WILLMS & SHIER ENVIRONMENTAL LAW MOOT COURT COMPETITION 2024

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

IN THE SUPREME ENVIRONMENTAL MOOT COURT OF CANADA

(ON APPEAL FROM THE BRITISH COLUMBIA COURT OF APPEAL)

B E T W E E N:

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

APPELLANTS

- and -

ACTTON SUPER-SAVE GAS STATIONS LTD.

RESPONDENT

FACTUM OF THE APPELLANTS
VICTORY MOTORS (ABBOTSFORD) LTD. and JANSEN INDUSTRIES 2010 LTD.
Pursuant to Rule 12 of the
Willms & Shier Environmental Law Moot Official Competition Rules 2024

TEAM 2024-08

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 This case concerns how British Columbia's *Environmental Management Act*, SBC 2003, c 53 ("***EMA***") and *Contaminated Sites Regulation,* BC Reg. 375/96 ("***CSR***") should be interpreted for the purposes of the fair allocation and recovery of costs of environmental remediation. There are two questions at issue: First, how is liability for remediation costs fairly and justly allocated between responsible parties? Second, what costs of remediation should be fully recoverable under s. 47 of the *EMA*, and by whom?

> *Environmental Management Act*, SBC, c 53 [*EMA*].
> *Contaminated Sites Regulation,* BC Reg. 375/96 [*CSR*].

2 On the first question, this case requires the Court to consider whether a Certificate of Compliance ("**CoC**") represents a 'benefit' to a remediating party that could justify a court increasing their liability for costs of remediation. On the second question, the Court must determine whether remediating parties may recover all reasonable legal costs of seeking contributions from other responsible parties, including those incurred through litigation.

3 The British Columbia Court of Appeal ("**BCCA**") correctly held that, in this case, the CoC obtained by Victory Motors (Abbotsford) Ltd. ("**VM**") does not represent a benefit to VM and should not be considered in allocating liability for remediation costs.

4 A CoC represents an integral part of the remediation process provided for under the *EMA*. Any benefit that it may confer is not usually distinguishable from the intended effects of remediation. While a CoC could conceivably represent a benefit over and above the remediation, this is not generally the case. Finding that a CoC always represents a benefit that should factor into the allocation of liability is inaccurate and would have the undesirable effect of undermining the "polluter pays" intention of the legislation and implementing a "remediator pays" scheme. Instead, courts must determine, on the facts of each case, when a CoC conferred a benefit that should factor into the allocation of liability.

5 In this case, the facts do not support a finding that the CoC conferred any benefit upon VM. It therefore should not have been considered by the Supreme Court of British Columbia ("**BCSC**") in allocating liability.

6 On the second question, the BCCA erred in holding that VM could not recover its reasonable legal costs of seeking contributions from other responsible parties through litigation under s. 47(3)(c) of the *EMA*. Read in context, the intention of s. 47(3)(c) is to encourage remediation by allowing remediators to recover all reasonable legal costs associated with seeking contributions from responsible persons. In line with this intention, the proper interpretation of s. 47(3)(c) of the *EMA* is that all legal costs of remediation, including litigation costs, are recoverable, subject only to their reasonableness.

7 There is no difference in the ability to recover legal costs based on whether a person is a "responsible person" or "any person" under s. 47(1) and s. 47(5) of the *EMA*. The only appropriate consideration is whether the person incurred reasonable costs of remediation for which other persons are liable. Holding otherwise would lead to an illogical result whereby people involved in remediation who are not themselves liable for the costs of remediation cannot recover their legal costs. Courts must avoid reading legislation in a way that leads to an absurd outcome.

> *EMA*, *supra* para 1 at s. 47.

B. Statement of the Facts

(i) Background Facts

8 There are two sites relevant to this case, both located along South Fraser Way in Abbotsford, British Columbia. The properties at 33261 South Fraser Way and 33264 Old Yale Road (contiguous lots that together are referred to as the "**Jansen Site**") are owned by Jansen Industries 2010 Ltd. ("**Jansen Ltd.**").

9 The property at 33258 South Fraser Way ("**VM Site**") has been owned by VM since December 28, 1948. Between 1940 and 1994, various gas stations were operated on the VM Site, including one operated by the Respondent, Actton Super-Save Gas Stations Ltd. ("**Super-Save**") from 1982 to 1992.

> *Jansen Industries 2010 Ltd. v Victory Motors (Abbotsford) Ltd.*, 2019 BCSC 1621 at para 16 [*VM BCSC*].

10 In 2009, Jansen Ltd. discovered hydrocarbon contamination on their site during a preliminary environmental investigation undertaken for a potential sale of the property. A further

investigation in 2010 identified the source of the contamination as the gas stations formerly operated on the VM Site.

> *VM BCSC, supra* para 9 at paras 18-21.

11 In June 2012, members of the Jansen family ("**Jansen Family**") incorporated a new company, Victory Motors Ltd. ("**VM Ltd.**"), which purchased all shares of VM. At all material times, the VM Site remained under the ownership of VM.

> *VM BCSC, supra* para 9 at para 24.

12 Shortly after the transfer of shares, VM retained Levelton Engineering Consultants Ltd. ("**Levelton**") to decommission the gas station and pump out the underground storage tanks at the VM Site. Jansen Ltd. also retained Levelton to drill monitoring wells and prepare a report on the contamination at the Jansen Site (*VM BCSC*). These remediation measures respectively cost $259,218 at the VM Site and $136,488 at the Jansen Site, totalling $395,706 ("**Levelton Costs**") (*VM BCSC*). In 2012, VM began litigation to recover these remediation costs from Super-Save and other parties responsible for the contamination (*VM BCSC*). In 2016, two other defendants who had operated gas stations at the VM Site settled their portions of the litigation. As part of the settlement, which remains confidential, they assisted in obtaining risk-assessment based CoCs at both sites pursuant to the *EMA* (*VM BCSC*). The VM CoC permitted all contaminated soil on the VM Site to remain in place and imposed the principal limitations that the current commercial land use be maintained and that any new commercial structure have a basement of no more than two meters below grade as it existed in October 2017 (*VM BCSC*).

> *VM BCSC, supra* para 9 at paras 21, 32, 16, 26, 31.

13 In 2012, VM invested approximately $800,000 to extensively renovate the building on the VM Site, which was subsequently leased to long-term commercial tenants.

> *VM BCSC, supra* para 9 at para 25.

(ii) Supreme Court of British Columbia Decision

14 The underlying decision, *Jansen Industries 2010 Ltd. v. Victory Motors (Abbotsford) Ltd.*, 2019 BCSC 1621 ("***VM BCSC***") involved a claim by VM and Jansen Ltd. against Super-Save for recovery of the costs of remediating the VM Site.

15 Of the issues discussed in *VM BCSC*, two are relevant to the current appeal: (1) whether VM received a benefit from the CoC that could be considered in the allocation of liability among the responsible parties, and (2) whether and which legal costs can be recovered as remediation costs under the *EMA*.

16 Super-Save argued that VM should be allocated greater responsibility for the costs of remediation under s. 35(2)(a) of the *CSR*, "the price paid for the property". They argued that the Jansen Family, as owners of VM Ltd., had paid a nominal price for the shares and had substantially profited from the remediation (*VM BCSC*). Applying *Salomon v. Salomon*, the trial judge determined that s. 35(2)(a) of the *CSR* was not relevant since a share purchase is not equivalent to a purchase of the property, of which VM "was at all material times the owner" (*VM BCSC*).

> *CSR*, *supra* para 1 at s. 35(2)(a).
> *VM BCSC, supra* para 9 at paras 108-109, 110-111.
> *Salomon v. Salomon & Co.,* [1897] A.C. 22 [*Salomon*].

17 The trial judge also found that the VM Site had not increased in value following the remediation, including the issuance of a CoC, given that multiple appraisals of the site prior to the remediation found the contamination to be immaterial to its value. Any change in value was attributable to the renovation of the existing building and subsequent lease to a commercial tenant. As a result, they determined that there was no "windfall" (*VM BCSC*).

> *VM BCSC, supra* para 9 at paras 112-116.

18 Jansen Ltd. and VM also claimed legal costs associated with remediation as recoverable costs of remediation under s. 47(3)(c) of the *EMA* (*VM BCSC*). The trial judge held that "legal costs" under s. 47(3)(c) of the *EMA* includes litigation costs. However, relying on *Gehring et al. v. Chevron Canada Limited et al.,* 2007 BCSC 468 ("***Gehring***"), he determined that VM could only recover its litigation costs on a 'party-and-party' basis under s. 47(3)(c) (*VM BCSC*). The trial judge considered that Jansen Ltd. was not a "responsible person" under the *EMA* because they

were not a contaminating party. Relying on the interpretation in *Canadian National Railway Co. v. A.B.C. Recycling Ltd.*, 2006 BCCA 429 ("***CNR BCCA***") that such persons are not captured by s. 47(3)(c), which allows recovery of legal costs in "seeking contributions from other responsible persons", the trial judge found that Jansen Ltd. could not recover its remediation legal costs (*VM BCSC*).

> *VM BCSC, supra* para 9 at paras 58, 60-62, 59.
> *Gehring et al. v. Chevron Canada Limited et al.*, 2007 BCSC 468 [*Gehring*] at para 36.
> *EMA*, *supra* para 1 at s. 47(3)(c).
> *Canadian National Railway Co. v. A.B.C. Recycling Ltd., 2006 BCCA 429* [*CNR BCCA*] at para 9.

19 Regarding the Levelton Costs, the trial judge determined that VM had received the "benefit of the remediation costs while being a significant contributor to the contamination" and opted to consider this under s. 35(2)(f) of the *CSR* which captures "any other factor relevant to a fair and just allocation" (*VM BCSC*). The trial judge therefore appeared to increase VM's allocation of liability for remediation costs to compensate for this unspecified "benefit". Ultimately, the trial judge allocated the largest portion of responsibility for remediation costs for the VM Site to VM at 45% (*VM BCSC*).

> *CSR*, *supra* para 1 at s. 35(2)(f).
> *VM BCSC, supra* para 9 at paras 148, 152-153.

(iii) Court of Appeal of British Columbia Decision

20 VM and Jansen Ltd. appealed the trial decision in *Victory Motors (Abbotsford) Ltd. v. Actton Super-Save Gas Stations Ltd*. 2021 BCCA 129 ("***VM BCCA***"), asserting that the trial judge erred 1) in allocating VM greater liability under s. 35(2)(f) of the *CSR* on the basis of benefit arising from the remediation and the CoC, and 2) in denying recovery of remediation legal costs under s. 47(3)(c) of the *EMA* due to a lack of evidence.

> *Victory Motors (Abbotsford) Ltd. v. Actton Super-Save Gas Stations Ltd*. 2021 BCCA 129 [*VM BCCA*].
> *VM BCSC, supra* para 9 at paras 152-153, 62-64.

(a) Allocation of Liability

21 The BCCA determined that the trial judge erred in allocating a higher percentage of responsibility to VM due to a so-called benefit arising from the CoC (*VM BCCA)*. The BCCA relied on the trial judge's factual finding that the remediation of the VM Site did not increase its

value beyond the costs of remediation (*VM BCCA*). As a result, the BCCA held that allocating additional liability to VM for obtaining the CoC was an effort to claw back an "alleged windfall" that did not exist (*VM BCCA*). More broadly, the BCCA held that considering such a benefit from remediation when allocating responsibility would discourage the efficient remediation of contaminated sites, contrary to the purpose of the *EMA (VM BCCA)*.

> *VM BCCA*, *supra* para 20 at paras 63-64, 67, 68, 56.

(b) Recovering All Remediation Legal Costs

22 In a recognition of the confused state of the law on this question, the BCCA opted to review the relevant jurisprudence and then "construe the legislative scheme as though it was a matter of first impression in this case".

> *VM BCCA, supra* para 20 at para 70.

23 The BCCA's review of jurisprudence noted the conflicting decisions on this area of law. While *CNR BCSC* held that legal costs should be recoverable on a full indemnity basis, *Gehring* held that legal costs under s. 47(3)(c) of the *EMA* were only recoverable on a party-and-party basis (*Gehring*). *CNR BCCA* overturned *CNR BCSC* but on the narrow determination that s. 47(3)(c) only permitted <u>responsible persons</u> to recover their legal costs (*CNR BCCA*). Since CNR was not a responsible person, it was barred from recovering any legal costs under s. 47(3)(c) of the *EMA*. The issue of whether legal costs should be recovered on a party-and-party or full indemnity basis was therefore unresolved.

> *Canadian National Railway Company et al. v A.B.C. Recycling Ltd.*, 2005 BCSC 647 [*CNR BCSC*].
> *Gehring, supra* para 18 at para 36.
> *CNR BCCA*, *supra* para 18 at para 5.

24 To reconcile the two different regimes set out in *Gehring* and *CNR BCSC*, the BCCA distinguished <u>litigation legal costs</u> from <u>remediation legal costs</u>. The BCCA determined that litigation legal costs are excluded from consideration under s. 47(3)(c) of the *EMA* and instead were only recoverable under the *Supreme Court Civil Rules*, B.C. Reg. 168/2009 ("***SCCR***"). The BCCA recommended parties establish a "totally separate treatment" in the remediation process between remediation legal costs and litigation legal costs (*VM BCCA*).

> *Supreme Court Civil Rules*, B.C. Reg. 168/2009.
> *VM BCCA, supra* para 20 at paras 98-103.

25 Relying on s. 47(1) of the *EMA* specifying the recoverability of "reasonably incurred costs of remediation", the BCCA found that remediation legal costs should be evaluated by judicial assessment following the disclosure of evidence. The recoverability of reasonable remediation legal costs would therefore be done on a *quantum meruit* basis. This does not bar the possibility of full indemnity, but allows judicial discretion on the matter.

> *EMA*, *supra* para 1 at s. 47(1).
> *VM BCCA, supra* para 20 at paras 106-107.

(c) Persons Eligible to Recover Legal Costs

26 Having distinguished remediation legal costs from litigation legal costs and determined the basis of recoverability for each, the BCCA reversed the approach taken in *CNR BCCA* that persons who were not responsible for the costs of remediation could not recover their legal costs on the basis that s. 47(3)(c) of the *EMA* specifies recovery from "other responsible persons" (*VM BCCA*).

> *EMA*, *supra* para 1 at s. 47(3)(c).
> *VM BCCA, supra* para 20 at para 108.

27 The BCCA held that under the *EMA*, persons exempt from responsibility for remediation under s. 46 were still "responsible persons" as defined s. 45 of the *EMA*, but that they were merely not <u>liable</u> for the costs of remediation. The BCCA found support for this interpretation in s. 48 of the *EMA* which states that remediation orders may be given to "<u>any</u> 'responsible person'" (*VM BCCA*).

> *EMA, supra* para 1 at s. 45, s. 48.
> *VM BCCA, supra* para 20 at para 114.

28 The BCCA also found support in the legislative scheme for the proposition that 'innocent' persons are also 'responsible persons' for the purposes of s. 47 of the *EMA*. The Court noted that, over time, a distinction has been developed between 1) responsibility for remediation itself and 2) responsibility for the <u>costs</u> of remediation. This distinction has been reinforced through legislative amendments as well as doctrinal and judicial interpretation separating "regulatory and financial considerations" (*VM BCCA*).

> *VM BCCA, supra* para 20 at paras 124-128, 134.

29 The BCCA noted that the ability to compel 'innocent' responsible persons to remediate is consistent with the purpose of the *EMA* to encourage efficient remediation of contaminated sites (*VM BCCA*). Only after remediation could such persons rely on s. 47 of the *EMA* to make other responsible persons contribute to these costs. Having established this, the BCCA departed from *CNR BCCA*. According to the BCCA, innocent owners are responsible persons and can recover legal costs under s. 47(c)(3) of the *EMA (VM BCCA)*.

> *VM BCC*A, *supra* para 20 at paras 135, 140, 142.

PART II -- QUESTIONS IN ISSUE

30 There are two questions in issue in this appeal:

(1) Whether a court may take into account the benefit enjoyed by a party in obtaining a CoC when allocating liability for the costs of remediating a contaminated site among responsible persons under the *EMA* (the "**Benefit Issue**").

(2) Whether legal costs associated with remediation or with pursuing litigation are recoverable under the *EMA*, and whether the answer differs depending on whether the person seeking cost recovery is a "responsible person" under s. 47(1) of the *EMA* or "any person" under s. 47(5) of the *EMA* (the "**Costs Issue**").

PART III -- ARGUMENT

A. Standards of Review

31 The standard of review for the Benefit Issue is one of palpable and overriding error. Accordingly, the determination of whether a benefit arose from the VM CoC that merited increasing the allocation of liability to VM is a question of mixed fact and law.

> *Housen v Nikolaisen*, 2002 SCC 33 at paras 27-37 [*Housen*].

32 The standard for review for the Costs Issue is correctness, as the determination of whether and by whom 'litigation costs' are recoverable under s. 47 of the *EMA* are questions of law.

> *Housen, supra* para 31 at para 8.

B. Statutory Interpretation of the *EMA*

33 Determining the Benefit Issue and Costs Issue requires this Court to engage in statutory interpretation of the *EMA*. In interpreting statutory provisions, courts must apply the "modern principle" of statutory interpretation: the words of a statute must 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".

> *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 at para 117.

34 From the first reading in the legislative drafting process of what is now the *EMA*, the Minister of Environment described it as realizing the policy of 'polluter pays' through imposing absolute, retroactive, and joint and several liability.

> *Workshop Holdings v CAE Machinery Ltd.*, 2003 BCCA 56 at para 41 [*Workshop Holdings*].

35 The 'polluter pays' principle aims to ensure remediation is done at the polluter's expense to prevent and deter pollution (*Workshop Holdings, CNR BCSC*). The *EMA* also aims to encourage the "speedy remediation of contaminated sites" (*Workshop Holdings, JI Properties BCCA*). These goals combined will be referred to as the "***EMA* Objectives**".

> *Workshop Holdings, supra* para 34 at para 68.
> *CNR BCSC, supra* para 23 at para 182.
> *J.I. Properties Inc. v PPG Architectural Coatings Canada Ltd.*, 2015 BCCA 472 at para 30 [*JI Properties BCCA*].

C. The VM CoC Cannot be Factored into the Allocation of Liability

(i) Overview

36 The BCCA appropriately reversed the trial judge's decision on the Benefit Issue. The BCCA accurately held that, in this case, there was no evidence that the VM CoC represented a "benefit" flowing to VM. Therefore, the trial judge made a palpable and overriding error by considering the VM CoC under s. 35(2)(f) of the *CSR* when allocating liability.

37 Section 35(2) of the *CSR* may permit the consideration of a benefit enjoyed by a party in obtaining a CoC when allocating liability for the costs of remediating a contaminated site among

responsible persons. However, it can only do so if, on the evidence before the trial judge, the CoC is found to confer a benefit that brings value beyond the costs of remediation.

38 In this case, there was no such evidence before the trial judge, and the BCCA therefore appropriately held that the trial judge could not consider the VM CoC when allocating liability.

(ii) Statutory Interpretation of s. 35(2) of the *CSR*

39 Section 35(2) of the *CSR* states that a court must consider prescribed factors when "determining the reasonably incurred costs of remediation", including "other factors relevant to a fair and just allocation". It is notable that the s. 47 of the *EMA* and s. 35(2) of the *CSR* ensures that "cost recovery" is constrained by 'reasonableness', revealing the legislature's intention to strike an appropriate balance so that remediators are not overcompensated by responsible persons. The *CSR* implements the *EMA* and therefore shares the *EMA* Objectives by enabling "fair and just allocation" of liability among responsible persons (*Rolin Resources)*.

> *CSR*, *supra* para 1 at s. 35(2).
> *Rolin Resources Inc. v CB Supplies Ltd*., 2018 BCSC 2018 at para 96.

40 Determining the "reasonably incurred" costs of remediation has been interpreted as requiring consideration of what costs are objectively reasonable in the circumstances (*CNR BCSC*). Section 35(2)(f) of the *CSR* gives discretion to courts to consider other factors that may alter what costs are "fair and just". However, "there is currently little or no judicial consideration of what those statements of principle may mean in the context of the operation of this regulatory scheme" (*JI Properties BCCA*).

> *CSR*, *supra* para 1 at s. 35(2)(f).
> *CNR BCSC, supr*a para 23 at paras 97-99.
> *JI Properties BCCA*, *supra* para 35 at para 78.

41 Given that s. 35(2)(f) of the *CSR* provides a broad discretion for courts to consider other factors relevant to a fair and just allocation, including ancillary benefits flowing to the remediating party, the question in this case then becomes: what is a CoC and does it confer a benefit?

(iii) The Role of CoCs is Contextual

42 A CoC is a written instrument issued by the British Columbia Director of Waste Management under s. 53(3) of the *EMA* which certifies that a contaminated site has been

remediated to the prescribed numerical standard or risk-based standard. As such, CoCs indicate that remediated sites meet the relevant regulatory standards (*JI Properties BCCA*).

> *JI Properties BCCA, supra* para 35 at paras 47-55.

43 Furthermore, pursuant to s. 46(1)(m) of the *EMA,* a CoC can function as a release from liability for property owners and other responsible persons. It provides that a responsible person is not liable for future remediation of a site for which a CoC was issued if a future owner opts to complete additional remediation and change the site use.

44 In theory, a CoC could also represent a benefit to its recipient. For example, a CoC could represent a benefit to a developer who purchases land with the express intention to redevelop it and completes additional remediation to obtain a CoC and secure financing. CoCs may be required as a condition to obtain approvals including rezoning, subdivision, demolition, or a development permit (*JI Properties BCCA*). In such cases, the CoC becomes a prerequisite for redevelopment and may take on a value to the recipient beyond the value of the remediation. As such, the court may identify a benefit where the increase in the site value is greater than the cost of remediation (*JI Properties BCSC*, *VM BCSC*).

> *JI Properties BCCA, supra* para 35 at paras 30, 69-73.
> *J.I. Properties Inc. v PPG Architectural Coatings Canada Inc.*, 2014 BCSC 1619 at para 192 [*JI Properties BCSC*].
> *VM BCSC*, *supra* para 9 at para 112.

45 However, in cases where the CoC does not confer any non-speculative advantage beyond confirming that the remediation is complete, the CoC is instead merely part of the remediation process. In other words, subject to their scope and costs, the remediation and the CoC cannot usually be distinguished. Where there is "lack of proof that the value of the property increased <u>as a result of the remediation</u>", the CoC does not represent a benefit that can be considered as a factor when allocating liability under s. 35(2) of the *CSR* (*JI Properties BCSC,* emphasis added).

> *JI Properties BCSC, supra* para 44 at para 193.

46 Always considering the benefit of a CoC would discourage remediators from obtaining one in cases where it represents a "careful and cautious" approach securing additional verification of

the standard of remediation beyond engineering or consultant reports (*CNR BCSC*). A remediator cannot be faulted for adopting this prudent approach as it is consistent with the *EMA* Objectives.

CNR BCSC, supra para 23 at para 151.

(iv) <u>Considering a CoC in Allocating Liability under s. 35(2) of the *CSR*</u>

47 Courts must consider, on the facts of each case, whether a CoC confers a benefit beyond the remediation of the site. When a benefit is found, it may be taken into account by the court when allocating liability. This respects the principle of fairness under s. 35(2)(f) of the *CSR* because the property owner may have secured "increased utility or value of the property" from the CoC that other responsible persons should not be liable for (*JI Properties BCSC*).

JI Properties BCSC, supra para 44 at para 192.

48 The *EMA* anticipates this scenario and seeks to address it by imposing a reasonableness standard on the costs of remediation. Notably, s. 46(1)(m) of the *EMA* limits the liability of responsible persons where a property owner decides to perform additional remediation in a bid to rezone a site after already having obtained a CoC for previous clean-ups. This ensures that the *EMA* Objectives are met in cases of reasonable remediation, while preventing those seeking cost recovery from obtaining a windfall at the expense of responsible persons (*CNR BCSC*).

CNR BCSC, supra para 23 at para 101-103.

49 On the other hand, when the CoC does nothing more than attest to the fact that a site is remediated to its pre-contamination state and use, in accordance with the *EMA*, it provides no benefit beyond the costs of remediation (*JI Properties BCSC*). When a CoC does not confer a benefit, as in the present case, it cannot be considered by the court when allocating liability because this would run counter to the *EMA* Objectives (*VM BCCA*).

JI Properties BCSC, *supra* para 44 at para 192.
VM BCCA, supra para 20 at paras 56-58.

(v) <u>The CoC Does Not Represent a Benefit in the Present Appeal</u>

50 Notwithstanding that a CoC may, in some circumstances, confer a benefit, the VM CoC did not. The trial judge found that the contamination of the VM Site - and, by extension, the

remediation - did not affect its value. Rather, the site increased in value because VM invested $800,000 in building renovations and acquired better management. The VM CoC did not create any new opportunities for rezoning, land use, or other advantages. The use of the VM Site following remediation was consistent with the existing building use and property zoning. In fact, the VM CoC imposed limitations on the use of the VM Site, requiring its current commercial land use be maintained.

VM BCSC, *supra* para 9 at paras 114, 112, 98, 31.

51 An appraisal established that the remediation would not increase its value since it was already being optimally used even while contaminated. The trial judge found that neither "Victory Motors nor the Jansen Family obtained any windfall from the remediation of the Victory Motors site" (*VM BCSC*). It was in fact unnecessary to obtain a CoC to maximize the VM Site's value, but rather a responsible and careful decision as intended by the *EMA*.

VM BCSC, supra para 9 at paras 98-99, 113-116.

52 Further, the share price is irrelevant to the determination of any benefit obtained from the CoC. The BCCA was correct in holding that the share price cannot be considered due to the principle of separate legal entities articulated in *Salomon v Salomon* and is therefore immaterial to the Benefit Issue.

Salomon, *supra* para 16.

(vi) <u>Conclusion</u>

53 Based on the factual findings of the trial judge, the BCCA correctly reversed the trial judge's decision on the Benefit Issue. A CoC may be considered when they confer a benefit and the Court finds it necessary to achieve an equitable allocation. However, this is not the case here because the VM CoC did not confer a benefit to VM and there is therefore no basis for considering it in allocating liability.

D. Reasonable Legal Costs Incurred by 'Any Person' are Fully Recoverable Under the *EMA*

(i) Overview

54 The BCCA correctly determined that remediation legal costs may be recovered by 'any person', whether they are a responsible person with liability for remediation costs or not. However, the BCCA erred in limiting recoverability under s. 47(3)(c) of the *EMA* to non-litigation remediation legal costs.

55 The correct interpretation of s. 47(3)(c) of the *EMA* is that all reasonable legal costs associated with remediation are recoverable, limited only by their reasonableness. Refusing to recognize litigation legal costs as recoverable will disincentivize remediation and will negatively impact the *EMA* Objectives. Holding that litigation legal costs should be distinguished from the other legal costs of remediation will also create problems on a practical level due to the difficulty of distinguishing between the two.

(ii) All Reasonable Legal Costs are Recoverable Under s. 47(3)(c) of the *EMA*

56 The BCCA's distinction between litigation and non-litigation remediation legal costs, with only the latter being recoverable under the *EMA*, contradicts the plain reading of s. 47(3)(c) and fails to give full effect to the *EMA* Objectives.

57 Under the *EMA*, s. 47 sets out the general principles of liability for the remediation of contaminated sites. Section 47(1) distinguishes persons liable for remediation from persons who incurred remediation costs and states that the former are "absolutely, retroactively and jointly and separately liable" to the latter for these costs. Section 47(3), in defining what constitutes costs of remediation, specifies that this covers "all costs of remediation" and includes, *without limitation*, "legal and consultant costs associated with seeking contributions from other responsible persons" under s. 47(3)(c). Section 47(5) allows for the recovery of all "reasonably incurred costs of remediation" by way of a cost recovery action.

EMA, *supra* para 1 at s. 47.

58 Properly interpreted, s. 47(3)(c) of the *EMA* allows the recovery of litigation costs associated with remediation. The inclusion of legal costs in the definition of costs of remediation–

all of which are explicitly recoverable without limitation–indicates a statutory intention to not distinguish between types of legal costs. Nowhere in the *EMA* is a distinction drawn between types of legal costs. In line with the interpretation of the *EMA* adopted in *Gehring* that the legislature would use specific language where it intended to make any such distinctions, the *EMA* would specify if it had intended for different legal costs to be subject to different rules of recovery (*Gehring*).

> *Gehring, supra* para 18 at para 55.

59 Furthermore, the words "seeking contributions" in s. 47(3)(c) of the *EMA* logically include the cost recovery actions explicitly permitted by s. 47(5). This is consistent with the interpretation in *CNR BCSC* that the "legal costs" referred to in s. 47(3)(c) of the *EMA* are the costs incurred while seeking to recover remediation expenses from responsible persons (*CNR BCSC*). These legal costs necessarily span litigation and other ways of seeking contributions, such as settlement negotiations. Excluding litigation costs as recoverable legal costs under s. 47 of the *EMA*, which itself is centered on cost recovery actions, would create an internal incoherence in the *EMA*. Therefore, s. 47(3)(c) of the *EMA* must be read as including litigation costs.

> *EMA*, *supra* para 1 at s. 47(3)(c).
> *CNR BCSC, supra* 23 at paras 181-182.

60 If litigation costs are not fully recoverable under s. 47(3) of the *EMA*, then the remediator will only be able to partially recover litigation costs on a party-and-party basis. Party-and-party costs are calculated according to a tariff schedule under the *SCCR*, and do not reflect the real costs incurred by parties to litigation. As litigation costs are often substantial, limiting the recovery of litigation remediation costs to a party-and-party basis undermines the *EMA* Objectives (*CNR BCSC*).

> *Supreme Court Civil Rules*, B.C. Reg. 168/2009.
> *CNR BCSC, supra* 23 at 182.

61 The full recovery of reasonable legal costs is more consistent with the *EMA* Objectives. Only allowing partial recovery of the substantial legal costs incurred by remediating parties would both disincentivize efficient remediation and undermine the polluter pays principle (*CNR BCSC*). Remediators may opt not to commence cost recovery actions if the expense of doing so exceeds the costs they seek to recover. As a result, responsible persons would be disincentivized from

paying their share if they suspect that a remediator will not pursue a cost recovery action due to the financial burden of litigation. In turn, potential remediators would be disincentivized from carrying out remediation in the first place if they cannot fully recover their costs. The very aim of s. 47(5) of the *EMA* is for "all those who remediate to recover their reasonably incurred costs of doing so, however they came to remediate, from those who a court finds were responsible for the pollution" (*Workshop Holdings*). It is furthermore "a means of requiring the polluter to pay and encouraging an owner to remediate" (*Workshop Holdings*). Excluding litigation costs from recoverable remediation legal costs inhibit the realization of the *EMA* Objectives.

> *CNR BCSC, supra* para 23 at para 182.
> *Workshop Holdings, supra* para 34 at paras 69-70.

(iii) Adverse Consequences of Excluding Litigation Legal Costs

62 The BCCA's interpretation of "remediation costs" as excluding litigation costs results in adverse consequences on a practical level. Dividing legal costs into "remediation legal costs" and "litigation legal costs" could result in parties frontloading their legal costs so that lawyers' fees can be considered "remediation legal costs" and not "litigation legal costs". Remediating parties may be motivated to engage lawyers early in the remediation process so that work potentially associated with preparing for future litigation can be completed at the remediation stage and be considered "remediation legal costs".

63 Splitting costs into remediation legal costs and litigation legal costs will also be challenging, as it will be difficult or even impossible to identify which costs belong in which category. Judges will be required to parse statements of account to determine which expenses fall into the category of remediation legal costs and which fall under litigation legal costs. This will lead to longer, more costly proceedings. In practice, lawyers often operate with the possibility of litigation in mind and do not distinguish between work done to prepare for litigation and other work completed for a client, since all work completed for a client may be useful in case of litigation. As a result, both lawyers and judges will face burdensome and unnecessary practical challenges.

64 With respect to the courts' role in analyzing legal invoices, a plaintiff's legal counsel could be required to testify regarding privileged communications. Determining which legal costs are litigation legal costs and which are remediation legal costs will likely result in breach of solicitor-

client privilege. The protection of solicitor-client privilege is of central importance to the Canadian legal system. Legislation which breaches it must "demonstrate a clear and unambiguous legislative intent to do so", which is absent in the *EMA* (*Alberta v University of Calgary, Ontario v Laurentian University*).

> *Alberta (Information and Privacy Commissioner) v University of Calgary*, 2016 SCC 53 at paras 26-28 [*Alberta v University of Calgary*].
> *Ontario (Auditor General) v Laurentian University*, 2023 ONCA 299 at paras 14-15, 20 [*Ontario v Laurentian University*].

(iv) There is Precedent for Departing from the *SCCR*

65 The BCCA refused to recognize that litigation legal costs were recoverable on a full indemnity basis under the *EMA* in part because it was concerned that this would make the *SCCR* redundant; however, there is precedent for departing from the *SCCR*. While "party-and-party costs are the default option", courts have recognized that departing from party-and-party costs is permitted in certain circumstances, for example, where the parties have agreed to a different arrangement by contract (*Eisler*).

> *Supreme Court Civil Rules*, B.C. Reg. 168/2009.
> *Eisler Estate v GWR Resources Inc.*, 2020 BCSC 562 at paras 29-30 [*Eisler*].

66 Since courts may depart from the *SCCR* regarding party-and-party costs to respect an arrangement agreed to by the parties, they ought to do so to comply with statutory provisions. In cases where another arrangement - whether it be statutory or contractual – trumps the default party-and-party costs arrangement, the court should direct the registrar to determine the appropriate amount of the payment. For example, the court may award the plaintiffs "full indemnity costs of this proceeding" to be determined by the registrar (*Eisler*).

> *Eisler, supra* para 65 at para 41.

67 Section 47 of the *EMA* clearly provides for a different calculation of costs. Given that there is precedent for the courts departing from the *SCCR'* party-and-party costs, there is no justification for not respecting the intention underlying s. 47(3)(c) of the *EMA* to fully indemnify remediating parties for litigation legal costs.

(v) <u>"Any Person" can Recover Legal Costs Under s. 47(3)(c) of the *EMA*</u>

68 The BCCA correctly determined that any person who has incurred remediation costs may recover those costs under s. 47 of the *EMA*. Interpreting the *EMA* so that only liable responsible persons under s. 45 of the *EMA* are entitled to fully recover their legal remediation costs, but not persons excluded from liability under s. 46, creates absurdity. For example, innocent owners could not recover their legal remediation costs, but owners partially responsible for the contamination of the site could.

69 The only reading of s. 47(3)(c) of the *EMA* that does not create this absurdity is one that does not limit recovery of legal costs based on whether one is a "responsible person" or "any person". The drafters of s. 47(3)(c) of the *EMA* might have assumed that any person who incurs legal costs of remediation and seeks contributions from responsible persons must themselves fall within the definition of a 'responsible person' under s. 45, hence the use of 'other' in "seeking contributions from other responsible persons" in s. 47(3)(c) of the *EMA*. However, it seems impossible that they would have intended to deny standing to recover costs under s. 47(3)(c) of the *EMA* to a person who is not a "responsible person" yet has incurred costs of remediation and seeks to recoup those costs from persons responsible for the contamination. This would serve to limit the efficient remediation of contaminated sites, thus contravening the *EMA* Objectives.

EMA, *supra* para 1 at s. 47(3)(c).

(vi) <u>All Reasonable Legal Costs are Recoverable in the Present Appeal</u>

70 In the present case, VM's litigation legal costs form part of its "reasonably incurred costs of remediation" as defined in s. 47(3)(c) of the *EMA* as "legal and consultant fees associated with seeking contributions from other responsible persons". Liability for reasonable litigation legal costs should be allocated between responsible parties in the same way as other remediation costs.

EMA, *supra* para 1 at s. 47(3)(c).

71 The reasonableness of litigation costs and the amount for which the responsible parties are liable should be assessed by a registrar based on the proportional allocation of liability determined by the courts (*CNR BCSC*). This will avoid the damage to solicitor-client privilege that could result from courts having to review communications between counsel and their clients and calling counsel as witnesses in order to rule on the reasonableness of litigation legal costs.

CNR BCSC, supra para 23 at paras 101-103.

(vii) <u>Conclusion</u>

72 The BCCA erred in finding that litigation legal costs should be distinguished from remediation legal costs, and that litigation legal costs are only recoverable under the *SCCR* on a party-and-party basis.

73 Following the modern principle of statutory interpretation, the *EMA* plainly intends that liability for legal costs of remediation be allocated between responsible parties. Separating litigation legal costs from other legal costs will create a host of practical issues, in addition to departing from the intention of the *EMA*. There is no justification for excluding litigation legal costs on the basis that this would make the *SCCR* redundant, since courts have acknowledged that the default rules may be departed from where another arrangement takes priority.

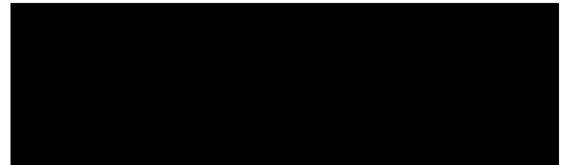
PART IV -- SUBMISSIONS IN SUPPORT OF COSTS

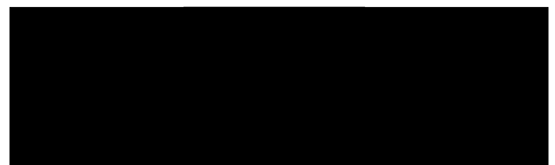
74 Based on the foregoing, the Appellants are entitled to all reasonable costs incurred in the litigation, including their costs of this Court and the BCCA, to be assessed by the registrar.

PART V -- ORDER SOUGHT

75 The Appellants seek an order that the appeal be allowed in full. The Appellants ask the Court not to disturb the BCCA decision to remit the allocation of liability to trial. The Appellants further seek an order that all reasonable costs of this action and of preceding actions be fully recoverable under s. 47(3)(c) of the *EMA* and assessed by the registrar.

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





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

PART VI -- TABLE OF AUTHORITIES

Authorities	**Paragraph No. In Factum**
Alberta (Information and Privacy Commissioner) v. University of Calgary, 2016 SCC 53.	65
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J.I. Properties Inc. v. PPG Architectural Coatings Canada Inc., 2014 BCSC 1619.	44-45, 47, 49
J.I. Properties Inc. v. PPG Architectural Coatings Canada Ltd., 2015 BCCA 472.	35, 40, 42, 44
Ontario (Auditor General) v. Laurentian University, 2023 ONCA 299.	64
Rolin Resources Inc. v CB Supplies Ltd., 2018 BCSC 2018.	39
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Victory Motors (Abbotsford) Ltd. v. Actton Super-Save Gas Stations Ltd., 2021 BCCA 129.	20-22, 24-29, 49
Workshop Holdings v. CAE Machinery Ltd., 2003 BCCA 56.	34-35, 61

LEGISLATION AT ISSUE

Environmental Management Act, S.B.C. 2003, c. 53, ss. 45-48

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.

(3) A secured creditor is responsible for remediation of a contaminated site if

(a) the secured creditor at any time exercised control over or imposed requirements on any person regarding the manner of treatment, disposal or handling of a substance and the control or requirements, in whole or in part, caused the site to become a contaminated site, or

(b) the secured creditor becomes the registered owner in fee simple of the real property at the contaminated site.

(4) A secured creditor is not responsible for remediation if it acts primarily to protect its security interest, including, without limitation, if the secured creditor

(a) participates only in purely financial matters related to the site,

(b) has the capacity or ability to influence any operation at the contaminated site in a manner that would have the effect of causing or increasing contamination, but does not exercise that capacity or ability in such a manner as to cause or increase contamination,

(c) imposes requirements on any person, if the requirements do not have a reasonable probability of causing or increasing contamination at the site, or

(d) appoints a person to inspect or investigate a contaminated site to determine future steps or actions that the secured creditor might take.

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) (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 they are 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 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.

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

- (a) a decision, determination, opinion or apportionment of liability for remediation from a director, or
- (b) an opinion respecting liability from an allocation panel.

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

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

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

- (a) whether a person is responsible for remediation of a contaminated site;
- (b) whether the costs of remediation of a contaminated site have been reasonably incurred and the amount of the reasonably incurred costs of remediation;
- (c) the apportionment of the reasonably incurred costs of remediation of a contaminated site among one or more responsible persons in accordance with the principles of liability set out in this Part;
- (d) such other determinations as are necessary to a fair and just disposition of these matters.

Remediation orders

48 (1) A director may issue a remediation order to any responsible person.

(2) A remediation order may require a person referred to in subsection (1) to do any or all of the following:

- (a) undertake remediation;
- (b) contribute, in cash or in kind, towards the costs of another person who has reasonably incurred costs of remediation;

(c) give security, which may include real and personal property, in the amount and form the director specifies.

(3) For the purpose of deciding whether to require a person to undertake remediation under subsection (2), a director may consider whether remediation should begin promptly, and must consider each of the following:

(a) adverse effects on human health or pollution of the environment caused by contamination at the site;

(b) the potential for adverse effects on human health or pollution of the environment arising from contamination at the site;

(c) the likelihood of the responsible persons or other persons not acting expeditiously or satisfactorily in implementing remediation;

(d) in consultation with the chief permitting officer designated under the Mines Act, the requirements of a permit issued under section 10 of that Act;

(e) in consultation with the regulator, the adequacy of remediation being undertaken under section 41 of the Energy Resource Activities Act;

(e.1)the actions being undertaken or to be undertaken under a recovery plan approved under section 91.2 (5) [responsible persons — spill response];

(f) other factors prescribed in the regulations.

(4) For the purpose of deciding who will be ordered to undertake or contribute to remediation under subsections (1) and (2), a director, to the extent feasible without jeopardizing remediation requirements, must

(a) take into account private agreements between or among responsible persons respecting liability for remediation, if those agreements are known to the director, and

(b) on the basis of information known to the director, name one or more persons whose activities, directly or indirectly, contributed most substantially to the site becoming a contaminated site, taking into account such factors as

(i) the degree of involvement by the persons in the generation, transportation, treatment, storage or disposal of any substance that contributed, in whole or in part, to the site becoming a contaminated site, and

(ii) the diligence exercised by persons with respect to the contamination.

(5) A remediation order does not affect or modify a right of a person affected by the order to seek or obtain relief under an agreement, other legislation or common law, including, but not limited to, damages for injury or loss resulting from a release or threatened release of a contaminating substance.

(6) If a remediation order, or a pollution abatement order under section 83 [pollution abatement orders] that imposes a requirement for remediation, is issued in respect of a site, and the director has not yet determined under section 44 [determination of contaminated sites] whether the site is a contaminated site, as soon as reasonably possible after the issuance of the order, the director must determine

(a) whether the site is a contaminated site, in accordance with section 44 [determination of contaminated sites], and

(b) whether the person named in the order is a responsible person under section 45 [persons responsible for remediation of contaminated sites].

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

(8) A person who receives a remediation order under subsection (1) or notice of a remediation order under subsection (13) must not, without the consent of the director, knowingly do anything that diminishes or reduces assets that could be used to satisfy the terms and conditions of the remediation order, and if the person does so, the director despite any other remedy sought, may commence an action against the person to recover the amount of the diminishment or reduction.

(9) The director may provide in a remediation order that a responsible person is not required to begin remediation of a contaminated site for a specified period of time if the contaminated site does not present an imminent and significant threat or risk to

(a) human health, given current and anticipated human exposure, or

(b) the environment.

(10) A person who has submitted a site disclosure statement under section 40 (7) [site disclosure statements of trustee, receiver, etc.] must not directly or indirectly diminish or reduce assets at a site designated in the site registry as a contaminated site, including, without limitation, by

(a) disposing of real or personal assets, or

(b) subdividing land

unless the person first requests and obtains written notice from a director that the director does not intend to issue a remediation order.

(11) If a director issues or gives notice of the intention to issue a remediation order to a person referred to in subsection (10), subsection (8) applies.

(12) A director may amend or cancel a remediation order.

(13) A director, on making a remediation order must, within a reasonable time, provide notice of the order in writing to every person holding an interest in the contaminated site if the interest is registered in the land title office or a land registry office of a treaty first nation at the time of issuing the order.

(14) A remediation order may authorize, subject to the terms and conditions a director considers necessary and reasonable, any person designated by the director to enter specified land for the purpose of ensuring that the remediation order is carried out according to its terms.

(15) If a remediation order authorizes a person to enter specified land, the person who owns or occupies the land must allow the authorized person to enter in accordance with the authorization.

(16) Subsections (14) and (15) do not authorize any person to enter any structure or part of a structure that is used solely as a private residence.

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

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

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

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

VICTORY MOTORS (ABBOTSFORD) LTD. and JANSEN INDUSTRIES 2010 LTD.
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 #2024-08

Counsel for the Appellants,
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