WILLMS & SHIER ENVIRONMENTAL LAW MOOT COURT COMPETITION 2024

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

IN THE SUPREME ENVIRONMENTAL MOOT COURT OF CANADA

(ON APPEAL FROM THE BRITISH COLUMBIA COURT OF APPEAL)

B E T W E E N:

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

APPELLANTS

- and -

ACTTON SUPER-SAVE GAS STATIONS LTD.

RESPONDENT

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

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

TEAM #2024-09

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

AND TO: **ALL REGISTERED TEAMS**

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PART I -- OVERVIEW AND STATEMENT OF FACTS

A. Overview of the Respondent's Position

1 This appeal engages a tension between two principles: (i) ensuring that the "polluter pays" for their contamination; and (ii) preventing windfall recovery to owners of contaminated sites.

2 In the judgment under appeal, the BC Court of Appeal (the "**BCCA**") incorrectly overturned the trial judge's ruling that the benefit of a Certificate of Compliance ("**CoC**") is relevant to allocating liability for remediation costs, but correctly held that costs associated with pursuing litigation are not recoverable. This appeal should be allowed in part.

3 With respect to the first issue, the Court should consider benefits enjoyed by Victory Motors ("**VM**") in obtaining a CoC when allocating liability for remediation costs. The unique nature of the site purchase in this case should not permit VM – as both a polluter and remediator – to obtain a windfall recovery and benefit from the CoC without paying its fair and just share of the costs. The Court should overturn the BCCA decision on this issue and reinstate the allocation of liability decided by the BC Supreme Court (the "**BCSC**").

4 On the second issue, VM is entitled to recover legal costs associated with remediation, but not costs associated with pursuing litigation. VM's status as a "responsible person" or "any person" under the *Environmental Management Act*, SBC 2003, c 53 ("***EMA***") makes no difference. The "any person" designation gives effect to the "polluter pays" principle and ensures that innocent owners can recover remediation costs. The Court should uphold the decision of the BCCA and dismiss the appeal on this issue.

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

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

5 This case concerns two properties in Abbotsford, British Columbia. The first is owned by Jansen Ltd. ("**Jansen Ltd**") and consists of two contiguous lots on South Fraser Way and Old Yale Road (the "**Jansen Site**"). The second is located across from the Jansen Site and has at all material

times been owned by VM (the "**VM Site**"). As corporate entities, Jansen and VM are both owned, directly or indirectly, by members of the Jansen family (the "**Jansen Family**").

6 In 2009, Jansen Ltd entered into an agreement to sell the Jansen Site, subject to the purchaser being satisfied with the site's environmental condition. The purchaser commissioned a preliminary environmental investigation, which revealed that the Jansen Site was contaminated with hydrocarbons. Due to this discovery, the purchaser chose not to purchase the Jansen Site.

Jansen Industries 2010 Ltd v Victory Motors (Abbotsford), 2019 BCSC 1621 at paras 18-19 [**SC reasons**].

7 Jansen Ltd then conducted its own environmental investigation of the Jansen Site. This investigation identified the contamination source to be a gas station that had previously operated on the VM Site. The Respondent, Actton Super-Save Gas Stations Ltd. ("**Super-Save**"), operated this gas station from 1982 to 1992. Both the Jansen Site and the VM Site were deemed to be contaminated sites under the *EMA* in or around 2010.

SC reasons, *supra* para 6 at paras 21, 16, 7.

8 From 1994 to 2012, VM allowed five disused underground storage containers ("**USTs**") and piping infrastructure to remain in an unremediated state on the VM Site. VM did not take any steps to drain or decommission the USTs until 2012.

SC reasons, *supra* para 6 at para 16.

9 Unique to this case, the Jansen Family did not purchase the VM Site directly. Rather, in 2012, the Jansen Family incorporated the company Victory Motors Ltd., which purchased all VM shares for $42,363.24. This share purchase agreement conferred ownership and control of the VM Site to the Jansen Family. VM filed two appraisal reports, which valued the VM Site at $2,800,000 in June 2015 and $3,200,000 in January 2018.

SC reasons, *supra* para 6 at paras 24, 113-114.

10 The VM and Jansen Sites were remediated and obtained CoCs in 2018. The BCSC found that VM was 45% responsible for the remediation costs of the VM Site, and 50% responsible for the remediation costs of the Jansen Site.

SC reasons, *supra* para 6 at paras 30, 153, 166.

C. Decision under Appeal

11 On appeal to the lower court, the BCCA considered two issues: (i) whether the trial judge erred in allocating liability to VM in part because they benefited from the CoC; and (ii) whether the trial judge erred by not awarding the Appellants legal fees incurred as costs of remediation.

Victory Motors (Abbotsford) Ltd v Actton Super-Save Gas Stations Ltd, 2021 BCCA 129 at paras 52-54 [**CA reasons**].

(i) *Allocation of liability*

12 On the first issue, Chief Justice Bauman held that the trial judge erred by considering the benefit of a CoC under s. 35(2) of the *Contaminated Sites Regulation*, BC Reg. 375/96 (the "***CSR***") when allocating liability for remediation costs. Bauman CJBC found that accounting for this benefit would deter "responsible persons" from remediating contaminated sites in a timely manner. He reasoned that this was contrary to the ultimate objective of the contaminated sites regulatory scheme, which is to encourage remediation.

CA reasons, *supra* para 11 at para 56.
Contaminated Sites Regulation, BC Reg. 375/96 [***CSR***].

13 Bauman CJBC held that the trial judge correctly declined to take the Jansen family's advantageous acquisition of the VM shares into account under s. 35(2)(a) of the *CSR*. However, he found that the trial judge's consideration of the share purchase instead under s. 35(2)(f) ran "counter to the well-established adage that one cannot do indirectly what one cannot do directly under a delegated legislative discretion." Further, as the Jansen Family purchased VM shares rather than the VM Site itself, Bauman CJBC held that considering the share purchase price would require the Court to impermissibly pierce the corporate veil.

CA reasons, *supra* para 11 at paras 55, 60, 66.

14 Two key factors underlie Bauman CJBC's ultimate finding that the trial judge erred in considering CoC benefits under s. 35(2)(f). Firstly, the BCSC found that the VM Site did not increase in value beyond the remediation costs. Secondly, Bauman CJBC held that he could not account for the Jansen Family's advantageous acquisition of the VM shares while maintaining proper corporate distinctions. Bauman CJBC remitted the issue back to the trial judge to re-allocate liability, with the benefit of the CA reasons.

> CA reasons, *supra* para 11 at paras 64, 67-69.

(ii) ***Recovery of costs***

15 At the BCCA, a key consideration in the wider decision regarding costs was whether the Court should award legal fees to the successful party. Bauman CJBC elected to award costs in part, drawing a distinction between legal costs associated with remediation ("**remediation legal costs"**) and legal costs associated with litigation ("**litigation legal costs**"). When drawing this distinction, Bauman CJBC gave extensive treatment to the BCSC and BCCA's rulings in *Canadian National Railway v ABC Recycling Ltd* (respectively, "***CNR* SC**" and "***CNR* CA**").

> *Canadian National Railway Company et al v ABC Recycling Ltd*, 2005 BCSC 647 [***CNR* SC**].
> *Canadian National Railway Co v ABC Recycling Ltd*, 2006 BCCA 429 [***CNR* CA**].

16 *CNR* SC concerned an action by Canadian National Railroad Company ("**CN**"), who sought to recover reasonably incurred costs of remediation for land formerly owned by CN. The issues at trial were: (a) what costs of remediation CN could recover; and (b) on what basis could CN recover legal fees as costs of remediation? The trial judge interpreted "remediation costs" broadly under the *EMA* to include litigation legal costs. The BCSC granted CN full indemnification, as the trial judge held that this best upheld the polluter pays principle.

> *CNR* SC, *supra* para 15 at para 182.

17 On appeal, the BCCA sought to determine whether s. 27 (now s. 47) of the *EMA* allowed successful litigants to recover "special costs", again what we refer to now as litigation legal costs. The BCCA overturned the trial decision, finding that s. 27 (now s. 47) did not allow successful litigants to recover full indemnity costs. The appeal ultimately turned on the fact that CN was not a responsible person under the *EMA*. As the *EMA* stipulated that remediators were entitled to

recover legal costs from "other responsible persons", and CN was not a responsible person, the BCCA held that CN was not entitled to recover costs.

> *CNR* CA, *supra* para 15 at paras 5-9.
> *EMA*, *supra* para 4 s 47.

18 Additionally, *CNR* CA established that an "innocent owner" under s. 46(1)(d) of the *EMA* is no longer a "responsible person", and therefore cannot be ordered to remediate a site. Following the *CNR* CA decision, because innocent owners were not "responsible persons", they could not recover remediation costs from responsible persons under the *EMA*. Bauman CJBC sought to address this in his treatment of *CNR* SC and *CNR* CA and give effect to the "polluter pays" principle by ensuring that innocent owners could recover remediation costs under the *EMA*. Bauman CJBC clarified that innocent owners were still "responsible person(s)" under the *EMA*, but were absolved of liability for remediation costs. Importantly, with respect to legal costs, Bauman CJBC highlighted and confirmed the distinction between litigation legal costs and remediation legal costs as critical to cost recovery under the *EMA*.

> CA reasons, *supra* para 11 at paras 113-115.
> *EMA*, *supra* para 4 s 46(1)(d).

19 While Bauman CJBC overturned the aforementioned section of *CNR* CA regarding innocent owners, he affirmed that the "broader impact" of *CNR* CA, and what is relevant for this appeal, was the distinction that the BCCA drew between remediation legal costs and litigation legal costs (CA reasons). Quoting *CNR* CA, Bauman CJBC held:

> [85] This distinction is implicit in Justice Lowry's statement at para. 10:
>
> > Certainly, subsection 27(1) makes no reference to a responsible person being liable for costs incurred in pursuing a recovery of remedial expenses. The wording of the section is limited to the person responsible for contamination being liable for the costs of remediation. It is not wording from which any legislative intent to provide for the special costs of litigation could be derived.
>
> [86] I take this to be a reference to litigation legal costs. This is reiterated at para. 11:

> In my view, section 27 [now s. 47 of the *EMA*] … makes no provision that governs the costs of the action to which CN is entitled...
>
> [87] *CNR C.A.* is, as urged, a narrow decision. In particular, it did not decide that recoverable costs of remediation, which are defined as "all costs of remediation" in s. 47(3), cannot include full indemnification for reasonably incurred remediation legal costs."
>
> [Emphasis in original]

CA reasons, *supra* para 11 at paras 85-87.

20 Bauman CJBC gives extensive treatment to the issue of remediation legal costs versus litigation legal costs, and explicitly identified the case *Gehring v Chevron Canada Limited,* 2007 BCCA 557 as problematic because this ruling fails to make this distinction. He asserted that "'costs of remediation' for the purposes of ss. 47(1) and (3) of the *EMA* includes remediation costs" but "not a party's litigation legal costs."

CA reasons, *supra* para 11 at paras 98-100, 104.

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

21 The Respondent's positions on the questions in issue are that the BCCA:

(1) erred in finding that a court should not consider the benefits enjoyed by a party in obtaining a CoC when apportioning liability among responsible persons for the costs of remediating a contaminated site under the *EMA* (the "**Benefit Issue**"); and

(2) correctly found that legal costs associated with litigation are not recoverable under the *EMA*, and that this is not affected by whether the party seeking recovery is classified as a "responsible person" or "any person" (the "**Costs Issue**").

PART III -- ARGUMENT

A. Standard of Review

22 It is uncontested that the Benefit Issue is reviewable on a standard of palpable and overriding error, and that the Costs Issue is reviewable on a standard of correctness.

> Appellants' Factum TEAM #2024-08 at paras 31-32 [**AF**].

B. Statutory Interpretation of the *EMA*

23 The modern approach to statutory interpretation requires that the words of legislation "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" (*Rizzo*). Additionally, s. 8 of the British Columbia *Interpretation Act*, RSBC 1996, c 238 (the "***BCIA***") provides that "every enactment must be construed as being remedial, and must be given such fair, large and liberal construction and interpretation as best ensures the attainment of its objects."

> *Rizzo & Rizzo Shoes Ltd (Re)*, 1998 CanLII 837 (SCC) at para 21 [***Rizzo***].
> *Interpretation Act*, RSBC 1996, c 238 s 8 [***BCIA***].

24 It is common ground on this appeal that the "polluter pays" principle underlies the contaminated sites regulatory scheme in British Columbia (AF). To advance this principle, the *EMA* requires that polluters pay the costs of cleaning up contamination they have previously benefitted. The *EMA* also encourages the timely clean-up of contaminated sites by current owners through regulating development.

> AF, *supra* para 22 at paras 34-35.
> *Seabright Holdings Ltd v Imperial Oil Ltd*, 2003 BCCA 57 at para 31.
> *Workshop Holdings Ltd v CAE Machinery Ltd*, 2005 BCSC 631 at para 69 [***Workshop***].

25 Where the parties part ways is on how the Court should decide the issues on appeal to best uphold the "polluter pays" principle and prevent windfall recovery, as developed below.

C. Issue 1: The benefit of VM's CoC can and should be considered under s. 35(2)(f)

26 The Court can and should consider the benefits of the CoC enjoyed by VM under s. 35(2)(f) of the *CSR* when apportioning liability for remediation costs.

27 The Appellants contend that the BCSC erred in considering the benefits of VM's CoC under s. 35(2)(f). This position is misguided. Accounting for the benefit of a CoC is within the Court's discretion to determine a "fair and just" allocation of costs under s. 35(2)(f). Failing to account for this benefit enjoyed by VM would be unfair and unjust in these circumstances.

AF, *supra* para 22 at paras 36-38.
CSR, *supra* para 12 s 35(2)(f).

(i) Legislative framework relevant to Issue 1

28 The *EMA* provides the framework for determining the apportionment of liability for remediating contaminated sites in British Columbia. Section 45 of the *EMA* stipulates that:

> **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.
>
> …
>
> (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 ...

EMA, *supra* para 4 s 45(1)-(2).

29 Section 46 of the *EMA* outlines persons who are "not responsible" for remediating contaminated sites. Section 46(1)(d) protects owners who purchased a contaminated site without knowledge of its contamination, and prior to purchasing conducted "appropriate inquiries into the previous ownership and use of the site."

EMA, *supra* para 4 s 46(1)(d).

30 Under s. 47(5) of the *EMA*, any person who incurs costs in remediating a contaminated site may begin an action or proceeding to recover reasonably incurred remediation costs "from one or more responsible persons" in accordance with the *EMA*'s principles of liability.

EMA, *supra* para 4 s 47(5).

31 Section 47(9)(c) of the *EMA* permits courts to apportion liability for remediation costs in accordance with the *EMA*'s principles of liability and the *CSR*. Section 35(2) of the *CSR* outlines several factors that courts must consider when allocating liability, including: (i) the price paid for the property by the party seeking cost recovery (*CSR* s. 35(2)(a)); and (ii) other factors relevant to a fair and just allocation (*CSR* s. 35(2)(f)).

EMA, *supra* para 4 ss 47(9)(c).
CSR, *supra* para 12 ss 35(2)(a), 35(2)(f).

(ii) Section 35(2)(f) allows courts to consider case-specific factors

32 Under s. 35(2)(f) of the *CSR*, described above, courts have broad discretion to consider factors "relevant to a fair and just allocation" of remediation costs. This discretion must be exercised in accordance with the "rationale and purview" of the contaminated sites statutory scheme: to advance the "polluter pays" principle and encourage the timely clean-up of contaminated sites.

CSR, *supra* para 12 s 35(2)(f).
Roncarelli v Duplessis, 1959 CanLII 50 (SCC) at 140.
Cowichan Valley (Regional District) v Wilson, 2023 BCCA 25 at para 15.
J.I. Properties v PPG Architectural Coatings Canada Ltd, 2015 BCCA 472 at para 29 [***J.I. Properties* CA**].

33 Section 35(2)(f) seeks to remedy unfairness. In previous cases, courts have considered several case-specific factors under s. 35(2)(f) to further this remedy-focused interpretation and ensure a "fair and just" allocation of liability costs for remediation in the circumstances.

CSR, *supra* para 12 s 35(2)(f).

34 Two cases are particularly helpful to examine the factors that courts have considered under s. 35(2)(f). In *J.I. Properties*, the defendant contaminated, and subsequently remediated, the site at-issue. The defendant's standard of remediation was no longer acceptable when the plaintiff

purchased the site. The BCSC considered the defendant's arguments regarding whether the plaintiff gained a windfall after they remediated the site to the contemporary standard. The trial judge accepted on "a matter of principle" that windfall could properly be considered under s. 35(2)(f), but that there was no evidence that the plaintiff paid a discounted price for the site or that the property value had increased following remediation (*J.I. Properties* SC). This reasoning was affirmed on appeal (*J.I. Properties* CA).

> *J.I. Properties Inc v PPG Architectural Coatings Canada Ltd*., 2014 BCSC 1619 at paras 190-195 [***J.I. Properties* SC**].
> *J.I. Properties* CA, *supra* para 32 at para 72.

35 In *CNR* SC, discussed above, the BCSC considered under s. 35(2)(f) unclaimed costs incurred by a party, and the overall costs incurred by both parties. These considerations ensured that the BCSC accounted fully for the benefits and losses borne by all parties when apportioning liability for remediation costs, to ensure that costs were allocated fairly.

> *CNR* SC, *supra* para 15 at para 75.

36 Critically, the Appellants concede that courts may consider benefits accrued to a party through obtaining a CoC when allocating liability under s. 35(2)(f) (AF). Considering this benefit permits courts to justly balance parties' benefits and losses when apportioning liability for remediation costs, and prevent windfall recovery.

> AF, *supra* para 22 at paras 47-49.

37 Considering the CoC under s. 35(2)(f) serves the same function as the windfall arguments contemplated in *J.I. Properties*: to ensure that owners of contaminated sites are not unjustly enriched by the remediation process. As in *CNR* SC, accounting for the benefit of a CoC permits courts to fully consider the benefits and losses borne by parties when apportioning liability.

(iii) Contrary to the Appellants' submissions, VM benefited from obtaining a CoC

38 On this appeal, the Appellants assert that VM did not benefit from obtaining a CoC, citing the trial judge's finding that the Jansen Site and VM Site did not increase in value following

remediation (AF; SC reasons). However, this limited interpretation of "benefit" fails to account for benefits other than property value.

> AF, *supra* para 22 at paras 50-52.
> SC reasons, *supra* para 6 at para 112.

39 CoCs signify that a site has been remediated, and obtaining a CoC increases the ability of owners to sell their property to willing buyers. This is a significant benefit. Without a CoC, site owners are limited in their business and/or financial freedoms with respect to the contaminated sites. Further, without a CoC, site owners may be forced to accept a lower price when selling their contaminated property.

40 Obtaining a CoC also confers flexibility to site owners for the use of their property. With a CoC, they may further develop the sites through the requirements in other interlocking statutes such as the *Islands Trust Act*, RSBC 1996, c 239, the *Local Government Act*, RSBC 2015, c 1, and the *Land Title Act*, RSBC 1996, c 1 (the "***Land Title Act***").

> *Workshop*, *supra* para 24 at para 69.
> *J.I. Properties* CA, *supra* para 32 at para 74.

41 The Jansen Family discovered that the Jansen and VM Sites were contaminated when they attempted to sell the Jansen Site. The Jansen Site's contamination was the reason why the original purchaser backed out of the sale. While the Site's remediation may not have increased its value beyond remediation costs, obtaining CoCs conferred a substantial benefit to the Jansen Family and VM regarding their ability to sell the Sites in the future.

> SC reasons, *supra* para 6 at para 19.

(iv) The CoC benefit accrued to VM should be considered under s. 35(2)(f)

42 The benefit enjoyed by VM in obtaining the CoC is relevant to the "fair and just" allocation of remediation costs under s. 35(2)(f) of the *CSR*. Accounting for this benefit:

a. prohibits windfall recovery by VM;

b. furthers the polluter pays principle; and

c. does not discourage the timely clean-up of contaminated sites.

(a) Accounting for the CoC benefit prohibits windfall recovery by VM

43 The Court should account for benefits accrued to VM from obtaining the CoC, as doing so prevents VM from obtaining windfall recovery. Failing to account for this benefit, as encouraged by the Appellants, would permit the Jansen Family to purchase the shares of VM for a bargain price, benefit from obtaining a CoC after remediation, and then transfer the CoC costs onto other parties. This would confer a windfall to the Jansen Family and is not "fair and just" as contemplated by s. 35(2)(f).

CSR, *supra* para 12 s 35(2)(f).

44 The Jansen Family's acquisition of the VM Site was unique. Rather than purchase the Site outright, the Jansen Family gained ownership and control of the Site by purchasing all VM shares through a corporation. The previous shareholder sold the shares to the Jansen Family for the bargain price of $42,363.24. In a 2018 appraisal, prior to obtaining the CoC, the VM Site was valued at $3,200,000.

SC reasons, *supra* para 6 at paras 24, 114-115.

45 The Appellants contend that neither VM nor the Jansen Family obtained a windfall through remediating the Jansen and VM Sites (AF). In support, the Appellants cite the trial judge's finding that remediating the VM Site did not increase its value beyond remediation costs, and the BCCA's holding that it could not consider the bargain share purchase price under s. 35(2)(f) without impermissibly piercing the corporate veil (SC reasons; CA reasons). However, the Respondent submits that this position ignores the wider benefits of obtaining a CoC beyond increasing a site's

value, as discussed above. Further, the share purchase price is a factor that is relevant to the fair and just allocation of costs under s. 35(2)(f), as developed below.

AF, *supra* para 22 at paras 50-52.
SC reasons, *supra* para 6 at para 112.
CA reasons, *supra* para 11 at paras 38, 66.

46 Section 35(2)(a) requires courts to consider the "price paid for the property" when allocating liability for remediation costs. This provision accounts for situations where a purchaser receives a windfall by purchasing a contaminated property for a significant discount, and then seeks cost recovery from responsible persons for remediating the site and obtaining a CoC. By accounting for the price paid for a contaminated site by a purchaser, s. 35(2)(a) seeks to remedy situations of windfall to purchasers.

CSR, *supra* para 12 s 35(2)(a).

47 The BCCA held that it could not consider the Jansen Family's advantageous acquisition of the VM shares under s. 35(2)(a), as the Jansen Family purchased the shares of VM and not the VM Site itself (CA reasons). Bauman CJBC also refused to consider the share purchase price under s. 35(2)(f), as he held that doing so would "run counter to the well-established adage that one cannot do indirectly what one cannot do directly under a delegated legislative discretion."

CA reasons, *supra* para 11 at paras 55, 60.

48 However, in cases like this where the facts make it difficult to include the acquisition of a responsible parties' interest in the property under s. 35(2)(a), the Court can and should consider purchase price under s. 35(2)(f) to ensure that remediation costs are allocated fairly and justly.

49 The Jansen Family's acquisition of the VM Site was unique, and circumvented the intentions of the legislature in enacting s. 35(2)(a). Thus, s. 35(2)(f) should operate remedially to permit the Court to consider the Jansen Family's advantageous acquisition of the VM shares, to ensure that costs are allocated fairly and justly between responsible persons in this case.

I) Courts should consider substance over form when allocating liability under the EMA

50 It would be unfair and unjust to permit the Jansen Family to use a corporate structure to receive a benefit through their bargain purchase of the VM shares – clearly demonstrated through the difference between the purchase price and value of the land – and then additionally benefit from the CoC.

51 The Respondent agrees that the principle in *Salomon v Salomon* provides that companies are a separate legal entity from their shareholders (AF). However, the Court ought not permit VM to purchase the VM Site through a share purchase agreement to avoid the liability costs associated with remediation, and simultaneously reap the benefits of remediation. While the legislature clearly intended to prevent these situations of double recovery under s. 35(2)(a), where this is not possible, the present appeal represents a unique situation of double recovery. The blanket provision s. 35(2)(f) ought to operate in circumstances like these, to deliver a fair and just outcome where unique facts render other legislative provisions ineffective.

> *Salomon v Salomon & Co*, [1897] A.C. 22.
> AF, *supra* para 22 at para 52.

52 Courts are not hamstrung by corporate structures when allocating liability for remediation costs to further the statutory goals and ensure that the polluter pays. For example, in *Tundra Turbos*, the petitioner owned and remediated a contaminated site, and subsequently sought to recover costs under the *EMA* from the defendant and former site owner, Tundra Turbos Inc. ("**Tundra**"). However, Tundra was dissolved after the property was sold. The BCSC sought to resolve the issue of whether, as a dissolved company, Tundra could be a "responsible person" under the *EMA* and thus be liable for remediation costs. The BCSC ultimately "retroactively and prospectively restore[d] Tundra for a period of two years" so that it could be allocated liability as a responsible person.

> *Foster v Tundra Turbos Inc*, 2018 BCSC 563 at paras 14, 79 [***Tundra Turbos***].

53 As *Tundra Turbos* demonstrates, courts can and should look at substance over form when ensuring that the polluter pays under the *EMA*, regardless of corporate structure. Applying *Tundra*

Turbos, the Court here should similarly employ s. 35(2)(f) broadly, to consider the Jansen Family's bargain share purchase when determining benefits conferred by the CoC.

(b) Accounting for the benefit of the CoC furthers the polluter pays principle

54 Further, contrary to the Appellants' position, accounting for the benefits of the CoC enjoyed by VM under s. 35(2)(f) gives effect to the "polluter pays" principle, pursuant to the *EMA*'s objectives (AF). Notably, the trial judge found that VM significantly contributed to the contamination of both the Jansen Site and VM Site. Based on these findings, the BCSC correctly allocated a significant portion of the costs to VM associated with obtaining the CoC that it benefited from, as it would not "be fair for [VM] to obtain the benefit of the CoC without bearing a substantial portion of the costs of obtaining it" (SC reasons).

> AF, *supra* para 22 at para 49.
> SC reasons, *supra* para 6 at paras 148, 152.

55 VM is a historic polluter who now stands to benefit from obtaining a CoC. Thus, the "polluter pays" principle supports allocating greater remediation costs to VM based on these benefits. It would not be fair and just to allow the Jansen Family to purchase the VM Site for a bargain price, and then have other parties pay for the entirety of the clean-up of the contamination, in these circumstances where VM was a major contributor to the contamination. Accounting for the CoC benefit accrued to VM thus advances the polluter pays principle, and should be considered by the court when apportioning liability under s. 35(2).

(c) Considering CoC benefits does not discourage timely clean-up of contaminated sites

56 Contrary to the lower court's analysis and the Appellants' position, accounting for the benefit of a CoC under s. 35(2)(f) does not discourage timely remediation of contaminated sites.

> CA reasons, *supra* para 11 at para 56.
> AF, *supra* para 22 at para 46.

57 There are several incentives for parties to remediate sites that would not be affected by the Court's consideration of benefits enjoyed by a party obtaining a CoC when allocating liability. Primarily, the interaction between the *EMA* and other statutes frequently requires remediation for

(re)developing contaminated sites. Namely, "a person generally requires a CoC ... as a condition of receiving approvals under other legislation (municipal development permits, for example)."

> *Burnaby (City) v Environmental Appeal Board*, 2017 BCSC 2267 at para 14.

58 Courts in previous cases have identified that the *EMA* operates in conjunction with other legislation to incentivize the remediation of sites, by requiring parties to obtain CoCs in order to redevelop properties. For example, in *J.I. Properties* SC, the trial judge held:

> "Subdivision, development and building permits cannot be granted in B.C. unless the Ministry of Environment is satisfied a site is not contaminated, or has been adequately remediated [citations omitted]."
>
> > *J.I. Properties* SC, *supra* para 34 at para 122.

59 The BCCA in *J.I. Properties* CA reaffirmed the trial judge's findings on this issue. The BCCA held that, because of the joint operation of several other provincial statutes in conjunction with the *EMA*, the plaintiff could not develop residential lots on the contaminated site without obtaining a CoC. To obtain a CoC, the plaintiff had to remediate the site. Thus, the statutory scheme encouraged remediation (*J.I. Properties* CA).

> *J.I. Properties* CA, *supra* para 32 at para 74.

60 In this case, contamination of the Jansen Site and the VM Site was discovered only when the Jansen Family attempted to sell the Jansen Site. When the prospective purchaser determined that the Jansen Site was contaminated, they backed out of the purchase agreement. This provided the impetus for the Jansen Family to remediate the Jansen Site.

> SC reasons, *supra* para 6 at paras 18-19.

61 Remediation as a result of (re)development is both required and common. Therefore, there are other larger incentives for the timely clean-up of contaminated sites that are unaffected by a court considering CoC benefits when apportioning liability for remediation.

(v) Conclusion on Issue 1

62 Overall, there are specific benefits accrued to VM from obtaining the CoC that the Court should consider when allocating of liability for remediation costs, to ensure that remediation costs are allocated fairly and justly under s. 35(2)(f) of the *CSR*.

63 The courts below interpreted the CoC benefit narrowly, by only considering change in land value as a result of obtaining the CoC. The Appellants urge this Court to do the same here. With respect, this interpretation fails to capture other benefits flowing from obtaining a CoC, such as increased freedom to use and dispose of the property as desired. These tangible benefits support the Court considering the benefit conferred to VM through obtaining a CoC under s. 35(2)(f).

64 The trial judge did not make a palpable and overriding error by contemplating the Jansen Family's advantageous acquisition of the VM shares under s. 35(2)(f), as the unique circumstances of the case required this consideration. Section 35(2)(f) should operate remedially to allow the Court to fully consider all benefits and losses borne by parties when allocating liability, including benefits conferred by the CoC.

D. Issue 2: Recoverability of legal costs under the BC *EMA*

65 It is common ground that remediation legal costs are recoverable under the *EMA* (AF). The parties part ways on the issue of whether litigation legal costs are recoverable under the *EMA*. The Appellants contend that limiting recovery of litigation legal costs to a party-and-party basis undermines the polluter pays principle (AF). Respectfully, the Respondent disagrees.

AF, *supra* para 22 at paras 54, 60.

66 Allowing recovery of litigation legal costs under the *EMA* would undermine the polluter pays principle, by incentivizing expensive litigation processes and disincentivizing settlement, and ultimately delaying timely and efficient remediation. Parties can properly recover litigation legal costs on a party-and-party basis under the *Supreme Court Civil Rules*, B.C. Reg. 168/2009 ("***SCCR***"). Nothing in the *EMA* modifies this existing cost recovery scheme, nor is there a statutory

basis to do so. The Appellants' proposed approach exceeds the intended scope of the legislation and would create redundancies in an already complex system.

Supreme Court Civil Rules, B.C. Reg. 168/2009 ("***SCCR***").

(i) Legislative framework relevant to Issue 2

67 The *EMA* takes an expansive approach to ownership, extending beyond the typical understanding of the *Land Title Act* by including commercial tenants, such as Super-Save, as "responsible persons." This extends liability for remediation costs. The Respondent accepts that Super-Save is and was a "responsible person" as defined by s. 45 of the *EMA*.

EMA, *supra* para 4 s 45.

68 Section 47 of the *EMA* deals with the general principles of liability for site remediation. The relevant provisions are:

> (3) For the purpose of this section, "costs of remediation" means all costs of remediation [emphasis added] and includes, without limitation,
>
> ...
>
> (c) legal and consultant costs associated with seeking contributions from other responsible persons, and
>
> …
>
> (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.

EMA, *supra* para 4 ss 47(3), 47(5).

(ii) Remediation Legal Costs and Litigation Legal Costs are Distinct Under the *EMA*

69 Section 47(3) of the *EMA* specifically cites "costs of remediation" as recoverable, including legal and consultant costs associated with remediation itself. Litigation legal costs, however, are not recoverable under the *EMA.* Both the legislation and case law clearly delineate between remediation legal costs, i.e. those legal costs associated with remediation itself; and

litigation legal costs, i.e. those associated with pursuing litigation against other responsible persons. In the CA reasons, Bauman CJBC defined remediation legal costs as:

> ... advising the remediating client, negotiating with the governmental authorities, and navigating the client through the creation of an acceptable remediation plan, its execution, and obtaining final regulatory approval. I do not mean to be exhaustive in listing these tasks.
>
> CA reasons, *supra* para 11 at para 94.
> *EMA*, *supra* para 4 s 47(3).

70 Conversely, Bauman CJBC defined litigation legal costs as:

> ...this subset of remediation legal costs would include 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. Again, this is not an exhaustive list.
>
> CA reasons, *supra* para 11 at para 99.

71 As summarized in paragraphs 15-20, Bauman CJBC spends extensive time addressing this specific issue, and provided clarification on the conflicting jurisprudence. Following *CNR* CA, Bauman CJBC adopted this distinction between remediation legal costs and litigation legal costs and emphasized it as the broader impact of the case.

> CA reasons, *supra* para 11 at paras 72-90.

(iii) Litigation legal costs are not recoverable under s. 47(3)(c)

72 Respectfully, the Appellants' interpretation of s. 47(3)(c) as including litigation legal costs is incorrect (AF). Applying Driedger's modern approach, and guided by s. 8 of the *BCIA*, the *EMA* clearly contemplates remediation legal costs and litigation legal costs to be distinct. Critical to the interpretation of the *EMA* on this issue is the meaning of "costs of remediation" under s. 47(3). Read in their grammatical and ordinary sense, the words of s. 47(3) restrict recovery to costs associated with remediation itself. Section 47(3)(c) uses the term "means", which is exhaustive. Therefore, any recoverable cost must fall under the categories outlined in ss. (a)-(d), and critically must be a <u>cost of remediation</u>.

> AF, *supra* para 22 at paras 56-61.
> *EMA*, *supra* para 4 s 47(3).

73 Continuing with the modern approach, the words of the statute must be read harmoniously within the scheme of the *EMA*. In doing so, the Court may look at indices such as the *EMA*'s title, preamble, purpose, headings, and punctuation. Reiterating Bauman CJBC's analysis in the CA reasons, the presumption against tautology holds that no words of a statute are redundant. The clause would not read "'**costs of remediation**' means all costs of remediation and includes without limit..." if the legislature did not intend that the clauses following be limited to the costs of remediation itself. A broad interpretation, as encouraged by the Appellants, renders the sentence grammatically redundant.

CA reasons, *supra* para 11 at paras 94, 99.

74 "Without limitation", in the context of the *EMA*, means the cost of remediation itself – *i.e.*, the cost of the services considered by Bauman CJBC above. It does not mean what could presumably fall under an unrestricted reading of "legal and consultant costs". To endorse the Appellants' approach would create the precise scenario they caution against, where any service remotely associated with "legal and consultant costs" would be recoverable under the *EMA*.

CA reasons, *supra* para 11 at paras 94, 99.
EMA, *supra* para 4 s 47(3).

75 Litigation costs reflect litigation strategy. The Appellants' position would incentivize parties to pursue litigation and run up costs rather than settle, as they could recover full indemnity costs under the *EMA* on the basis of liability rather than success. This risk dwarfs the accounting games highlighted by the Appellants and directly undermines a fair and just allocation of costs because, as the Appellants also highlight, litigation costs can and often do exceed the cost of remediation itself (AF). This is why it is critical for these costs to remain separate and parties to understand that they will have go through the *SCCR* process to recover litigation legal costs. Additionally, s. 47(1) of the *EMA* refers to "reasonably incurred costs of remediation", which the Respondent submits is coloured by s. 47(3)(c) and limited to remediation legal costs.

AF, *supra* para 22 at para 61.
EMA, *supra* para 4 ss 47(1), 47(3)(c).

76 Taking a wider lens to the *EMA*, the title, combined with the absence of a preamble or purpose statement, means that the statute itself provides limited guidance as to what is intended

beyond its words. With such limited context from the *EMA* itself, a narrow interpretation of s. 47(3)(c) is warranted to prevent spurious litigation and encourage timely settlement.

77 Ultimately, to resolve the meaning of s. 47(3)(c), the modern approach to statutory interpretation requires consideration of the *EMA*'s overall objective and legislative intent.

78 The *EMA* is animated by the "polluter pays" principle, as discussed above. Cost recovery under the *EMA* gives literal effect to this principle by requiring polluters to pay. The *EMA* also aims to encourage the timely remediation of the contaminated sites. While the Appellants eloquently summarize the animus of polluter pays, the dispute in this appeal concerns what the polluter pays for. The Respondent's position does not impede either of the *EMA*'s objectives. However, what would undermine the "polluter pays" principle is the scheme advanced by the Appellants under which costs awards incentivize litigation and disincentivize settlement, ultimately inflating tertiary costs with little relevance to the actual remediation of sites. This approach would extend the legal process at the expense of both the litigants and the timely remediation of sites.

AF, *supra* para 22 at para 61.

79 Applying s. 8 of the *BCIA* also supports this finding. A fair, large, and liberal interpretation of the *EMA* requires that courts consider the wider effects of the statute, such as its interaction with the *SCCR*. Further, the object of the *EMA* is to make polluters pay. As discussed, nothing in the Respondent's analysis of the provisions at-issue interferes with this objective.

BCIA, *supra* para 23 s 8.

(iv) The *SCCR* is the fair method to reimburse litigation legal costs

80 It is important to note that litigants can recover litigation legal costs through the standard rules under the *SCCR*. This is a routine procedure. What is under consideration for this appeal is a party's ability to recover costs under the *EMA*, not to litigate the broader effectiveness of British Columbia's costs regime.

81 The Appellants are correct that in certain circumstances, courts can opt out of the *SCCR* process (AF). However, what they fail to demonstrate is why doing so would be appropriate in this

case. They discuss at length potential shortfalls of the regime, but this discussion ignores that the issue on appeal is cost recovery under the *EMA*, not the wider British Columbia costs regime. An implicit purpose behind the *SCCR* is to avoid the situation where every piece of legislation that contemplates costs requires a bespoke cost-recovery scheme. If the process of accurate book-keeping is as onerous as the Appellants suggest, then there is even more imperative to adopt standardization to ensure that parties understand what is expected from them.

AF, *supra* para 22 at paras 65-67.

(v) "Any Person" versus "Responsible Person" has no effect under the *EMA*

82 The distinction between litigation legal costs and remediation legal costs is unaffected by whether the person seeking cost of recovery is a "responsible person" under s. 47(1) of the *EMA*, or "any person" under s. 47(5) of the *EMA*. In both scenarios, the moving party is entitled to recover legal costs associated with remediation, but not legal costs associated with litigation.

EMA, *supra* para 4 ss 47(1), 47(5).

83 Section 47(1) of the *EMA* states that a "responsible person" is "absolutely, retroactively and jointly and separately liable to any person or government body for reasonably incurred costs of remediation of the contaminated site." A "responsible person" is entitled to recover costs of remediation from other "responsible persons", as discussed above. The differentiator from "any person" is the assignment of liability to the current party undertaking the remediation.

EMA, *supra* para 4 s 47(1).

84 The use of the term "any person" in s. 47(5) of the *EMA* seeks to ensure that an innocent owner, or any other innocent party bearing costs for remediation, can recover costs from responsible persons and give effect to the polluter pays principle. The party in question can "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 [emphasis added]." Again, the *EMA* specifically restricts costs to those associated with remediation. This does not represent an expansion of the recoverable costs available to remediators.

EMA, *supra* para 4 s 47(5).

85 The distinction between “responsible person” and “any person” gives effect to the polluter pays principle, as it ensures that responsible persons (polluters) pay for remediation costs. This distinction does not allow for parties to recover litigation costs under the *EMA.* Section 47(5) simply ensures that innocent owners or parties undertaking remediation can recover remediation costs from other responsible persons.

EMA, *supra* para 4 s 47(5).

(vi) Conclusion on Issue 2

86 Bauman CJBC’s analysis was correct and should be adopted by this Court. This analysis is consistent with the polluter pays principle, which in the realm of costs, ultimately means that the polluter must pay for remediating a site in a manner proportional to their share of the environmental damage caused. Permitting recovery of litigation legal costs would be redundant with the existing *SCCR* regime and discourage settlement, ultimately undermining the *EMA*’s objective of encouraging timely and efficient remediation. Whether a party is classified as “any person” or a “responsible person” does not impact this outcome.

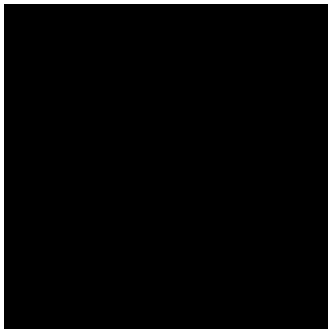
PART IV -- SUBMISSIONS IN SUPPORT OF COSTS

87 If the Respondent’s position is adopted and this appeal is allowed in part, the Respondent is entitled to all reasonable costs.

PART V -- ORDERS SOUGHT

88 The Respondent seeks an order allowing the appeal in part. This Court should overturn the BCCA ruling and uphold the BCSC decision on the allocation of liability for remediation costs, rather than remit the matter back to the trial judge. The Respondent further seeks an order confirming the BCCA ruling that only legal costs associated with remediation are recoverable under the *EMA* and assessed by the registrar.

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



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Actton Super-Save Gas Stations Ltd.

PART VI -- TABLE OF AUTHORITIES

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OTHER MATERIALS

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

-and-

ACTTON SUPER-SAVE GAS STATIONS LTD.
RESPONDENT

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

SUPREME ENVIRONMENTAL MOOT
COURT OF CANADA

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

TEAM #2024-09

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

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