

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 #04-2024

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

AND TO: ALL REGISTERED TEAMS

<i>PART I -- OVERVIEW AND STATEMENT OF FACTS</i>	1
A. Overview of the Appellants’ Position	1
B. Statement of the Facts	2
<i>PART II -- QUESTIONS IN ISSUE</i>	4
<i>PART III -- ARGUMENT</i>	5
A. Re-apportioning liability without considering the enjoyed by a party in obtaining a CoC	5
(i) Legal Framework for Allocating Remediation Costs	5
B. As responsible persons, both Jansen Ltd and Victory Motors are entitled to recover both legal and litigation costs under the BC EMA.	11
(i) The Jansen Ltd and Victory Motors are both responsible persons under the BC EMA.	11
(ii) Legal costs are recoverable under the BC EMA.	12
(iii) Cost of litigation recoverable under the <i>BC EMA</i>	16
<i>PART IV -- SUBMISSIONS IN SUPPORT OF COSTS</i>	19
A. Recovery Under the BC EMA	20
B. Recovery for Litigation Costs	21
<i>PART V -- ORDER SOUGHT</i>	22
<i>PART VI -- TABLE OF AUTHORITIES</i>	23
<i>PART VII -- LEGISLATION AT ISSUE</i>	24
A. Environmental Management Act [SBC 2003] C. 53	24
B. Contaminated Sites Regulation B.C. Reg. 375/96	25
C. Court Rules Act SUPREME COURT CIVIL RULES [Last amended September 1, 2023 by B.C. Reg. 176/2023] Appendix B — Party and Party Costs	25

TABLE OF CONTENTS

Page No.

PART I -- OVERVIEW AND STATEMENT OF FACTS

A. Overview of the Appellants' Position

1. This is an appeal from the decision of the British Columbia Court of Appeal (“**BCCA**”) decision in *Victory Motors (Abbotsford) Ltd. V. Actton Super-Save Gas Station Ltd.* 2021 BCCA 129, Docket CA46464. The appellants seek to recover the costs incurred in remediating contaminated lands pursuant to the *Environmental Management Act*, S.B.C. 2003, c.53 (“**BC EMA**”).

2. The British Columbia Court of Appeal judge was correct in determining that the benefit a party receives from acquiring a Certificate of Compliance should not be considered in the allocation of liability for site remediation costs. *Victory Motors (Abbotsford) Ltd.* (“**Victory Motors**”) and *Jansen Industries 2010 Ltd.* (“**Jansen Ltd**”), seek a review of the cost allocation to be consistent with the Court of Appeal's ruling and meet the intent and purpose of section 35(2) of the Contaminated Sites Regulation B.C. Reg. 375/96 (the “**CSR**”).

BC Reg 375/96, s.35(2).

3. The Court of Appeal correctly held that legal costs associated with remediation are recoverable under section 47(3) of the *BC EMA*.

Environmental Management Act, SBC 2003, c 53, s 47(3) [*BC EMA*].

4. The Appellants, *Victory Motors* and *Jansen Ltd* (the “Appellants”), submit that the Court of Appeal Judge erred in determining that the expenses incurred through litigation to recover remediation costs are not recoverable under the *BC EMA*. Under the provisions of the *BC EMA*, the eligibility for cost recovery should be consistent, regardless of whether the claimant is a

"responsible person" as defined in section 47(1) or "any person" as per section 47(5) of the *BC EMA*.

BC EMA, supra para 3, s 47(1), s 47(5).

B. Statement of the Facts

5. Jansen Ltd owns two abutting properties used for commercial purposes in Abbotsford, British Columbia (the "Jansen Ltd site"). Situated across the street from the Jansen Ltd site, Victory Motors owns a site that was historically used as a gas station (the "Victory Motors site").

6. Between the 1940s and 1994, the Victory Motors site was used for the purposes of gasoline distribution. During this period, the Victory Motors site became contaminated resulting in contamination migrating onto the Jansen Ltd site. The migration of contaminants continued after the gasoline distribution operation ceased their operations on the Victory Motors site.

7. Jansen Ltd commenced a litigation against Victory Motors for the contamination of its property ("Action S115054"). Meanwhile, the Jansen family incorporated a company and purchased Victory Motors through share acquisition.

8. On October 31, 2012, Victory Motors proceeded to initiate legal proceedings against the former gasoline station operators responsible for the contamination of the Victory Motors site ("Action S127599"). Also, at that time Victory Motors undertook renovations at its own cost and expense to improve its buildings and subsequently found tenants who leased out the entire Victory Motors site.

9. Jansen Ltd. and Victory Motors contracted Levelton Engineering Consultants Ltd. ("**Levelton**") to complete the remediation of both the Jansen Ltd site and Victory Motors site. Upon completion of the remediation a Certificate of Compliance (the "**CoC**") under the *BC EMA* was issued for both sites in 2018.

10. The CoCs allowed the contaminated soil to remain *in-situ* on the properties provided the existing commercial use not change, and any new commercial buildings constructed not have a basement deeper than two meters below the surface level.

11. The expenses the Appellants incurred for Levelton's services to acquire the CoCs amounted to \$259,218 for the Victory Motor site and \$136,488 for the Jansen Ltd site, totaling \$395,706 (the "**Levelton Costs**").

12. Acton Super-Save Gas Station Ltd. And Phill Can Enterprises Ltd, a company controlled by Super-Save Gas (Collectively "**Super-Save**"), Shell Canada Ltd ("**Shell**"), and Chevron Canada Ltd ("**Chevron**"), all historically operated a retail gas fuel outlet on the Victory Motors site which included in the action between Jansen Ltd and Victory Motors as additional defendants.

13. Jansen Ltd and Victory Motors resolved its claims with Chevron and Shell through a BC Ferry Agreement limiting their liability to a fixed amount resolving the claims against these parties. The only legal issues remaining were Jansen Ltd's claims against Victory Motors and Super-Save, and Victory Motors' claim against Super-Save, being the parties involved in this appeal.

14. Victory Motors and Jansen Ltd seek recovery of the cost of remediation for the Victory Motors and Jansen Ltd sites paid to Levelton, legal fees associated with arranging for the

remediation of the contaminated site and seeking contributions from other responsible persons as provided for in the *BC EMA*.

15. The trial judge declined to award the Appellants legal fees and found that a higher portion of remediation costs should be allocated Victory Motors as a responsible person because of the benefit it obtained from having the CoC for the Victory Motors site.

16. The Court of Appeal held that no benefit was enjoyed by Victory Motors in obtaining the CoC for the Victory Motors site and confirmed that the legal costs of remediation are recoverable subject to the appropriate verification of those costs.

PART II -- QUESTIONS IN ISSUE

17. The following issues are raised on this appeal:

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

PART III -- ARGUMENT

A. *Re-apportioning liability without considering the enjoyed by a party in obtaining a CoC*

(i) **Legal Framework for Allocating Remediation Costs**

18. Section 35 of the *CSR* outlines how costs are to be divided amongst two or more responsible groups seeking recovery of reasonably incurred costs of remediation. To determine a fair cost apportionment, the court will evaluate how each party contributed to both the need for remediation and the remediation efforts themselves by considering several factors related to acquisition and remediation. Those factors are set out in section 35(2) of the *CSR*.

Gehring et al v. Chevron Canada Limited, 2006 BCSC 1639 at para 118.

(a) **s. 35(2)(a); the Price Paid for the Property**

19. The Appellants submits that the trial judge did not err in finding that section 35(2)(a) of the *CSR* does not apply. The Victory Motors site has consistently been owned by Victory Motors with no change in ownership.

20. Companies are distinct and separate legal entities from their shareholders. The Jansen family did not purchase the Victory Motors site, rather, it purchased the owner of the site, Victory Motors. Shareholders of a corporation do not own the corporation's assets.

Salomon v. Salomon & Co., 1897 A.C. 22 [*Salomon*].
Kosmopoulos v Constitutional Insurance Co., 1987 1 SCR 2

21. The Jansen family's share acquisition does not fall within section 35(2)(a) because the price they paid was not for the purchase of the Victory Motors. Even if the share acquisition cost is to be viewed as an effective purchase cost for the site, such an interpretation does not align with

the explicit language of the section, nor is there any suggestion that it pertains to share acquisition in a corporation.

22. While it is the Appellants position that it is not appropriate to take the Jansen's share acquisition cost into account, even if the share acquisition cost were considered, the remediation did not increase the value of the Victory Motors site more than the remediation costed. The profit the Jansen family realized was due to the deal with the previous owner of Victory Motors, the renovation of the building, and securing high-quality tenants, all of which are unrelated to the remediation, as indicated by the report submitted by various appraisers, and therefore are not barred from recover its remediation cost.

J.I. Properties Inc v. PPG Architectural Coatings Canada Inc., 2014 BCSC 1619 Para 191-93 [*J.I. Properties*].
Jansen Industries 2010 Ltd. v Victory Motors (Abbotsford) Ltd., 2019 BCSC 162 para 112-13 [*Jansen*].

(b) s.35(2)(b) the relative due diligence of the responsible persons involved in the action

23. The Appellants submit that the trial judge did not err on the relative lack of due diligence of the parties involved in the action and how it attributes to the allocation of remediation cost.

24. The inspection protocols in place from 1982 to 1992 did not detect minor leaks, that over time, could result in significant soil contamination. The trial judge confirmed that Super-Save was obligated to implement more stringent inspection measures, including the testing of surrounding soils for potential contaminants. Also, Victory Motors failed to take proper steps to decommission the underground storage tanks (the "USTs") after the gasoline distributors ended their operations.

Jansen, supra para 22 at paras 121-122.

25. Super-Save and Victory Motors did not fulfill their respective due diligence, thereby incurring primary responsibility for the duration in which they oversaw the USTs. Consequently,

Super-Save ought to bear the primary responsibility for the persistent contamination spanning from 1982 to 1992, while Victory Motors bear the primary responsibility for the ongoing contamination from 1994 to 2012. This entails that they should each absorb 50% of the aggregate costs of remediation corresponding to their respective periods of control.

Halme's Auto Service Ltd. v. British Columbia (Ministry of Environment), 2014 CarswellBC 811 at para 56.

(c) s.35(2)(c) the amount of contaminating substances and the toxicity attributable to the persons involved in the action

26. The trial judge did not err in finding that by the time Super-Save ceased its operations in 1992, it is likely that a considerable amount of contamination had already been present. Even had Victory Motors expedited the extraction of the USTs and related infrastructure following the end of Gardiner Leasing Ltd.'s lease in 1994, the reality remains that contamination at its site had already occurred, with contaminants migrated to the Jansen Ltd site.

27. In 2012, when the USTs were finally emptied, they contained a substantial volume of fuel, including the Chevron tanks which had been out of use for approximately four decades. This confirms that the leaking of the USTs is not the significant cause of the contamination of the properties. The quantity of contaminants released into the environment between 1994-2012 is likely much less than that of other responsible parties.

Jansen, supra para 22 at paras 141-145.

(d) s.35(2)(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

28. The trial judge based on a review of the evidence confirmed the relative degree of involvement of each responsible party in the contamination of the Jansen Ltd and Victory Motors sites.

(e) s.35(2)(e) any remediation measures implemented and paid for by each of the persons in the action

29. Victory Motors was the only party that engaged in any meaningful remediation efforts and took on all the risks associated with those remediation efforts including the risk of increased or unknown costs. The remediation costs incurred by Victory Motors include the cost of remediation to meet the standard for obtaining a CoC and the cost for decommissioned the infrastructure and emptied the five remaining USTs. All these costs are included in the total sum claimed in this action.

(f) s.35(2)(f) other factors relevant to a fair and just allocation

(i) *Benefit enjoyed by obtaining a CoC*

30. The BCCA correctly confirmed that the benefit enjoyed by party in obtaining a CoC should not be taken into consideration when apportioning liability for the costs of remediating a contaminated site among responsible persons under the *BC EMA*.

Victory Motors (Abbotsford) Ltd. v. Acton Super-Save Gas Stations Ltd., 2021 BCCA 129 para 56-57 [VM BCCA].

31. The Polluter-Pay Principle requires polluters to pay the cost of the clean-up of contamination from which they benefitted in the past. This principle is not limited to any timeframe

or immediacy, as to hold polluters accountable for activities that had not yet been prohibited or were authorized at the time of occurrence.

Seabright Holdings Ltd v. Imperial Oil Ltd., 2003 BCCA 57 at para 31 [*Seabright*].

J.I. Properties, *supra* para 22 at para 29.

Workshop Holdings Limited v. CAE Machinery Ltd., 2005 BCSC 631 at para 69 [*Workshop Holdings*].

32. Weighing the benefit enjoyed by party in obtaining a CoC is contrary to the ultimate objective of the statutory scheme, which is to encourage remediation and undermines the Polluter-Pay Principle. Considering the benefit of the CoC would discourage parties to incur the cost for obtaining the CoC, including cost for timely remediation.

33. In the alternative, even if the Court is to take the benefit enjoyed by the party in obtaining a CoC into consideration, there is no such benefit that is solely enjoyed by Victory Motors and Jansen Ltd that could increase the proportion of remediation cost allocated to them.

34. The trial judge found that there is no windfall financial benefit enjoyed by the parties obtaining a CoC. The only other tangible benefit associated with obtaining a CoC would be the legal benefits. The CoC obtained for both the Victory Motors and the Jansen Ltd sites not only absolves Victory Motors and Jansen Ltd from any future obligation to remediate the properties but also extends this exemption to other "responsible persons." In accordance with section 46(1)(m) of the *BC EMA*, also known as the "innocent acquisition" exception; any person who is a responsible person for a contaminated site and has secured a CoC following remediation is exempt from bearing the costs of remediation related to subsequent (i) land-use changes or (ii) further remediation efforts. This exception allows for land to be acquired without the fear of future litigation from interested parties. If parties could be held liable for land they played no part in contaminating, it would have disastrous ripple effects on land transfer, where any land that had

been previously contaminated would not be sellable for risk of future litigation, even with a CoC in place.

Jansen, supra para 22 at para 116.
BC EMA, supra para 3, s 46(1)(m).

35. The Court of Appeal was correct in stating one cannot do indirectly what one cannot do directly under a delegated legislative discretion. The ruling overturned the trial judge's stance on the favorable acquisition between the Jansen family and the former shareholder of Victory Motors, which led to an allocation of remediation cost under section 35(2)(f) of the *CSR*. The trial judge was using the "benefit" gained from the transaction as an opportunity to guarantee that Victory Motors assumed complete responsibility for the ongoing contamination of its site. However, no benefit that accrued to Victory Motors in relation to the remediation of and the CoC issued to the Jansen Ltd site. This approach, however, merges the identities of the Jansen family and Victory Motors, which should be considered distinct entities as mentioned in the analysis of s.35(2)(a).

VM BCCA, supra para 30 at paras 59-64.

(ii) Risk taken on by Victory Motor

36. In pursuit of a fair and just allocation of remediation cost, portion received by each party should be proportional to the risk assumed. In remediating a piece of contaminated land without a confirmed CoC and through the innocent acquisition exception, the Jansen Ltd should be entitled to recoup the remediation costs and be free from liability covered under the CoC.

37. Victory Motors is assuming the risk of conducting remediation efforts that may not ultimately satisfy the criteria for a CoC or may not result in the full recovery of remediation costs from other responsible parties. Taking on such a risk involves a potential financial burden without guaranteed reparation – in the same vein, a party will be encouraged to practice proactive

environmental stewardship if they will be compensated for their efforts. Recognizing and compensating the risks undertaken by such parties aligns with the broader objective of promoting timely and effective remediation of contaminated sites.

38. Without considering the benefit of the CoCs, the allocation of remediation on Victory Motors for both sites would have been reduced. There should be very little to no difference to that of the Jansen Ltd site since the trial judge determined that the sole distinction between is that Victory Motors does not receive the same level of benefit from the CoC granted to Jansen Ltd site. Furthermore, the Appellants request that the court consider the risk undertaken by Victory Motors in carrying out remediation as discussed above when apportioning the cost. The Appellants submit that based on the application of the various factors outlined in section 35(2) of the *CSR* the allocation of costs to Victory Motors should be 20% for both contaminated sites.

Jansen, supra para 22 at para 155, 165-66.

B. *As responsible persons, both Jansen Ltd and Victory Motors are entitled to recover both legal and litigation costs under the BC EMA.*

(i) **Jansen Ltd and Victory Motors are both responsible persons under the BC EMA.**

39. The trial judge correctly found that Victory Motors is a “person responsible” for remediation costs. Under section 45(1) of the *BC EMA*, the current owner or operator of the site is responsible for remediation of a contaminated site. Victory Motors, as the owner of the Victory Motors site is not subject to any exception under s.46(1)(m) and therefore is responsible for remediation of the site.

BC EMA, supra para 3, s 45(1)(a).

Jansen, supra para 22 at para 34.

VM BCCA, supra para 30 at para 112.

40. Jansen Ltd, however, is subject to the “innocent acquisition” rules. The Court of Appeal confirmed that Jansen Ltd can be seen as a s.45(1) “responsible person” without being liable for the remediation. To make all landowners liable, even if the land they own was acquired without being responsible for the contamination would be unfair and contradicts the statutory regime as it would limit the sale of brownfield properties and risks land sitting contaminated for undetermined periods of time.

VM BCCA, supra para 30 at paras 112-114.

(ii) Legal costs are recoverable under the BC EMA.

41. The legal costs associated with remediation are properly recoverable under the *BC EMA*, regardless of whether the person seeking cost recovery is a “responsible person” under section 47(1) or “any person” under section 47(5).

(a) Responsible Persons can recover legal fees as stated in the Act.

42. Parties considered “responsible persons” under *BC EMA* section 47(1) are entitled to recover the actual legal costs of remediation. Section 47(3) defines “costs of remediation” as “all costs of remediation” and includes a non-exclusive list of costs. The Court of Appeal confirmed that “there is every reason to include “all costs” actual legal costs reasonably incurred in effecting the remediation of a contaminated site.”

VM BCCA, supra para 30 at paras 93-95.

43. *BC EMA* specifically provides for recovery set out in section 47(3)(c) for “legal and consultant costs associated with seeking contribution from another responsible person.” This provision allows for the recovery of legal costs and is not an exhaustive list and can also be used

to indicate the types of costs the legislature intended to allow on recovery. It is appropriate under section 47(3)(c) of the *BC EMA* to capture "all costs of remediation" which is the clear intent to the legislature.

VM BCCA, supra para 30 at paras 93-95.

(b) “Any person” can also recover legal fees.

44. In the alternative, if it is found that Jansen Ltd. does not meet the requirement of a responsible person, which we submit is not the case, “any person” is also able to collect the legal costs associated with remediation under s.47(5). The section provides that “any person” includes only those who have incurred costs in carrying out remediation of a contaminated site and provides a non-exclusive list of examples of who these parties may be. This definition would include Jansen Ltd. While the allocation of liability is in dispute, Jansen Ltd. incurred costs in carrying out the remediation of their land as noted in paragraph 9.

45. Section 47(5) goes on to note that “any person may commence a proceeding to recover reasonably incurred costs of remediation from responsible persons in accordance with the principles of liability set out in this Part of the *BC EMA*”. In order to determine the principles of recovery set out in this part, it is important to consider the meaning of “this part” and then identify the principles upon which recovery is set out. Section 47(5) is clearly in “Part 4 — Contaminated Site Remediation of the Act,” that states the principles of liability in s.47 “General principles of liability for remediation.”

46. The definition of “costs of remediation” is noted within the general principles of liability under s.47(3); the same definition analyzed in paragraph 42 and 43. Therefore, “all costs” appropriately include legal costs reasonably incurred in effecting the remediation of a

contaminated site and appropriately applies to both “any person” and “responsible parties”. As a result, Jansen Ltd. and Victory Motors can recover their legal costs associated with the remediation.

VM BCCA, supra para 30 at paras 94, 95, 104.
J.I. Properties, supra para 22 at para 29.

47. While section 47(5), places the condition that the costs of remediation must be reasonably incurred, this does not preclude legal fees. It is reasonable to expect a lawyer may be needed to navigate the complex legislation and requirements to ensure that a piece of land is properly remediated in accordance with the statutory requirements.

VM BCCA, supra para 30 at paras 94, 93, 99.

(c) The legislation must be read purposively.

48. The *BC EMA* must be read purposively. Every piece of legislation should receive a fair, large and liberal construction and be read in the context of the scheme of the particular Act, the object of the Act, and the intention of Parliament. In this case, when determining the meaning of “all costs” under s.47(3), the purpose of the *BC EMA* and the intention of the BC legislature: environmental cleanup and the Polluter-Pay Principle must be taken into consideration.

Rizzo & Rizzo Shoes Ltd. (Re), 1998 1 SCR 27 at para 21, Iacobucci J. quotes Elmer Driedger, “Construction of Statutes” (1983) Butterworths, and s. 10 of the *Interpretation Act*, R.S.O. 1980, c. 219 [Rizzo].
J.I. Properties, supra para 22 at para 29.

49. As noted in paragraph 31, the Polluter-Pay Principle prevails in environmental law, specifically in the *BC EMA*. It is well established that the *BC EMA* was enacted to, among other reasons, protect and remediate the environment as stated by the Court of Appeal: “the overall objective of Part 4 of the *BC EMA* is to encourage owners to clean up contaminated sites while ensuring those responsible for the pollution will ultimately be accountable for the costs.”

J.I. Properties, supra para 22 at para 30, citing *Workshop Holdings*, supra para 31 at para. 69. *VM BCCA*, supra para 30 at para 56, citing *Workshop Holdings*, supra para 31 at para. 41; *J.I. Properties*, supra para 22 at para. 29. *Seabright*, supra para. 31; *Rolin Resources Inc. v. CB Supplies Ltd.*, 2018 BCSC 2018 at para. 208.

50. In interpreting the purpose of the *BC EMA*, the intention of the legislation was clear that the purpose of the Act is to redevelop contaminated properties. During the second reading of the *BC EMA*, it was noted that the *BC EMA* will help redevelop contaminated sites, explicitly listing former gas stations as an example of a contaminated site that “blot(s) the landscape in many of our communities.” The purpose of the *BC EMA* is to ensure remediation of contaminated properties through the application of the polluter-pay principle. This intent is properly considered in determining the meaning of the term “all costs.”

References re *Greenhouse Gas Pollution Pricing Act*, [2021] S.C.J at para 51, citing *Kitkatla Band v. British Columbia (Minister of Small Business, Tourism and Culture)*, 2002 SCC 31, [2002] 2 S.C.R. 146, at para. 53.
Hunter pg. 7273 Hansards Wednesday, October 8, 2003 p.m.

(i) A failure to allow the collection of the remediation legal fees from responsible persons goes against these principles of the BC EMA.

51. The interpretation of the meaning of “all costs” to not include legal costs goes against the purpose of the *BC EMA*. The purpose of environmental cleanup and the Polluter-Pay Principle applies to all those encompassed by the *BC EMA*, including both “responsible parties” and “all parties.” Any failure to allow property owners who were not responsible for any contamination to collect legal fees as part of the remediation costs may result in contaminated lands not being remediated which would be in direct contradiction to the purpose and intent of the *BC EMA*.

Canadian National Railway Company et al. v. A.B.C. Recycling Ltd., 2005 BCSC 647 at 179- 181 [CNR BCSC].

52. Additionally, liability is apportioned for a reason: those who pollute must pay their share. Those who have not been found responsible for contamination should not have to pay the legal fees that would not have occurred without the polluter. Making responsible parties liable to indemnify legal costs will serve as a deterrent to contaminating activities. It is appropriate that “all costs” be interpreted to include legal costs which will allow parties to recover in line with the purpose of the *BC EMA*.

CRN BCSC, supra para 51 at paras 179-181.

VM BCCA, supra para 30 at para 79.

(iii) **Cost of litigation recoverable under the *BC EMA*.**

53. As argued above in paragraph 39 and 40, Jansen Ltd. and Victory Motors are “responsible persons.” With that, both parties can recover costs under the provisions of section 47(3)(c), that lists “legal and consultant costs associated with seeking contributions from other responsible persons” as part of a non-exclusive list on what can be recovered under the meaning of “all costs”.

54. The Court of Appeal erred in their finding that litigation costs are not recoverable because they ended their analysis prematurely without considering other possibilities. The Court of Appeal Judge first states that legal costs are captured both in s.47(1) and the beginning of s.47(3). He then goes on to note that s.47(3)(c) is merely an indication to ensure legal costs are included in the meaning of “all costs of remediation,” given that one would not normally associate legal costs in the pursuit of contribution from other responsible persons as “costs of remediation.” Such costs had to be specifically identified and added as appropriate for recovery under s.47(3)(c).” While we agree with this analysis, respectfully, the Court of Appeal erred in finding this to be the only reason for the legislature to include this provision.

VM BCCA, supra para 30 at paras 95-96.

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

VM BCCA, supra para 30 at para 96.

56. Section 47(3)(c) was created not only as a reminder that the legal and consultant costs of remediation can be recovered but also that all legal costs incurred by a remediating responsible party are recoverable until that party is no longer in the pursuit of contribution from the other responsible party.

VM BCCA, supra para 30 at para 96.

57. It is reasonable to expect that litigation costs would be included in the legal costs associated with seeking contributions. The legislature added s.47(3)(c), an intentionally broad statement to ensure that polluters are held liable for a failure to take responsibility for their actions.

58. Victory and Jansen remediated the land and incurred the remediation costs. The remediation was required in most part because of other polluters, including the Respondent. The Appellants are merely trying to recover the costs that the polluters caused in accordance with the provisions of the *BC EMA*; put another way, the Appellants are currently incurring legal costs in pursuing action to gain contribution towards the costs they incurred because of another party’s pollution.

(a) “Any person” can also recover litigation costs under the definition of “all costs.”

59. Alternatively, if the court finds that Jansen Ltd. is not a responsible party, which we do not agree is the case, “any party” can collect litigation fees under section 47(3)’s meaning of “all costs.” The goal of the *BC EMA* has clearly been established to be one of environmental remediation taking into consideration the Polluter-Pay Principle when determining the meaning of “all costs”.

(i) The reading of litigation into section 47(3)(c) does not preclude litigation from being read into the meaning of “all costs”.

60. First, it should be noted that the argument above stating that “responsible persons” may collect litigation fees under section 47(3)(c) does not preclude the ability of “any person” to recover litigation fees under the broader section 47(3), given that the list is not exclusive. that remediation legal costs can be recovered under section 47(3)(c), which does not diminish the inclusiveness of section 47(1) and 47(3).

(ii) “All costs” is broad with no exceptions.

61. The *BC EMA* is clear in allowing full recovery of the costs incurred by remediation. The purpose of recovery is to put the landowner or other responsible party back in the same position had they not had to remediate their land. In the event that litigation is required in order to recover the costs incurred by remediation, it is appropriately included in the definition of “all costs”.

62. While section 47(3) includes a list of examples of what could be included in “all costs,” there is no exception provision regarding what is not a “cost of remediation.” The language clearly

stating “all costs of remediation” paired with the lack of exclusions, indicate that the legislature wants to allow broad recovery under the cost of remediation. This would include litigation costs.

(iii) Litigation recovery under BC EMA aligns with Polluter-Pay Principles.

63. Allowing parties to recover under the *BC EMA* reinforces the Polluter-Pay Principle. If litigation costs are collected according to Appendix B of the *BC Supreme Court Civil Rules*, scales and unit caps may prevent polluters from paying for their share of the damage caused to the environment. Under the *BC EMA*, the allocation of litigation costs is based on contribution to the pollution on the land undergoing remediation. This is in accordance with the intention of the legislature when drafting the *BC EMA*.

64. Additionally, allowing litigation recovery under the *BC EMA* promotes land remediation. Responsible parties may be more likely to remediate their land, knowing that they will be able to collect all the costs they will incur to complete the remediation, including any litigation fees. Conversely, rather than dragging their feet with payment, responsible parties will know that any action they take to prolong the completion, including payment, of the remediation process will ultimately result in a larger bill they have to pay.

65. The Appellants are entitled to recovery of the litigation costs under section 47 of the *BC EMA*.

PART IV -- SUBMISSIONS IN SUPPORT OF COSTS

66. The Appellant seeks their costs of the appeal fixed and awarded to Victory Motors and Jansen as set out in Section 47: Principles of Liability of the *BC EMA* and Part 14: Costs, Appendix B of the *BC Supreme Court Civil Rules*.

A. *Recovery Under the BC EMA*

67. In seeking recovery for all remediation costs and litigation fees under the *BC EMA*, the Appellants are not attempting to double-dip and collect litigation costs. The Appellants acknowledge that collection of litigation fees under the *BC EMA* would preclude the Appellants from then recovering the same costs under the *Supreme Court Civil Rules*.

68. Jansen Ltd. as a landowner, is responsible for remediation, under *BC EMA* Section 45(1)(a). However, it has been established that they were not responsible for the contamination and therefore can recover the reasonably incurred costs of remediation from one or more responsible persons as noted in section 47(5). Jansen Ltd. are completely and fully are appropriately indemnified for the cost of remediation including legal and litigation fees under section 47(5).

VM BCCA, supra para 30 at para 141.

69. We ask the court to find Victory Motors Ltd to be liable for 20% of remediation costs and that it is more appropriate to grant 80% recovery of the cost of remediation including legal and litigation fees under section 47(3). These figures have been reached based on the analysis done between paragraphs 30 and 38.

B. *Recovery for Litigation Costs*

70. Should the Appellants not be permitted to recover litigation costs under s.47 of the *BC EMA*, both Victory Motors and Jansen Ltd, seek recovery of litigation legal costs to be awarded and calculated in accordance with the s.14(1) of the *Supreme Court Civil Rules*.

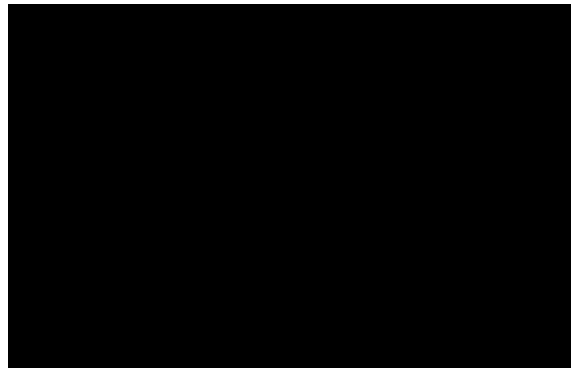
71. In determining the awarding of party-to-party costs, the court fix the scale of costs at Scale C. The issue before the court is a matter of more than ordinary difficulty (s.2(2)(c)), requiring the difficult issue of considerations of apportionment and extent of liability under the *BC EMA* to be litigated. These proceedings not only impact the Appellants, but also have bearing on developers, landowners and any other BC community members who may be impacted by land contamination and remediation requires. It is because of the important and extent of the proceedings that the Appellants request costs be fixed at Scale C.

BC Reg 168/2009, Appendix B, s 2.
Mort v. Saanich School Board No. 63, 2001 BCSC 1473; *Slocan Forest Products Ltd. v. Trapper Enterprises Ltd.*, 2010 BCSC 1494; *Bradshaw Construction Ltd. v. Bank of Nova Scotia (B.C.C.A.)*, 1992 B.C.J. No. 1657.

PART V -- ORDER SOUGHT

72. Jansen Ltd and Victory Motors respectfully request that this Honourable Court allow the Appeal and overturn the decision of the court below by reappportioning 20% liability to Victory Motors and granting both Appellants full legal and litigation costs.

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



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

PART VI -- TABLE OF AUTHORITIES

	Paragraph No.
Bradshaw Construction Ltd. v. Bank of Nova Scotia (B.C.C.A.), 1992 B.C.J. No. 1657.	71.
Canadian National Railway Company et al. v. A.B.C. Recycling Ltd., 2005 BCSC 647.[CRN BCSC]	51, 52.
Gehring et al v. Chevron Canada Limited 2006 BCSC 1639 [Gehring]	18.
Halme's Auto Service Ltd. v. British Columbia (Ministry of Environment) 2014 CarswellBC 811.	25.
Hansards- Hunter pg. 7273 Wednesday, October 8, 2003 p.m.	50.
J.I. Properties Inc v. PPG Architectural Coatings Canada Inc. 2014 BCSC 1619. [J.I. Properties]	22,31,46,48,49.
Jansen Industries 2010 Ltd. v Victory Motors (Abbotsford) Ltd., 2019 BCSC 162. [Jansen]	22,24,27,34,38,39.
Kitkatla Band v. British Columbia (Minister of Small Business, Tourism and Culture), 2002 SCC 31, [2002] 2 S.C.R. 146.	51.
Kosmopoulos v Contstitutional Insurance Co., 1987 1 SCR 2	20.
Mort v. Saanich School Board No. 63, 2001 BCSC 1473.	71.
Re Rizzo & Rizzo Shoes Ltd, Iacobucci J. quotes Elmer Driedger in Construction of Statutes and s. 10 of the Interpretation Act,	48.
References re Greenhouse Gas Pollution Pricing Act, [2021] S.C.J.	51.
Rolin Resources Inc. v. CB Supplies Ltd., 2018 BCSC 2018.	50.
Salomon v. Salomon & Co., [1897] A.C. 22 [Salomon].	20.
Seabright Holdings Ltd v. Imperial Oil Ltd, 2003 BCCA 57. [Seabright]	31, 49.
Slocan Forest Products Ltd. v. Trapper Enterprises Ltd., 2010 BCSC 1494. [Slocan Forest]	71.
Victory Motors (Abbotsford) Ltd. v. Actton Super-Save Gas Stations Ltd., 2021 BCCA 129 [VM BCCA].	35,39,40,42,43,46, 47,49,52,54,55,56,68
Workshop Holdings Limited v. CAE Machinery Ltd., 2005 BCSC 631.[Workshop]	31, 49

PART VII -- LEGISLATION AT ISSUE

A. *Environmental Management Act [SBC 2003] C. 53*

Persons responsible for remediation of contaminated sites

s.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.

Persons not responsible for remediation

s.46(1) The following persons are not responsible for remediation of a contaminated site:

- (m) a person who was a responsible person for a contaminated site for which a certificate of compliance was issued and for which another person subsequently proposes or undertakes to
 - (i) change the use of the contaminated site, and
 - (ii) provide additional remediation;

General principles of liability for remediation

s.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.

(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.

(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.

B. *Contaminated Sites Regulation B.C. Reg. 375/96*

Determining compensation under section 47 (5) of the Act

s.35(2) In an action between 2 or more responsible persons under section 47 (5) of the Act, the following factors must be considered when determining the reasonably incurred costs of remediation:

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

C. *Court Rules Act SUPREME COURT CIVIL RULES [Last amended September 1, 2023 by B.C. Reg. 176/2023] Appendix B — Party and Party Costs*

Scale of costs

2(1) If a court has made an order for costs, it may fix the scale, from Scale A to Scale C in subsection (2), under which the costs will be assessed, and may order that one or more steps in the proceeding be assessed under a different scale from that fixed for other steps.

(2) In fixing the scale of costs, the court must have regard to the following principles:

- (a) Scale A is for matters of little or less than ordinary difficulty;
- (b) Scale B is for matters of ordinary difficulty;
- (c) Scale C is for matters of more than ordinary difficulty.

(3) In fixing the appropriate scale under which costs will be assessed, the court may take into account the following:

- (a) whether a difficult issue of law, fact or construction is involved;
- (b) whether an issue is of importance to a class or body of persons, or is of general interest;
- (c) whether the result of the proceeding effectively determines the rights and obligations as between the parties beyond the relief that was actually granted or denied.

(4) If, after December 31, 2006, a settlement is reached under which payment of assessed costs is agreed to or an order for costs is made, and if no scale is fixed or agreed to in that settlement or order, the costs must be assessed under Scale B, unless a party, on application, obtains an order of the court that the costs be assessed under another scale.

(5) If, after it fixes the scale of costs applicable to a proceeding under subsection (1) or (4), the court finds that, as a result of unusual circumstances, an award of costs on that scale would be grossly inadequate or unjust, the court may order that the value for each unit allowed for that proceeding, or for any step in that proceeding, be 1.5 times the value that would otherwise apply to a unit in that scale under section 3 (1).

(6) For the purposes of subsection (5) of this section, an award of costs is not grossly inadequate or unjust merely because there is a difference between the actual legal expenses of a party and the costs to which that party would be entitled under the scale of costs fixed under subsection (1) or (4).

(7) If costs may be assessed without order or agreement, the scale of costs must be fixed by the registrar on the assessment.

(8) If an offer to settle is made under Rule 9-1, any costs payable on acceptance of that offer must be assessed under Scale B.

**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 #04-2024



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