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 #6

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

AND TO: **ALL REGISTERED TEAMS**

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PART I -- OVERVIEW AND STATEMENT OF FACTS

A. Overview of the Appellants' Position

1 Jansen Industries 2010 Ltd. ("Jansen Ltd.") and Victory Motors (Abbotsford) Ltd. ("Victory Motors") (collectively, the "Appellants") request the appeal: (i) be dismissed in relation to the finding that a benefit accrued to Victory Motors from the Certificate of Compliance; and (ii) allowed in relation to the recovery of legal costs from Actton Super-Save Gas Stations Ltd. and Phil Van Enterprises Ltd. (collectively, "Super-Save").

2 On the first issue, the British Columbia Court of Appeal ("BCCA") rightly found that the trial judge erred at law in holding that a higher portion of remediation costs should be allocated to a property owner, Victory Motors, because they benefited from obtaining Certificates of Compliance under the *Environmental Management Act*, SBC 2003, c 53 ("*EMA*") for the contaminated properties. To hold otherwise punishes Victory Motors for obtaining a Certificate of Compliance. The trial judge's finding is inconsistent with the purpose of the contaminated sites regime, set out in Part 4 of *EMA* and the *Contaminated Sites Regulation*, BC Reg 375/96 ("*CSR*"); to encourage property owners to undertake remediation in a timely way, while providing them a means to recover from the polluters. It is also inconsistent with the factual findings that the property value did not change due to the Certificate of Compliance.

3 On the second issue, legal costs associated with remediation and with pursuing litigation are recoverable under the *EMA.* The BCCA erred in excluding 'litigation legal costs' from the ambit of section 47(3)(c), this unjustly excludes 'litigation legal costs' from the action under section 47(5). All legal costs should be eligible for recovery. The exclusion of 'litigation legal costs' from section 47(3)(c) contradicts the explicit language of the *EMA* and the jurisprudence. The exclusion of litigation legal costs is contrary to the 'polluter pays' principle and creates incentives contrary to the intent of the legislation.

4 Recovery of legal costs should not differ between a "responsible person" and "any person" under section 47(3)(c) of the *EMA.* A proper interpretation of section 47(3)(c) allows "any person", which includes "responsible persons", to recover legal costs. This means Jansen Ltd. can recover legal costs from Super-Save. To otherwise deny "any person" recovery of legal

costs under the *EMA* because they are not also a "responsible person" is an absurd and unjust result that the legislature could not have intended.

B. Statement of Facts

(i) General Principles of the Contaminated Sites Regime

5 Part 4 of the *EMA* and the *CSR* establish the regime for the identification, determination, and remediation of contaminated sites and the scheme for the assessment and allocation of liability for their remediation. Liability under the scheme is absolute, retroactive, joint, and separate. Once a site is determined to be contaminated, "responsible persons" must remediate the site and may be liable to anyone who has incurred remediation costs unless an exemption from liability can be established (section 47). The scheme is set up to be a litigious system. Cost recovery flows through section 47(5) of the *EMA* which creates a cause of action for recovery from responsible persons. A "responsible person" is broadly defined and includes current and past owners and operators of the site.

6 Section 35(2) of the *CSR* governs how to allocate costs amongst responsible persons. The interpretation of section 35(2) of the *CSR* is central to the dispute on appeal:

> 35 (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;
>
> …
>
> (f) other factors relevant to a fair and just allocation.

CSR at s. 35(2).

7 Under section 47(9) of the *EMA*, apportionment must accord with the principles of liability set out in Part 4 of the *EMA*, outlined above.

(ii) Background Facts

8 The Appellants are both British Columbia companies owned and operated, directly or indirectly, by members of the Jansen family.

Trial Reasons at para 4.

9 There are two properties relevant to the litigation. First, a property owned by Jansen Ltd. which consists of two contiguous lots with civic addresses of 33261 South Fraser Way and 33264 Old Yale Road (collectively, the "Jansen Site"). Second, a property owned by Victory Motors since 1948 with a civic address of 33258 South Fraser Way (the "Victory Motors Site"), which is across the road from the Jansen Site.

Trial Reasons at para 6.

10 The Victory Motors Site was the operating site of a gas station from the 1940s until 1994. The operation history is as follows:

a. No later than 1950 until 1974: Chevron Canada Limited ("Chevron").

b. 1974-1982: A company which has since had its assets and liabilities acquired by Shell Canada Limited/Shell Canada Limitée ("Shell").

c. 1982-1992: The respondent, Actton Super-Save Gas Stations Ltd.

d. 1992-1994, Gardner Leasing Ltd, under the Super-Save name.

Trial Reasons at para 16.

11 In 2009, Jansen Ltd. sought to sell the Jansen Site. A preliminary site investigation revealed it was contaminated.

Trial Reasons at paras 18-19.

12 In 2010 Jansen Ltd. retained Levelton Engineering Consultants Ltd. ("Levelton") to investigate the source of the contamination, which indicated it was the gas station that had formerly operated on the Victory Motors Site.

Trial Reasons at para 21.

(iii) Commencement of the Litigation

13 On August 2, 2011, Jansen Ltd. commenced an action in the Supreme Court of British Columbia (the "Jansen Ltd. Action"), seeking remediation costs pursuant to the *EMA* from

Victory Motors and Actton Super-Save Gas Stations Ltd. and Phil Van Enterprises Ltd. (the last two are collectively “Super-Save”).

Trial Reasons at paras 2, 22.

14 The Jansen Ltd. Action also named Chevron and Shell as defendants, and Abbotsford Imports Ltd. was a third party. The Appellants settled with Chevron and Shell and Super-Save settled with Abbotsford Imports Ltd.

Trial Reasons at paras 10-11.

15 In 2012, the Jansen family incorporated a company named Victory Motors Ltd. which acquired all the shares of Victory Motors from the then owner, Anne Webber, for $42,363.24. The sale included a guarantee from Jansen Ltd to indemnify Ms. Webber from any claims relating to the contamination.

Trial Reasons at para 24.

16 After the acquisition, Victory Motors commenced an action on October 31, 2012, seeking remediation costs pursuant to the *EMA* from responsible persons. Chevron and Shell settled with Victory Motors. Super-Save remained as a defendant.

Trial Reasons at paras 25-26.

17 In 2018, the Appellants obtained Certificates of Compliance for the Jansen Site and Victory Motors Site pursuant to section 53 of the *EMA*. The Appellants paid $395,706 to Levelton to obtain the Certificates of Compliance as follows:

a. Victory Motors Site: $259,218; and

b. Jansen Site: $136,488.

Trial Reasons at paras 26, 30-36, 50.

18 The parties agree that Jansen Ltd. is not responsible for any costs of remediation.

Trial Reasons at para 43.

(iv) The Trial Decision

19 At trial, there was no dispute that Super-Save is a responsible person. The main issues at trial relevant to this appeal were:

a. Whether legal fees, as remediation costs, were recoverable; and

b. The allocation of liability amongst the responsible persons and those who settled.

Trial Reasons at paras 37, 51-52.

20 The trial judge rejected all claims for remediation costs except those paid to Levelton to obtain the Certificates of Compliance.

Reasons for Judgment, *Victory Motors (Abbotsford) Ltd v Actton Super-Save Gas Stations Ltd*, 2021 BCCA 129 at para 20 [Appellate Reasons].

21 The trial judge denied Jansen Ltd.'s claim for recovery of legal costs under section 47(3) of the *EMA* against Super-Save because they are not a responsible person.

Trial Reasons at paras 59-60.

22 Under section 47(3) of the *EMA*, the trial judge accepted the Appellants' claim for legal costs incurred in the conduct of the litigation, but denied the Appellants' request for an order to the Registrar to determine this quantum. Instead, legal expenses recoverable under section 47(3) must be established at trial. Consequently, there was no award for legal costs.

Trial Reasons at paras 60-65.

23 The trial judge found that any profits realized by the Jansen family was attributable to the bargain made with Ms. Webber, and were not dependent on the remediation of the site. The fair market value of the Victory Motors Site did not increase beyond the costs of remediation.

Trial Reasons at para 112.

24 When allocating remediation costs, the trial judge rejected the bargain price acquisition of the Victory Motors shares as a relevant factor under section 35(2)(a). However, the trial judge

allocated a “substantial portion of the costs” to Victory Motors under 35(2)(f) because it obtained “the benefit of the Certificate of Compliance” while being a contributor to the contamination.

Trial Reasons at paras 110-111, 148-152.

25 The trial judge allocated the most liability for the Victory Motors Site to Victory Motors, followed by Super-Save, Chevron and Shell, as follows:

a. Victory Motors 45%

b. Super-Save 35%

c. Chevron 15%

d. Shell 5%

Trial Reasons at para 153.

26 The allocation of liability for the Jansen Site was as follows:

a. Super-Save 50%

b. Victory Motors 30%

c. Chevron 15%

d. Shell 5%

Trial Reasons at para 166.

(v) The BCCA Decision

27 The Appellants appealed on the grounds that:

a. The trial judge’s allocation of the costs of remediation is contrary to the intent and purpose of the *EMA* to advance the “polluter pays” principle.

b. The trial judge erred in refusing to award legal fees incurred as costs of remediation.

Appellate Reasons at paras 52-54.

28 The trial judge erred by factoring the benefit enjoyed by Victory Motors in obtaining the Certificate of Compliance for the Victory Motors Site when allocating costs under section 35(2)(f) of the *CSR*. The BCCA found that it was not in keeping with the object of the scheme and, on the findings of fact, the Certificate of Compliance carried no benefit. The allocation of remedial costs was remitted to the trial judge with the benefit of the Court's reasons.

Appellate Reasons at para 69.

29 The BCCA interpreted section 47(3)(c) to be a non-exhaustive subset of remediation costs, including "those for legal services engaged in the investigation of other responsible persons, negotiations with those persons, and drafting and preparing agreements for joint remediation and cost sharing."

Appellate Reasons at para 99.

30 The BCCA found that Jansen Ltd. could potentially recover under section 47(3)(c) of the *EMA*. It reasoned that being exempted from responsibility via section 46(1)(d) does not prevent a person described in section 45 from being a "responsible person".

Appellate Reasons at paras 113, 142.

31 The BCCA saw no error in the determination that the legal costs could not be referred to the Registrar.

Appellate Reasons at paras 144-145.

PART II -- QUESTIONS IN ISSUE

32 There are two issues on appeal:

a. May a court take into account the benefit enjoyed by a party in obtaining a Certificate of Compliance when apportioning liability for the costs of remediating a contaminated site among responsible persons under the *EMA*?

b. Are legal costs associated with remediation or with pursuing litigation recoverable under the *EMA*, and does the answer differ depending upon whether the person seeking cost

recovery is a “responsible person” under section 47(1) or “any person” under section 47(5) of the *EMA*?

PART III -- ARGUMENT

A. Standard of Review

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

Housen v Nikolaisen, 2002 SCC 33 at para 8.

B. Allocating Remediation Costs Based on the Benefit of Remediation

34 There are three reasons the BCCA correctly found that it was an error to allocate a substantial portion of remediation costs to Victory Motors because they received the benefit of the Certificate of Compliance. First, to factor any benefit of a Certificate of Compliance in the allocation of remediation costs frustrates the purpose of the statutory scheme. Second, it is unjust and unfair, and therefore contrary to section 35(2)(f) of the *CSR*. Third, the findings of fact establish that there was no benefit derived from the Certificate of Compliance.

(i) Frustrates the Purpose of the Statutory Scheme

35 It was contrary to the purpose of the statutory scheme for the trial judge to take into account any ‘benefit’ of a Certificate of Compliance in the allocation of remediation costs.

36 While the *EMA* does not contain a ‘purposes’ provision, the British Columbia courts have correctly identified that the polluter-pays principle is at the heart of the scheme. The courts have rightly identified the objective of the *EMA* is “to encourage the timely clean-up of contaminated sites by current owners”. A related purpose is “to require polluters to pay the cost of the clean-up of contamination from which they have benefitted in the past”.

Appellate Reasons at para 56-58 citing *J.I. Properties Inc v PPG Architectural Coatings Canada Ltd*, 2015 BCCA 472 at paras 29-30 [*J.I. Properties* CA].

37 This characterization is supported by prior case law, the words of the legislation, and legislative debates.

38 In addition to a plethora of British Columbia Court decisions supporting this interpretation, the Supreme Court of Canada ("SCC") recognized that the *EMA* contains the polluter pay principle.

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

39 The words of the legislation clearly hold polluters liable for the responsibility of remediation and the costs of that remediation, and exempts non-responsible persons from liability for those costs.

> See, for example, *EMA* at s. 46(1)(c).

40 Legislative debates support the British Columbia courts' interpretation. During the legislature's most recent amendments to the *EMA*, the polluter pays principle was at the forefront of discussions of the bill. The Minister of the Environment introduced the bill as "a series of amendments to the *Environmental Management Act*, to uphold the polluter-pays principle". Similarly, the shadow Minister for Environment stated that "[t]he ultimate goal of [the *EMA*] is to make sure that the responsible people pay".

> British Columbia, Legislative Assembly, *Hansard*, 42nd Leg, 4th Sess, No 325 (8 May 2023) at 1:50pm.
>
> British Columbia, Legislative Assembly, *Hansard*, 42nd Leg, 4th Sess, No 353 (31 October 2023) at 3:40pm.

41 The scheme is intended to encourage owners to achieve compliance through remediating contaminated properties by empowering owners who remediate with the ability to recover costs for remediation from the actual polluters. Taking into account the benefit of a Certificate of Compliance in the allocation of remediation costs discourages an owner who is also a "responsible person" from remediating its lands in a timely way, and is therefore not within the contemplation of the legislature. This would also hold that remediating owners, rather than polluters, are responsible for the costs of remediation. As the BCCA agreed, "[t]he trial judge's allocation of a substantial portion of remediation costs to Victory Motors because they received the 'benefit of the Certificate of Compliance' is inconsistent with, and indeed contrary to, the ultimate objective of the scheme, which is to encourage remediation".

> Appellate Reasons at para 56-57.

42 The BCCA correctly identified that the trial judge erred in law by allocating the costs of remediation in contradiction with the purpose of the scheme. It is fundamental to the rule of law that discretion is exercised in accordance with the spirit and intent of the statute which grants it, and any irrelevant considerations extraneous to the statutory purpose amount to a legal error.

Roncarelli v Duplessis, [1959] SCR 121, [1959] RCS 121 at paras 140-141.

(ii) It is Unfair and Unjust to Owners Who Remediate, Thus Contrary to Section 35(2)(f) of the *CSR*

43 It is not fair or just to deviate from the polluter pays objective through factoring the benefit of a Certificate of Compliance against an owner to allocate remediation costs to them. At issue in the appeal are two competing interpretations of section 35(2)(f) of the *CSR*: being whether or not the benefit of a Certificate of Compliance is a relevant factor to the "fair and just allocation" of remediation costs amongst responsible persons. This Court should give effect to the interpretation that is consistent with the object of the scheme. That object includes the polluter pays principle. The interpretation consistent with this objective is that the benefit of a Certificate of Compliance is not a factor relevant to a just or fair allocation under section 35(2)(f) of the *CSR*. To interpret the *CSR* otherwise transforms the scheme into a remediator pays scheme, which frustrates the objective sought by the legislature.

Celgene Corp v Canada (Attorney General), 2011 SCC 1 at para 14 [*Celgene Corp*].

44 First, it is unjust and unfair to owners who remediate to, as discussed above, deviate from the polluter pays by undermining the statutory purpose.

45 Second, it would be unfair and unjust to factor the benefit of the Certificate of Compliance against Victory Motors due to the bargain acquisition of the Victory Motors shares. The BCCA holds that the owner's motivation is "largely irrelevant" to liability, whether it be to develop the property, sell it, or remediate it. This aligns with the purpose of the scheme: to encourage timely remediation at the cost of actual polluters. The need for remediation is often driven by an owner's pursuit for profit by developing or selling the property, which does not detract from the polluter pays principle.

J.I. Properties Inc v PPG Architectural Coatings Canada Inc, 2014 BCSC 1619 at para 111.

46 Third, this approach ignores that previous contributors to the contamination benefitted from that contamination. The scheme's purpose is to discourage polluters and encourage remediation. Requiring Victory Motors to carry a larger share of the remediation costs *discourages* remediation and *encourages* polluters who can thus avoid their fair share of the costs but benefit from the pollution. This is unfair and unjust to owners who remediate contaminated properties and later seek remediation costs from responsible persons.

(iii) Finding a Benefit is Not Supported by the Findings of Fact

47 In the case of the Victory Motors Site, the findings of fact do not support finding that Victory Motors enjoyed a financial benefit from the Certificate of Compliance. The trial judge found that the remediation did not increase the value of the site beyond the costs of remediation.

> Trial Reasons at paras 112-116.

48 In the case of the Jansen Site, no benefit accrued to Victory Motors. Victory Motors could not have benefitted from remediation of a neighboring property, owned by a different company. Any benefit from the Certificate of Compliance would confer to Jansen Ltd., an innocent owner that all parties agree is not responsible for remediation costs.

49 There is no benefit to Victory Motors from the Certificates of Compliance, and there are no grounds to pierce the corporate veil to find otherwise. Victory Motors Ltd. (incorporated by the Jansen Family) purchased the *shares* of Victory Motors, not the Victory Motors site. This was not the sale of land at a discount. As the BCCA rightly found, the trial judge's increase of Victory Motor's allocation was "an effort to claw back a portion of the alleged windfall enjoyed by the purchaser of the Victory Motors shares at a bargain price". This is unfair and unjust to Victory Motors.

> Appellate Reasons at paras 67-68.

50 The only benefit enjoyed by Victory Motors can be the Certificate of Compliance itself. No benefit derived from the remediation and there was no finding that the remediation generated an increased utility of the properties. There is no benefit to be found in the purchase of the Victory Motors Site, since the site was acquired through a share purchase, not a land purchase.

The benefit of the Certificate of Compliance itself is not fair and just grounds to allocate a substantial portion of remediation costs to Victory Motors.

(iv) Comparison with Ontario's Scheme Reaffirms There is No Benefit from a Certificate of Compliance

51 Ontario is another large jurisdiction with a well developed contaminated sites scheme. The Ontario counterpart to a Certificate of Compliance is a Record of Site Condition under the *Environmental Protection Act*, RSO 1990 c E 19 ("*EPA*"). While roughly analogous instruments, a Record of Site Condition is more substantive, requiring a lengthier review process and affording more protection from liability.

52 Obtaining a Record of Site Condition requires heavily prescribed site assessments, and includes a guarantee by a qualified professional that there is no evidence of any contaminants remaining on the site (sections 23-33.8 of the *Records of Site Condition - Part XV.1 of the Act*, O Reg 153/04). Obtaining a Record of Site Condition protects all owners - past, present, and future - from a number of orders, including for remediation, control orders, and stop orders (section 168.7 of the *EPA*).

53 A Certificate of Compliance certifies that a site has been satisfactorily remediated to meet the standards of the scheme, but not necessarily that the site be clear of contaminants (section 53(3) of the *EMA*). Obtaining a Certificate of Compliance is a less arduous process (see section 53(3) of the *EMA*) and does not afford the same protections from liability as a Record of Site Condition. There is only one exemption from liability flowing from a Certificate of Compliance in the *EMA*: if a person changes the use of a site with a Certificate of Compliance or provides additional remediation, a person who is a responsible person before that change or remediation is no longer responsible for remediation of the site (section 46(1)(m)) of the *EMA*).

(v) Any Benefit is Nonetheless an Irrelevant Factor under Section 35(2)(f) of the *CSR*

54 The trial judge erred in considering the acquisition of Victory Motors' shares under section 35(2)(f) of the *CSR*, since "the price paid for the property by the person seeking cost recovery" is the factor under section 35(2)(a). In the words of the BCCA, this was an error by the trial judge's as it "runs counter to the well-established adage that one cannot do indirectly what

one cannot do directly under a delegated legislative discretion". While the BCCA's analysis on this point is brief, its conclusion is supported by the well-established principle of statutory interpretation that "you cannot do that indirectly which you are prohibited from doing directly". The acquisition of the shares was rightly found by both Courts to be irrelevant under section 35(2)(a), since the property was acquired through a share purchase and resulted in no windfall to the purchaser. Therefore, any benefit is irrelevant to the allocation.

Appellate Reasons at paras 59-60.

Madden v Nelson and Fort Sheppard Railway Company, [1899] UKPC 47, (1899) AC 626 at p 627-628 relied on in *Robinson v Countrywide Factors*, [1978] 1 SCR 753, 72 DLR (3d) 500 at p 765.

C. Legal Costs Associated with Remediation or With Pursuing Litigation are Recoverable Under the *EMA*

(i) The *EMA* Allows Recovery of *All* Costs of Remediation

55 The proper understanding of section 47(3) of the *EMA* allows for the recovery of both remediation legal costs and litigation legal costs. An alternative finding contradicts the explicit language of section 47(3). Section 47(3) reads:

> (3) For the purpose of this section, "costs of remediation" means all costs of remediation and includes, without limitation,
>
> (a) costs of preparing a site profile,
>
> (b) costs of carrying out a site investigation and preparing a report…
>
> (c) legal and consultant costs associated with seeking contributions from other responsible persons, and
>
> …
>
> [Emphasis added]

EMA at s. 47(3).

56 "All costs of remediation" includes costs that would not have been incurred *but for* the contamination caused by a responsible person. Both 'remediation legal costs' and 'litigation legal costs' would not be incurred but for the pollution of responsible parties.

57 The BCCA was alive to this language but failed to do faith to the actual words used since the Court did not truly grant all costs. The BCCA erred in creating bespoke carve-outs based on considerations not found in the *EMA* itself.

Appellate Reasons at para 94.

(ii) The *EMA* Explicitly Provides for the Recovery of Both 'Remediation Legal Costs' and 'Litigation Legal Costs'

58 Remediation legal costs are captured by section 47(1) of the *EMA* and the introductory words of section 47(3). This is supported by the definition of "remediation" in section 1 and the recoverability of "all costs of remediation" under section 47(3). Further, section 47(3)(a) explicitly mentions an example of a 'remediation legal cost': the preparation of a site disclosure statement.

Appellate Reasons at para 95.

59 Section 47(3)(c) of the *EMA* clarifies that 'litigation legal costs' are included in "all costs of remediation" and excluding them contradicts the explicit words of section 47(3)(c). The specific reference to the recoverability of "legal and consultant costs associated with seeking contributions from other responsible persons" in section 47(3)(c) is required since one would not normally associate legal costs in pursuit of contribution from responsible persons as costs of remediation.

Appellate Reasons at para 96.

60 Legal costs incurred in pursuit of contribution from other responsible persons include 'litigation legal costs'. The function of section 47(3)(c) is to categorize legal costs incurred in pursuit of contribution from other responsible persons as costs of remediation. Litigation for the recovery of remediation costs is a pursuit of contribution. The goal of the litigation is to recover funds from responsible persons for their fair share of remediation costs.

(iii) It is Contrary to the Polluter Pays Principle and the Intention of Section 47 of the *EMA* to Exclude Litigation Legal Costs from the Ambit of Section 47(3)(c)

61 The primary objective of section 47 should be understood to require polluters to pay all reasonably incurred costs of remediation of contamination from which they have benefitted. As discussed above, the primary and related objectives of the *EMA* are to require polluters to pay the cost of remediation of contamination from which they have benefitted and to ensure a timely clean-up of contaminated sites, respectively. The language of sections 47(1) and 47(3) further illuminates the intention behind section 47 of the *EMA*. Liability for reasonably incurred costs of remediation is imposed on the person responsible for remediation in section 47(1). Section 47(3) defines the "costs of remediation" as "all costs of remediation".

J.I. Properties CA at para 29-30.

62 Finding that 'litigation legal costs' are not recoverable under the *EMA* disincentivizes remediation, and is therefore contrary to the way the statutory scheme is intended to operate. Litigation is costly. The possibility that an innocent party could end up in a worse financial position from remediating a site is inequitable and undermines the legislature's intent. Allowing for the recovery of 'litigation legal costs' provides greater certainty for a plaintiff when considering pursuing an action, encouraging a plaintiff to remediate and then recover their remediation costs as intended by the scheme.

63 Excluding the indemnification of legal costs discourages a plaintiff from pursuing litigation. The scheme is inherently litigious; the structure is to remediate first and allocate liability later. It is contradictory to discourage litigation within a scheme that implicitly requires litigation to recover remediation costs.

Appellate Reasons at para 135 citing *Seaspan ULC v Director, Environmental Management Act,* 2014 BCEAB 22 at paras 8-10.

64 Indemnifying legal costs incentivizes polluters to settle claims for recovery and creates a less litigious atmosphere. Awarding full indemnity of legal costs promotes settlements of claims over litigation, since polluters know they are liable for the legal costs of claimants. This, in turn, promotes the prompt clean-up of contaminated sites, apportionment of resulting costs, and

compliance with remediation orders. Responsible parties would continue to be exempt from liability for the legal costs of an unsuccessful claim against them since claims for legal costs must be reasonably incurred from seeking contribution from another party.

Canadian National Railway Company v ABC Recycling Ltd, 2005 BCSC 647 at paras 98, 183 [*CNR* SC].

(iv) Interpreting 'Litigation Legal Costs' as Damages Recoverable Under Section 47(3)(c) Does Not Create a Redundancy with the *Supreme Court Civil Rules*

65 Both 'litigation legal costs' and 'remediation legal costs' are remediation costs that can be awarded under section 47(5) of the *EMA*. Section 47 plays a compensatory role. It reimburses a party for "all costs of remediation" that would not have been incurred but for the contamination caused by a responsible person. By allowing plaintiffs to pursue "reasonably incurred costs of remediation", section 47(5) suggests that costs of remediation are akin to damages. Actual costs are not equivalent to special costs under the *Supreme Court Civil Rules*. The BCCA supported this conclusion, finding that reasonably incurred costs of remediation are recovered through an action under section 47(5).

Appellate Reasons at para 141.

CNR SC at para 174.

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

(v) The BCCA Erred in Implying the Existence of Two Legally Significant Categories of Legal Costs and Excluding One of Them from the Ambit of Section 47(3)(c)

66 The BCCA erroneously drew a line between 'litigation legal costs' and 'remediation legal costs' and excluded 'litigation legal costs' from the ambit of section 47(3)(c). This distinction is not set out in the legislation or supported by case law.

Appellate Reasons at para 84, 98.

67 All legal costs associated with seeking contributions from other responsible persons are recoverable under section 47(3)(c). There is no language in section 47 of the *EMA* which indicates that legal costs should be split into two categories. Section 47(3) explicitly states that

"costs of remediation" includes "all costs of remediation". It follows that "costs of preparing a site disclosure statement", set out in section 47(3)(a), includes all costs of preparing a site disclosure statement. There is no reason to depart from this interpretation of costs when reading sections 47(3)(b) and 47(3)(c). The pairing of legal and consultant costs in the same subsection further indicates that the legislature did not intend for legal costs to be treated differently than other remediation costs.

68 It is inconsistent with the scheme as a whole, in light of the language of the *EMA*, to judicially carve out a significant contributor to the costs of remediation. Due to the way that the scheme has been set up, litigation legal costs are practically unavoidable when seeking to obtain contributions from other responsible persons. The determination that 'costs' means 'all costs' within the context of section 47(3) is consistent with the ordinary meaning of 'costs': an amount that has to be spent to buy or to obtain something. It follows that, "legal and consultant costs" in section 47(3)(c) is the amount that has to be spent on legal and consultant fees to obtain contributions from other responsible persons.

69 As expected by the language of the *EMA*, past jurisprudence does not separate legal costs into two categories. For example, in *CNR* SC, the BCSC considered legal costs as a whole and 'litigation legal costs' were not excluded. In *Gehring et al v Chevron Canada Limited et al*, 2007 BCSC 468 ("*Gehring*"), the BCCA made no distinction between 'remediation legal costs' and 'litigation legal costs'.

CNR SC at paras 171-173.

Gehring at para 31.

70 The BCCA misinterpreted *Canadian National Railway Co v ABC Recycling Ltd*, 2006 BCCA 429 ("*CNR* CA") to mean that legal costs should be separated into 'remediation legal costs' and 'litigation legal costs'. The interpretation of the term 'legal costs' was not a live issue before the Court. *CNR* CA was dealing with a very narrow issue on appeal: whether 27(2)(c) of the *Waste Management Act*, RSBC 1996, c 482 was applicable to the facts of the case. Finding that *CNR* CA implied that 'legal costs' should be separated into 'litigation legal costs' and 'remediation legal costs' is not supported by the actual holding of that decision.

Appellate Reasons at paras 83, 87.

(vi) Legal Costs Under Section 47 of the *EMA* Are Fully Recoverable

71 In light of the broad language of "all costs of remediation", which conditions the entire subsection, it is incongruous to conclude that a party seeking recovery of costs of remediation under section 47 of the *EMA* is entitled to full indemnity for all of the items listed in section 47(3) except for legal costs. This is especially so when considering the linkage between legal costs and consultant costs in section 47(3)(c) of the *EMA.* Further, section 47(3)(c) would be rendered superfluous if it were interpreted to mean party-and-party costs, as these are granted in any successful action under the *Supreme Court Civil Rules*. This is contrary to the principle that the legislature is presumed not to speak gratuitously. Third, as discussed above, full indemnity for reasonably incurred costs of remediation is more consistent with the purpose and scheme of the legislation.

CNR SC at para 173, 179-181.

72 *Gehring* does not prevent an award of legal costs under section 47(3)(c) on a full indemnity basis. *Gehring* suggests that section 47(3)(c) only allows for party-and-party costs due to an absurdity that is no longer of concern as the Appellants address in section D, below.

Gehring at para 34.

D. Any Person is Entitled to Receive the Legal Costs Under the *EMA*

73 The legal costs recoverable under the *EMA* should not differ whether the person seeking recovery is "any person" or a "responsible person" under the *EMA*. This question arises largely because of the BCCA's previous interpretation of section 47(3)(c) in *CNR CA*; that only "responsible persons" can recover under section 47(3)(c) because it reads "recovery from *other* responsible persons" (emphasis added). This caused the BCCA to grapple with whether Jansen Ltd. is a "responsible person" so it could still recover legal costs under the *EMA*, despite having no liability by virtue of section 46(1)(d).

CNR CA at paras 5-10.

74 The proper interpretation of the provision results in “any person” being entitled to recover the legal costs previously described under the *EMA*. If the person seeking recovery otherwise qualifies, it does not matter if they are a “responsible person” or “any person”.

75 The *EMA* aims to enforce the “polluter pays principle” and the timely clean-up of contaminated sites. The *CNR CA* interpretation of section 47(3)(c) frustrates this objective. It precludes innocent parties, like Jansen Ltd., from recovering legal fees because they are not responsible for the pollution. It also saves the polluter, Super-Save, from paying. This discourages innocent owners from remediating polluted land and saves the polluter from paying their fair share.

76 The Appellants acknowledge that this Court cannot adopt their preferred interpretation solely because it is more consistent with the overall objective of the statute. The SCC has held that “the words, if clear, will dominate; if not, they yield to an interpretation that best meets the overriding purpose of the statute.” However, the word “other” in section 47(3)(c) has created ambiguity in the section and created turbulence in the courts. Given this evident ambiguity and the availability of an alternate valid reading on the language of the text, per *Celgene Corp*, the section is open to an interpretation that best meets the overriding purpose of the statute.

Celgene Corp at para 21.

(i) An Interpretation of Section 47(3)(c) Which Allows Only Responsible Persons to Recover Legal Costs Results in Absurd Consequences

77 The *CNR CA* interpretation that only “responsible persons” can recover legal costs under the *EMA* results in absurd consequences that cannot reflect the intention of the legislature. Justice Iacobucci wrote that “it is a well established principle of statutory interpretation that the legislature does not intend to produce absurd consequences.” The *CNR CA* interpretation results in two kinds of absurdity that the courts have avoided in the past, and should again.

Rizzo & Rizzo Shoes Ltd (Re), [1998] 1 SCR 27, [1998] ACS No 2 at para 27.

78 First, it is absurd for interpretations to result in persons deserving of better treatment receiving worse treatment and vice versa. These have been rejected for absurd consequences. *R v Wust*, 2000 SCC 18 (“*Wust*”) is an example where the SCC rejected an interpretation that

rewarded severe offenders while penalizing lesser offenders. The *CNR CA* interpretation of section 47(3)(c) is inconsistent with the SCC's directions in *Wust*. Under this interpretation, an innocent party such as Jansen Ltd. is put in a less favorable position than they would be if they were a polluter (and so a liable "responsible person" under the *EMA*). This allows polluters to pay less for remediation, rather than "all costs of remediation" as section 47(3) commands. It further promotes resisting and litigating to avoid payment, as under this interpretation polluters will not have to pay the legal fees of innocent persons. It is more likely that the legislature intended this provision to create a near full indemnity of the innocent remediator's legal fees, thus incentivizing responsible persons to not dispute remediation costs.

> Ruth Sullivan, *The Construction of Statutes*, 7th ed (Toronto: LexisNexis Canada, 2022) at 307 [Sullivan].
>
> *Wust* at para 42.

79 Second, interpretations that lead to unjust or inequitable consequences have also been labeled as absurd and rejected by the courts. In *R v Canadian Pacific Ltd*, [1995] 2 SCR 1031, [1995] SCJ No 62 ("*Canadian Pacific*"), the SCC said that "it may be presumed that the legislature does not intend unjust or inequitable consequences to flow from its enactments". The *CNR CA* interpretation of section 47(3)(c) results in consequences that are as inequitable as the language of the provision could possibly enable. It is absurd for a party with clean hands to be denied the very remedy permitted to a party with dirty hands.

> *Canadian Pacific* at para 66.

(ii) A Proper Interpretation of Section 47(3)(c) Results in "Any Person" Being Able to Recover Legal Costs

80 The proper interpretation of section 47(3)(c) is that a claimant can recover the legal cost of pursuing "other" responsible persons besides the responsible person with whom they are in litigation. It is likely that the legislature intended for the list at section 47(3) to set the boundaries of what is meant by "all costs of remediation".

81 Courts favour interpretations that avoid absurd consequences when the text is not clear. Sullivan, as quoted by the Saskatchewan Court of Appeal, identifies the practice of courts, where

"the more compelling the absurdity to be avoided, the greater the departure from the ordinary meaning that is tolerated" and if the absurdity is obvious and intolerable, "most courts will strain language to avoid it and some courts will go further and significantly alter the legislative text".

Hess v Thomas Estate, 2019 SKCA 26 at para 54.

82 This court should treat *CNR CA* with caution and instead adopt an interpretation consistent with the presumption against absurdity. The text in section 47(3)(c) is not clear, and is open to interpretation. As discussed, the *CNR CA* interpretation results in absurd consequences that the legislature could not have intended. The Appellants' preferred interpretation of the text does not require the court to "strain the language" of the text to reach outcomes that the legislature must have intended.

83 The Appellants' preferred interpretation fits well with the scheme, allowing for either a "responsible person" or "any person" to recover under section 47(3)(c). This quells the concern from *Gehring* where the court could not "see any principled basis for permitting a polluting plaintiff to recover costs on a higher basis than the basis on which a non-polluting plaintiff can recover costs." Further, it creates a route to recover additional legal costs which would not otherwise be available to applicants, or redundant by providing another means to recover party-and-party costs.

Gehring at para 36.

84 The list at section 47(3) is designed to set the boundaries of remediation cost recovery. It is not exhaustive. For example, nowhere in section 47 is it explicitly said that persons who remediate can recover the cost of obtaining the Certificate of Compliance (here, the $359,706 paid to Levelton), yet it is seemingly obvious that these costs are recoverable, of which the parties are in agreement.

Trial Reasons at para 50.

85 The SCC has considered inclusive lists like that in section 47(3). The SCC held that when terms like "including" are used to introduce specific examples, these are "terms of extension, designed to enlarge the meaning of preceding words". In the case at hand, the preceding words are already broad: "all costs of remediation". This suggests that the purpose of the list in section

47(3) is meant to "provide a specific illustration of a subset of a given category of things in order to make it clear that that category extends to things that might otherwise be expected to fall outside it".

Canada (Attorney General) v Igloo Vikski Inc, 2016 SCC 38 at para 71.

86 Section 47(3)(b) appears to extend "costs of remediation" beyond that which one might expect when viewing that term in isolation, just as explained by the SCC. It goes beyond the plain language and provides for costs of preparing a site report *whether or not* the site has been determined under the *EMA* to be contaminated. This is not an obvious cost of remediation, whereas a site report after a site has been determined to be contaminated would be. This further suggests that section 47(3) is meant to set the boundaries of "all costs of remediation".

87 This interpretation avoids frustrating the purpose of the scheme in cases where there are no responsible persons besides the defendant. If the legislature was willing to have a responsible person (like Super-Save) pay the legal fees of pursuing a third party, then it is logical that the legislature would have that responsible person pay the legal fees spent pursuing that responsible party themselves. This is less remote and within the boundary set by the legislature.

88 This interpretation aligns with the scheme and furthers the object of the legislation. The object of the *EMA* is not frustrated by absurd results, and "any person" can recover legal costs if they are "reasonably incurred" as section 47(5) commands. This results in Jansen Ltd. being entitled to receive the legal costs aforementioned despite not being a "responsible person".

E. If Only Responsible Persons Can Recover Under Section 47(3)(c), Jansen Ltd. Can Still Recover Legal Costs

89 In the alternative, if the court prefers the *CNR CA* interpretation, Jansen Ltd. can still recover under section 47(3)(c). The BCCA in the Appellate Reasons thoroughly examined the legislative history of the contaminated sites regime, concluding that there exist responsible persons who are liable and those who are not. Jansen Ltd. would be the latter and could still recover under section 47(3)(c) because they are a "responsible person" nonetheless.

Appellate Reasons at paras 113-136.

90 The language in the *CSR* supports the BCCA's analysis. Throughout the *CSR*, "responsible person" appears to be used synonymously with "remediator". If "responsible person" strictly applied to liable parties, then non-liable parties, such as Jansen Ltd., would be excluded from the scheme in several instances. For example, section 39 of the *CSR* discusses the process of a "responsible person" requesting a voluntary remediation agreement. If non-liable parties are no longer "responsible persons", then this section would not apply to them, and the legislation would be silent on this situation. Sullivan states that "if there is a choice between two plausible interpretations, [courts] ordinarily prefer the interpretation that avoids creating a gap." If the Appellate Reasons are rejected, gaps are created throughout the scheme, such as the application of risk-based standards in section 18 or applications for remediation plan approvals in section 49. This would be under-inclusive and fail to provide the necessary guidance to persons who are free from liability.

Sullivan at 371, 375.

PART IV -- SUBMISSIONS IN SUPPORT OF COSTS

91 If successful in the appeal, pursuant to the proper interpretation of section 47(3)(c) of the *EMA* discussed above, the appellants seek full indemnity costs.

PART V -- ORDER SOUGHT

92 The Appellants seek an order that the appeal be allowed with costs. The Appellants seek this Court exercise its discretion to correct the trial judge's substantial allocation to Victory Motors and adjust the costs of remediation. A proper allocation would result in Victory Motors bearing 10% of the costs in the Victory Motors Action, and 5% in the Jansen Ltd. Action, and the respondents bear the balance previously allocated to Victory Motors (Super-Save bear 65% of the costs in the Victory Motors Action, and 75% in the Jansen Ltd. Action).

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

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[redacted]

Counsel for the Appellants

Victory Motors (Abbotsford) Ltd. and

Jansen Industries 2010 Ltd.

PART VI -- TABLE OF AUTHORITIES

Paragraph No.

Jansen Industries 2010 Ltd v Victory Motors (Abbotsford) Ltd, 2019 BCSC 1621.	47, 84.
J.I. Properties Inc v PPG Architectural Coatings Canada Inc, 2014 BCSC 1619.	45.
J.I. Properties Inc v PPG Architectural Coatings Canada Ltd, 2015 BCCA 472.	61.
Madden v Nelson and Fort Sheppard Railway Company, [1899] UKPC 47, (1899) AC 626.	54.
R v Canadian Pacific Ltd, [1995] 2 SCR 1031, [1995] SCJ No 62.	79.
R v Wust, 2000 SCC 18.	78.
Records of Site Condition - Part XV.1 of the Act, O Reg 153/04.	52.
Rizzo & Rizzo Shoes Ltd (Re), [1998] 1 SCR 27, [1998] ACS No 2.	77.
Robinson v Countrywide Factors, [1978] 1 SCR 753, 72 DLR (3d) 500.	54.
Roncarelli v Duplessis, [1959] SCR 121, [1959] RCS 121.	42.
Ruth Sullivan, *The Construction of Statutes*, 7th ed (Toronto: LexisNexis Canada, 2022)	78, 90.
Supreme Court Civil Rules, BC Reg 168/09.	65.
Victory Motors (Abbotsford) Ltd v Actton Super-Save Gas Stations Ltd, 2021 BCCA 129.	36, 41, 49, 54, 57-59, 63, 65-66, 70, 89.
Waste Management Act, RSBC 1996, c 482.	70.

PART VII -- LEGISLATION AT ISSUE

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

Part 1 — Introductory Provisions

Definitions

1 (1) In this Act:

…

"remediation" means action to eliminate, limit, correct, counteract, mitigate or remove any contaminant or the adverse effects on the environment or human health of any contaminant, and includes, but is not limited to, the following:

(a) preliminary site investigations, detailed site investigations, analysis and interpretation, including tests, sampling, surveys, data evaluation, risk assessment and environmental impact assessment;

(b) evaluation of alternative methods of remediation;

(c) preparation of a remediation plan, including a plan for any consequential or associated removal of soil or soil relocation from the site;

(d) implementation of a remediation plan;

(e) monitoring, verification and confirmation of whether the remediation complies with the remediation plan, applicable standards and requirements imposed by a director;

(f) other activities prescribed by the minister;

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;

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

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

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

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

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

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

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

(j) a person who owns or operates a contaminated site that was contaminated only by the migration of a substance from other real property not owned or operated by the person;

(k) an owner or operator of a contaminated site containing substances that are present only as natural occurrences not assisted by human activity and if those substances alone caused the site to be a contaminated site;

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

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

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

(ii) provide additional remediation;

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

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

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

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

General principles of liability for remediation

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

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

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

(a) costs of preparing a site profile,

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

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

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

(4) Liability under this Part applies

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

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

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

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

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

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

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

(8) Despite subsection (7), if independent remediation has been carried out at a site and the site has not been determined or considered under section 44 [determination of contaminated sites] to

be or to have been a contaminated site, the court must determine whether the site is or was a contaminated site.

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

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

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

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

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

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

Application of risk-based standards for remediation

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(b) by the director using other available data.

Determining compensation under section 47(5) of the Act

35 (1) For the purposes of determining compensation payable under section 47 (5) of the Act, a defendant named in a cost recovery action under that section may assert all legal and equitable

defences, including any right to obtain relief under an agreement, other legislation or the common law.

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

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

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

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

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

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

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

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

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

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

Voluntary remediation agreements

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

(a) a detailed site investigation;

(b) a remediation plan;

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

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

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

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

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

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

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

Requests for certificates

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

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

(a) preliminary and detailed site investigation reports;

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

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

(ii) a schedule of sampling conducted, and

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

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

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

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

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

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

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

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

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

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

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

(a) the applicant, and

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

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

14 (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.

***Waste Management Act,* RSBC 1996, c 482, s. 27.**

General principles of liability for remediation

27 (1) A person who is responsible for remediation at a contaminated site is absolutely, retroactively and jointly and severally 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) For the purpose of this section, **"costs of remediation"** means all costs of remediation and includes, without limitation,

(a) costs of preparing a site profile,

(b) costs of carrying out a site investigation and preparing a report, whether or not there has been a determination under section 26.4 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 manager, a municipality, an approving officer, a division head or a district inspector under this Part.

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

TEAM #6

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Victory Motors (Abbotsford) Ltd. and
Jansen Industries 2010 Ltd.