

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**

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**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

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TEAM # 2024-07

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

**AND TO: ALL REGISTERED TEAMS**

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## I OVERVIEW AND STATEMENT OF FACTS

### A. Overview of the Respondent's position

1 Far from being a simple quibble about costs, this case raises a serious legal issue for the court: when deciding a case which touches on a specific legislative objective, will the court still protect the essential legal principle of fairness? All parties agree that it is important to remediate pollution. However, beyond simply incentivizing remediation, the *Environmental Management Act*, SBC 2003, c 53 (“*Act*”) enshrines in British Columbia law the principle that polluters must pay to clean up their mess. In the case at bar, the Appellants have used complex business structures to avoid paying the fair cost to remediate their site. They have done so despite the court of first hearing finding that the Appellants were responsible for polluting for twice as long as the Respondent. The law permits the court to consider the full picture of the business activities on the site in apportioning costs. In this case, the principle of fairness requires that the court do so.

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

2 The polluter pays principle dictates that those who cause contamination should be held accountable for their pollution. This principle has been at the forefront of the *Act* since its inception:

“So-called brownfield sites exist because under current contaminated-site rules, liability for cleanup falls on people who had nothing to do with the pollution. [...] This bill starts to change those processes, so we can start to see the redevelopment of former gas stations that blot the landscape in many of our communities”.

Moreover, recent debates on amendments to the act affirm its purpose of the act is “to uphold the polluter-pays principle”.

“Bill 57, Environmental Management Act”, 2nd reading, British Columbia, Legislative Assembly, *Official Report of the Debates of the Legislative Assembly (Hansard)*, 16-12, (8 October 2003) at 7273 (Mike Hunter).

British Columbia, Legislative Assembly, *Official Report of the Debates of the Legislative Assembly (Hansard)*, (8 May 2023) at 11287 (George Heyman).

3 In this case, a finding in favour of the Respondent is consistent with environmental law principles, including the polluter pays principle and the objective of an environmentally sound British Columbia (“**BC**”). In its decision, the Court should apply the rules laid out in the *Act* and the *Contaminated Sites Regulation* BC Reg 375/96 (“**Regulation**”) in a way which is consistent with the underlying principles of the *Act* and the stated objectives of the legislation.

Ruth Sullivan, *The Construction of Statutes*, 7th ed (Toronto: LexisNexis Canada, 2022) at 185.  
*Contaminated Sites Regulation*, BC Reg 375/96 [*Regulation*].  
*Victory Motors (Abbotsford) Ltd v Acton Super-Save Gas Stations Ltd*, 2021 BCCA 129 [Appellate Reasons]  
 at paras 56-57.

4 The Respondent agrees with the findings of the Court of Appeal and submits that “any person” under section 47(5) of the *Act* may recover reasonable “costs of remediation” under subsection 47(3). The reasonable “costs of remediation” do not include litigation legal costs. The Appellants do not meet the evidentiary standard to recover any remediation legal costs under subsection 47(5) of the *Act*.

5 The Certificate of Compliance obtained by Victory Motors is a benefit that should be considered when allocating remediation costs under the *Regulation*.

6 To properly allocate the remediation costs in light of the benefit of the Certificate of Compliance, the Court should look behind the corporate veil and consider Victory Motors (Abbotsford) Ltd’s (“**Victory Motors Ltd.**”) acquisition of Victory Motors. The evidence demonstrates that Victory Motors Ltd. is merely a puppet through which Mr. Jansen and Jansen Industries 2010 Ltd. (“**Jansen**”) have accrued the benefits of the Certificate of Compliance. Piercing the corporate veil will allow the Court to appropriately allocate the costs and prevent the Appellants from circumventing the analysis under subsection 35(2)(a) of the *Regulation*.

7 Even if the Court must maintain the present corporate distinctions between Victory Motors and the Appellants, the Court should still consider the benefit of the Certificate of Compliance under subsection 35(2)(f) given the complex business relations in the case at bar and the Appellants’ voluntary remediation activities.

**B. Respondent’s position with respect to the Appellants’ statement of facts**

8 The Respondent accepts the facts as set out in the factum of the Appellant. The following are the Respondent’s submissions which provide additional context for the agreed facts.

Appellant Factum, paragraphs 5-31.

**(i) General principles of the contaminated sites regime**

9 Part 4, Division 3 of the *Act* establishes how a “responsible person” is identified in section 45 and how liability is allocated in sections 46, 47, and 50.

*Act*, ss 45, 47, 50.

10 Subsection 47(5) of the *Act* creates a cause of action to recover the remediation costs from “responsible persons”.

*Act*, s 47(5).

11 Under subsection 62(1) of the *Act*, subsection 35(2) of the *Regulation* guides judges in allocating responsibility for remediation costs between multiple “responsible persons”.

*Act*, s 62(1).

*Regulation*, s 35(2).

**(ii) Preliminary litigation**

12 The Jansen family incorporated Victory Motors Ltd. to acquire Victory Motors in 2012 for the purpose of controlling the litigation in this current action. This purpose was a finding in a related action concerning the property value assessment of the Victory Motors site (“**VM site**”).

*Victory Motors (Abbotsford) Ltd v British Columbia (Assessor of Area No 15 - Fraser Valley)*, 2015 BCSC [Fraser Valley 2015] 1230 at para 36.

13 The property assessment of the VM site found that there was a reduction in the value of the land using an income approach to evaluate the assessed highest and best use of the land given the contamination. “Responsible persons” undergoing voluntary remediation, such as Victory Motors and Jansen, are given the benefit of a reduction in property tax through this reduction in the assessed value of their property by obtaining a Certificate of Compliance. In addition, there is a benefit for future sales from eliminating the risk of subsequent contamination liability.

*Victory Motors (Abbotsford) Ltd v Assessor of Area No 15 - Fraser Valley*, 2017 BCCA 295 [Fraser Valley 2017] at paras 28, 68.

*Seaspan ULC v North Vancouver (District)*, 2022 BCCA 433 [Seaspan] at paras 15-17.

**(iii) The British Columbia Court of Appeal decision**

14 The BC Court of Appeal interpreted subsection 47(1) and subsection 47(3) of the *Act* together to conclude that “costs of remediation” includes “remediation legal costs” which are legal costs incurred outside of litigation.

Appellate Reasons at paras 93, 95, 99-102.

15 The BC Court of Appeal set out the evidentiary standard to recover “remediation legal costs” as requiring distinct files and time-keeping protocols to maintain a distinction between “remediation legal costs” and “litigation legal costs”. The Court found that the Appellants did not meet this standard and could not refer the matter to the registrar.

Appellate Reasons at paras 103, 144-145.

## II THE RESPONDENT'S POSITION WITH RESPECT TO THE QUESTIONS AT ISSUE

16 The two statutory questions at issue in this appeal are as follows,

1. Are legal costs associated with remediation or with pursuing litigation recoverable under the *Act*, and
  - a) does the answer differ depending upon whether the person seeking cost recovery is a “responsible person” under the *Act*, s. 47(1) or “any person” under the *Act*, s. 47(5)?
2. Can a court consider the benefit enjoyed by a party in obtaining a Certificate of Compliance when apportioning liability for the costs of remediating a contaminated site among “responsible persons” under the *Act*?

17 Question 1 should be answered in the negative: that is to say, legal costs associated with litigation are not recoverable under the *Act*. Question 1 a) should be answered in the negative: there should not be a difference between a “responsible person” or “any person”. Differentiating between a “responsible person” or “any person” would be contrary to the objective of the statutory scheme.

18 Question 2 should be answered in the affirmative: the benefit associated with a Certificate of Compliance should be considered when apportioning liability for remediation costs among “responsible persons”.

## III ARGUMENT

### A. Standard of review

19 The first question at issue, regarding remediation legal costs, is a question of law. The appropriate standard of review is correctness.

*Housen v Nikolaisen*, 2002 SCC 33 [*Housen*] at para 8.

- a) A statutory interpretation of the *Act* supports Justice Bauman’s distinction on Appeal that “any person” may begin an action to recover remediation costs under subsection 47(5). The Respondent also agrees that legal costs associated with litigation cannot be recovered under the *Act* due to conflict with the *Supreme Court Civil Rules* (“**Rules**”).

Appellate Reasons at paras 100, 102-105, 141.  
*Supreme Court Civil Rules*, BC Reg 168/2009, Rule 14-1.

20 The second question at issue, regarding the benefit enjoyed by a party in obtaining a Certificate of Compliance, is a question of mixed fact and law. The appropriate standard of review is palpable and overriding error.

*Housen* at para 37.

*Mahjoub v Canada (Citizenship and Immigration)*, 2017 FCA 157 at paras 61-65.

- b) The first palpable error stems from the lack of proper consideration by the courts below for the evidence concerning the property values, and business practices of the Jansen principals when acquiring Victory Motors. The error is overriding because this lack of consideration prevented the courts from conducting a full analysis of the business structures in the case which affected the allocation of responsibility under subsection 35(2)(a).

*Jansen Industries 2010 Ltd v Victory Motors (Abbotsford) Ltd*, 2019 BCSC 1621 [Trial Reasons] at para 70.  
*Fraser Valley 2015* at para 36.

- c) Neither of the courts below properly considered the facts that would trigger the applicability of subsection 32(2)(b) of the *Regulation* which also led to an overriding error in the allocation of responsibility. The error is palpable because at trial, Justice Sewell found a complete lack of due diligence on the part of Victory Motors for allowing the longest duration of recent contaminating activity, but failed to distinguish this lack of due diligence from other “responsible persons”.

Trial Reasons at paras 5-7, 122.

- d) Furthermore, the courts below made a palpable error in not considering the benefit gained from voluntary remediation and, therefore, from a Certificate of Compliance, which led to an overriding error in deciding the allocation of responsibility for remediation costs under subsection 35(2)(f).

Trial Reasons at paras 112, 116.

**B. The Appellants in this case should not be able to recover the legal costs of litigation under subsection 47(3)**

21 Before considering the allocation of costs, it is necessary to clarify what costs are being allocated. The Respondent agrees with Appellants’ position, as stated in paragraphs 73-76 of their factum, that any person may claim legal costs associated with remediation. However, the



Respondent submits that the legal costs associated with litigation are not recoverable, and that the Appellant has not met the evidentiary standard to be awarded those costs.

Appellant Factum, paragraph 73-76.

22 As described in this section, statutory and legislative interpretation of the Act has established a distinction between the legal costs associated with remediation, which may be recovered under subsection 47(3)(c) and the legal costs a party may accrue when pursuing litigation under subsection 47(5). A fair interpretation of the facts in this case will be consistent with earlier jurisprudence, which set the expectations of the Respondent in conducting its affairs.

**(i) The Act creates a status-based system to differentiate relevant parties**

23 The Act creates an absolute and retroactive status-based liability system to impose separate obligations on the various parties that may be involved in contaminated site remediation.

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

Act, s 47(1).

24 The Act establishes a regulatory scheme to ensure polluters pay the costs of contamination they have benefitted from in the past. The scheme is status-based. Under the scheme, “Persons” are allocated the costs to clean up the pollution depending on how the following subsections apply to them:

- a) “Persons responsible for remediation of contaminated sites” identified in section 45;
- b) “Responsible persons”: parties identified in section 45 and parties identified in section 45 found not responsible for the remediation of a contaminated site in section 46;
- c) “Any person”: parties that have incurred costs in carrying out remediation and are seeking to recover costs from “responsible persons”.

Act, ss 45, 46, 47.

Appellate Reasons at paras 124, 128, 136, 141.

*First National Properties Ltd v Northland Road Services Ltd*, 2008 BCSC 569 [*First National Properties*] at para 55.

*Ji Properties Inc v PPG Architectural Coatings Canada Inc*, 2015 BCCA 472 [*Ji Properties*] at para 29.

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

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

*Rolin Resources Inc v CB Supplies Ltd*, 2018 BCSC 2018 [*Rolin*] at para 208.

25 The *Act* uses this status-based liability system to assign obligations so that the reasonable costs of remediation can be assigned in a fair and just manner:

- a) “Persons responsible for remediation of contaminated sites” can be named as defendants in actions commenced under subsection 47(5) and are assigned liability for reasonably incurred costs under subsection 47(1),
- b) “Responsible persons” can be named as defendants in an action under section 47(5), and unless they are exempted from liability under section 46, can be assigned liability for reasonably incurred costs as “persons responsible for remediation” under subsection 47(1), and
- c) “Any person” can begin the action under subsection 47(5) and can be assigned liability if they fall into any of the above statuses.

*Act*, ss 47(1), 47(5).  
Appellate Reasons at paras 139-141.

26 The *Act* creates these distinctions to ensure that:

- a) all polluters can be held liable for reasonable costs as “persons responsible for remediation of contaminated sites” according to the polluter pays principle; and
- b) innocent parties can identify and seek payments from the polluters by commencing an action against “responsible persons”.

*Act*, ss 47(1), 47(5), 50(3).  
Appellate Reasons at para 141.

**(ii) Recovery of remediation costs is not limited to “responsible persons”**

27 Limiting recovery of remediation costs to “responsible persons” would be contrary to the objectives of the legislation and the polluter pays principle. Subsection 47(5) of the *Act*, which creates the status-based cause of action to allow private recovery of remediation costs, states:

“47 (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.” [Emphasis added]

*Act*, s 47(5).

28 Subsection 47(5) allows “any person” to recuperate reasonably incurred costs of remediation from “persons responsible for remediation”.

Appellate Reasons at para 141.  
*Domovitch v Willows*, 2006 BCSC 1068 at para 19.

29 This regime ensures that all parties, including innocent parties, can commence an action under subsection 47(5) to recuperate reasonable costs of remediation, thus embodying the polluter pays principle. On appeal, Justice Bauman explained that the *Act* is structured inclusively to protect innocent parties by allowing them to recover costs, apportioning liability to multiple “responsible persons” while achieving the underlying objective of contaminated site remediation.

Appellate Reasons at paras 138, 141.

30 In reaching this conclusion, Justice Bauman departed from the precedent set in *Canadian National Railway Co v ABC Recycling Ltd [CNR]*, that only “responsible persons” can recover legal remediation costs. The Court in *CNR* based its decision on the plain text of 47(3)(c), which states that “legal and consultation costs associated with seeking contributions from other responsible persons” [can be apportioned].

Appellate Reasons at para 141.  
*Canadian National Railway Co v ABC Recycling Ltd*, 2006 BCCA 429 [*CNR*] at para 5.

31 The interpretation of section 47(3)(c) from *CNR* frustrates the objective of the *Act* to enforce the polluter pays principle by precluding innocent parties from recovering reasonably incurred legal costs of remediation. Therefore, Justice Bauman’s statutory analysis should be preferred to *CNR*’s to ensure that the *Act* functions as intended by the legislature.

**(iii) Legal costs associated with pursuing litigation are not recoverable under the *Act***

32 Previous decisions interpreting subsections 47(1) and 47(3) of the *Act* have established a distinction between the legal costs associated with remediation (“remediation legal costs”) that may be recovered under subsection 47(3)(c), and legal costs a party may accrue when pursuing litigation to recover remediation costs (“litigation legal costs”). For example, in *Rolin*, the BC Supreme Court did not consider recovery of litigation costs under the *Act* when deciding on the allocation of reasonably incurred remediation costs.

Appellate Reasons at paras 93-99.  
*Rolin* at paras 282-285.

33 Subsection 47(3) of the *Act* defines the “costs of remediation” as “all costs of remediation” and goes on to enumerate a non-exhaustive list of costs. Subsection 47(3)(c) permits the recovery of legal costs associated with seeking contributions from other “responsible persons”. The Appellants, in their factum at paragraphs 55-56, have interpreted the plain language of these

subsections to mean that legal costs should be evaluated according to a but-for test: all legal costs should be recoverable if they would not have been required but-for the contamination.

Appellant Factum, paragraph 55-56.

34 The Respondent disagrees with this proposed test - as discussed in this section, it is inconsistent with precedent and would frustrate the existing statutory scheme under the Rules. The Appellants' attempt to clarify the relationship between the proposed test and the Rules illustrates the difficulty in merging categories of costs, as it would treat the costs to litigate as a form of damages. This would undermine the strict ethical and accounting obligations for lawyers required by the Rules, and create an incentive to waste the court's time with unnecessary matters in which a party could claim litigation costs from the other party as damages, further undermining the purpose of the Rules.

*Act*, ss 47(3), 47(3)(c).  
*Supreme Court Civil Rules*, BC Reg 168/2009, Rule 14-1.  
 Appellant Factum, paragraph 65.

35 The Appellants' proposal to merge the types of legal costs also fails to consider how subsection 47(3)(c) has been interpreted and why. Treating the two types of costs as the same would allow polluters, such as Victory Motors, to gain a benefit through litigation that would undermine the implementation of the polluter pays principle, as demonstrated in *CNR*.

36 In *CNR*, the BC Court of Appeal concluded that the intent of the *Waste Management Act*, RSBC 1996, c 482, was to allocate liability for costs incurred in pursuing recovery of remedial expenses, not to provide for special costs of litigation. The *Waste Management Act* was the predecessor act to the *Act*. The Court made this determination to ensure polluters could not expand and then transfer remediation costs through litigation. In that case, a less well-resourced party was deemed a "responsible person" because it was the new owner of a site, not because it had contributed to polluting the site. In line with the polluter pays principle, requiring the "responsible person" in *CNR* to pay the litigation costs as a remediation cost would have been unfair. As a result, the Court allowed regular party-and-party costs and set aside the order for special costs.

*Waste Management Act*, RSBC 1996, c 482.  
 Appellate Reasons at para 97.  
*CNR* at paras 10, 11.

37 Similarly, Justice Sewell found at trial that Victory Motors was negligent, causing twenty years of contamination. It would not be consistent with the principle of fairness to allow a major

polluter of this site to receive special costs of litigation by claiming remediation costs against another “responsible person”.

Trial Reasons at para 122.  
Appellate Reasons at para 42.

38 While subsection 47(3) of the *Act* is a non-exhaustive list of reasonable costs associated with remediation, considering litigation costs under the *Act* would create conflict with the rules of civil procedure. In BC, the Rules codify these rules and provide a legislative regime to allocate “litigation legal costs”. Considering litigation costs as remediation costs would allow for the losing party to bear all legal costs in any dispute over a contaminated site, regardless of other factors in litigation, which is inconsistent with all Canadian rules of civil procedure. Therefore, it would create a conflict to consider “litigation legal costs” under subsection 47(3) of the *Act*.

Appellate Reasons at paras 100, 102-105.  
*Supreme Court Civil Rules*, BC Reg 168/2009, Rule 14-1.

39 Not considering litigation costs under subsection 47(3) of the *Act* is consistent with the legislative intent as expressed in both the *Act* and the Rules. This also serves to protect the expectations of litigants while enabling innocent parties to recover legal fees.

**(iv) To recover legal costs, they must be clearly documented and differentiated from remediation costs**

40 Given the distinction between litigation and remediation costs recognized by the court, plaintiffs must keep strict records of their costs related to remediation to ensure there is no confusion between “remediation legal costs” and “litigation legal costs”. Once a judge has identified grounds to recuperate remediation costs and has allocated liability, the judge must assess the evidence submitted on a standard of reasonableness to identify what is considered “reasonable remediation costs” per subsection 47(1) of the *Act*.

*Act*, s 47(1).  
Trial Reasons at para 64.  
Appellate Reasons at para 144.

41 The Appellants have grounds to recover remediation legal costs as “any person...who incurs costs in carrying out remediation of a contaminated site” under subsection 47(5) of the *Act*.  
*Act*, s 47(5).

42 However, despite having grounds for recovery, the Appellants will not be able to recover remediation legal costs under subsection 47(3) because of the lack of specific bookkeeping.

Without specific bookkeeping, the Appellants cannot differentiate between remediation legal costs and litigation legal costs. The Appellants are claiming \$150,000 for remediation legal costs with no evidence to explain this quantification or the nature of these services.

Trial Reasons at para 58.

43 This evidentiary requirement was addressed at trial and in *Rolin*. In *Rolin* the total remediation costs were stated and specifically identified. The judge in *Rolin* then determined the apportionment of liability before awarding the plaintiffs 50% recuperation of what was determined to be the “reasonable remediation costs” of the total claimed.

*Rolin* at paras 73, 284.

Trial Reasons at para 64.

Appellate Reasons at para 103.

44 The obligation to properly track expenses is an essential element of cost recovery rules and reflects the courts’ commitment to the proper administration of justice. Thus, the Court should be persuaded by prior decisions, and should rule that Jansen and Victory Motors Ltd. cannot meet the evidentiary standard to recover their remediation legal costs.

Trial Reasons at paras 32, 64, 101.

Appellate Reasons at para 144.

**C. An analysis of the benefits and costs of the remediation indicates that Victory Motors Ltd should bear the bulk of the remediation costs**

45 Section IV of the *Act* governs BC’s contaminated sites. Under the scheme, the government requires landowners to remediate land which they find is contaminated. The purpose of this section is to ensure the land is still remediated, even in the case of a dispute about responsibility for pollution. The section also permits individuals who have remediated a site to transfer the liability to other “responsible persons” who had contributed to pollution to ensure that remediation occurs while fairness is maintained.

Sowinski, J. Michael. *Environmental Liability Transfer in British Columbia: Evaluation and Recommendations for Options to Implement the 14th Principle*. Environmental Management Division, 2011.

46 Section 47 of the *Act* dictates that a Court can allocate responsibility for remediation. When there are multiple “responsible persons”, a Court may be required to apportion the responsibility for remediation between multiple “responsible persons”.

47 The objective of the *Act* is to ensure that persons remediate contaminated sites and “responsible persons” are held accountable.

*Jl Properties* at para 29.

*Workshop Holdings* at para 41.  
*Seabright Holdings* at para 31.  
*Rolin* at para 208.

**(i) Subsection 35(2) should be interpreted purposively**

48 Purposive interpretation is widely used in judicial decision making at all court levels. As described in Sullivan’s seminal text, the premises which underlie purposive interpretation are:

“(1) All legislation is presumed to have a purpose. It is possible for courts to discover or adequately reconstruct this purpose through interpretation.

(2) Legislative purpose must be taken into account in every case and at every stage of interpretation, including initial determination of a text’s meaning.

(3) In so far as the language of the text permits, interpretations that are consistent with or promote legislative purpose should be adopted, while interpretations that defeat or undermine legislative purpose should be avoided.”

Ruth Sullivan, *The Construction of Statutes*, 7th ed (Toronto: LexisNexis Canada, 2022) at § 9.01.

49 The Court, in this case, should interpret both the *Act* and the *Regulation* purposively. A key purpose of the relevant statute is to ensure that there is a fair allocation of final remediation payments among polluters. This is demonstrated by the intrinsic evidence in the text and structure of the relevant sections, and by the extrinsic evidence presented by the Hansard discussed in section A, paragraph 2 of this factum. To determine the fair allocation, the Court should consider factors identified in subsection 35(2) of the *Regulation*, particularly subsections 35(2)(a) (cost paid for the property), 35(2)(b) (responsibility), and 35(2)(f) (other factors relevant to fair allocation).

Ruth Sullivan, *The Construction of Statutes*, 7th ed (Toronto: LexisNexis Canada, 2022) at 185.  
*Act*, s 45-50.  
*Regulation*, s 35(2).

50 In the present Case, the appeal decision underemphasized this crucial purpose, and the polluter pays principle; instead, the Justice determined that creating an incentive for the timeliness of remediation was paramount. The Court of Appeal’s reasoning aimed to avoid discouraging future “responsible persons” who were considering remediating their sites, justifying this on the grounds that an objective of the *Act* was to ensure timely remediation.

Appellate Reasons at paras 56, 58.

51 Speedy remediation has been contemplated in several cases as a related purpose of the *Act*, but it is not the primary objective of the *Act*. The possibility of incentivizing timely remediation should not trump the foundational polluter pays principle which informs the *Act*.

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

52 The mechanism by which the *Act* functions to address timely remediation is not the creation of an incentive structure. The legislative scheme is structured as a command-and-control regime, for which delays in remediation can attract orders or direct government intervention. In applying a purposive interpretation of the *Act* in this case, the Court should consider the relevant subsection in the context of the overall contaminated sites regime. In that context, while timely remediation of pollution is a purpose of the *Act*, it does not need to take priority over other objectives more closely tied to the purpose of the portion of the statutory regime at issue in this case. A purposive interpretation that emphasises the polluter pays principle would lead the Court to consider the benefit under subsection 35(2)(f) of the *Regulation* and not prioritise the timeliness of remediation through this portion of the regime.

Maria López-Gamero, José F. Molina-Azorín, and Enrique Claver-Cortés, “The Potential of Environmental Regulation to Change Managerial Perception, Environmental Management, Competitiveness and Financial Performance” *J of Cleaner Production* 18:10 (2010) 963 at 964.  
*Act*, s 48.

**(ii) The corporate veil should be pierced to consider Victory Motors Ltd.'s *de facto* purchase of the VM site under subsection 35(2)(a) of the *Regulation***

53 Under subsection 35(2)(a) of the *Regulation*, courts can consider the price paid for a site in allocating liability. However, the VM site was not directly acquired by any parties. The Appellants acquired the site through an acquisition of Victory Motors. The Jansen principals have acquired and controlled Victory Motors through Victory Motors Ltd., which they incorporated to purchase the shares of Victory Motors.

Trial Reasons at para 70.  
*Fraser 2015* at para 36.

54 On appeal, the Court found that the Jansen principals acquired control over the VM site through the acquisition of Victory Motors rather than through a purchase of the site itself. The Court held that the purchase could not be considered because the corporate distinctions between the Jansen principals and Victory Motors Ltd. had to be maintained per *Salomon v Salomon & Co*. As a result, the Court declined to consider subsection 35(2)(a) of the *Regulation* in the present case.

Appellate Reasons at para 64.  
*Salomon v Salomon & Co*, [1897] AC 22.



55 The Supreme Court of Canada in *Kosmopoulos v Constitution Insurance Co* clarified that a Court can dissolve corporate distinctions when necessary. Doing so is referred to as piercing the corporate veil. Veil piercing is a broad doctrine not informed by one singular principle. Instead, veil piercing ensures that a separate legal personality does not enable fraudulent activity or further any unjust purpose. When a corporation is a shell, the mere agent or puppet of its controlling shareholder or a parent corporation, a Court can pierce the corporate veil.

*Kosmopoulos v Constitution Insurance Co*, [1987] 1 SCR 2, at para 10.

56 Veil piercing is applied on a case-by-case basis dependent on the facts and the injustice achieved by maintaining corporate distinctions.

LCB Gower, *Modern Company Law*, 4th ed (London: Stevens & Sons, 1979) at 138.  
*Kosmopoulos* at paras 10-11.

57 Victory Motors is merely a puppet for the Jansen principals and they have improperly used corporate distinctions to circumvent the fair allocation of responsibility under the *Act* and the *Regulation*.

58 The Jansen family acquired all the shares of Victory Motors to maintain control of the litigation and to acquire the VM site. At trial, Mr. Jansen confirmed his intentions to obtain the shares of Victory Motors.

“[Mr. Jansen] stated that he arranged for the purchase of the shares of Victory Motors to, in his words, get control of the litigation relating to the remediation of the contaminated sites.”

Trial Reasons at para 70.

59 Similarly, in *Fraser Valley 2015*, the Court found that Mr. Jansen created Victory Motors Ltd. to purchase Victory Motors so as to acquire the VM site and to control the litigation concerning the recovery of remediation costs.

“Notwithstanding these considerable disadvantages, the property did sell: to a company created for that purpose by the owner of the Jansen property, which had also proved unsellable due to the contamination from the Victory Motors property. Why did Mr. Jansen buy? Because it would give Jansen Industries control of the litigation it had commenced arising from the contamination.”

*Fraser Valley 2015* at para 36.

60 The Court should pierce the corporate veil and consider the assets of Victory Motors as being purchased by the Jansen principals.

61 A Court can pierce the corporate veil to fairly apportion liability or to consider the assets of a related corporation or a shareholder. For example, in *Borden Ladner Gervais v Sinclair et al* the Court considered piercing the corporate veil to allow a property to be transferred to a creditor to satisfy an outstanding debt by a Defendant. The Court pierced the veil in this case as the corporation acted only as a shell for the Defendant.

*Borden Ladner Gervais v Sinclair et al*, 2013 ONSC 7640 at para 18.  
*Covert et al v Minister of Finance of Nova Scotia* [1980] 2 SCR 774 at 492.

62 In the case at bar, Victory Motors Ltd. is merely a corporate name under which the principals of Jansen are operating. This structure allows them to conduct litigation in their own name, preventing the Court from considering the purchase price of Victory Motors under subsection 35(2)(a) while mitigating the consequences of Victory Motors' contaminating activity as a factor under the *Regulation*. By piercing the veil, the Court can apply subsection 35(2)(a) to consider the allocation of responsibility under the *Regulation* without being hindered by the current corporate distinctions, which ultimately amount to Victory Motors being an alter-ego for Jansen. The Court should pierce the corporate veil to remedy this unjust benefit.

63 In this circumstance, the Respondent's share of the costs of remediation should be reduced to avoid the Appellant gaining an unfair benefit. This type of windfall benefit was considered unjust both at trial and in *JJ Properties*. A developer who acquires a site with knowledge that it was contaminated should be required to absorb the full cost of remediating contamination when the remediation increases the value of the property in an amount in excess of the remediation costs. This is because the developer already benefited from the low price of the land and recouped the cost of their investment; recovery from other "responsible persons" would constitute an unfair windfall.

Trial Reasons at paras 109-111.  
*JJ Properties* at paras 191-193.

64 In this case, the unfair benefit acquired by Victory Motors Ltd. is that it can recover the costs of remediation while simultaneously enjoying an increase in the VM site value after knowingly purchasing a contaminated site. The Appellants are benefiting from the transaction more than the costs of remediation. Lifting the corporate veil allows this Court to consider the low price Victory Motors Ltd. paid to gain control of the VM site and the subsequent increase in the property's value.

**(iv) Application of subsection 35(2)(b) would increase the liability of Victory Motors**

65 The application of subsection 35(2)(b) of the *Regulation* would also increase the portion of the Recovery Costs paid by the Appellants. The subsection states that that the Court should consider:

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

*Regulation*, s 35(2)(b).

66 At Trial, Justice Sewell stated that there was a complete lack of due diligence on the part of Victory Motors who allowed 18 years of contamination activity by failing to decommission the underground gasoline storage tanks on site. This period is the longest ongoing period of contamination out of the three most recent operators of the VM site. Furthermore, it is almost double the period during which the Respondent contaminated the site. The considerable contamination by Victory Motors logically requires that their allocation of responsibility be at least double the allocation to the Respondent.

Trial Reasons at para 5-7, 122.  
Appellate Reasons at para 42.

**(vi) The benefit of the Certificate of Compliance can be considered under subsection 35(2)(f) without piercing the corporate veil**

67 If this Court does not find lifting the corporate veil to be appropriate, it can nevertheless consider the benefit the Appellants derived from the Certificate of Compliance under subsection 35(2)(f). Subsection 35(2)(f) of the *Regulation* is the broadest category for considering the allocation of responsibility under the *Act*, and considers any additional factors relevant to a fair allocation of responsibility for remediating a contaminated site.

*Regulation*, s 35(2)(f).

68 “Responsible persons” who own a contaminated site benefit under the *Act* when they receive a Certificate of Compliance. Those who contaminated a site and benefited from the remediation of their sites should bear a greater share of the responsibility for remediation. When other parties are also required to pay the costs of remediation, this benefit should be considered under a broad purposive interpretation of subsection 35(2)(f). As Justice Sewell, stated,

“In the context of Victory Motors [Ltd]’s failure to act responsibly I also do not consider it to be fair for [Victory Motors Ltd] to obtain the benefit of the Certificate of Compliance without bearing a substantial portion of the costs of obtaining it.”

Trial Reasons at para 152.

69 Similarly, on appeal, Justice Bauman found that an owner of a contaminated site who contributed to the contamination of said site enjoys the benefit of remediation of that site. However, Justice Bauman found that in allocating responsibility under the scheme, considering this benefit would discourage owners from remediating their site, which runs contrary to an objective of the *Act*.

Appellant Reasons at para 56.

70 It is more plausible that “responsible persons” who have contaminated their sites will still seek to remediate despite having a higher allocation of responsibility than other parties. This is because owners still benefit from remediation even if their allocation of responsibility is higher. This benefit is the remediation of their site with its associated benefits of saleability and the increased property value. Thus, site owners who are also persons responsible for remediation are still incentivized to remediate their sites.

**(vii) The Appellants have gained approximately \$350,000 from the Certificate of Compliance**

71 *Seaspan* illustrates concretely how to calculate the benefit gained from remediation and therefore a Certificate of Compliance. The courts below did not have the assistance of this case when determining the allocation of responsibility for reasonable remediation costs.

72 *Seaspan ULC* was the owner of a property that was contaminated both from activity prior to its purchase in 1965 and from its own activities on the site after 1965. The Ministry of Environment identified that the site was contaminated in the early 1990s, but *Seaspan* ignored requests to undergo voluntary remediation. Once the *Act* came into effect, the Ministry issued a remediation order under section 48 to *Seaspan* in 2010 as a “responsible person”. *Seaspan* had only completed half of its remediation at the time of this appeal, a period of over 12 years.

*Seaspan* at paras 6-12.

73 The case concerned a dispute over an assessment of *Seaspan*’s property value. *Seaspan* argued that the Court should consider the anticipated cost of remediation and deduct it from the assessed value of the Property to lower its property tax for the contaminated land. The parties agreed that the value of any improvements to the property would not be at issue, only the value of

land subject to fee simple title as vacant land. The agreed-upon formula to estimate the value of contaminated land was:

$$\text{Impaired Value} = \text{Unimpaired Value} - \text{Cost Effect} - \text{Use Effect} - \text{Risk Effect}$$

*Seaspan* at para 16.

74 To calculate the final Impaired Value of land, an assessment of the land value if it were not contaminated is needed (“Unimpaired Value”). From this value, the extent of remediation costs a hypothetical purchaser may be liable for (“Cost Effect”) is deducted, as is the impairment of the highest and best use of the land caused by the contamination (“Use Effect”). Finally, if there is any risk for the hypothetical purchaser being liable for remediation (“Risk Effect”), it is also accounted for.

*Seaspan* at para 17.

75 The *Act* intends to attach the liability for costs of remediating contamination to “responsible persons” and to relieve potential owners of that liability. Remediation orders absolve subsequent purchasers of liability for remediation, and therefore there is a benefit of the remediation order that runs with the land and accrues to a potential purchaser of the land: the “responsible person” continues to bear the costs of remediation. In *Seaspan*, the assessed value of the land did not go down. This is because as the current owner of the property, and having received a remediation order, *Seaspan* bore the financial burden to remediate the land. As a result, it did not obtain a benefit which could reduce the assessed value. However, this is not the case for those undertaking voluntary remediation.

*Seaspan* at paras 46, 49-51.

76 “Responsible persons” undertaking voluntary remediation are given benefits when obtaining a Certificate of Compliance. The first benefit is a reduction in assessed property value which accrues as a reduction in property tax. The second benefit is the ability to sell the contaminated property to a hypothetical purchaser at a fair market price without any risk of litigation stemming from contamination or remediation costs. When applied to the case at bar, it is possible to determine that Victory Motors and the Jansen principals are obtaining these benefits because of the voluntary remediation they completed in 2012.

77 The first benefit can be determined using the formula of Impaired Value from *Seaspan* based on the remediation costs accrued for the VM site in obtaining the Certificate of Compliance

and the 2012 market values listed in *Fraser Valley 2017*. By subtracting the Impaired Value of the VM site from the Unimpaired Value, the benefit of decreased assessed property value from obtaining the Certificate of Compliance can be calculated.

Trial Reasons at para 32.  
*Fraser Valley 2017* at paras 27-28.

78 In the case at bar, for the VM site, the Unimpaired value is \$1,178,090, based on an income approach, if the VM site was renovated to be a two-story mixed-use development. The Cost Effect is \$259,218, reflecting the remediation costs for the VM site. The Use Effect is \$98,090, determined by subtracting the value of highest and best use of the contaminated land based on an income approach (\$1,080,000 value of the site with a one-story, multi-tenant building) from the Unimpaired Value. The Risk Effect is \$0 because the Appellants have received a Certificate of Compliance. Based on the calculations in *Seaspan*, this indicates that:

$$\begin{aligned} \text{Impaired Value} &= \$1,178,090 - \$259,218 - \$98,090 - \$0 = \$820,782 \\ \text{Benefit from the Voluntary Remediation/Certificate of Compliance} &= \$1,178,090 - \\ &\$820,782 = \$357,308 \end{aligned}$$

The reduced value of the VM site caused by the Certificate of Compliance is therefore \$357,308, the benefit of which will accrue in the form of reduced property tax.

79 The second benefit, in the form of an unimpeded sale, can also be calculated using the formula of Impaired Value from *Seaspan* and the property values described above. In this potential sale, the Cost and Risk Effects of the VM site are brought down to a value of \$0 after obtaining a Certificate of Compliance following voluntary remediation. Therefore, the benefit is realised through the ability to sell the contaminated property at a fair market price for its highest and best use based on an income approach.

$$\text{Impaired Value} = \$1,178,090 - \$0 - \$98,090 - \$0 = \$1,080,000$$

80 After undertaking this assessment as set out in *Seaspan*, the benefits from obtaining the Certificate of Compliance for the VM site become objective values that can be separated from the “bargain price” share purchase of Victory Motors and the improvements made to the property. This assessment provides a clear valuation of the Certificate of Compliance’s benefit to owners of the property.

81 Courts should consider the benefit of obtaining a Certificate of Compliance under subsection 35(2)(f) in light of the jurisprudentially established objective of the *Act* to ensure

polluters pay their fair share. The *Seaspan* fee simple market value assessment for contaminated land provides a clear valuation of the benefits accrued by Victory Motors. This benefit is greater than the costs of remediation.

82 Therefore, a finding in favour of the Appellants will allow them to use their complex business structures to unfairly extract a windfall profit in the case at bar. Victory Motors is using its position as the owner and major polluter of the VM site to extract a benefit from the Certificate of Compliance in excess of the costs from undertaking a voluntary remediation. In taking control of this action, launched under subsection 47(5), the Appellants are unfairly increasing the profit of this remediation by seeking further remediation costs from other “responsible persons”. Ultimately, the *Act* does not only aim to remediate pollution: it also mandates a fair allocation of the costs to pay for it. If you pollute your own site and profit from it, you bear the burden of cleaning it up. Not to consider the benefit the Appellants gain through the Certificate of Compliance under subsection 35(2) would be contrary to this principle of fairness which underlies the polluter pays principle.

**IV SUBMISSIONS IN SUPPORT OF COSTS**

83 The Respondent requests party and party costs pursuant to Rule 82(1) of the *Rules of the Supreme Court of Canada*.

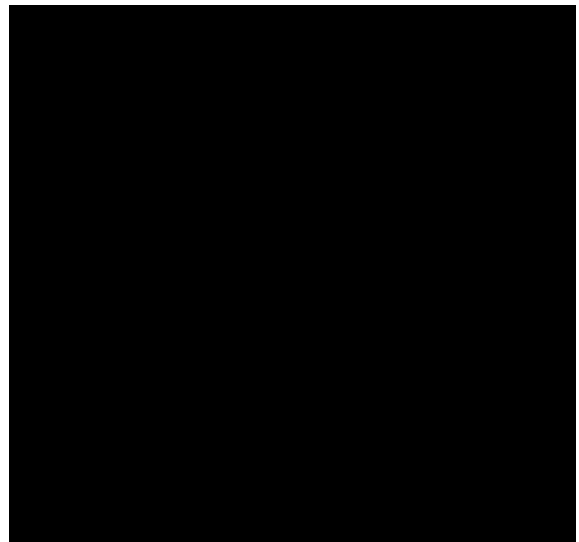
*Rules of the Supreme Court of Canada*, SOR/2002-156.

**V ORDER SOUGHT**

84 It is respectfully requested that the appeal be dismissed on the question of litigation costs being considered coverable under the *Act*.

85 It is further requested that the allocation of responsibility for remediation costs be sent back to trial in light of the Respondent's interpretation of subsection 35(2) of the *Regulation*.

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



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



## VI TABLE OF AUTHORITIES

### Cases & Secondary Sources

Case	Paragraph No. In Factum
<i>Borden Ladner Gervais v Sinclair et al</i> , 2013 ONSC 7640 at para 18.	61.
<i>Canadian National Railway Co v ABC Recycling Ltd</i> , 2006 BCCA 429 at 5, 10-11.	30, 36.
<i>Covert et al v Minister of Finance of Nova Scotia</i> [1980] 2 SCR 774 at 492.	61.
<i>Domovitch v Willows</i> , 2006 BCSC 1068 at 19.	28.
<i>First National Properties Ltd v Northland Road Services Ltd</i> , 2008 BCSC 569 at 55.	24.
<i>Housen v Nikolaisen</i> , 2002 SCC 33 at 8, 37.	19-20.
<i>Jansen Industries 2010 Ltd v Victory Motors (Abbotsford) Ltd</i> , 2019 BCSC 1621 at 5-7, 24, 32, 58, 64, 70, 101, 109-111, 116, 122, 148, 152	20, 37, 40, 42-44, 53, 58, 63, 66, 68, 77.
<i>JI Properties Inc v PPG Architectural Coatings Canada Inc</i> , 2015 BCCA 472 at 29.	24, 47, 63.
<i>Kosmopoulos v Constitution Insurance Co</i> , [1987] 1 SCR 2 at 10-11.	55-56.
<i>Mahjoub v Canada (Citizenship and Immigration)</i> , 2017 FCA 157 at 61-65.	20.
<i>Rolin Resources Inc v CB Supplies Ltd</i> , 2018 BCSC 2018 at 73, 85, 208, 282-285.	24, 32, 43, 47.
<i>Salomon v Salomon &amp; Co</i> , [1897] AC 22.	54.
<i>Seabright Holdings Ltd v Imperial Oil Ltd</i> , 2003 BCCA 57 at 31.	24, 47
<i>Seaspan ULC v North Vancouver (District)</i> , 2022 BCCA 433 at 6-12, 16-17, 46, 49-51.	13, 72-75.
<i>Victory Motors (Abbotsford) Ltd v Assessor of Area No 15 - Fraser Valley</i> , 2017 BCCA 295 at 4, 27-28.	13, 77.

<i>Victory Motors (Abbotsford) Ltd v British Columbia</i> (Assessor of Area No 15 - Fraser Valley), 2015 BCSC 1230 at 36.	12, 20, 59.
<i>Victory Motors (Abbotsford) Ltd v Actton Super-Save Gas Stations Ltd</i> , 2021 BCCA 129 at 32, 42, 56-57, 64, 66, 92-105, 124, 128, 136, 138-141, 144-145.	3, 14-15, 19, 24-26, 28-30, 32, 36-38, 40, 43-44, 50, 54, 66.
<i>Workshop Holdings Ltd v CAE Machinery Ltd</i> , 2003 BCCA 56 at 41.	24, 47.
<i>Workshop Holdings Limited v CAE Machinery Ltd</i> , 2005 BCSC 631 at 69.	51.

Secondary Sources	Paragraph No. In Factum
“Bill 57, Environmental Management Act”, 2nd reading, British Columbia, Legislative Assembly, <i>Official Report of the Debates of the Legislative Assembly (Hansard)</i> , 16-12, (8 October 2003) at 7273 (Mike Hunter).	2.
British Columbia, Legislative Assembly, Official Report of the Debates of the Legislative Assembly (Hansard), (8 May 2023) at 11287 (George Heyman).	2.
LCB Gower, <i>Modern Company Law</i> , 4th ed (London: Stevens & Sons, 1979) at 138.	56.
Maria López-Gamero, José F. Molina-Azorín, and Enrique Claver-Cortés, “The Potential of Environmental Regulation to Change Managerial Perception, Environmental Management, Competitiveness and Financial Performance” <i>J of Cleaner Production</i> 18:10 (2010) 963 at 964.	52.
Ruth Sullivan, <i>The Construction of Statutes</i> , 7th ed (Toronto: LexisNexis Canada, 2022) at 185.	3, 48-49.
Sowinski, J. Michael. Environmental Liability Transfer in British Columbia: Evaluation and Recommendations for Options to Implement the 14th Principle. Environmental Management Division, 2011.	45.

## VII LEGISLATION

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

### Division 3 — Liability for Remediation

#### Persons responsible for remediation of contaminated sites

**45** (1) Subject to [section 46](#) [*persons not responsible for remediation*], the following persons are responsible for remediation of a contaminated site:

- (a) a current owner or operator of the site;
- (b) a previous owner or operator of the site;
- (c) a person who
  - (i) produced a substance, and
  - (ii) by contract, agreement or otherwise caused the substance to be disposed of, handled or treated in a manner that, in whole or in part, caused the site to become a contaminated site;
- (d) a person who
  - (i) transported or arranged for transport of a substance, and
  - (ii) by contract, agreement or otherwise caused the substance to be disposed of, handled or treated in a manner that, in whole or in part, caused the site to become a contaminated site;
- (e) a person who is in a class designated in the regulations as responsible for remediation.

(2) In addition to the persons referred to in subsection (1), the following persons are responsible for remediation of a contaminated site that was contaminated by migration of a substance to the contaminated site:

- (a) a current owner or operator of the site from which the substance migrated;
- (b) a previous owner or operator of the site from which the substance migrated;
- (c) a person who
  - (i) produced the substance, and
  - (ii) by contract, agreement or otherwise caused the substance to be disposed of, handled or treated in a manner that, in whole or in part, caused the substance to migrate to the contaminated site;
- (d) a person who

- (i) transported or arranged for transport of the substance, and
  - (ii) by contract, agreement or otherwise caused the substance to be disposed of, handled or treated in a manner that, in whole or in part, caused the substance to migrate to the contaminated site.
- (3) A secured creditor is responsible for remediation of a contaminated site if
- (a) the secured creditor at any time exercised control over or imposed requirements on any person regarding the manner of treatment, disposal or handling of a substance and the control or requirements, in whole or in part, caused the site to become a contaminated site, or
  - (b) the secured creditor becomes the registered owner in fee simple of the real property at the contaminated site.
- (4) A secured creditor is not responsible for remediation if it acts primarily to protect its security interest, including, without limitation, if the secured creditor
- (a) participates only in purely financial matters related to the site,
  - (b) has the capacity or ability to influence any operation at the contaminated site in a manner that would have the effect of causing or increasing contamination, but does not exercise that capacity or ability in such a manner as to cause or increase contamination,
  - (c) imposes requirements on any person, if the requirements do not have a reasonable probability of causing or increasing contamination at the site, or
  - (d) appoints a person to inspect or investigate a contaminated site to determine future steps or actions that the secured creditor might take.

#### **Persons not responsible for remediation**

- 46** (1) The following persons are not responsible for remediation of a contaminated site:
- (a) a person who would become a responsible person only because of an act of God that occurred before April 1, 1997, if the person exercised due diligence with respect to any substance that, in whole or in part, caused the site to become a contaminated site;
  - (b) a person who would become a responsible person only because of an act of war if the person exercised due diligence with respect to any substance that, in whole or in part, caused the site to become a contaminated site;
  - (c) a person who would become a responsible person only because of an act or omission of a third party, other than
    - (i) an employee,
    - (ii) an agent, or
    - (iii) a party with whom the person has a contractual relationship,

if the person exercised due diligence with respect to any substance that, in whole or in part, caused the site to become a contaminated site;

(d) an owner or operator who establishes that

- (i) at the time the person became an owner or operator of the site,
  - (A) the site was a contaminated site,
  - (B) the person had no knowledge or reason to know or suspect that the site was a contaminated site, and
  - (C) the person undertook all appropriate inquiries into the previous ownership and uses of the site and undertook other investigations, consistent with good commercial or customary practice at that time, in an effort to minimize potential liability,
- (ii) if the person was an owner of the site, the person did not transfer any interest in the site without first disclosing any known contamination to the transferee, and
- (iii) the owner or operator did not, by any act or omission, cause or contribute to the contamination of the site;

(e) an owner or operator who

- (i) owned or occupied a site that at the time of acquisition was not a contaminated site, and
- (ii) during the ownership or operation, did not dispose of, handle or treat a substance in a manner that, in whole or in part, caused the site to become a contaminated site;

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

- (i) transported or arranged to transport the substance to the site, if the owner or operator of the site was authorized under an Act to accept the substance at the time of its deposit, and
- (ii) received permission from the owner or operator described in subparagraph (i) to deposit the substance;

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

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

- (h) a person who provides assistance respecting remediation work at a contaminated site, unless the assistance is carried out in a negligent fashion;
- (i) a person who provides advice respecting remediation work at a contaminated site unless the advice is negligent;
- (j) a person who owns or operates a contaminated site that was contaminated only by the migration of a substance from other real property not owned or operated by the person;
- (k) an owner or operator of a contaminated site containing substances that are present only as natural occurrences not assisted by human activity and if those substances alone caused the site to be a contaminated site;
- (l) subject to subsection (2), a government body that possesses, owns or operates a roadway, highway or right of way for sewerage or waterworks on a contaminated site, to the extent of the possession, ownership or operation;
- (m) a person who was a responsible person for a contaminated site for which a certificate of compliance was issued and for which another person subsequently proposes or undertakes to
  - (i) change the use of the contaminated site, and
  - (ii) provide additional remediation;
- (n) a person who is in a class designated in the regulations as not responsible for remediation.

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

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

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

### **General principles of liability for remediation**

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

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

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

- (a) costs of preparing a site disclosure statement,
- (b) costs of carrying out a site investigation and preparing a report, whether or not there has been a determination under [section 44](#) [*determination of contaminated sites*] as to whether or not the site is a contaminated site,
- (c) legal and consultant costs associated with seeking contributions from other responsible persons, and
- (d) fees imposed by a director, a municipality, an approving officer or the [regulator](#) under this Part.

(4) Liability under this Part applies

- (a) even though the introduction of a substance into the environment is or was not prohibited by any legislation if the introduction contributed in whole or in part to the site becoming a contaminated site, and
- (b) despite the terms of any cancelled, expired, abandoned or current permit or approval or waste management plan and its associated operational certificate that authorizes the discharge of waste into the environment.

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

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

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

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

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

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

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

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

### **Remediation orders**

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

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

- (a) undertake remediation;
- (b) contribute, in cash or in kind, towards the costs of another person who has reasonably incurred costs of remediation;
- (c) give security, which may include real and personal property, in the amount and form the director specifies.

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

- (a) adverse effects on human health or pollution of the environment caused by contamination at the site;
- (b) the potential for adverse effects on human health or pollution of the environment arising from contamination at the site;
- (c) the likelihood of the responsible persons or other persons not acting expeditiously or satisfactorily in implementing remediation;
- (d) in consultation with the chief permitting officer designated under the *Mines Act*, the requirements of a permit issued under [section 10](#) of that Act;
- (e) in consultation with the [regulator](#), the adequacy of remediation being undertaken under [section 41](#) of the *Energy Resource Activities Act*;



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

(f) other factors prescribed in the regulations.

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

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

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

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

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

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

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

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

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

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

(8) A person who receives a remediation order under subsection (1) or notice of a remediation order under subsection (13) must not, without the consent of the director, knowingly do anything that diminishes or reduces assets that could be used to satisfy

the terms and conditions of the remediation order, and if the person does so, the director despite any other remedy sought, may commence an action against the person to recover the amount of the diminishment or reduction.

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

- (a) human health, given current and anticipated human exposure, or
- (b) the environment.

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

- (a) disposing of real or personal assets, or
- (b) subdividing land

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

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

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

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

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

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

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

## Contaminated site regulations

- 62 (1) Without limiting section 138 (1) [*general authority to make regulations*], the Lieutenant Governor in Council may make regulations as follows:
- (a) requiring disclosures by persons not specified in [section 40](#) [*site disclosure statements*], including, without limitation, disclosures by lessors and lessees;
  - (b) prescribing fees for the purposes of this Part and Part 5 [*Remediation of Mineral Exploration Sites and Mines*] including, without limitation, fees for assessing or reviewing site disclosure statements, site investigation reports and remediation plans and reports, whether or not prepared under a remediation order;
  - (c) governing the content of the site registry and the management of and procedures relating to the site registry, including requirements for public access to the registry and for persons to submit information to the registrar;
  - (d) prescribing the information required for the purposes of section 43 (2) (f) [*site registry*];
  - (e) designating classes of persons as responsible persons in addition to those referred to in [section 45](#) [*persons responsible for remediation of contaminated sites*];
  - (f) designating classes of persons who are not responsible persons in addition to those referred to in [section 46](#) [*persons not responsible for remediation*];
  - (f.1) for the purposes of section 40 (2) (a), respecting the activities or level of activity that constitutes decommissioning a site or ceasing operations;
  - (g) prescribing requirements respecting the obligation of a vendor to provide a site disclosure statement under section 40 (6);
  - (h) respecting allocation panels, including, without limitation,
    - (i) governing the procedures and deliberations of an allocation panel, and
    - (ii) establishing the fees payable to allocation panel members;
  - (i) prescribing the information that must be provided to, and the procedures to be followed by, a director making a determination under [section 50](#) [*minor contributors*];
  - (j) establishing requirements for the purposes of [section 52](#) [*public consultation and review*], including without limitation, requirements that consultations in respect of prescribed classes of remediation be facilitated by a medical health officer;
  - (k) [\[Repealed 2020-3-5.\]](#)
  - [\(k.1\) respecting analysis of soil for the purposes of section 55 \(1.1\) \(a\);](#)

- (k.2) prescribing persons for the purposes of section 55 (1.1) (b);
  - (k.3) respecting the preparation of summaries of analyses for the purposes of section 55 (1.2) (a) (iv);
  - (k.4) prescribing the form and manner in which notice is given for the purposes of section 55 (1.2) (b);
  - (k.5) prescribing dates for the purposes of section 55 (1.2) (c);
  - (k.6) setting out amounts of soil for the purposes of section 55 (1.4);
  - (k.7) respecting notice that must be given, in addition to the notice required under section 55 (1.1), in respect of
    - (i) the removal of soil from sites that have been used for a specified industrial or commercial use, or
    - (ii) the deposit of soil referred to in subparagraph (i) of this paragraph;
  - (k.8) for the purposes of section 55.1 (2), prescribing the total amount of relocated industrial or commercial site soil present at a site, and for this purpose, the amount prescribed may not be less than 5 000 m<sup>3</sup>;
  - (l) establishing transitional requirements for remediation that began before April 1, 1997;
  - (m) authorizing a director to require a report of a qualified professional and specify the requirements of the report before exercising the director's authority under this Part;
  - (n) prescribing factors that must be considered in determining reasonable costs of remediation, circumstances in which costs of remediation are considered reasonable and evidentiary matters for the purposes of an apportionment of remediation costs by a court under [section 47](#) [*general principles of liability for remediation*] or by the director in a remediation order under [section 48](#) [*remediation orders*];
  - (o) respecting compensation payable by the government under section 48 (7) [*remediation orders*];
  - (p) prescribing procedures that must be followed and criteria that must be considered by a director under section 58 (1) [*orphan sites*];
  - (q) exempting any person from any requirement under this Part in circumstances and on conditions that the Lieutenant Governor in Council may prescribe;
  - (r) respecting modifications, interpretive guidelines and procedures for any exemptions set out in [section 46](#) [*persons not responsible for remediation*].
- (2) [Section 139](#) [*regulations — general rules*] applies for the purpose of making regulations under this section.

*Contaminated Sites Regulation*, BC Reg 375/96 [*Regulation*].

### **Determining compensation under section 47 (5) of the Act**

**35** (1) For the purposes of determining compensation payable under section 47 (5) of the Act, a defendant named in a cost recovery action under that section may assert all legal and equitable defences, including any right to obtain relief under an agreement, other legislation or the common law.

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

- (a) the price paid for the property by the person seeking cost recovery;
- (b) the relative due diligence of the responsible persons involved in the action;
- (c) the amount of contaminating substances and the toxicity attributable to the persons involved in the action;
- (d) the relative degree of involvement, by each of the persons in the action, in the generation, transportation, treatment, storage or disposal of the substances that caused the site to become contaminated;
- (e) any remediation measures implemented and paid for by each of the persons in the action;
- (f) other factors relevant to a fair and just allocation.

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

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

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

[am. B.C. Regs. 322/2004 and 324/2004, s. 35.]

*Rules of the Supreme Court of Canada, SOR/2002-156.*

**Payment of costs**

**47** The Court may, in its discretion, order the payment of the costs of the court appealed from, of the court of original jurisdiction, and of the appeal, or any part thereof, whether the judgment is affirmed, or is varied or reversed.

R.S., c. S-19, s. 49

**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

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SUPREME ENVIRONMENTAL MOOT  
COURT OF CANADA

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

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**TEAM # 2024-07**

[REDACTED]

[REDACTED]

[REDACTED]

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