

THE PROBLEM

The competition case is an appeal to the Supreme Environmental Moot Court of Canada of the British Columbia Court of Appeal (“BCCA”) decision in *Victory Motors (Abbotsford) Ltd. v. Actton Super-Save Gas Stations Ltd.*, 2021 BCCA 129. The Supreme Environmental Moot Court of Canada is a Canadian appellate court of last resort. The doctrines of precedent and *stare decisis* apply as if it were the Supreme Court of Canada.

INSTRUCTIONS:

Between 2009 and 2010, Jansen Industries 2010 Ltd. (“Jansen”) and Victory Motors (Abbotsford) Ltd. (“Victory Motors”) discovered each of their properties were contaminated. The contamination originated from underground gasoline storage tanks (“USTs”) at the Victory Motors property. The Victory Motors property was originally a gas station from approximately 1940 to approximately 1994.

Jansen and Victory Motors brought actions against Actton Super-Save Gas Stations Ltd. (“Super-Save”), Shell Canada Ltd. (“Shell”), and Chevron Canada Ltd. (“Chevron”). Super-Save, Shell and Chevron had each previously operated the gas station at the Victory Motors property. The Plaintiffs settled the claims with Chevron and Shell. The Plaintiffs pursued the claim against Super-Save.

Prior to trial, the Plaintiffs completed remediation and acquired Certificates of Compliance pursuant to section 53(3) of the *Environmental Management Act* (“EMA”).

The action against Super-Save focused on the recovery of remediation costs \$395,706 and legal fees of \$150,000. Victory Motors further claimed the costs of removing the USTs, loss of rental income during the remediation period, and potential costs incurred as a result of future litigation.

The British Columbia Supreme Court (“BCSC”) awarded remediation costs to the Plaintiffs, but refused to award legal fees as recoverable costs of remediation.



Victory Motors and Jansen appealed on the grounds that:

- ◆ contrary to the intent and purpose of the EMA to advance the "polluter pays" principle, the BCSC's decision effectively undermines the incentive for an owner who might be a "responsible person" under the EMA to remediate its own lands, and
- ◆ the BCSC refused to award legal fees incurred as a part of the remediation.

On appeal, the BCCA held that the BCSC erred in its fairness analysis by taking into account the benefit enjoyed by Victory Motors in obtaining a Certificate of Compliance for its property. The issue on allocation of liability as between Victory Motors and Super-Save was remitted back to the trial judge.

The Supreme Environmental Moot Court of Canada has granted leave to appeal the decision of the BCCA on the following questions:

- 1 May a court take into account 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 BC EMA?
- 2 Are legal costs associated with remediation or with pursuing litigation recoverable under the BC EMA, and does the answer differ depending upon whether the person seeking cost recovery is a "responsible person" under the BC EMA, s. 47(1) or "any person" under the BC EMA, s. 47(5)?