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 #2024-10

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 The present case is an appeal from the British Columbia Court of Appeal ("BCCA") dated March 29, 2021. The appellants, Jansen Industries 2010 Ltd. ("Jansen Ltd.") and Victory Motors (Abbotsford) Ltd. ("Victory Motors"), remain unsatisfied with previous findings regarding the apportioning of liability and with the recoverability of legal fees accrued during the remediation of contaminated lands. The results of the case and the precedent they establish do not align with the "polluter pays" principle foundational to the relevant statute, that being British Columbia's *Environmental Management Act*, S.B.C. 2003, c. 53, [*BC EMA*].

2 The appellants have remediated two properties that were polluted via improper gasoline storage practices, employing engineering consultants that investigated and cleaned the lands by emptying several underground gasoline storage tanks ("USTs"). The appellants further improved the properties with commercial buildings, effectively repurposing these contaminated sites into functional and statutorily compliant lands used by tenants and national companies alike.

3 The appellants relied on processes laid out by the *BC EMA* to do so, subsequently representing a success of the environmental statute. The statute allowed the landowners to obtain Certificates of Compliance which proved the remediation of the lands, as well as bring an action against Actton Super-Save Gas Stations Ltd. and Phil Van Enterprises Ltd., a company controlled by Super-Save Gas (collectively, "Super-Save"). Chevron Canada Limited ("Chevron") and Shell Canada Limited/Shell Canada Limitee ("Shell") were responsible for the contamination to a lesser degree as well but have settled with the appellants, whereas the settlement offered by Super-Save contained unenforceable restrictions.

4 If Certificates of Compliance serve to increase the liability of responsible owners, and Super-Save does not pay for reasonable remediation costs, the *BC EMA* loses its proverbial teeth by de facto creating economic deterrents that run contrary to the objective of the statute. As such, the appellants seek to confirm a reasonable apportioning of liability relative to remediation costs that does not erroneously consider the benefits of Certificates of Compliance. This would render Super-Save properly responsible for the remediation costs of the appellants' previously contaminated, but now revitalized lands. It serves the Court and Canadian society to establish *BC EMA* precedent that makes polluters pay and gives credit where credit is due, thus encouraging initiative in bettering environmentally contaminated sites and bolstering the effect of the statute.

B. Statement of the Facts

(i) Background

5 Jansen Ltd. owns a property consisting of two contiguous lots in Abbotsford British Columbia; 33261 South Fraser Way and 33264 Old Yale Road. Across this site is the second property, 33258 South Fraser Way, which has at all material times been owned by Victory Motors.

6 From 1940 to 1994 various gas stations operated on the Victory Motors property. Chevron operated a station from 1950 to 1974 followed by Turbo Resources Limited ("Turbo") operating a gas station until 1982. All of Turbo's assets and liabilities were acquired by Shell in 1993.

7 In 1982, following the end of Turbo's operations, Super-Save leased the Victory Motors property and operated a gas station until 1992. On July 8, 1992, Super-Save entered a Dealer Supply Contract with Actton Petroleum Sales under which Gardner Leasing Ltd. operated a gas station until 1994. The property was not used as a gas station again, though the USTs remained on the property unused.

8 In 2009, Jansen Ltd. attempted to sell their property. This sale was not completed because the to-be purchaser commissioned a stage 1 and 2 preliminary environmental investigation on the site and discovered the land to be contaminated with hydrocarbons.

9 Jansen Ltd. then engaged Levelton Engineering Consultants Ltd. ("Levelton") in 2010 to further investigate the environmental pollution. The Victory Motors property was found to be the source of the contamination.

10 In response Jansen Ltd. commenced an action against Victory Motors on August 2, 2011. At this point the shares of Victory Motors were owned by an elderly woman declining in health, Anne Webber.

11 Jansen Ltd. purchased all the shares of Victory Motors from Ms. Webber in 2012, providing them indirect control of both sites and all litigation matters. In return Ms. Webber received $42,363.24 and an indemnification agreement that completely freed her from any liability relative to the environmental contamination emerging from the Victory Motors property.

12 In 2012, Jansen Ltd. and Victory Motors engaged the services of Levelton to supervise the emptying of the USTs that caused the environmental contamination and Victory Motors

commenced an action (the "Victory Motors Action") against Chevron, Shell, and Super-Save for their historical land pollution.

13 These undertakings represent the physical and legal remediation of both properties, during which Jansen and Victory Motors obtained Certificates of Compliance in 2018. Issued under the *EMA,* these certificates permitted the level of contamination remaining in the soil and provided guidelines for the lands' further lawful use. The price of these certificates necessary for remediation totalled $395,706 (collectively, the "Levelton Costs").

14 Jansen Ltd. and Victory Motors also spent approximately $800,000 building and renovating commercial use buildings on the properties. The buildings were fully leased by high quality tenants within a year of the renovations.

15 Chevron and Shell settled in the Victory Motors Action via a *BC Ferry* Agreement which limited their liability to an undisclosed fixed amount and barred Victory Motors and Jansen Ltd. from seeking future recovery for their contamination.

16 Just two months after Victory Motors attained their certificate, IKM Properties Ltd, the owner of a property directly east of the Jansen Ltd. lots, commenced an action (the "IKM Action") against Victory Motors and members of the Jansen family seeking remediation costs pursuant to the *EMA*.

17 At the time this case reached the British Columbia Supreme Court ("BCSC") three claims remained: Jansen Ltd.'s claim against Victory Motors and Super-Save, Victory Motors' claim against Super-Save, and the IKM Action.

(ii) The Trial Judgment 2019 BCSC 1621

18 Jansen Ltd. and Victory Motors sought the recovery of the Levelton Costs and the legal fees accrued in remediating the contaminated lands, as per the *BC EMA*. Victory Motors also sought the costs of removing the remaining USTs, damages for three years of rental income loss, and future costs arising from the IKM Action. Both also sought stigma damages for the diminution of the market value of both properties.

19 At trial, the Honourable Justice Sewell awarded only the Levelton Costs to Jansen Ltd. and Victory Motors, dismissing all other relief sought by the Jansen family.

20 Their seeking of legal costs was dismissed due to a lack of evidence. Furthermore, through a process of allocating liability between responsible parties, as per the *BC EMA*, the Levelton Costs were apportioned. Subsequently the jointly and severally liable parties split the remediation costs.

21 The trial judge relied on an accounting of the benefit of the Certificates of Compliance to further hold that Victory Motors bore 45% of the responsibility of the costs of remediating the Victory Motors property and 30% of the responsibility for the Jansen property.

22 Consequently, the total expenses accrued by the Jansen family at the end of the trial case relative to the remediated properties included: $42,363.24 (the purchase of Victory Motors), approximately $800,000 (the new commercial buildings), $150,000 (the sum of legal fees incurred in connection with the remediation process), and $157,594 (the amount Victory Motors owed in remediation costs as per the allocation of liability).

23 The companies responsible for the historic contamination of the lands paid $142,570 for the remediation of the Victory Motors property ($90,726 of which was paid by Super-Save) and $95,541 for the Jansen Ltd. property ($68,244 of which was paid by Super-Save).

24 Justice Sewell's decisions regarding apportioning liability and the costs of remediation hinged on an argument of fairness, holding that Victory Motors ought to bear a substantial amount of responsibility due to benefits flowing from the Certificate of Compliance.

25 Jansen Ltd. and Victory Motors (together, "the appellants") challenged the trial judge's apportionment of liability (that took into account the benefit of the certificate of compliance for its property) that rendered Victory Motors responsible for $157,594 of the remediation costs (approximately 40%). The appellants also challenged the requirement of evidence at trial of their reasonable legal costs accrued in seeking recovery from other responsible persons, seeking instead a reference to the registrar for an assessment of the legal expenses.

(iii) The Appeal Judgment 2021 BCCA 129

26 The Honourable Chief Justice Bauman provided the written reasons for this appeal case, concurred with by the Honourable Mr. Justice Tysoe and the Honourable Madam Justice Bennett. Pursuant to the appellants' challenges, Chief Justice Bauman identified two issues in the appeal: the allocation of responsibility between Victory Motors and Super-Save relative to the

Levelton Costs and the trial judge's refusal to award the appellant's the legal fees accrued throughout the *BC EMA* remediation process.

27 CJ Bauman held that a reference to the registrar was not attainable for the appellants and further affirmed the trial judge's decision regarding the recovering of remediation legal costs, seeing no error in the conclusion of the trial judge and dismissed that aspect of the appeal.

28 CJ Bauman dismissed the cross-appeal, holding that Super-Save was not a substantially successful party at trial, whereas the appellants are successful parties despite not recovering the full extent of their remediation costs.

29 It was also found by the BCCA that the trial judge did not err in finding that Super-Save offered an enforceable and reasonably acceptable settlement.

30 The Chief Justice allowed the rest of the appeal and remitted the issue of the allocation of liability between Victory Motors and Super-Save and awarded the costs of the appeal and cross appeal to the appellants.

PART II -- QUESTIONS IN ISSUE

31 There are two issues on which this appeal turns.

32 The first issue: may a court take into account the benefits flowing from Certificates of Compliance when apportioning liability between responsible persons for the costs of remediating a contaminated site under the *BC EMA*?

33 The second issue: are remediation legal costs or litigation legal costs are recoverable under the *BC EMA* and does a party's status as a "responsible person" or "any person", as per ss. 47(1) and 47(5) respectively, change the recoverability of these distinct legal costs?

PART III -- ARGUMENT

34 In resolving the first issue of apportioning liability for remediation costs, an analysis of s. 47 of the *BC EMA* as well as s. 35 of the *Contaminated Sites Regulation,* B.C. Reg. 375/96 [*CSR*], is required. This is because an application of s. 47(9) of the *BC EMA* in this case triggers s. 35(2) of the *CSR* when allocating responsibility between two or more "responsible persons".

> *Environmental Management Act*, S.B.C. 2003, c. 53, s.47.
> *Contaminated Sites Regulation,* B.C. Reg. 375/96, s.35.

35 Resolving the second issue of recovering legal costs flowing from the remediation process requires further analysis of s. 47 of the *BC EMA,* specifically subsections 47(1), 47(2), 47(3), and 47(5). Relevant jurisprudence also necessitates an analysis of s. 27(2) of the *Waste Management Act*, R.S.B.C. 1996, c. 482 [*WMA 1996*], as the statutory predecessor of the relevant *BC EMA* section.

> *Environmental Management Act*, S.B.C. 2003, c. 53, ss .47(1-3), 47(5).
> *Waste Management Act*, R.S.B.C. 1996, c. 482, s. 27(2).

A. The Certificate of Compliance and the "Polluter Pays" Principle

(i) The Statutory Objective

36 The first viable definition of the "Polluter Pays" principle comes from Principle 16 of the Rio Declaration on Environment and Development, a United Nations "Conference on Environment and Development" document. This document served as a guide on sustainable development and was signed by over 175 countries. Canada played a key role in these internationally significant conventions on environmental policy.

> Robert Goemmel, "Legal and Societal Responses to Threats Resulting from Modern Science and Technology." *New Zealand journal of environmental law* 13, no. 13 (2009): 73–115.
>
> Stephanie Meakin "*THE RIO EARTH SUMMIT SUMMARY OF THE UNITED NATIONS CONFERENCE ON ENVIRONMENT AND DEVELOPMENT"* 1992. <https://publications.gc.ca/CollectionR/LoPBdP/BP/bp317e.htm#:~:text=(20)%20Canada%20played%20a%20key,sign%20the%20Convention%20in%20Rio.>

37 Chief Justice Bauman explores the foundation of the *BC EMA*:

> This Court in *J.I. Properties C.A.*, revisited the scheme of the legislation:
>
> [29] Before turning to the details of the issues on appeal, it is worthwhile to set out the principal elements of the regulatory scheme giving rise to them. As has been noted, the scheme came into force in 1997. It radically changed the

regulation and rules governing the cleanup of contaminated sites. A foundation of the new scheme is the 'polluter pays' principle: *Workshop Holdings v. CAE Machinery Ltd.*, 2003 BCCA 56 at para. 41. The statutory objective is to require polluters to pay the cost of the cleanup of contamination from which they have benefitted in the past: *Seabright Holdings Ltd. v. Imperial Oil Ltd.*, 2003 BCCA 57 at para. 31. This is so even where their polluting activities had not been prohibited or had been authorized at the time they occurred.

[30] A related purpose of the scheme is to encourage the timely cleanup of contaminated sites by current owners. One way this purpose is achieved is to regulate the development of a contaminated site: *Workshop Holdings Limited v. CAE Machinery Ltd.*, 2005 BCSC 631 at para. 69.

[Emphasis added.]

Victory Motors 2021 at para 58.

38 Similarly, Justice Kirkpatrick in relevant jurisprudence states:

There can be no question that a fundamental principle underlying Part 4 of the Act is that the "polluter pays." As CN submits, the principle demands that polluters pay the full cost of the environmental damage that their activities produce and that those who benefit economically from pollution be held responsible for the remediation of the pollution. This fundamental principle is amply supported by the authorities referred to by CN, including: Imperial Oil Ltd. v. Quebec (Minister of the Environment), 2003 SCC 58 (CanLII), [2003] 2 S.C.R. 624, at ¶ 23; Workshop Holdings Ltd., supra; No. 158 Seabright Holdings Ltd. v. Imperial Oil Ltd., (2003), 2003 BCCA 57 (CanLII), 12 B.C.L.R. (4th) 226 (C.A.), at ¶ 31; and Beazer East, Inc. v. British Columbia (Environmental Appeal Board) (2000), 2000 BCSC 1698 (CanLII), 84 B.C.L.R. (3d) 88 (S.C.), at ¶ 56.

Canadian National Railway Company et al. v. A.B.C. Recycling Ltd., 2005 BCSC 647 [*CNR S.C.*].

Jansen Industries 2010 Ltd. v. Victory Motors (Abbotsford) Ltd., 2019 BCSC 1621

39 Chief Justice Bauman's support of the principle saw an immediate effect of hope in Canadian legal spheres. The *BC EMA* is purported to be Canada's most significant environmental litigation, and his decisions strengthening the implementation of the polluter pays principle was lauded by environmental lawyers across the country.

Elie Laskin et al., "The 'polluter pays' principle: Proposed amendments to the Environmental Management Act may usher in a new era for B.C. industrial companies" 2023. <https://www.osler.com/en/blogs/risk/june-2023/the-polluter-pays-principle-proposed-amendments-to-the-environmental-management-act-may-usher-in>.

Thomas D. Boyd and Jillian Epp, "Polluter Pays (And Maybe Pays Your Lawyer): BC Court of Appeal Clarifies the Law on Recovery of Costs in Contaminated Sites Claims" 2021. <https://canliiconnects.org/en/commentaries/91838>.

Christie McLeod et al., "Canada: BC Court Of Appeal Allows Recovery Of Legal Fees As Remediation Costs" 2022. <https://www.mondaq.com/canada/environmental-law/1159746/bc-court-of-appeal-allows-recovery-of-legal-fees-as-remediation-costs>.

Brent Meckling and Kim Brown, “Court of Appeal Expands Recovery of Legal Costs in Contaminated Sites Litigation” 2021. <https://www.cwilson.com/court-of-appeal-expands-recovery-of-legal-costs-in-contaminated-sites-litigation/>.

(ii) Considering the Benefits of Certificates of Compliance

40 Obtaining the necessary environmental certificates and even intentionally acting to profit from remediation are not grounds to apportion greater liability to Victory Motors. If the benefits of a Certificate of Compliance justify placing more liability on responsible persons, this will serve as an economic deterrent. Such reasoning is inconsistent with, and even runs contrary to the ultimate objective of the *BC EMA*.

41 Chief Justice Bauman agreed in the Court of Appeal, contesting the trial judge’s notion that fairness necessitates that Victory Motors bears a substantial portion of the costs of obtaining the certificate because of its benefits. CJ Bauman found the trial judge’s inconsistency in applying the relevant regulations found in the *CSR* to be a reversible error. The trial judge correctly did not take into account the advantageous acquisition of the Victory Motors’ shares relative to s. 35(2)(a) of the *WMA 1996* but did hold Victory Motors accountable for the same reasons under s. 35(2)(f). In support of this, CJ Bauman evokes the well-established adage “one cannot do indirectly what one cannot do directly under a delegated legislative discretion.”

Victory Motors (Abbotsford) Ltd. v. Actton Super-Save Gas Stations Ltd., 2021 BCCA 129 at para 60.

42 This would effectively result in a statutory path in which responsible persons must bear liability of the pollutive misconduct by virtue of attempting to remediate the lands, and furthermore opening oneself to the difficulties of third-party litigation in engaging with this remediation process, such as the IKM action.

43 The EMA provides the right to recover reasonable remediation costs, which is central to the ultimate objective and foundational “polluter pays” principle of the scheme of encouraging remediation. This right and objective would be weakened, if not made redundant, by requiring responsible owners to obtain certificates that effectively disincentivize the timely remediation of contaminated lands. This objective is confirmed by Chief Justice Bauman’s analyses of relevant jurisprudence.

Workshop Holdings at para. 41
Victory Motors (Abbotsford) Ltd. v. Actton Super-Save Gas Stations Ltd., 2021 BCCA 129 [*Victory Motors 2021*]
J J. I. Properties Inc. V. PPG Architectural Coatings Canada Ltd., 2015 BCCA 472 at para. 29
Seabright Holdings Ltd. v. Imperial Oil Ltd., 2003 BCCA 57 at para. 31
Rolin Resources Inc. v. CB Supplies Ltd., 2018 BCSC 2018 at para. 208.

(iii) The Polluter's Attempt to Settle

44 Super-Save's settlement offer was for $450,000, which is greater than the remediation costs and thus is seemingly reasonable. It could even be said to have been an attempt by the polluter to pay, However, CJ Bauman's and the trial judge's objective analyses on the matter is irrefutable; the settlement offer was an unenforceable one that included a restrictive covenant that was "binding on future purchasers". This term remains beyond the power of the Courts and lends to the notion that the offer ought not to be accepted by the appellants.

Victory Motors 2021 at paras 153-157.

(iv) The Responsible Family

45 The Jansen family should be awarded for initiative and their successful remediation of the contaminated sites. They began this litigation journey when they attempted to sell their property and realized their land was contaminated. The owners then sought solutions, employing the knowledge and expertise required to remediate the lands.

46 Instead of maliciously targeting the previous owner of Victory Motors and their misfortune, the family freed Ms. Webber of her liabilities and provided her a clean escape from the complex and difficult task of remediation. The appellants bore the economic and legal risks of the remediation and placed themselves in a position of vulnerability, as confirmed by the IKM Action swiftly following Victory Motors' obtainment of a Certificate of Compliance.

47 The appellants thus represent a shining example of both innocent and responsible owners. Without parties such as the appellants, the *BC EMA* could not produce the positive effect on environmentally contaminated sites that it is now proven to be able to facilitate.

B. Remediation Legal Costs and Litigation Legal Costs

(i) Remediation Legal Costs are Fully Recoverable under the *BC EMA;* Litigation Legal Costs are Recoverable under the *Supreme Court Civil Rules*

48 Chief Justice Bauman distinguished between remediation legal costs and litigation legal costs. Costs of remediation for the purposes of sections 47(1) and (3) of the *EMA* include only remediation legal costs according to Chief Justice Bauman. They do not include a party's litigation legal costs. While he concedes that the overarching directive of the *EMA* is the "polluter pays" principle, he states that litigation legal costs are better left assessed under the *Supreme Court Civil Rules*. Therefore, one must distinguish between the two sets of legal costs:

the remediation legal costs and litigation legal costs. The overarching directive of the legislation is that the "polluter pays" and is responsible for all costs of litigation. By creating this distinction, with remediation legal costs and litigation legal costs, this directive is met. Remediation legal costs are incurred in effecting the remediation of a property. They are incurred outside of the actual litigation. Litigation legal costs are incurred in the litigation seeking to recover the costs of remediation.

> *Victory Motors 2021* at paras 103, 104.
> *Supreme Court Civil Rules*—B.C. Reg. 168/2009.

49 However, it should be noted that neither the *BC EMA* nor the relevant jurisprudence of *CNR S.C.*, *CNR C.A., and Gehring* concretely employed such a distinction. Chief Justice Bauman explains that in *CNR C.A.* this distinction is implied in paras 10 and 11, but immediately after this affirms that Justice Lowry "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." Thus, the jurisprudence was still vague on this point at the time of Chief Justice Bauman's decision. This is also confirmed by Chief Justice Bauman's observation that *Gehring* outright ignores the distinction between remediation legal costs and litigation legal costs.

> *Canadian National Railway Company et al. v. A.B.C. Recycling Ltd.*, 2005 BCSC 647 [*CNR S.C.*].
> *Canadian National Railway Co. v. A.B.C. Recycling Ltd.*, 2006 BCCA 429 [*CNR C.A.*].
> *Gehring et al. v. Chevron Canada Limited et al.*, 2007 BCSC 468 [*Gehring*]

50 While maintaining this distinction between costs, Chief Justice Bauman states that if "legal costs" were broadly constructed to include both remediation and litigation legal costs, the usual party and party costs rule (Rule 14—1) would yield little in respect to legal costs incurred in effecting the remediation of the site. The flaw in past jurisdiction was ruling that s. 47(3)(c) covered the field of costs under the *EMA*. But as Chief Justice Bauman states, s. 47(3)(c) only covered a subset of remediation legal costs incurred by one responsible party seeking contribution from another.

> *Victory Motors 2021* at para 87.

(ii) Remediation Legal Costs Under s.47 of the *BC EMA*

51 Costs of remediation for the purpose of sections. 47(1) and (3) of the *EMA* include remediation legal costs and do not include a party's litigation legal costs. Remediation legal costs

are captured by s. 47(1), which states that a person responsible for the remediation of a contaminated site is "absolutely, retroactively and jointly and separately" liable for reasonably incurred costs of remediation". Remediation legal costs are also captured by the introductory words of s. 47(3), since costs of remediation include "all costs of remediation" associated with a responsible person seeking contributions from other responsible persons. The subset of costs in 47(3)(c) is related to costs involving legal services engaged in investigation of other responsible persons, negotiations with those persons, and drafting and preparing agreements for joint remediation and cost sharing (not an exhaustive list).

Victory Motors 2021 at para 95, 99.
Environmental Management Act, S.B.C. 2003, c. 53, ss .47(1-3).

(iii) How Costs Are Assessed

52 As per Chief Justice Bauman, "reasonably incurred remediation legal costs" should be assessed by the trial judge on a proper evidentiary basis. The considerations informing the reasonableness assessment of remediation legal costs will vary based on the circumstances and are at the discretion of the trial judge. In terms of their relevance before the trial judge, the considerations set out at s. 71 of the *Legal Profession Act*, S.B.C. 1998, c. 9, costs must be assessed on a quantum meruit basis.

Victory Motors 2021 at para 107.
The Legal Profession Act, S.B.C. 1998, c. 9.

(iv) The State of Status-Based Recoverability of Legal Costs under the *BC EMA*

53 The answer of whether it matters that a party seeking remediation or litigation costs is a "responsible person" or "any person" under the *BC EMA* is a resounding no. The status of a party does not change their ability to recover remediation costs, and with either status litigation costs are not recoverable under the *BC EMA*. What matters instead of the status of the party is the type of the cost being sought; remediation legal costs can be sought under the *BC EMA,* whereas litigation legal costs require evoking the Supreme Court Civil Rules.

54 Chief Justice Bauman found C*NR C.A.'s* conclusion incorrect, where the court stated that the innocent owner cannot take advantage of s. 47(3)(c) as they are not another "responsible person." Responsible persons are defined as: current or past owners (including a person in possession of, or who controls the use of real property, such as a tenant) or an operator of a site

(which effectively means anyone who does business on it). It also means a producer (someone who produced and disposed of, handled or treated a substance that caused contamination. It also means a transporter (someone who transported or arranged for transport, and disposed of, handled or treated substance that caused contamination).

Victory Motors 2021 at paras 107, 127.
Environmental Management Act, S.B.C. 2003, c. 53, ss .47(3)(c).

55 According to Chief Justice Bauman, in the context of s. 47, while the innocent owner may not be liable for the costs of remediation, however, under s. 47(5), they may commence an action to recover reasonably incurred costs of remediation from other responsible persons (who are found to be "responsible for remediation of a contaminated site"). Under s. 47(3), those "costs of remediation" mean all costs of remediation, including actual remediation legal costs and the s. 47(3)(c) subset of costs. These subsets of costs are described as costs incurred "seeking contributions from other responsible persons". Litigation legal costs remain to be awarded and calculated in accordance with the *Supreme Court Civil Rules.*

Victory Motors 2021 at para 141.
Environmental Management Act, S.B.C. 2003, c. 53, ss .47(3-5).

56 Chief Justice Bauman states that this section does not impose liability on a "responsible person"--rather, it imposes it on someone responsible for remediation of a contaminated site. Thus, one can be a responsible person without being liable for the costs of remediation. A party may independently remediate a contaminated site, but they will also be able to recoup their remediation costs from "responsible persons" who are also responsible for the remediation of the site because they are not exempt under s. 46. Thus, in the context of s. 47, the innocent owner is not liable for the costs of remediation, but under 47(5) they may commence an action to recover reasonably incurred costs of remediation from other responsible persons. Those “costs of remediation” mean all costs of remediation, including actual remediation legal costs.

Victory Motors 2021 at paras 140, 141.

57 If a party is required to remediate contamination and there is evidence that it did not cause the contamination and was not otherwise responsible for the costs of remediation, it is reasonable to expect for that party to invoke the provisions of the legislation that specifically address its concerns about bearing costs that it is ultimately responsible for, as per section 47. Therefore, the innocent party, Jansen in this case, must get its costs recovered.

Victory Motors 2021 at para 138.

58 Section 47 creates a new statutory cause of action that is status based, not fault based. The object of the legislation is to encourage prompt remediation of contaminated sites. It does not impose a statutory obligation to remediate a contaminated site but rather provides a right to recover reasonable remediation costs from a "responsible person", if ordered to do so by a government official or by the Court pursuant to s. 47(5). Under the *EMA,* it is not an offence to contaminate a site, but only to fail to remediate if ordered to do so."

First National Properties Ltd. v. Northland Road Services., 2008 BCSC 569.

C. Access to Justice: Avoiding Pyrrhic Victories

59 Had the trial judge's reasoning in apportioning liability remained precedent, the benefits of a Certificate of Compliance could be used to justify an increased apportioning of costs towards responsible remediators, which would result in pyrrhic victories for the remediating owners. The economic deterrent that such reasoning presents would discourage owners from remediating their lands, but furthermore would bar potential remediators in less financially secure positions than the Jansen family.

60 Owners of contaminated property that cannot risk the economic vulnerability inherent to remediating lands are now supported by fairer reasonings surrounding the consideration of the benefits of Certificates of Compliance.

PART IV -- SUBMISSIONS IN SUPPORT OF COSTS

61 The appellants submit the following considerations in support of costs:

62 The standing payment orders subject the appellants to nearly 40% of the responsibility of remediating their properties, amounting specifically to $157,594. This is an unjust apportioning of liability, giving Victory Motors 45% of the liability of their own property, and 30% of the liability of Jansen Ltd.'s property.

63 The appellants submit that these figures should be significantly adjusted to apportion a majority of the liability relative to remediation costs to Super-Save. This would be a just apportionment that takes into account the reasoning of Chief Justice Bauman and fairly treats the remediating appellants.

PART V -- ORDER SOUGHT

64 The appellants seek an order dismissing the trial judge's apportionment of liability regarding remediation costs and the awards flowing from it.

65 The appellants respectfully request that this Court affirm Chief Justice Bauman's finding that Victory Motors' obtainment of a Certificate of Compliance and its subsequent benefits should not result in apportioning them greater liability for remediation costs as facilitated by the *BC EMA*.

66 The appellants also respectfully request that this Court complete the task of allocating liability for the remediation of the appellants' properties with the benefit of Chief Justice Bauman's reasons and order the ensuing payments owed to the appellants for the costs of remediating their properties.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 12th day of January 2024.

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

TABLE OF AUTHORITIES

Case Law **Paragraph No.**

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4. *Gehring et al. v. Chevron Canada Limited et al.*, 2007 BCSC 468..49

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

-and-

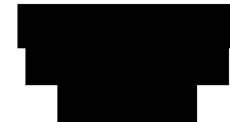
ACTTON SUPER-SAVE GAS STATIONS LTD.
RESPONDENT

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

SUPREME ENVIRONMENTAL MOOT COURT OF CANADA

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

TEAM #2024-10



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