurred in effecting the remediation of the property ('remediation legal costs') and legal costs incurred in the litigation seeking to recover the costs of remediation ('litigation legal costs')." The BCCA found that remediation costs "do not include a party's litigation legal costs which are awarded and assessed in the usual way under the *Rules*." This interpretation made in *CNR* is supported by various principles of statutory interpretation.

Canadian National Railway Co. v A.B.C. Recycling Ltd., 2006 BCCA 429 at para 10 [*CNR CA*].
Appeal Decision, supra para 4 at para 104.

60 To conduct statutory interpretation of the *EMA*, the lens through which the legislation is viewed must first be established. Driedger's modern principle of statutory interpretation is that "words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament." Through a purposive reading of the *EMA* and in light of the intention of the Legislature, the object and purpose of section 47 of the *EMA* is to encourage the remediation of contaminated sites and fairly allocate the financial burden accompanying remediation.

E. A. Driedger, *The Construction of Statutes*, 2nd ed (Toronto: Butterworths, 1974) at 67.
Rizzo & Rizzo Shoes Ltd. (Re), 1998 CanLII 837 at para 21 (SCC).

Workshop Holdings Ltd. v CAE Machinery Ltd., 2003 BCCA 56 at paras 40-41.

61 A principle of statutory interpretation is the presumption against tautology; each word in legislation was purposively selected by the legislature. Courts must presume that the legislature "does not speak in vain." They only use the words required to make their point. Therefore, the presumption against tautology indicates that the Legislature would have included the word litigation in section 47(3)(c) if that was what intended.

Ruth Sullivan, *Statutory Interpretation*, 3rd ed (Toronto: Irwin Law Inc, 2016) at 43 [*Sullivan*] citing *Canada (Attorney General) v JTI-Macdonald Corp*, 2007 SCC 30 at para 87.

62 Furthermore, while courts have had the opportunity to read in litigation legal costs in previous cases, they have consistently refrained from doing so. The BCCA expanded upon the types of costs which may be included in this non-exhaustive list of remediation legal costs, such as "investigation of other responsible persons, negotiations with those persons, and drafting and preparing agreements for joint remediation and cost sharing" but did not include litigation legal costs in this list. Similarly, when section 47(3)(c) was interpreted in *Rolin*, the court opted to include loss of rental income into this non-exhaustive list while omitting litigation legal costs.

Rolin, supra para 30 at para 204.
Appeal Decision, supra para 4 at paras 96, 99, 100, 102.

63 In the alternative, it is not the role of the court to read in the word "litigation" into section 47(3)(c) of the *EMA*. When courts read words into legislation, they step into the realm of amending legislation, rather than interpreting it. It is an important principle of law that "[u]nder the constitutional doctrine of the separation of powers, courts may interpret legislation, but they are not allowed to amend it."

Sullivan, supra, para 61 at 290.

64 The Appellants argue that the BC Legislature must have intended for litigation legal costs to be included in the definition of section 47(3)(c) of the *EMA*, stating that:

> If, the legislature merely wanted to remind parties that legal and consulting fees are part of the remediation costs, the legislature would have specifically stated so. Instead, the legislature used the term "legal costs in pursuit of contribution," creating a more fulsome picture of the level of legal and consultant costs that can be collected.

This argument presumes the legislature's intention without looking to other legislation to determine how costs of this nature have previously been allocated. For example, in the *Protection of Public Participation Act*, the BC Legislature made it clear that "the applicant is entitled to costs

on the application and in the proceeding, assessed as costs on a full indemnity basis unless the court considers that assessment inappropriate in the circumstances."

SBC 2019 c 3, s 7.
Appellant factum at para 55.

65 The *Protection of Public Participation Act* is an example of the BC Legislature creating legislation which clearly bypasses the *SCCR* to award costs on a full indemnity basis. The BC Legislature could have created a similar distribution of costs under the *EMA* by using explicit language that bypasses the previously established scheme for determining costs, yet they refrained from doing so.

66 The Appellants forward that litigation legal cost recovery under the *EMA* aligns with the "polluter-pays" principle, and that disallowing litigation legal costs will discourage parties from remediating. However, the "polluter-pays" principle is achieved successfully through the recovery of remediation costs. Requiring the payment of litigation legal costs *on top* of the already paid remediation costs will simply result in a "polluter punish" system rather than "polluter pays."

Appellant factum at para 63.

67 Courts must presume that the legislature creates their legislation with significant care and attention paid to the words used; if they intended litigation legal costs to be included under section 47(3) of the *EMA*, then they would have done so explicitly. Adding "litigation" into the provision has not been amended into the legislation, nor has it been included in the jurisprudence until this point. Litigation legal costs are distinct from remediation legal costs, and are not recoverable under the *EMA*.

(iii) Litigation Legal Costs are Properly Addressed Under the Supreme Court Civil Rules

68 The BCCA found that litigation legal costs are properly managed under the *SCCR* rather than the *EMA*, stating that including litigation legal costs under "all legal costs" of 47(3)(c) of the *EMA* would make the *SCCR* redundant. Per the presumption of coherence – which presumes that the legislature intends for legislation to work together coherently – this court should acknowledge that when the *EMA* was created, there was already a functional system in place to address costs awards: the *SCCR*.

Sullivan, supra para 61 at 43 quoting *Canada (Attorney General v JTI-Macdonald Corp*, 2007 SCC 30 at para 87.
Appeal Decision, supra para 4 at para 100.

69 The purpose of costs awards under the *SCCR* is *not* to fully indemnify the party who paid remediation costs. Instead, litigation legal costs are designed to compensate the successful party *for the extent* of the damage inflicted upon them by the opposing party. Costs are only payable when the courts determine that a party is entitled to receive them. Litigations legal costs are not guaranteed and may not be awarded at all in an action. While the Appellants ask to recover "all the costs they will incur to complete the remediation, including any litigation fees" this request goes directly against the purpose of costs awards.

Armand v Carr, 1927 CanLII 4 (SCC).
SCCR, *supra* para 52, Rule 14-1(13).
Wiebe v Douglas, 2013 BCSC 572.
Appellant Factum at para 64.

70 Further, the Appellants' request for full indemnity costs bypasses the courts ability to make discretionary decisions regarding the fair allocation of costs. Cost awards are an opportunity for the court to use its discretion. As such, the extent that they are subject to appellate review is limited:

> This discretionary determination should not be taken lightly by reviewing courts. It was [the trial judge's] discretion to exercise, and unless he considered irrelevant factors, failed to consider relevant factors, or reached an unreasonable conclusion, then his decision should be respected. To quote Lord Diplock in *Hadmor Productions Ltd. v Hamilton*, an appellate court "must defer to the judge's exercise of his discretion and must not interfere with it merely on the ground that the members of the appellate court would have exercised the discretion differently.

Canadian Pacific Ltd. v Matsqui Indian Band, 1995 CanLII 145 (SCC) at para 39.

71 The *SCCR* clearly dictates how litigation legal costs should be awarded. The structure created for recovering litigation costs works in concert with other pieces of legislation created by the BC Legislature. In order to avoid pieces of legislation becoming redundant, courts should start with the presumption that the *SCCR* is to be utilized to award costs unless specifically ousted by other legislation.

SCCR, *supra* para 52, Rule 14-1(1-3).

72 The nature of cost allocation highlights a fundamental underpinning of the justice system: judicial discretion. If the Legislature had intended to change how the courts assign costs, they would have done so clearly in the legislation. Furthermore, the structure in place for awarding litigation costs is well established and comprehensive. The Legislature has created a thorough scheme for awarding costs, reducing the need for other legislation such as the *EMA* to dictate how costs are awarded.

Court of Appeal Act, SBC 2021, c6, s 45(1).
SCCR, *supra* para 52, Rule 14-1(1).

73 The *SCCR* has a clear structure that outlines how costs should be awarded and provides uniformity to the recoverability of litigation fees. The Appellants recognize the authority of the *SCCR* by requesting litigation legal costs in the alternative if this court does not award them through the *EMA*.

Appellant factum at paras 66 – 67, 70.

74 If the Legislature had intended for the *EMA* to work around the *SCCR*, the *EMA* would include a provision stating, "notwithstanding Rule 14 of the *SCCR*". Without this type of provision in the legislation, this Court should presume that the BC Legislature intends both statutes to operate harmoniously. This harmonious operation is achieved if the *EMA* regime covers remediation legal costs and the *SCCR* covers litigation legal costs.

Sullivan, supra para 61 at 181.

(iv) The Differentiation Between "Responsible Person" and "Any Person" has No Bearing on Recovering Litigation Legal Costs

75 For the above-mentioned reasons, litigation legal costs should not be recoverable under the *EMA* and are instead better managed under the *SCCR*. This restriction does not differ whether the party claiming litigation legal costs is a "responsible person" under section 47(1) of the *EMA* or whether they are "any person" under section 47(5) of the *EMA*.

Appellant factum at para 39.

76 Section 45 of the *EMA* outlines the parties who are responsible for remediation of a contaminated site. Victory Motors clearly falls within this definition as a current owner and operator of the site per section 45(1)(a) of the *EMA*. Further, Victory Motors does not meet the requirements necessary to establish a statutory exemption under section 46 of the *EMA*. Therefore, the distinction between a "responsible person" and "any person" is inconsequential to the determination of Victory Motors' cost allocation.

EMA, supra para 1, ss 45, 45(1)(a), 46.

77 Section 47(1) of the *EMA* indicates that a <u>responsible person</u> is ultimately liable for the reasonably incurred costs of remediating their property. Section 47(5) of the *EMA* expands who can seek costs for remediation beyond a responsible person or a director to include "<u>any person</u>…who incurs costs in carrying out remediation of a contaminated site."

EMA, supra para 1, ss 47(1), 47(5) [emphasis added].

78 Understanding the distinction between “responsible person” and “any person” in the legislation is important because it identifies who can successfully make a claim for remediation costs. In including section 47(5), the BC Legislature was likely contemplating a situation in which an innocent owner who is not “responsible” in the sense defined by section 47(1) was unable to claim for remediation costs under the legislation. By including section 47(5), the Legislature ensured that innocent owners who do not fit within the ambit of “responsible person” outlined by section 47(1) could still recover their costs of remediation.

79 The BCCA further explored the difference between “responsible person” and “any person.” The BCCA described both a status-based and fault-based definition of “responsible,” and found that the evolution of the legislative scheme and prior jurisprudence supported “a distinction to be drawn between being a ‘responsible person’ and being liable (that is responsible) for the remediation of the contaminated site.” The distinction between a “responsible person” and “any person” outlined by the *EMA* and reinforced by the BCCA’s status- versus fault-based allocation of liability makes it possible for an innocent owner to claim for their costs of remediation. However, section 47(5) should not be used to expand remediation legal costs to include the litigation legal costs.

Appeal Decision, *supra* para 4 at para 113.

80 Despite this clear difference between “responsible persons” and “any persons” under the *EMA,* this distinction does not change the fact that litigation legal costs are not recoverable under the *EMA.* While the BC Legislature clearly intended to ensure that innocent parties who could not claim under section 47(1) of the *EMA* could still recover their remediation costs under the legislation, these costs must still be reasonable and are restricted to remediation legal costs. Including section 47(5) in the *EMA* does not provide the additional legislative intent required to make litigation legal costs recoverable. Therefore, there is no basis on which to allow litigation legal cost recovery under the *EMA* simply because the claimant is “any person.” Litigation legal costs would be better managed under the existing legislative scheme of the *SCCR*, even if the claimant is an innocent party such as Jansen.

81 Only in “very rare” cases “where there has been reprehensible, scandalous or outrageous conduct and is designed to chastise improper conduct and deter others” will full indemnity be awarded. As previously discussed, had the Legislature wanted to ensure full litigation legal costs were recoverable for “any person” under section 47(5) of the *EMA,* they would have used explicit

language. Changing the costs allocation to include litigation legal costs would be an attempt of the courts to make a policy decision that innocent parties are entitled to costs on a full indemnity basis in the absence of legislative intent.

> Lisa Armstrong, "Costs on Motions (ON)" online < https://plus.lexis.com/api/permalink/202c81e7-bedd-4635-8938-9b35ae85ee56/?context=1537339>.

82 Litigation legal costs are not available to parties under the *EMA*, and this restriction does not differ whether the party in question is a "responsible person" under section 47(1) of the *EMA* or "any person" under section 47(5) of the *EMA.*

PART IV – SUBMISSIONS IN SUPPORT OF COSTS

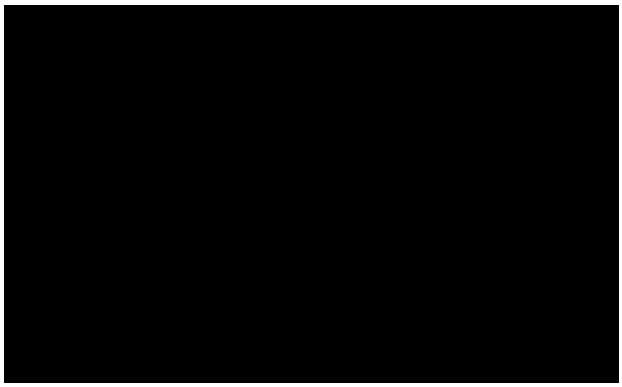
83 The Respondent seeks all reasonable costs incurred in the litigation including their costs of this Court to be assessed by the registrar.

PART V – ORDER SOUGHT

84 The Respondent requests that the BCCA's decision to remit the matter back to the BCSC be overturned and to restore the BCSC's allocation of liability.

85 The Respondent seeks the BCCA's decision be upheld on the second issue.

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

Authority	**Paragraph No.**
Armand v Carr, 1927 CanLII 4 (SCC)	69
Armstrong, Lisa, "Costs on Motions (ON)" online < https://plus.lexis.com/api/permalink/202c81e7-bedd-4635-8938-9b35ae85ee56/?context=1537339>	81
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J.I. Properties Inc. v PPG Architectural Coatings Canada Ltd., 2015 BCCA 472	26, 30, 45
Kosmopoulos v Constitution Insurance Co. [1987] 1 SCR 2	24, 37
Public Participation Act, SBC 2019, c 3	64
Rizzo & Rizzo Shoes Ltd. (Re), 1998 CanLII 837 (SCC)	60
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Salomon v Salomon & Co., [1897] A.C. 22 (H.L.)	24, 37
Sullivan, Ruth, *Statutory Interpretation*, 3rd ed (Toronto: Irwin Law Inc, 2016)	61, 63, 68, 74
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Victory Motors (Abbotsford) Ltd. v Actton Super-Save Gas Stations Ltd., 2021 BCCA 129	4, 19, 21, 23, 46, 51, 56, 57, 58, 59, 62, 68, 79
Wiebe v Douglas, 2013 BCSC 572	69
Workshop Holdings Ltd v CAE Machinery Ltd, 2003 BCCA 56	60

PART VII - LEGISLATION AT ISSUE

***Environmental Management Act*, SBC 2003, c 53, section 45 – 47.**

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;

(d) 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;

(e) 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;

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 Site Regulation*, B.C. Reg. 375/96, section 35.**

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.

***Supreme Court Civil Rules* B.C. Reg. 168/2009, Rule 14-1 (1-3, 13).**

Rule 14-1 — Costs

How costs assessed generally

14-1 (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

14-1 (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

14-1 (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.

…

When costs payable

14-1 (13) If an entitlement to costs arises during a proceeding, whether as a result of an order or otherwise, those costs are payable on the conclusion of the proceeding unless the court otherwise orders.

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 #2024-05

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