File No.

IN THE SUPREME COURT OF CANADA
(ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO)

BETWEEN:

JOHN THORDARSON and THORCO CONTRACTING LIMITED

Applicants
(Respondents)

- and –

MIDWEST PROPERTIES LTD.

Respondent
(Appellant)

- and –

MINISTRY OF THE ENVIRONMENT AND CLIMATE CHANGE

Intervener

APPLICATION FOR LEAVE TO APPEAL

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NOTICE OF APPLICATION FOR LEAVE TO APPEAL

TAKE NOTICE that John Thordarson and Thorco Contracting Limited apply for leave to appeal to the Court, under sections 40 (1) and 43 (1) of the *Supreme Court Act* and rule 25(1) of the Rules of the Supreme Court of Canada from the judgment of the Court of Appeal for Ontario in file number C56758 made November 27, 2015, and for an Order granting leave to appeal, with costs, or any further or other order that the Court may deem appropriate;

AND FURTHER TAKE NOTICE that this application for leave is made on the following grounds:

ISSUE 1: Interpretation of Section 99 of the *Environmental Protection Act* – does it apply to historical contamination?

Should section 99 of the EPA be interpreted to apply to historical contamination even where there is no identifiable spill event? Is historical contamination properly classified as a "spill"?

ISSUE 2: *Caveat Emptor* – can a purchaser circumvent this doctrine by suing its neighbour?

Are purchasers relieved from conducting their due diligence and investigation?

ISSUE 3: Double recovery, measure of damages and unjust enrichment – can a plaintiff recover both civilly and statutorily for the same restoration costs or does this result in an unjust enrichment? How are damages measured in environmental contamination cases?

Is a plaintiff entitled both to have its property remediated, through an administrative order, and to receive damages for the costs of that same remediation? When is it appropriate for the courts to take into consideration "stigma," restoration costs, and diminution in property value – and what weight should be given to each?

Dated at London, Ontario this 25th day of January, 2016.

SIGNED BY (*signature of counsel or party or agent*) Paula Lombardi

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NOTICE TO THE RESPONDENT OR INTERVENER: A respondent or intervener may serve and file a memorandum in response to this application for leave to appeal within 30 days after the day on which a file is opened by the Court following the

filing of this application for leave to appeal or, if a file has already been opened, within 30 days after the service of this application for leave to appeal. If no response is filed within that time, the Registrar will submit this application for leave to appeal to the Court for consideration under section 43 of the *Supreme Court Act*.

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Case Name:
Midwest Properties Ltd. v. Thordarson

Between
Midwest Properties Ltd., Plaintiff, and
John Thordarson and Thorco Contracting Limited, Defendants

[2013] O.J. No. 848

2013 ONSC 775

73 C.E.L.R. (3d) 303

2013 CarswellOnt 2183

Court File No. CV-09-382649

Ontario Superior Court of Justice

A. Pollak J.

Heard: January 7-11, 14, 16-18 and February 15, 2013.
Judgment: February 28, 2013.

(44 paras.)

Environmental law -- Environmental liability -- Civil litigation -- Common law -- Tort -- Negligence -- Private nuisance -- Contaminated land -- Liability for contamination -- Action by property owners for damages for nuisance, negligence and statutory breach dismissed -- Defendants used neighbouring property as storage site for PHC waste -- PHC contaminants had migrated onto plaintiffs' property into soil and groundwater -- Plaintiffs could not recover damages under Environmental Protection Act as defendants had been ordered to remediate property -- No evidence of damage or loss, such as loss in property value, inability to use property to operate business or business losses -- No evidence property not contaminated when plaintiffs acquired it -- No evidence defendants acted recklessly or with disregard for plaintiffs' property rights.

Tort law -- Negligence -- Dangerous things and situations -- Chemicals -- Action by property owners for damages for nuisance, negligence and statutory breach dismissed -- Defendants used neighbouring property as storage site for PHC waste -- PHC contaminants had migrated onto plaintiffs' property into soil and groundwater -- Plaintiffs could not recover damages under Environmental Protection Act as defendants had been ordered to remediate property -- No evidence of damage or loss, such as loss in property value, inability to use property to operate business or business losses -- No evidence property not contaminated when plaintiffs acquired it -- No evidence

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defendants acted recklessly or with disregard for plaintiffs' property rights.

Tort law -- Nuisance -- Liability -- Emissions and contamination -- Action by property owners for damages for nuisance, negligence and statutory breach dismissed -- Defendants used neighbouring property as storage site for PHC waste -- PHC contaminants had migrated onto plaintiffs' property into soil and groundwater -- Plaintiffs could not recover damages under Environmental Protection Act as defendants had been ordered to remediate property -- No evidence of damage or loss, such as loss in property value, inability to use property to operate business or business losses -- No evidence property not contaminated when plaintiffs acquired it -- No evidence defendants acted recklessly or with disregard for plaintiffs' property rights.

Action by property owners for damages for nuisance, negligence and statutory breach. The plaintiffs purchased their property in December 2007. The defendants owned a neighbouring property, which they used as a storage site for petroleum hydrocarbon waste. The plaintiffs' experts opined that PHC contaminants migrated from the defendants' property onto the plaintiffs' property into the soil and the groundwater. The Ministry of the Environment ("MOE") standards were exceeded at some tested locations on the property and the defendants had been ordered by the MOE to investigate the extent of the contamination and remediate the property. The plaintiffs alleged that the defendants were in continuous breach of their obligations under the Environmental Act since 1998. They claimed statutory damages under the EPA as well as damages for nuisance and negligence related to the migration of contamination from the defendants' property. The defendants took the position that there was no recoverable loss by the plaintiffs as they were under an order to remediate the plaintiffs' property. Furthermore, they argued that it was reasonable to conclude that a significant portion of the contamination occurred before July 2007, prior to the plaintiff's owning the property. Finally, they argued that the plaintiffs had not shown any actual harm to the property.

HELD: Action dismissed. The EPA could not be interpreted in a manner to allow for damages for the costs of remediation in circumstances where such remediation had already been ordered under the EPA. Furthermore, the plaintiffs were not entitled to a double recovery arising from the EPA, which would result if their property was remediated pursuant to the MOE order and they were awarded costs of remediation. There was no evidence of damage or loss pursuant to s. 99 of the EPA, such as an actual loss in property value or the inability to use the property to operate the business or business losses. Furthermore, there was no evidence that the plaintiffs acquired a property which was not already damaged and therefore the plaintiffs could not establish that any chemical alteration in the soil or groundwater had occurred in its property. Finally, there was no evidence that the conduct of the defendants was reckless, destructive, persistent, pervasive and heedless of the plaintiffs' physical integrity and property rights.

Statutes, Regulations and Rules Cited:

Environmental Protection Act, R.S.O. 1990, c. E.19, s. 99

Counsel:

Evert Van Woudenberg, for the Plaintiff.

Frank Zechner, for the Defendants.

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1 **A. POLLAK J.**:-- Midwest Properties Ltd. ("Midwest" or the "Plaintiff") became owner of 285 Midwest in December 2007. Midwest claims damages against Thorco Contracting Limited ("Thorco"), and its' principle, John Thordarson (collectively, the "Defendants"), emanating from the migration of contamination from 1700 Midland Avenue onto 285 Midwest. 1700 Midland Avenue has been used by the Defendants as a storage site for petroleum hydrocarbon waste since 1973. Midwest alleges that such contaminants have permeated their soil and groundwater.

2 The Plaintiffs' claims against the Defendants are brought on three different bases: statutory remedy under the *Environmental Protection Act*, R.S.O. 1990, c. E.19 ("*EPA*"), damages for nuisance and negligence, and punitive damages.

3 The Plaintiffs allege that the Defendants have been in continuous breach of their obligations under the *EPA* since 1988. The Plaintiffs' experts have opined that PHC contaminants have migrated from 1700 Midland onto 285 Midwest into the soil and groundwater, and "free product" has been found on the property. The Ministry of the Environment ("MOE") standards are exceeded at some tested locations on their property, and 285 Midwest must ultimately be remediated and protected from more migrating contamination. The Plaintiff submits that damages for the cost of their proposed remediation should be awarded.

4 The MOE has ordered the Defendants to investigate the extent of the contamination of 285 Midwest and to correspondingly remediate the property.

5 The Defendants submit that there is no recoverable loss by the Plaintiff, as they are under an Order of the MOE to remediate 285 Midwest from any contaminants originating from 1700 Midland.

6 The Defendants also submit that it is reasonable, on the evidence, to conclude that a significant portion, or all, of the contamination on 285 Midwest occurred before July 2007, prior to the Plaintiffs' owning 285 Midwest. The Defendants specifically rely on evidence that there were large quantities of liquid waste on 285 Midwest from the late 1990's until 2001. As of 2000, the evidence suggested that liquid waste quantities on 285 Midwest were decreased as a result of the winding down of the Thorco business.

7 There was no evidence on whether the property exceeded MOE standards, with respect to the relevant contaminants, when the Plaintiffs bought the property in December 2007. The evidence was that the Plaintiffs had a Phase I environmental assessment performed at this time, but there was no testing of the soil or the groundwater.

8 I accept the expert evidence of Mr. Bob Tossell for Midwest, who testified that, on the basis of all of the material and testing produced and reviewed by Pinchin Environmental Ltd., the groundwater would flow from 1700 Midland onto 285 Midwest and that the known contamination at 1700 Midland would necessarily migrate onto, and has contaminated, 285 Midwest. There is, however, no evidence as to when such contamination has occurred.

9 The Defendants do not dispute the evidence that shows contamination of certain chemicals on the Midwest property beyond MOE standards. They do, however, dispute the fact that such contamination was caused by contaminants escaping from their property. I do not accept their submission in this regard. Although they advanced a theory that the contamination could have been caused by another property, they did not provide evidence to substantiate such an allegation.

10 The crux of the Defendants' position is that Midwest has not proven any alleged damages. The issue is whether the Plaintiff:

(a) have/ing proven that there are readings of contaminants on some parts of the property in excess of the MOE standards;
(b) but not having proven when such contamination occurred;
(c) is entitled to be awarded damages in the amount that will pay for what it submits is a reasonable remediation plan.

11 The Defendant submits that a common requirement underlying the different causes of action claimed by Midwest is proof of actual damage to the property caused by the Defendants.

12 The Defendants submit that there is no evidence that the alleged spill of pollutants has caused an "adverse effect", as contemplated by the *EPA*, or that the Plaintiff has suffered any damages. More particularly, a chemical alteration in the soil content does not establish harm or damage to the property. The fact that certain contaminants in the soil exceed the relevant MOE standards is not evidence of physical harm or damage to the property. Further, there is no evidence that there was any chemical alteration of their property after they acquired it. In the same vein, the Defendants submit that there is no evidence of any impairment of the use that Midwest is making of its property, no harm or material discomfort to any person, no adverse impact on the health of any person, no evidence that the property is unfit for continued use as a commercial/industrial property for the manufacture of clothing, and no evidence of interference with the normal conduct of business at the property. Midwest has not shown any interference with its operation of business, and no loss of profits or other financial loss associated with the presence of the contaminants at 285 Midwest. They argue that, without proof that there has been actual, substantial, physical damage and harm to the property, all of the Plaintiff's claims cannot succeed.

13 Midwest, on the other hand, submits that to succeed, it must prove that:

(d) Contamination exists at 1700 Midland;
(e) That contamination is migrating onto 285 Midwest;
(f) The remediation plan proposed by the Plaintiff is reasonable; and
(g) The reasonable costs of implementing that remediation plan.

14 Midwest submits that under the various causes of action in its claim, proof of contamination of the Midwest property unequivocally entitles it to an award of damages equivalent to the cost of a reasonable remediation plan. Midwest similarly argues that the "adverse effect" on the property, or damages they have suffered, are proven by the testing results that show levels of pollutants above acceptable MOE standards after they purchased 285 Midwest.

EPA Claim

15 Midwest relies on the following sections of the *EPA*, which provide right of action for compensation in favour of any person incurring loss or damage as a result of neglect or default in carrying out a duty imposed by the *EPA* or any orders made under its authority:

Compensation, spills

99. (1) In this section,

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"loss or damage" includes personal injury, loss of life, loss of use or enjoyment of property and pecuniary loss, including loss of income.

Right to compensation

(2) Her Majesty in right of Ontario or in right of Canada or any other person has the right to compensation,

(a) for loss or damage incurred as a direct result of,

- (i) the spill of a pollutant that causes or is likely to cause an adverse effect,
- (ii) the exercise of any authority under subsection 100 (1) or the carrying out of or attempting to carry out a duty imposed or an order or direction made under this Part, or
- (iii) neglect or default in carrying out a duty imposed or an order or direction made under this Part;

(b) for all reasonable cost and expense incurred in respect of carrying out or attempting to carry out an order or direction under this Part,

from the owner of the pollutant and the person having control of the pollutant.

Exception

(3) An owner of a pollutant or a person having control of a pollutant is not liable under subsection (2) if they establish that they took all reasonable steps to prevent the spill of the pollutant or if they establish that the spill of the pollutant was wholly caused by,

- (a) an act of war, civil war, insurrection, an act of terrorism or an act of hostility by the government of a foreign country;
- (b) a natural phenomenon of an exceptional, inevitable and irresistible character; or
- (c) an act or omission with intent to cause harm by a person other than a person for whose wrongful act or omission the owner of the pollutant or the person having control of the pollutant is by law responsible,

or any combination thereof.

Qualification

(4) Subsection (3) does not relieve the owner of the pollutant or the person having control of the pollutant,

- (a) from liability for loss or damage that is a direct result of neglect or default of the owner of the pollutant or the person having control of

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the pollutant in carrying out a duty imposed or an order or direction made under this Part; or

(b) from liability, under clause (2) (a), for cost and expense incurred or, under clause (2) (b), for all reasonable cost and expense incurred,

(i) to do everything practicable to prevent, eliminate and ameliorate the adverse effect, or

(ii) to do everything practicable to restore the natural environment,

or both.

Enforcement of right

(5) The right to compensation under subsection (2) may be enforced by action in a court of competent jurisdiction.

Liability

(6) Liability under subsection (2) does not depend upon fault or negligence.

Contribution

(7) In an action under this section,

(a) where the plaintiff is an owner of the pollutant or a person having control of the pollutant, the court shall determine the degree, if any, in which the plaintiff would be liable to make contribution or indemnification under subsection (8) if the plaintiff were a defendant; and

(b) where the plaintiff is not an owner or a person having control referred to in clause (a), the court shall determine the degree, if any, in which the plaintiff caused or contributed to the loss, damage, cost or expense by fault or negligence,

and the court shall reduce the compensation by the degree, if any, so determined.

Extent of liability

(8) Where two or more persons are liable to pay compensation under this section, they are jointly and severally liable to the person suffering the loss, damage, cost or expense but as between themselves, in the absence of an express or implied contract, each is liable to make contribution to and indemnify the other in accordance with the following principles:

1. Where two or more persons are liable to pay compensation under this section and one or more of them caused or contributed to the loss,

damage, cost or expense by fault or negligence, such one or more of them shall make contribution to and indemnify,

i. where one person is found at fault or negligent, any other person liable to pay compensation under this section, and
ii. where two or more persons are found at fault or negligent, each other and any other person liable to pay compensation under this section in the degree in which each of such two or more persons caused or contributed to the loss, damage, cost or expense by fault or negligence.

2. For the purpose of subparagraph ii of paragraph 1, if it is not practicable to determine the respective degrees in which the fault or negligence of two or more persons liable to pay compensation under this section caused or contributed to the loss, damage, cost or expense, such two or more persons shall be deemed to be equally at fault or negligent.
3. Where no person liable to pay compensation under this section caused or contributed to the loss, damage, cost or expense by fault or negligence, each of the persons liable to pay compensation is liable to make contribution to and indemnify each other in such degree as is determined to be just and equitable in the circumstances.

Enforcement of contribution

(9) The right to contribution or indemnification under subsection (8) may be enforced by action in a court of competent jurisdiction.

Adding parties

(10) Wherever it appears that a person not already a party to an action under this section may be liable in respect of the loss, damage, cost or expense for which compensation is claimed, the person may be added as a party defendant to the action upon such terms as are considered just or may be made a third party to the action in the manner prescribed by the rules of practice for adding third parties.

16 At trial, neither party was able to provide the Court with any jurisprudence on the interpretation of the term "loss or damages" under the *EPA*.

17 The Court provided the parties with copies of *Mortgage Insurance Co. of Canada v. Innisfil Landfill Corp.* (1996), 3 O.T.C. 44, 2 C.P.C. (4th) 143, wherein the Court held that:

> 11 Further it would appear to me that the damage aspect is somewhat blurred under this statutory provision. Pursuant to s. 99(2) the Hodgsons would still have to show loss or damage as a direct result of the spill. However, the loss or damage can arise because the spill "causes or is likely to cause *an adverse effect*" (emphasis added). While PWL would not appear to be responsible for any spill (which took place) of leachate leaking from the authorized site of

> the garbage dump before it became R/M and thereafter migrated across the ILC boundary to the neighbouring properties, including that of the Hodgsons, PWL would be responsible for any adverse effect caused by a PWL generated leachate. It would seem to me that the language of the statute would be sufficiently all encompassing to take into account a loss to property value directly caused by the spill as an adverse effect. The difficulty for the Hodgsons here will be in identifying where and how much of the PWL generated leachate penetrates their border and then by how much that PWL generated spill will further reduce their property value from what it is said to have already been decreased by virtue of the pre-PWL generated leachate. The Hodgsons should only be allowed leave to sue for loss caused by the PWL generated leachate. In this regard, there has been no satisfactory demonstration that the Hodgsons' property has been invaded by PWL generated leachate. If and when that happens then it would appear appropriate to allow the Hodgsons to sue for spill liability of PWL generated leachate if they can then demonstrate that they have suffered a loss over and above what they say is now the problem created by pre-PWL generated leachate. Perhaps in this regard the Hodgsons might explore the possibility of pursuing the Environmental Compensation Corporation pursuant to s. 103 of the EPA; of course they will still face the hurdle of showing an increase in loss for this 1985-1990 generated leachate over and above what may have been caused by pre-Nov. 29, 1985 generated leachate.

18 The parties made submissions on this case.

19 Although this decision dealt with a request for leave to commence action against a court appointed receiver, the court had to consider the nature of the relief that the *EPA* intended. The court, in that case, commented on the types of damage defined in the *EPA*. The evidence of the type of damages claimed by Midwest - namely the fact that the property had locations where the soil and groundwater exceeded MOE standards was not referred to by the court, nor was there any reference to damages to be awarded for the cost of remediation.

20 The *EPA* gives the MOE the power to order the Defendants to remediate the Plaintiff's property and it has, in fact, done so. In the current context, this Court holds that the *EPA* cannot be interpreted, as suggested by the Plaintiff, in an expansive manner that allows damages contemplated by section 99 to include damages for the cost of remediation in circumstances where such remediation has already been ordered under the *EPA*.

21 Midwest submits that there is no requirement for it to wait for an excessive period of time for remediation; rather, they are entitled to pursue an immediate remediation strategy notwithstanding the presence of an MOE order to remediate. Midwest submits that this is sensible as there is no guarantee the remediation will be performed, let alone on a timely basis.

22 There is no evidence before the Court regarding the length of time such remediation will take. I do not accept Midwest's submission for the reasons articulated above. Further, Midwest cannot be entitled to a double recovery arising from the same legislation, which would result if their property is remediated pursuant to the MOE order and this Court concurrently awards a sum equivalent to Midwest's proposed remediation.

12

23 The Court finds that the Plaintiff did not introduce evidence of damage or loss pursuant to section 99 of the *EPA*, such as actual loss in property value or its inability to use its property or operate its business on its property, or business losses. The Court therefore dismisses Midwest's claim on this basis.

Nuisance

24 The parties agree that an actionable nuisance has been defined as "... causing physical injury to land or substantially interfering with the use or enjoyment of land or an interest in land, where, in the light of all the surrounding circumstances, this injury or interference is held to be unreasonable."

25 Midwest submits that an escape of hydrocarbons contaminating its soil and water is a clear nuisance [*Ball v. Imperial Oil Resources Ltd.*, 2008 ABQB 765, paras. 117-118]. Similarly, the Defendants allowed a noxious substance to escape onto its property, thereby damaging Midwest's land or property.

26 With respect to this nuisance claim, the Defendants allege that the Plaintiff failed to prove requisite damages, which is similar to the argument made in respect to the *EPA* claim.

27 I agree with these submissions. There is no evidence that Midwest acquired a property which was not already damaged (as there is no evidence of the environmental state of the property when it was acquired). The Plaintiff, therefore, cannot establish that any chemical alteration in the soil and groundwater has occurred in its property. The Plaintiff did not take action against the vendor of the property, or the environmental company that did the Phase I testing on the property.

28 If Midwest purchased a contaminated property, it must prove that there has been an increase in the contamination level of property caused by the Defendants.

29 In *Mortgage Insurance Co. of Canada v. Innisfil Landfill Corp.* (1996), 3 O.T.C. 44, 2 C.P.C. (4th) 143, para. 9, the court held the following with respect to a claim of nuisance:

> In *Muirhead v. Timbers Brothers Sand & Gravel Limited* (1977), 3 C.C.L.T. 1 (Ont. H.C.) Rutherford J. at p. 5 stated:
>
> The law of nuisance refers to invasions of an occupier's interest in the beneficial use and enjoyment of land. To succeed in a private nuisance action, the plaintiff must establish either:
>
> (1) some interference with the beneficial use of his premises: or
> (2) some injury to those premises or the property located thereon.
>
> With respect to the first branch of the above principle, sufficient interference with beneficial use to support a nuisance action is present where there is any substantial interference with the comfort or convenience of persons occupying or using the premises (Salmond on The Law of Torts, 16th ed. (1973), at p.56, quoted in *Walker*, [1975] O.J. No. 2254, at p. 38) and, as pointed-out in the *Walker* case, the character of the locality in question has no relevance with respect to the second branch of the above principle, where material change to the plaintiff's premises (or property thereon) occurs as a

> result of the activities of the defendant, the plaintiff is entitled to redress irrespective of locality:
>
> Actual damage must be proven to succeed in nuisance (as opposed to trespass which is actionable per se): see *Mann v. Saulnier* (1959), 19 D.L.R. (2d) 130 (N.B. C.A.) at p. 133. No special damages (for alleged devaluation of property) can be advanced on the basis of mere speculation that a prospective purchaser might be apprehensive about the impact of the alleged nuisance on the property: see *Desrosiers v. Sullivan* (1985), 66 N.B.R. (2d) 243, 169 A.P.R. 243 (Q.B.) at p. 251, affirmed (1986), 76 N.B.R. (2d) 271, 192 A.P.R. 271 (N.B. C.A.); leave to appeal refused (1987), 79 N.B.R. (2d) 90 n, 201 A.P.R. 90 (note) (S.C.C.). An interference with the health of the plaintiffs thereby interfering with their enjoyment of the lands would fall within the essence of nuisance: see *Palmer v. Stora Kopparbergs Bergslags AB* (1983), (sub nom. *Palmer v. Nova Scotia Forest Industries)* 2 D.L.R. (4th) 397 (N.S. T.D.) at p. 493. If there were an actionable nuisance created previous to PWL becoming the R/M of this garbage dump, then PWL would incur liability for nuisance if it did not take timely steps to abate it: see *Brewer v. Kayes*, [1973] 2 O.R. 284 (Dist. Ct.) where Gratton D.C.J. said at p. 288.

30 In *Smith v. Inco Ltd.*, 2011 ONCA 628, the court held:

> [116] The alleged harm in this action was not related to the levels of nickel in the soil or the actual effects, if any, of that nickel on the property or its occupiers. Rather, as the trial judge stated at para. 12, "the alleged harm in this action is restricted to the negative effect, if any, on property values." For the claimants to succeed, they had to prove that their properties failed to appreciate in value, as they otherwise would have, because of adverse publicity generated by MOE's findings and reports that nickel from Inco had contaminated the soil on their properties.
>
> [67] In our view, actual, substantial, physical damage to the land in the context of this case refers to nickel levels that at least posed some risk to the health or wellbeing of the residents of those properties. Evidence that the existence of the nickel particles in the soil generated concerns about potential health risks does not, in our view, amount to evidence that the presence of the particles in the soil caused actual, substantial harm or damage to the property. The claimants failed to establish actual, substantial, physical damage to their properties as a result of the nickel particles becoming part of the soil. Without actual, substantial, physical harm, the nuisance claim as framed by the claimants could not succeed.

31 For reasons referred to above, I agree with the submissions of the Defendant that the Plaintiff has not proven damages in nuisance.

Negligence

32 The Plaintiff alleges the Defendants were negligent in the operation of their business at 1700 Midland, resulting in spills at 1700 Midland which constituted a nuisance to the Plaintiff's land.

33 In *Mortgage Insurance Co. of Canada v. Innisfil Landfill Corp.* (1996), 3 O.T.C. 44, 2 C.P.C. (4th) 143, para. 9, which I have referred to above, the court summarized the following with respect to the negligence claim:

> (d) *Negligence* - A fundamental requirement of negligence is the constituent element of there being shown actual damage suffered by the plaintiff as a result of the defendant's breach of a duty of care towards the plaintiff. Actual damage must be proven; if not there will not be any entitlement to a verdict for nominal damages: see Maple Leaf Lumber Co. v. Caldbrick (1917), 40 O.L.R. 512 (C.A.) at p. 524; see also *Klar, Linden, Cherniak, Kryworlk, Remedies in Tort*, Vol. 3 (Toronto; Carswell, 1987) ch. 16, ss. 16-8. Again the Hodgsons would appear to have difficulty with showing any ability to prove damage based on the leachate plume.

34 For the reasons articulated above, the Court similarly reaches the conclusion that Midwest failed to prove damages to support its negligence claims.

Punitive

35 The parties do not dispute the requirements for an award of punitive damages. Punitive damages are awarded in exceptional cases for malicious, oppressive and high-handed misconduct that offends the court's sense of decency [*Desjardins v. Blick* (2009), [2009] O.J. No. 1234, 2009 CarswellOnt 1613, para. 26 (Ont. S.C.J.)].

36 Punitive damages should be awarded only in exceptional cases for malicious, oppressive, and high-handed misconduct that offends the court's sense of decency. The purpose of punitive damages is to condemn the Defendant's conduct and to deter the Defendant and others from engaging in similar conduct in the future.

37 I accept the Defendants' submissions that a finding that the conduct of the Defendants was wrong in law, caused or permitted the deposit of contaminants onto the Plaintiffs property, or has caused damage, would be insufficient to warrant an award of punitive damages.

38 The Plaintiff, however, submits that it is appropriate to award punitive damages of $100,000 given the severity of the Defendants conduct and the length of time for during which the conduct continued. The amount of the award must demonstrate that it is not the cost of a license to continue wholly inappropriate and indefensible conduct.

39 The Plaintiff refers to jurisprudence where awards of punitive damages were made, all of which can be distinguished from the present circumstances.

40 In *Deumo v. Fitzpatrick*, 39 C.E.L.R. (3d) 299, para. 23 (Ont. S.C.J.), the court held that the conduct of the Defendants was reckless, destructive, persistent, pervasive and heedless of their neighbours' physical integrity and property rights, and therefore awarded punitive damages in the amount of $20,000.

41 I do not find that the evidence supports such a finding on the Defendants' conduct.

Costs

42 The Plaintiff submitted a Bill of Costs for $105,603 on a partial indemnity basis, and $139,981 on a substantial indemnity basis.

43 The Defendants submitted a Bill of Costs for $62,353.50 on a partial indemnity basis, and $83,446.50 on a substantial indemnity basis.

44 As the Defendants are the successful party, they are entitled to an award of costs. Submissions on costs may be made as follows:

(i) by the Plaintiff until 12:00 p.m. on March 12, 2013; and
(ii) by the Defendants until 12:00 p.m. on March 19, 2013.

A. POLLAK J.

Court File No. CV-09-382649

ONTARIO
SUPERIOR COURT OF JUSTICE

THE HONOURABLE MADAM	)	**THE 28TH DAY OF**
	)	
MR. JUSTICE POLLAK	)	**FEBRUARY, 2013**

COURT OF JUSTICE SUPERIOR COURT · COUR SUPÉRIEURE DE JUSTICE

B E T W E E N :

MIDWEST PROPERTIES LTD.

Plaintiff

-and-

JOHN THORDARSON and THORCO CONTRACTING LIMITED

Defendants

JUDGMENT

THIS ACTION was heard on January 7, 8, 9, 10, 11, 14, 16, 17, 18, 2013 and February 15, 2013, in the presence of the lawyers for the parties.

ON READING THE PLEADINGS AND HEARING THE EVIDENCE and the submissions of the lawyers for the parties,

1. **THIS COURT ORDERS AND ADJUDGES** that this action be dismissed, with costs to the defendants to be fixed on a partial indemnity basis.

This judgment bears interest at the rate of 3.0 % per year commencing on March 28, 2013.

FEB 1 9 2014

R. Itleman, Registrar
Superior Court of Justice

TORONTO: 459712\1 (90155)

MIDWEST PROPERTIES LTD. v. JOHN THORDARSON and THORCO CONTRACTING LIMITED

Court File No: CV-09-382649

ONTARIO
SUPERIOR COURT OF JUSTICE

Proceeding commenced at Toronto

JUDGMENT

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Case Name:
Midwest Properties Ltd. v. Thordarson

Between
Midwest Properties Ltd., Plaintiff (Appellant), and
John Thordarson and Thorco Contracting
Limited, Defendants (Respondents)

[2015] O.J. No. 6209

2015 ONCA 819

Docket: C56758

Ontario Court of Appeal

K.N. Feldman, C.W. Hourigan and M.L. Benotto JJ.A.

Heard: June 1, 2015.
Judgment: November 27, 2015.

(126 paras.)

Damages -- Types of damages -- Exemplary or punitive damages -- Where high-handed, malicious, arbitrary or highly-reprehensible misconduct -- Appeal by landowner from dismissal of claim in nuisance, negligence and under section 99(2) of Environmental Protection Act against polluting neighbour allowed -- Landowner entitled to judgment for full cost to remediate property, polluted by PHC over many years by neighbour who flouted Ministry orders regarding safe storage and disposal -- Director of small company jointly and severally liable -- Punitive damages warranted for wanton disregard for environmental obligations over period of many years.

Environmental law -- Environmental liability -- Civil litigation -- Quantum -- Nature of damage -- Land -- Award -- Common law -- Torts -- Negligence -- Private nuisance -- Contaminated land -- Liability for contamination -- Reduced property value -- Site remediation -- Appeal by landowner from dismissal of claim in nuisance, negligence and under section 99(2) of Environmental Protection Act against polluting neighbour allowed -- Landowner entitled to judgment for full cost to remediate property, polluted by PHC over many years by neighbour who flouted Ministry orders regarding safe storage and disposal -- Director of small company jointly and severally liable -- Extant Ministry order against polluter did not preclude recovery -- Damages established to support nuisance and negligence claims, as property value decreased and health risks present -- Punitive damages of $50,000 awarded against both polluter and owner -- Environmental Protection Act, ss. 91, 99.

Appeal by Midwest Properties (Midwest) from the dismissal of its action against Thorco and its owner, Thordarson. Midwest acquired industrially-zoned property in 2007. Thorco had owned the neighbouring property since 1973, servicing petroleum handling equipment and lining tanks on the property. Thorco stored various materials and wastes on the property, including PHCs. Thorco provided Midwest with environmental reports about its property when it learned Midwest might be interested in purchasing its property. Midwest was also permitted to conduct environmental studies on the property. PHC contamination on Thorco's property was disclosed. Midwest learned Thorco had been storing waste PHC without permission until 1988, after which it stored waste PHC in excess of its permitted amount. Thorco and its owner had been convicted of offences under the Environmental Protection Act in 2000. They did not comply with orders to reduce the waste stored on the property and to store permitted waste in a manner compliant with the Act. It was clear from the record of the 2000 hearing that PHC had been entering the ground on Thorco's property for many years. Midwest obtained an environmental report on its property and learned PHCs had contaminated the soil and groundwater. There was a risk PHC would enter its building and pose a health risk. Expert evidence was provided that it would cost $1,328,000 to remediate Midwest's property. In 2012, the Ministry of the Environment ordered Thorco to take the steps necessary to restore the property that had been contaminated, including Midwest's property. They failed to meet the deadlines set out in the order, and failed to take any steps to remediate Midwest's property. Midwest sued Thorco and its owner for damages for negligence, nuisance as well as under section 99(2) of the Act. The judge found Midwest was precluded for seeking damages under section 99(2) because the Ministry order was extant. She rejected the assertion that Midwest should not have to wait an inordinate amount of time for Thorco to fulfil its responsibilities pursuant to the order, and found that to award damages under this head would amount to granting Midwest double recovery. The judge dismissed the nuisance claim on the basis that damages were not established. She found nothing to prove Midwest's property was more contaminated at the time of trial than it had been when it acquired the property in 2007. A punitive damages claim was also dismissed.

HELD: Appeal allowed. Midwest was entitled to judgment for the full amount of its estimated remediation costs of $1,328,000. Thorco and Thordarson were each also liable in the amount of $50,000 for punitive damages. The judge erred in her interpretation of section 99(2) of the Act. The legislative objective of establishing a separate, distinct ground of liability for polluters mandated the ability of a neighbour to sue for damages despite the existence of a Ministry order. The judge's interpretation permitted Thorco to avoid its obligation to pay damages solely on the basis of the order. There was no possibility of double recovery, as the Ministry intervened in the appeal and agreed it would redirect its remediation order if Thorco was ordered to pay remediation damages to Midwest. Midwest was not obliged to prove an actionable nuisance to succeed in its section 99(2) claim. Midwest's claim was not statute-barred by the operation of a two-year limitation period because it commenced its claim against Thorco within two years of acquiring its property. It was not obliged to state what level of contamination existed prior to purchasing the property. Given that Thorco was a small company owned and operated by Thordarson, he was jointly and severally liable for the damages owing to Midwest. The nuisance and negligence claims should not have been dismissed given the uncontradicted evidence at trial that established a diminution in value of Midwest's property and a human health risk. A punitive damage award was warranted because Thorco's non-compliance with Ministry orders was chronic and its indifference to the environmental condition of its property and surrounding areas demonstrated a wanton disregard for its environmental obligations.

Statutes, Regulations and Rules Cited:

An Act to Amend the Environment Protection Act, 1971,

Environmental Protection Act, R.S.O. 1990, c. E.19, s. 1(1) R s. 91(1), s. 99, s. 99(1), s. 99(2), s. 99 (2)(a), s. 99(2)(a) (i), s. 99(2)(a)(iii), s. 99(2)(b), s. 99(3), s. 99(8)

Limitations Act, 2002, S.O. 2002, c. 24, s. 17

Appeal From:

On appeal from the judgment of Justice Andra Pollak of the Superior Court of Justice, dated February 28, 2013, with reasons reported at 2013 ONSC 775, 73 C.E.L.R. (3d) 303.

Counsel:

Evert Van Woudenberg, for the appellant.

Frank Zechner and Christopher Du Vernet, for the respondents.

Sandra Nishikawa and Isabelle O'Connor, for the intervener Minister of the Environment and Climate Change.

The judgment of the Court was delivered by

C.W. HOURIGAN J.A.:--

A. OVERVIEW

1 The appellant, Midwest Properties Ltd. ("Midwest"), and the respondent, Thorco Contracting Limited ("Thorco"), own adjoining properties in an industrial area of Toronto.

2 Thorco has stored large volumes of waste petroleum hydrocarbons ("PHC") on its property for several decades. As a result of Thorco's storage practices, PHC has contaminated the soil and groundwater on its property. From 1988-2011, Thorco was in almost constant breach of its license and/or compliance orders issued by the Ontario government ministry now known as the Ministry of the Environment and Climate Change (the "MOE").

3 Groundwater flows from Thorco's property into Midwest's property, and this has contaminated the latter with significant concentrations of PHC. Midwest discovered the contamination after it acquired its property in December 2007. Midwest sued Thorco and its owner, John Thordarson, relying upon three causes of action: breach of s. 99(2) of the *Environmental Protection Act*, R.S.O. 1990, c. E.19 (the "*EPA*"), nuisance, and negligence.

4 The trial judge held that the respondents were not liable under any of the causes of action. She found that Midwest failed to prove that it had suffered damages, in particular because it had not proven that the PHC contamination lowered the value of its property. In addition, she ruled that because the MOE had already ordered the respondents to remediate Midwest's property, a remedy under s. 99(2) was not available to Midwest. In that regard, the trial judge found that the *EPA* should not be interpreted in an "expansive manner" that might permit double recovery.

5 Midwest appeals and seeks judgment for the cost to remediate its property, approximately $1.3 million. The MOE intervenes in this appeal to contest the trial judge's finding that its order to remediate precludes recovery under s. 99(2) of the *EPA*.

6 In my view, the trial judge erred in her interpretation and application of the private right of action contained in s. 99(2) of the *EPA*. This private right of action was enacted over 35 years ago and is designed to overcome the inherent limitations in the common law in order to provide an effective process for restitution to parties whose property has been contaminated. The trial judge's interpretation of the section is inconsistent with the plain language and context of this provision; it undermines the legislative objective of establishing a distinct ground of liability for polluters. This is remedial legislation that should be construed purposively. It is important that courts not thwart the will of the Legislature by imposing additional requirements for compensation that are not contained in the statute.

7 The trial judge also erred in law in concluding that Midwest could not succeed in nuisance or negligence because it was unable to prove damage, and in her assessment of punitive damages, as in my view the conduct of the respondents in the circumstances clearly merits a punitive award.

8 For the reasons that follow, I would allow the appeal and grant judgment to Midwest.

B. FACTS

(1) Background

9 Midwest acquired the industrially-zoned property and building located at 285 Midwest Road in Toronto in 2007. It or a related company uses 285 Midwest for the manufacture and distribution of clothing. Prior to its purchase of 285 Midwest, Midwest obtained a Phase I Environmental Audit on the property from TS Environmental Services, primarily consisting of a visual inspection of the property to identify any potential contamination. At that time, Midwest did not have the soil or groundwater at the property tested for contamination as the Phase I report indicated that a Phase II report was not required.

10 Mr. Thordarson has controlled Thorco since 1969. Thorco acquired 1700 Midland Avenue in 1973. On the approximately 1.1 acre property, Thorco's business activities related to the servicing of petroleum handling equipment and the lining of tanks, and as a corollary to this business, Thorco began storing various materials and wastes on the property in 1974.

11 After purchasing 285 Midwest, Midwest became interested in acquiring all or part of the adjoining property at 1700 Midland to expand its operations. Mr. Thordarson provided Midwest with two reports on the property by XCG Consultants Ltd.: a Phase I Environmental Site Assessment completed in 1999, and an update of that report completed in 2001. He also gave Midwest permission to access 1700 Midland for further environmental study. As it was aware that PHC storage was taking place at 1700 Midland, Midwest hired Pinchin Environmental Ltd. to conduct both Phase I and Phase II environmental studies on the property. These reports disclosed PHC contamination at 1700 Midland.

(2) PHC Storage and Contamination at 1700 Midland

12 Thorco had been storing waste PHC, among other things, on 1700 Midland since 1974, but only applied for a Certificate of Approval from the MOE to store wastes on the property in 1983. In 1988,

22

the MOE issued a Certificate of Approval allowing for two storage tanks, 56 drums, and the storage of 22,520 gallons of waste. Mr. Thordarson's evidence at trial revealed that, even in 1988, the amount of waste PHC stored on the property well exceeded 22,520 gallons.

13 By 1996, according to a "Field Observation Report" from the MOE, Thorco was exceeding its Certificate of Approval by 53,000 gallons and was not storing the waste material according to MOE guidelines. At that time, an MOE "Field Order" was issued requiring Thorco to remove the excess waste, store the waste material on its property according to MOE guidelines, and immediately cease accepting waste at 1700 Midland until the conditions in the 1988 Certificate of Approval were satisfied.

14 Another "Field Observation Report" noted in 1997 that: "This site has been out of compliance with Certificate of Approval ... dated April 18, 1988 since its issuance. To date, there has not been satisfactory progress by Thorco Contracting Ltd. to bring this site into compliance." That report further noted that, at that time, Thorco had approximately 38 tanks and bins containing material, along with an undisclosed number of drums containing "heavy sludge" or oily water, and approximately 85,496 gallons of waste on its property. Thorco was again ordered to, among other things, dispose of excess waste, store waste properly, and stop accepting more waste. Thorco was also ordered to submit financial assurance in the amount of $85,496 to the MOE.

15 Thorco's first report obtained from XCG Consultants reveals that, by 1999, there were approximately 420,000 litres (roughly 111,000 gallons) of waste PHC on 1700 Midland, stored in 20 above ground storage tanks.

16 In 2000, Thorco and Mr. Thordarson were convicted by the Ontario Court (Provincial Division) of *EPA* offences, including counts of failing to dispose of all wastes in excess of the maximum permitted quantities specified in the Certificate of Approval obtained in 1988, failing to submit financial assurance in the amount of $85,496 to the MOE, and failing to ensure the proper storage of materials on 1700 Midland. A court order issued, ordering, among other things, the removal of significant quantities of oil and water, solid catalyst, and oil sludge, and requiring compliance with the 1988 Certificate of Approval.

17 Thorco's updated report from XCG Consultants shows that as of August 2001, Thorco had only reduced its inventory to approximately 172,000 litres (roughly 45,000 gallons). Mr. Thordarson's evidence at trial was that he began to wind down the business operations of Thorco in 2002. A "Provincial Officer Report" of the MOE notes that as of March 2003, wastes were still not being stored in compliance with the 1988 Certificate of Approval, and that approximately 15 tonnes of hydrocarbon sludge remained on site in violation of the order of the Ontario Court (Provincial Division). In 2008, while further MOE inspections revealed that Thorco and Mr. Thordarson had significantly reduced the volume of waste on site, a report indicated that, "Most notable, is the Company's continual reluctance to store subject waste properly, so as to prevent spills to the natural environment. The company's storage of subject waste and chemical storage poses a significant risk of impairing the natural environment."

18 A new MOE order issued in 2008, and while some improvements had been made by 2009, approximately 10,000 litres of waste remained in "non-approved storage tanks." As of January 4, 2011, all liquid waste had been removed from 1700 Midland, but during that year concerns still remained about a waste storage pit on the property, unsecured against the infiltration of precipitation, that continued to generate oily water.

19 All indications, from the 2000 court order and numerous MOE reports, are that PHC was entering the ground at 1700 Midland for many years, if not decades. The court order stated that several containers were not secured against the infiltration of precipitation, were of questionable integrity, and were even "leaking oily water." An MOE inspection report in 2008 noted many risks that the materials on site would contaminate the environment, or were already doing so. Among other things, that report noted the following:

* "At the time of inspection, oily water was spilling from the opening of tank #44 to the ground..."

* "A second tank ... had an access hatch cut into the side of the tank... [w]aste oily water was also level with the tank opening... The tank contents were also slowly leaking to the ground at the time of inspection."

* "A mini roll-off bin was observed in the south-east portion of the yard. The bin contained full pails of paints, solvents, sealants and various other waste chemicals... The bin was full of stormwater and was overflowing to the ground at the time of inspection."

* "Pooled stormwater saturated the southern portion of the site adjacent to the Outdoor Storage Pit... A light sheen was evident on the surface of this stormwater. Cross contamination with oil from the outdoor storage pit is highly likely. **Risk of off-site movement is probable.**" [Emphasis in original.]

20 Officer Mitchell of the MOE, the author of the reports beginning in 2008, testified at trial that during one inspection in 2008 he observed an "outdoor waste processing pit" in which waste furnace oil had breached a containment structure and mixed with storm water immediately adjacent to 285 Midwest. That processing pit was, in Officer Mitchell's words, "absolutely kind of the worst way of holding back waste, hydrocarbon, fuel, oil and the such." He further testified at trial that the storage practices at 1700 Midland were "probably some of the worst I have seen." His 2011 report notes that, "Many years of processing oily waste in this unapproved manner has resulting in ongoing petroleum hydrocarbon spills to the surrounding soils... Soil samples collected outside the pit confirm the presence of petroleum hydrocarbons." Significantly, the summary section of that report notes the following:

> The outdoor waste processing pit has been the source of a spill of petroleum hydrocarbons to the natural environment. This was confirmed on September 7, 2011 as grab samples collected in and around the waste processing pit confirm the presence of petroleum hydrocarbons. The release of petroleum hydrocarbons in this manner may cause an adverse effect...

21 The Phase II Environmental Site Assessment of 1700 Midland, commissioned by Midwest and completed by Pinchin Environmental, confirmed the contamination of the property when measurements were taken in 2008. Pinchin Environmental drilled several monitoring wells at various locations on both 1700 Midland and 285 Midwest to conduct its environmental studies. The measurements taken at these wells were partly concerned with measuring the concentration of PHC "fractions" in the groundwater and soil.

22 The 2011 MOE standards broke PHC into different "fractions": F1 to F4. These fractions differ based on the number of carbon atoms in the molecules, and indicate the volatility and mobility of the PHC: F1 is volatile and mobile, whereas F4 is not. More volatile fractions get into the air and pose a risk to human health, and the MOE standards reflect this difference, with less strict standards for higher fractions.

23 On 1700 Midland, six monitoring wells showed results that exceeded MOE standards for PHC in groundwater. Two monitoring wells showed results that exceeded MOE standards for PHC in soil.

(3) PHC Contamination at 285 Midwest

24 Learning of the contamination at 1700 Midland from the Pinchin Environmental studies, Midwest then obtained a Phase II report on its own property. This report and subsequent studies revealed PHC contamination of the soil and groundwater at 285 Midwest that exceeded MOE guidelines.

25 Measured from 2008 to 2012, the concentrations of several PHC fractions exceeded MOE standards at a number of monitoring wells on 285 Midwest. At two locations, monitoring wells 101 and 102, "free product", "pure hydrocarbon", or "free phase hydrocarbon" was observed in 2011 and 2012. The appearance of "free product" indicates that the PHC concentration at that location was so high that the PHC could no longer remain entirely dissolved in groundwater. Monitoring well 106, installed inside the building at 285 Midwest, detected an F2 fraction exceeding MOE standards. Midwest's expert testified at trial that this result indicated a risk that volatile PHC could enter the building and pose a health risk to the occupants.

26 Moreover, evidence at trial established that the situation at 285 Midwest was getting worse over time. While tests of monitoring well 101 in 2011, and monitoring well 102 in 2008, showed that the PHC was still dissolved in groundwater, tests of these same monitoring wells revealed "free product" in monitoring well 101 in 2012, and in monitoring well 102 in 2011. Midwest's expert testified that the discovery of free product PHC indicated that conditions at 285 Midwest were much worse than previously thought.

(4) Financial Impact of PHC Contamination on Midwest

27 Three experts on environmental assessment gave expert evidence at trial on the financial impact of PHC contamination: Andy Vanin and Robert Tossell, of Pinchin Environmental, for Midwest, and Thomas Kolodziej, of XCG Consultants, for the respondents.

28 Mr. Vanin was qualified as an expert on "environmental site assessment", but stated that he also had expertise in whether a mortgage lender would finance a contaminated property. He testified that the owner of a property contaminated with PHC has two concerns: (1) potential third-party liability as a result of offsite migration through groundwater, and (2) diminution of the value of the property and the ability to use the property as collateral. He continued, "this is not a property that any lender would probably want in their books."

29 Mr. Tossell was qualified as an expert in environmental assessment and rehabilitation, and agreed that he did not profess to be an expert in "corporate finance matters, mortgaging or corporate lending, [or] banking practices." He testified that "[a]ny contaminated property comes with stigma" that reduces the interest of some prospective purchasers, and that "if you want to sell your property it's

likely you're going to have to comply" with MOE standards. On cross-examination, Mr. Tossell stated that a property owner could have trouble getting financing for contaminated property.

30 Mr. Kolodziej acknowledged that the willingness of a prospective purchaser of land possibly contaminated with PHC, even after successfully completing a risk assessment, "depends on the risk tolerance of the potential buyer". According to him, some buyers "thrive" on properties with a risk assessment attached "to find a better deal."

31 Midwest's expert evidence was that the reasonable costs of remediating 285 Midwest would be $1,328,000. Mr. Tossell testified that removing "pure phase hydrocarbon" is a "challenge to a remediator." Further migration of free product to 285 Midwest would be "more expensive to deal with." On behalf of the respondents, Mr. Kolodziej opined that Midwest's expert estimates were "high" and that "it's difficult really to judge", because there was "not enough data to make such a far-reaching or so definite or absolute statements as far as the costs." The respondents did not, however, lead positive evidence on the costs of remediating 285 Midwest.

(5) The MOE Order to Remediate 285 Midwest

32 On January 16, 2012, Officer Mitchell issued a report which noted, in part, the following:

> An Environmental Subsurface Investigation and Restoration Program needs to be conducted to delineate the full vertical and horizontal extent of petroleum hydrocarbons spilled near the Waste Processing Pit... The Environmental Subsurface Investigation and Restoration Program shall include a plan to restore the natural environment in accordance with section 93(1) of the EPA.

33 This report was followed by an order, issued on January 19, 2012, including the following directives to Thorco and Mr. Thordarson:

* "the Orderees shall retain the services of one or more Qualified Person (s) to prepare and complete an Environmental Subsurface Investigation and Restoration Program..."
* "provide written confirmation to the undersigned Provincial Officer that the Qualified Person(s) have been retained..."
* "provide a written copy of the proposed Environmental Subsurface Investigation and Restoration Program for the Site to the undersigned Provincial Officer for written acceptance."
* "Within 30 days of receiving written acceptance by the undersigned Provincial Officer, implement the Environmental Subsurface Investigation and Restoration Program at the site."

34 At trial, Officer Mitchell was asked whether that order applied only to 1700 Midland. He replied: "No. That was intended to basically go wherever they believe or demonstrated the contamination to go to." He further testified that he believed that, based on his previous experience at the site, "the contamination had likely moved south towards 285 Midwest." Finally, he testified that,

while Thorco and Mr. Thordarson had done some things required by the order at the time of trial, the work was not being done within the specified timeframes and that, as a result, Thorco and Mr. Thordarson were in breach of the order.

35 The trial judge found, at para. 20 of her reasons, that the respondents had in fact been ordered to remediate 285 Midwest.

36 As of the date of the appeal, no work had been undertaken by Thorco and Mr. Thordarson to remediate 285 Midwest.

C. REASONS FOR DECISION OF THE TRIAL JUDGE

37 The trial judge accepted, at para. 8, Midwest's expert evidence establishing that groundwater would flow from 1700 Midland onto 285 Midwest, and that as a result, the known contamination at 1700 Midland would migrate onto, and has contaminated, 285 Midwest. She rejected, at para. 9, the respondent's submission that the contamination at 285 Midwest could have been caused by another property. She found, however, that "There is ... no evidence as to when such contamination has occurred."

38 The trial judge dismissed Midwest's claim under s. 99(2) of the *EPA*. She referred to the discussion of damages under s. 99(2) in *Mortgage Insurance Co. of Canada v. Innisfil Landfill Corp.* (1996), 2 C.P.C. (4th) 143 (Ont. Gen. Div.), at para. 11, noting that the court in that case had not referred to the type of damages claimed by Midwest (namely, the fact that MOE standards were exceeded at certain locations on the property), nor had it addressed damages for the cost of remediation. She noted, at para. 20, that the MOE had already ordered the respondents to remediate 285 Midwest and that "the *EPA* cannot be interpreted ... in an expansive manner that allows damages contemplated by section 99 to include damages for the cost of remediation in circumstances where such remediation has already been ordered under the *EPA*."

39 The trial judge rejected, at para. 22, Midwest's arguments that it should not have to wait an excessive amount of time for its property to be remediated under the MOE order, and that there was no guarantee that the property would actually be remediated by the respondents under the MOE order, on the basis that there was no evidence before the court as to how long remediation would take. She further held that an award of damages equivalent to the cost of remediation in these circumstances would create the opportunity for double recovery if the property were subsequently remediated in accordance with the MOE order. Finally, the trial judge held, at para. 23, that Midwest had not introduced evidence of loss or damage required under s. 99(2)(a)(i), such as actual loss in property value, inability to use or operate its business on the property, or business losses.

40 The trial judge dismissed Midwest's nuisance claim on the basis that it had failed to prove damages. She noted, at para. 27, that, because there was no evidence of the environmental state of 285 Midwest at the time it was acquired in 2007, Midwest could not prove that there was any chemical alteration in the soil and groundwater on its property. She held that Midwest would have to prove that there was an increase in the contamination level of the property. The trial judge also dismissed Midwest's negligence claim on the basis that Midwest had failed to prove damages. Finally, the trial judge dismissed Midwest's claim for punitive damages.

D. ISSUES

41 This appeal raises the following issues:

(i) Did the trial judge err in finding that recovery under s. 99(2) of the *EPA* is precluded where the MOE has ordered a defendant to remediate a plaintiff's land?

(ii) Did the trial judge err in finding that no compensable "loss or damage" under s. 99(2) of the *EPA* was established in the circumstances of this case?

(iii) Is Mr. Thordarson personally liable under the *EPA*?

(iv) Did the trial judge err in dismissing the nuisance and negligence claims?

(v) Did the trial judge err in dismissing the claim for punitive damages?

E. ANALYSIS

(i) Interaction Between the MOE Order and the s. 99 Claim

42 Midwest brought a claim against the respondents under s. 99(2) of the *EPA*, which provides:

> (2) Her Majesty in right of Ontario or in right of Canada or any other person has the right to compensation,
>
> (a) for loss or damage incurred as a direct result of,
>
> (i) the spill of a pollutant that causes or is likely to cause an adverse effect,
>
> (ii) the exercise of any authority under subsection 100 (1) or the carrying out of or attempting to carry out a duty imposed or an order or direction made under this Part, or
>
> (iii) neglect or default in carrying out a duty imposed or an order or direction made under this Part;
>
> (b) for all reasonable cost and expense incurred in respect of carrying out or attempting to carry out an order or direction under this Part,
>
> from the owner of the pollutant and the person having control of the pollutant.

43 In my view, the trial judge's interpretation of s. 99(2) is inconsistent with the wording of the legislation and with binding authority on the proper interpretive approach to the *EPA*. Moreover, having regard to the history and purpose of the statutory private right of action found in s. 99(2), it is clear that her interpretation is also inconsistent with its purpose.

44 I turn first to the history of this part of the *EPA*. Section 99(2) is found in Part X of the *EPA*, which was introduced in 1979 and proclaimed into force on November 29, 1985. There is very little case law interpreting s. 99(2), and none of the reported cases have addressed the purpose of this

provision in any depth. However, the legislative context and background provide some guidance as to the provision's objective. Part X, which is commonly referred to as the "Spills Bill", is aimed at two main goals.

45 The first goal is to minimize the harm caused through the discharge of pollutants by requiring prompt reporting and clean-up by the party that owned or controlled the pollutant, regardless of fault. The second goal is to ensure that parties that suffer damage through the discharge of pollutants are compensated by establishing a statutory right to recovery from parties that owned and controlled the pollutant: Mario D. Faieta et al., *Environmental Harm: Civil Actions and Compensation* (Markham, ON: Butterworths, 1996), at p. 144. These objectives, and others, were stated expressly by the Hon. Dr. Harry Parrot, then Minister of the Environment, on the introduction of a revised Bill 24, *An Act to amend the Environmental Protection Act, 1971*, into the Legislature: Ontario, Legislative Assembly, *Official Report of Debates (Hansard)*, 31st Parl., 3rd Sess., No. 8 (27 March 1979), at p. 255.

46 An early commentator understood Part X to "superimpose liability over the common law, where intent, fault, reasonable use, escape, extent of damage, duty of care and foreseeability are not an issue. Rather, the ownership and control of the spill pollutant is the primary question": J.W. Harbell, "Common Law Liability for Spills", in Stanley M. Makuch, ed., *The Spills Bill: Duties, Rights and Compensation* (Toronto: Butterworths, 1986), at p. 25. This is consistent with the Minister of the Environment's comments at the introduction of the revised bill, where he noted that one of the intentions of the bill was "To establish liability for compensation for damage resulting from a spill and for the cost of cleanup which clarifies and extends the right to compensation at common law" (emphasis added).

47 The Minister of Environment also made the following comments on first reading of the bill that eventually became Part X:

> I believe those who create the risk should pay for restoration as a reasonable condition of doing business; it is not up to an innocent party whose land or property has been damaged. At present, persons manufacturing and handling contaminants are not legally responsible in the absence of fault or other legal ground of liability. Common law and the existing provisions of the Environmental Protection Act are inadequate in spelling out the necessary procedures to control and clean up spills and restore the natural environment.

Ontario, Legislative Assembly, *Official Report of Debates (Hansard)*, 31st Parl., 2nd Sess., No. 151 (14 December 1978), at p. 6178. [Emphasis added.]

48 The modern principle of statutory interpretation requires that courts read legislative provisions "in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament": *Bell ExpressVu Ltd. Partnership v. Rex*, 2002 SCC 42, [2002] 2 S.C.R. 559, at para. 26.

49 In my view, the trial judge's interpretation undermines the legislative objective of establishing a separate, distinct ground of liability for polluters. It permits a polluter to avoid its no-fault obligation to pay damages solely on the basis that a remediation order is extant. The purposes of the *EPA* would be frustrated if a defendant could use an MOE order as a shield. Such an interpretation would also discourage civil proceedings, and may even discourage MOE officials from issuing remediation orders for fear of blocking a civil suit.

29

50 In addition to violating the general rules of statutory interpretation, the trial judge's interpretation of s. 99(2) is also inconsistent with the specific principles applicable to interpretation of the *EPA*. The trial judge stated explicitly, at para. 20 of her reasons, that s. 99(2) should not be interpreted expansively. This is inconsistent with the interpretive approach to the *EPA* mandated by the Supreme Court of Canada.

51 In *R. v. Consolidated Maybrun Mines Ltd.*, [1998] 1 S.C.R. 706, at para. 54, the Supreme Court held that the preventative and remedial purposes of the *EPA* must "be borne in mind in interpreting the scheme and procedures established by the Act." Similarly, in *R. v. Castonguay Blasting Ltd.*, 2013 SCC 52, [2013] 3 S.C.R. 323, at para. 9, the Supreme Court held as follows:

> The *EPA* is Ontario's principal environmental protection statute. Its status as remedial legislation entitles it to a generous interpretation (*Legislation Act*, 2006, S.O. 2006, c. 21, Sch. F, s. 64; *R. v. Canadian Pacific Ltd.*, [1995] 2 S.C.R. 1031 (S.C.C.), at para. 84). ... [E]nvironmental legislation embraces an expansive approach to ensure that it can adequately respond "to a wide variety of environmentally harmful scenarios, including ones which might not have been foreseen by the drafters of the legislation". Because the legislature is pursuing the objective of environmental protection, its intended reach is wide and deep. [Emphasis added, citations removed.]

52 The trial judge's interpretation of s. 99(2) is also inconsistent with the plain language and context of this provision. It ignores the fact that under the *EPA*, a person can, as a result of a spill, be subject to various remedial or preventative orders. These consequences are complementary, not exclusive of one another.

53 There is no language in s. 99(2) to support the trial judge's conclusion that a party cannot advance a claim under this section if the owner or party in control of the pollutant is already subject to an MOE order. On the contrary, s. 92(2)(a)(iii) specifically provides for recovery of loss or damage incurred as a result of a defendant's neglect or default in carrying out its obligations under the *EPA*. These "obligations under the *EPA*" must include obligations imposed under a remediation order. Consequently, it is clear that an MOE order and recovery under s. 99(2) are not mutually exclusive.

54 The trial judge was concerned that an award of remediation damages under s. 99 could permit Midwest to achieve double recovery: "Midwest cannot be entitled to a double recovery arising from the same legislation, which would result if their property is remediated pursuant to the MOE order and this Court concurrently awards a sum equivalent to Midwest's proposed remediation" (para. 22).

55 Given the fact that the respondents have not cleaned up their property, or 285 Midwest, since being ordered to do so in 2012, I believe the chances of them now moving with alacrity to remediate the property before Midwest takes its remediation action is remote. In my view, the possibility of double recovery should not prevent an order for damages for the remediation of contaminated property under s. 99(2) where the MOE has already ordered the remediation of the property. In any event, the MOE intervened in this appeal and agreed that it would be forced to redirect its remediation order in the event that the respondents were ordered to pay remediation damages to Midwest. Therefore, the potential for double recovery in this case has been eliminated.

(ii) Failure to Prove Damages

56 The trial judge also dismissed, at para. 23, Midwest's s. 99(2) claim on the ground that it "did not introduce evidence of damage or loss pursuant to section 99 of the *EPA*, such as actual loss in property value or its inability to use its property or operate its business on its property, or business losses." The respondents assert three arguments in support of the trial judge's conclusion on damages.

57 First, the respondents argue that any damages awarded to Midwest should be measured by the diminution in the value of Midwest's property rather than by the cost of remediation.

58 The respondents note that, while Mr. Vanin and Mr. Tossell suggested that there would be negative financial impacts from the contamination, neither was qualified as an expert in mortgages or property valuation. Midwest also did not tender any appraisal reports or property valuations. Therefore, the respondents submit that there is no basis to conclude that the value of Midwest's property has been adversely affected, and accordingly, no basis on which to award damages.

59 I would not give effect to these arguments.

60 There is a significant debate in the case law about whether diminution in value or restoration costs is the appropriate measure of damages in cases of environmental harm: see Faieta et al., at p. 293.

61 At common law, the traditional view was that damages for any type of injury to property should be measured by the diminution in value caused by the injury: see *Hosking v. Phillips* (1848), 154 E.R. 801, 3 Exch. Rep. 168 (Eng. Ex. Ct.). More recently, courts have awarded damages based on restoration costs, even if those costs exceed the amount of the decrease in property value: see Katherine M. van Rensburg, "Deconstructing *Tridan*: A Litigator's Perspective" (2004) 15 J. Envtl. L. & Prac. 85, at p. 89; see e.g. *Jens v. Mannix Co.* (1978), 89 D.L.R. (3d) 351 (B.C.S.C.); *Horne v. New Glasgow*, [1954] 1 D.L.R. 832 (N.S.S.C.).

62 The restoration approach is superior, from an environmental perspective, to the diminution in value approach. Since the cost of restoration may exceed the value of the property, an award based on diminution of value may not adequately fund clean-up: Bruce Pardy, *Environmental Law: A Guide to Concepts* (Markham, ON: Butterworths, 1996), at p. 223.

63 In its *Report on Damages for Environmental Harm*, the Ontario Law Reform Commission canvassed a number of methods for calculating damages. Ultimately, it recommended the adoption of methodologies, like the restoration approach, that "best ensure that the environment is returned to its pre-contaminated condition": Ontario Law Reform Commission, *Report on Damages for Environmental Harm* (Toronto: Ontario Law Reform Commission, 1990), at p. 56. The Commission concluded, at p. 55, that "the ultimate goal of the courts should be to ensure that the environment is put in the same position after the mishap as it was before the injury."

64 Two relatively recent cases reflect the trend toward awarding remediation damages. In *Tridan Developments Ltd. v. Shell Canada Products Ltd.* (2000), 35 R.P.R. (3d) 141 (S.C.), aff'd (2002), 57 O.R. (3d) 503 (C.A.), leave to appeal refused, 177 O.A.C. 399 (note), a property neighbouring a gas station was contaminated with gasoline after a leak in a fuel line. Since the defendant polluter admitted liability, the only issue at trial was the assessment of damages. The plaintiff sought to recover the cost of returning its property to "pristine" condition. It also claimed "stigma" damages measured as the diminution in the value of its property. The defendant argued that the plaintiff had suffered no damages due to the spill, or that alternatively, its damages should be limited to the cost of remediating the property to the MOE's minimum standards. The trial judge awarded damages as

requested by the plaintiff. On appeal, this court overturned the stigma damage award but upheld the trial judge's decision to order damages for the cost of future remediation.

65 The respondents argue *Tridan* does not apply because the defendant in that case admitted it was liable. There is no merit in this argument. The damages analysis in *Tridan* is relevant regardless of whether liability was admitted or found by the court.

66 The second case is *Canadian Tire Real Estate Ltd. v. Huron Concrete Supply Ltd.*, 2014 ONSC 288, 88 C.E.L.R. (3d) 93. It also involved PHC contamination by a neighbour. Justice Leitch ordered the defendant to pay $3.6 million, which was the estimated cost for future remediation, as damages for nuisance, negligence, trespass and strict liability. She found that this award would place the plaintiff in the position it was in prior to the tortious conduct.

67 Neither *Tridan* nor *Canadian Tire* involved a claim under s. 99(2) of the *EPA*. There is no reported case where a court has awarded damages for the cost of future remediation under this section. Nonetheless, in my view, awarding damages under s. 99(2) based on restoration cost rather than diminution in property value is more consistent with the objectives of environmental protection and remediation that underlie this provision.

68 This approach to damages reflects the "polluter pays" principle, which provides that whenever possible, the party that causes pollution should pay for remediation, compensation, and prevention: see Pardy, at p. 187. As the Supreme Court has noted, the polluter pays principle "has become firmly entrenched in environmental law in Canada": *Imperial Oil Ltd. v. Quebec (Minister of the Environment)*, 2003 SCC 58, [2003] 2 S.C.R. 624, at para. 23. In imposing strict liability on polluters by focusing on only the issues of who owns and controls the pollutant, Part X of the *EPA*, which includes s. 99(2), is effectively a statutory codification of this principle.

69 Further, a plain reading of s. 99(2) of the *EPA* suggests that parties are entitled to recover the full cost of remediation from polluters. Pursuant to s. 99(2)(a), a party is entitled to recover all "loss or damage" resulting from the spill. Section 99(1) provides that "loss or damage" includes personal injury, loss of life, loss of use or enjoyment of property and pecuniary loss, including loss of income. Section 99(2)(b) provides that a party has a "right to compensation for all reasonable cost and expense incurred in respect of carrying out or attempting to carry out an order or direction under this Part, from the owner of the pollutant and the person having control of the pollutant." In my view, under either part of s. 99(2), polluters must reimburse other parties for costs they incur in remediating contamination.

70 In summary, restricting damages to the diminution in the value of property is contrary to the wording of the *EPA*, the trend in the common law to award restorative damages, the polluter pays principle, and the whole purpose of the enactment of Part X of the *EPA*. It would indeed be a remarkable result if legislation enacted to provide a new statutory cause of action to innocent parties who have suffered contamination of their property did not permit the party to recover the costs of remediating their property, given the *EPA*'s broad and important goals of protecting and restoring the natural environment.

71 The second argument advanced by the respondents is that compensation under s. 99(2) is dependent upon the establishment of an actionable nuisance, which requires proof of physical injury to the land or substantial interference with the use or enjoyment of the land in order to claim damages. In support of that position they rely upon the decision of this court in *Hollick v. Metropolitan Toronto* (1999), 46 O.R. (3d) 257 (C.A.), aff'd 2001 SCC 68, [2001] 3 S.C.R. 158.

72 According to the respondents, there was no such evidence before the court. They say the fact that certain contaminants exceed MOE standards is not evidence of physical harm to the property. They also argue that there was no evidence tendered of health risks, impacts to individuals at Midwest's property, or interference with potable water.

73 I am not persuaded that, in order to succeed in its claim under s. 99(2), Midwest is required to prove an actionable nuisance. As noted above, the purpose of enacting s. 99(2) was to provide a flexible statutory cause of action that superimposed liability over the common law. In so doing, the Legislature recognized the inherent limitations of the common law torts of nuisance and negligence. This new cause of action eliminated in a stroke such issues as intent, fault, duty of care, and foreseeability, and granted property owners a new and powerful tool to seek compensation.

74 The interpretation urged upon us by the respondents, that under this new cause of action a plaintiff could only recover if it could first prove that the defendant's conduct constituted a nuisance at common law, is entirely incongruous with the purpose of the enactment of s. 99(2). The Legislature is presumed to know the law. If the Legislature wanted to define the new cause of action in a manner consistent with the existing common law of nuisance it could have done so. It did not.

75 I am also not persuaded that *Hollick* is authority for the proposition that proof of common law nuisance is a prerequisite for a claim under s. 99. The issue in that case was whether a putative class action should be certified. The plaintiff had pleaded nuisance, negligence, *Rylands v. Fletcher*, and s. 99 of the *EPA*. While Carthy J.A. indicated that "No one of these claims can be established unless a nuisance is proved", in my view, this comment should be taken as indicating that the claims in the proceeding were dependent on the proof of an underlying "nuisance" in the colloquial sense.

76 In *Hollick* the court was not dealing with the merits of a s. 99 claim, but instead considering whether there were sufficient common issues to justify class certification. Ultimately, the court concluded that there were not because there was not sufficient commonality on the issues relating to the source and impact of the pollution. In contrast, in this case there is no issue that there was a spill of a pollutant as that term is defined in s. 91(1) and that the spill caused an adverse effect by, among other things, causing damage to property as defined in s. 1(1).

77 Third, the respondents argue that Midwest has not demonstrated that its property was clean when it was purchased in December 2007. They say that the time at which the property was contaminated is relevant to the application of the *Limitations Act, 2002*, S.O. 2002, c. 24, Sch. B. The respondents submit that Midwest has an obligation to establish that the contamination occurred within the two year limitation period and that, in the case of an ongoing contamination, they are only responsible for pollution that is proven by Midwest to have occurred during that period (i.e. two years).

78 I would not give effect to this argument. First, the respondents ignore s. 17 of the *Limitations Act, 2002*, which provides that "There is no limitation period in respect of an environmental claim that has not been discovered." Here there is no question that Midwest commenced its action within two years of buying the property and discovering the contamination.

79 Second, the respondents are not absolved from liability under s. 99(2) on the basis that Midwest cannot state what level of contamination occurred before and after they purchased the property. There is no requirement under the *EPA* for them to do so. Further, the respondents should not be able to use their lengthy history of pollution and non-compliance as a shield to limit the amount of damages they now owe.

80 For the foregoing reasons, I would find that the trial judge erred in law in her conclusion that Midwest had not proven recoverable damages under s. 99 of the *EPA*. As noted above, there is really no dispute on the evidence regarding the costs of the remediation. Midwest led expert evidence that the reasonable costs of remediating its property would be $1,328,000 and the respondents, while challenging that expert evidence, did not lead positive evidence on the costs of remediating Midwest's property. In my view, the future remediation costs for Midwest's property are recoverable and Midwest is entitled to judgment for the full amount of its estimated costs, being $1,328,000.

(iii) Personal Liability Under the *EPA*

81 The trial judge found that the respondents were not liable under the *EPA*. Understandably, she did not consider whether Mr. Thordarson had any personal liability under the statute. Given my conclusions above regarding the *EPA*, the issue of personal liability now arises.

82 Section 99(2) of the *EPA* establishes a right to compensation from "the owner of the pollutant and the person having control of the pollutant." The term "owner of the pollutant" is defined in s. 91 (1) as "the owner of the pollutant immediately before the first discharge of the pollutant, whether into the natural environment or not, in a quantity or with a quality abnormal at the location where the discharge occurs." Thorco falls squarely within this definition.

83 Mr. Thordarson relies on the "corporate veil" principle set out by this court in *ScotiaMcLeod Inc. v. Peoples Jewellers Limited* (1995), 26 O.R. (3d) 481 (C.A.), at paras. 25-26, to argue that he is not personally liable. I disagree.

84 Section 99(2) provides that an action lies against the owner of the pollutant and the person who controls the pollutant. "Person having control of a pollutant" is defined in s. 91(1) as "the person and the person's employee or agent, if any, having the charge, management or control of a pollutant immediately before the first discharge of the pollutant, whether into the natural environment or not, in a quantity or with a quality abnormal at the location where the discharge occurs." This definition, and the use of the word "and" in s. 99(2), indicates that the party or entity that owns the pollutant and the person or people, including employees and agents, who manage or control the pollutant can all be held liable under this provision. In other words, parties with control of a pollutant cannot rely on separate ownership of the pollutant to shield themselves from liability.

85 The question remains whether Mr. Thordarson had "control" of the PHC. Mr. Thordarson is Thorco's principal, and had sole control of Thorco during the relevant time period. As noted above, Thorco owned the PHC.

86 There are two reported cases involving claims against corporate principals, directors or officers under s. 99(2). In *Bisson v. Brunette Holdings Ltd.* (1993), 15 C.E.L.R. (N.S.) 201 (Ont. Gen. Div.), the plaintiffs brought an action under s. 99(2) against a neighbouring gas station and the person who was its principal shareholder, manager, and president, after gasoline leaked onto their property. Although the individual defendant was ultimately able to rely on the due diligence defence in s. 99(3), the court found, at para. 32, that he "had the charge, management, and control of the gasoline, on the company's behalf, immediately prior to its escape, and that therefore he falls squarely within the definition" in s. 91(1) of a "person having control of a pollutant."

87 On the other hand, in *United Canadian Malt Ltd. v. Outboard Marine Corp. of Canada Ltd.* (2000), 48 O.R. (3d) 352 (S.C.), s. 99(2) claims against current and former directors of the corporate defendant and its American parent company were struck on the ground that the pleaded facts did not

suggest these individuals had charge, management or control of the pollutants. The individual defendants only became "embroiled in the issues after the contamination problem was found to exist, and subsequently with respect to the attempts to remedy the problem" (para. 32).

88 These cases make clear that a finding that a corporate principal, director, or officer is a "person having control of a pollutant" will be dependent on the factual circumstances of the case. In my view, the present case is similar to *Bisson*. Like the corporate defendant in *Bisson*, Thorco is a small business whose day-to-day operations are effectively controlled by one person--Mr. Thordarson. His evidence at trial established that it was he who applied for the Certificate of Approval from the MOE and that he was responsible for both the material being brought on to 1700 Midland and its storage on the property.

89 In light of the evidence and the similarities to *Bisson*, in this case Mr. Thordarson had control of the PHC for the purpose of s. 99(2). As for the allocation of damages between Thorco and Mr. Thordarson, s. 99(8) provides that liability under s. 99(2) is joint and several.

(iv) Nuisance and Negligence Claims

90 Given that the compensatory damages sought under the common law causes of action are the same as those sought under the *EPA*, it is unnecessary to decide the issue of whether the trial judge erred in dismissing the appellant's claims in nuisance and negligence in order to determine the entitlement of the appellant to compensatory damages. However, the issue becomes relevant to the question of the availability of punitive damages because this court has held that where a statutory cause of action provides for compensatory damages only, a court cannot award punitive damages, which are, by their nature, non-compensatory: see *Lord (Litigation Guardian of) v. Downer* (1999), 125 O.A.C. 168 (C.A.). Thus, in order to determine whether punitive damages are available it is necessary to first decide whether the trial judge erred in dismissing the nuisance and negligence claims.

91 The trial judge dismissed Midwest's nuisance claim on the basis that it had failed to prove damages. She noted that, because there was no evidence of the environmental state of 285 Midwest at the time it was acquired in 2007, Midwest could not prove that there was any chemical alteration in the soil and groundwater on its property. She held that Midwest would have to prove that there was an increase in the contamination level of the property. The trial judge then cited *Innisfil Landfill*, where the court approved, at para. 9, of the following statements of law:

> Actual damage must be proven to succeed in nuisance... No special damages (for alleged devaluation of property) can be advanced on the basis of mere speculation that a prospective purchaser might be apprehensive about the impact of the alleged nuisance on the property... An interference with the health of the plaintiffs thereby interfering with their enjoyment of the lands would fall within the essence of nuisance.

92 She further cited *Smith v. Inco Ltd.*, 2011 ONCA 628, 107 O.R. (3d) 321, leave to appeal refused, [2011] S.C.C.A. No. 539, [2012] 1 S.C.R. xii (note), in part for the proposition that:

> [A]ctual, substantial, physical damage to the land in the context of this case refers to nickel levels that at least posed some risk to the health or wellbeing of the residents of those properties. Evidence that the existence of the nickel particles in the soil generated concerns about potential health risks does not,

> in our view, amount to evidence that the presence of the particles in the soil caused actual, substantial harm or damage to the property. The claimants failed to establish actual, substantial, physical damage to their properties as a result of the nickel particles becoming part of the soil. Without actual, substantial, physical harm, the nuisance claim as framed by the claimants could not succeed.

93 The trial judge then concluded that Midwest had not proven damage in nuisance.

94 The trial judge also dismissed Midwest's negligence claim on the basis that it had failed to prove damage. She referred again to *Mortgage Insurance Co. of Canada*, at para. 9, for the proposition that, "A fundamental requirement of negligence is the constituent element of there being shown actual damage suffered by the plaintiff as a result of the defendant's breach of a duty of care towards the plaintiff."

95 The respondents submit that the trial judge was correct in dismissing both causes of action. They argue the fact that certain contaminants in the soil exceed the relevant MOE guidelines is not evidence of physical harm or damage to the property. The latter cannot be inferred from the former; evidence of actual harm or interference with use is required.

96 The respondents further submit that there is no evidence of any impairment of the use that the appellant is making of its property, no harm or material discomfort to any person, no adverse impact on the health of any person, no evidence that the property is unfit for continued use as a commercial/industrial property for the manufacture of clothing, and no evidence of interference with the normal conduct of business at the property.

97 With respect to the financial impact of the contamination, the respondents submit that while Mr. Vanin and Mr. Tossell suggested that there would be a negative financial impact, neither of those expert witnesses was qualified as an expert in mortgages, property valuation or property appraisals.

98 In my view, the trial judge erred in dismissing these claims on the basis that damage had not been established. There was uncontradicted evidence at trial that established a diminution in the value of the appellant's property and a human health risk. Nowhere in her reasons did the trial judge consider the evidence. Instead she made findings that damage had not been established without reference to the evidence at trial.

99 With respect to property values, Messrs. Vanin and Tossell testified that PHC contamination would lower the value of property and/or make it more difficult to obtain financing. Although not professional appraisers, they were experts in the environmental assessment of realty. They have expert knowledge of the relationship between particular contaminants and their general effect on property values. While the experts did not quantify the loss, quantification of damages is not required to establish that Midwest has suffered damage compensable under the law of nuisance and negligence.

100 With respect to health risks, Mr. Tossell testified that the F1 and F2 fractions for PHC are volatile and constitute a risk to human health and the environment. Soil and groundwater sampling at 285 Midwest showed results which exceeded the permitted concentrations at several locations on the property. Monitoring well 106, installed underneath the building at 285 Midwest to assess the condition for the occupants of the building, showed an F2 reading over the MOE limit. Mr. Tossell

testified that there is a risk that the volatile PHC will get into the building and that this is a potential health risk to the occupants.

101 The fact that the contamination of the property with PHC presented a health risk to the employees of Midwest is evidence of physical and material harm or injury to the property. Again we are not concerned with the quantification of the loss, because any damages would be subsumed in the compensatory damages awarded under the *EPA*. The point is that there was uncontradicted evidence that the appellant had suffered damage in terms of physical and material harm or injury to the property and diminution in the value of its property.

102 This situation is distinguishable from the facts in *Inco* where there was nickel contamination but no evidence that the change in the chemical composition of the soil posed any health risk to the occupants or diminished the value of the plaintiffs' property at the time of the contamination.

103 The respondents also submit that the trial judge was correct in finding that damage had not been established because Midwest could not prove that there had been any contamination after it acquired its property. This conclusion is unsupportable because it is contrary to the evidence regarding the worsening condition of 285 Midwest.

104 There was uncontradicted evidence that after December 2007 there was a qualitative difference in the PHC contamination. In monitoring well 102, free product was not detected in 2008, but was detected in 2011; in monitoring well 101, free product was not detected in 2011 but was detected in 2012. The evidence of Mr. Tossell was that it was more expensive and challenging for a remediator to remove free product. Thus the evidence established that the PHC contamination grew worse and more expensive to fix after the appellant acquired 285 Midwest in 2007.

105 In my view, the trial judge erred in dismissing the claims in nuisance and negligence on the basis that the appellant had not established any damage. There was uncontradicted evidence that supported a finding that damage had been suffered. The trial judge committed a palpable and overriding error in not considering that evidence and in reaching the unsupported finding that damage had not been proven.

106 It is also clear that the other elements of the torts of nuisance and negligence are made out on the facts of this case. Nuisance is a substantial and unreasonable interference with the plaintiff's use or enjoyment of land: *Antrim Truck Centre Ltd. v. Ontario (Transportation)*, 2013 SCC 13, [2013] 1 S.C.R. 594, at para. 18. While the jurisprudence prior to *Antrim* established that physical or material harm to land was presumptively unreasonable, in *Antrim* the Supreme Court held, at para. 51, that the reasonableness of the interference must be assessed in all cases. The court, however, also held that where actual physical damage is at issue, the reasonableness analysis will likely be brief: *Antrim*, at para. 50.

107 Such is the case here. The invasion of PHC onto Midwest's property, to the point that the product is of such a concentration that it can no longer dissolve in groundwater and is found to pose a risk to human health, cannot be classified as trivial, insubstantial, or reasonable. The interference becomes all the more unreasonable when the significant cost to Midwest to remediate the contamination and undo the damage to the soil and groundwater on its property is considered. This is not the kind of interference with the use or enjoyment of property that society, through the law of nuisance, expects a property owner such as Midwest to bear in the name of being a good neighbour.

108 Midwest's claim in negligence is also made out. Beyond proof of damage, to succeed in a negligence action, the plaintiff must demonstrate that the defendant owed it a duty of care, that the defendant breached the standard of care, and that the damage was caused, legally and factually, by that breach: *Mustapha v. Culligan of Canada Ltd.*, 2008 SCC 27, [2008] 2 S.C.R. 114, at para. 3.

109 A landowner owes a duty to adjoining landowners to avoid acts or omissions that may cause harm to those adjoining landowners: *Canadian Tire*, at para. 299. There can be no serious suggestion on the facts of this case that Thorco actually complied with the standard of care expected of a reasonable landowner. The evidence established that the respondents were never in compliance with the Certificate of Approval issued by the MOE in 1988 with respect to the limits on waste material or required storage practices. On the contrary, excessive amounts of waste materials were stored on 1700 Midland in conditions that easily allowed the contents to be infiltrated by rainwater and escape to the natural environment.

110 The trial judge found, at paras. 8-9 of her reasons, that the expert evidence established that the contamination at 285 Midwest was caused by the migration of the known contamination at 1700 Midland, through the flow of groundwater, onto 285 Midwest.

111 While the respondents were only convicted of failing to comply with an MOE order once, the series of reports from Officer Mitchell, beginning in 2008, disclose a repeated pattern of what can only be described as utter disregard for the effect that the deficient storage practices of chemicals stored on the property could have on the surrounding environment, including 285 Midwest.

112 In conclusion, the appellant established an entitlement to damages under both nuisance and negligence. The trial judge erred in dismissing these claims.

113 Mr. Thordarson cannot rely on the "corporate veil" principle in *ScotiaMcLeod* to avoid personal liability for the commission of these torts. It is well-established in the law of Ontario that "employees, officers and directors will be held personally liable for tortious conduct causing physical injury, property damage, or a nuisance even when their actions are pursuant to their duties to the corporation": *ADGA Systems International Ltd. v. Valcom Ltd.* (1999), 43 O.R. (3d) 101 (C.A.), at para. 26.

114 As noted above, Thorco is a small business whose day-to-day operations are effectively controlled by Mr. Thordarson, and there is no question that he was intimately and equally involved in the conduct which was both a nuisance and negligent.

115 The following passage from *Desrosiers v. Sullivan* (1986), 76 N.B.R. (2d) 271 (C.A.), leave to appeal refused, 79 N.B.R. (2d) 90 (note), has often been quoted and is equally applicable in the circumstances of this case:

> The question here is whether Mr. Sullivan, who was the manager and principal employee of the company that committed the nuisance, may be responsible along with the company. I see no reason why, because of his involvement in creating and maintaining the nuisance, Mr. Sullivan should not also be responsible. Here, as the trial Judge found, Mr. Sullivan was the principal employee of the company and the person responsible for its day-to-day operations and on that basis he was responsible for both creating and maintaining the nuisance.

...

> The question here, as I have pointed out, is not whether Mr. Sullivan was acting on behalf of or even if he "was" the company, but whether a legal barrier, here a company, can be erected between a person found to be a wrongdoer and an injured party thereby relieving the wrongdoer of his liability. In my opinion, once it is determined that a person breaches a duty owed to neighbouring landowners not to interfere with their reasonable enjoyment of their property, liability may be imposed on him and he may not escape by saying that as well as being a wrongdoer he is also a company manager or employee.

116 As a result, I would hold Thorco and Mr. Thordarson jointly and severally liable to Midwest.

(v) Punitive Damages

117 The trial judge held, at para. 36 of her reasons, that an award of punitive damages would be made only "in exceptional cases for malicious, oppressive and high-handed misconduct that offends the court's sense of decency." She further noted that findings that the respondents' conduct was wrong in law, caused or permitted the deposit of contaminants onto 285 Midwest, or caused damage, would be insufficient to warrant an award of punitive damages.

118 The trial judge distinguished one case cited by Midwest, *Deumo v. Fitzpatrick* (2008), 39 C.E.L.R. (3d) 299 (Ont. S.C.), where the conduct of the defendant was "reckless, destructive, persistent, pervasive and heedless of their neighbours' physical integrity and property rights", concluding that the evidence in the present case did not support such a finding.

119 Midwest submits that punitive damages should be awarded where conduct is high-handed, malicious, arbitrary or highly reprehensible, and in cases where a defendant consciously, deliberately, and callously disregards a neighbour's rights. They argue that the respondents' conduct was severe, lasted decades, had a profit motive, and was undeterred by MOE orders.

120 The respondents submit that punitive damages are exceptional and Midwest has not demonstrated that the respondents' behaviour was malicious or otherwise deserving of punishment, particularly during the relevant period of time contemplated by the *Limitations Act, 2002*. Their position is that mere contamination of Midwest's property is not a sufficient basis to ground a punitive damages claim.

121 In my view, the trial judge erred in law in concluding that an award of punitive damages was not appropriate in this case. The general objectives of punitive damages are to punish, to deter, and to denounce a defendant's conduct: *Whiten v. Pilot Insurance Co.*, 2002 SCC 18, [2002] 1 S.C.R. 595, at para. 68. An award of punitive damages should be rationally connected to one of these objectives: *Whiten*, at para. 71. Factors relevant to determining the rational limits of a punitive damage award include whether the defendant persisted in the conduct over a lengthy period of time, whether the defendant was aware that what he or she was doing was wrong, and whether the defendant profited from the conduct: *Whiten*, at para. 113.

122 On the facts of this case a punitive damages award was clearly warranted. Thorco's history of non-compliance with its Certificate of Approval and MOE orders, and its utter indifference to the environmental condition of its property and surrounding areas, including Lake Ontario, demonstrates

a wanton disregard for its environmental obligations. This conduct has continued for decades and is clearly driven by profit. Mr. Thordarson testified at trial that one of the reasons he did not comply with the 22,520 gallon limit on waste in the Certificate of Approval, when that certificate was issued in 1988, was that he was not aware of an economical way of doing so.

123 The 1999 report from XCG Consultants informed the respondents that it would cost approximately $43,000 to dispose of the inventory of PHC and catalyst at the property, and recommended that "soil and groundwater should be investigated to assess potential soil impacts and rule out groundwater impacts on-site." Thorco and Mr. Thordarson made a business decision not to invest this modest sum, or conduct further investigations. Instead they permitted the level of contamination and the costs of remediation to increase exponentially.

124 This is the type of conduct by a defendant that warrants punitive sanction by the court. I would award Midwest punitive damages in the amounts of $50,000 against Thorco and $50,000 against Mr. Thordarson.

F. DISPOSITION

125 I would allow the appeal, set aside the judgment of the trial judge and substitute judgment against both respondents jointly and severally for $1,328,000 in damages under s. 99 of the *EPA*. Given that the respondents are liable in nuisance and negligence, I would also award Midwest $50,000 in punitive damages against each of the respondents.

126 With respect to costs of the appeal, Midwest sought costs on a partial indemnity scale of $74,894 and the respondents sought costs on that scale of $56,250. Midwest as the successful party is entitled to its costs, which I would fix at $70,000, inclusive of all fees, disbursements and applicable taxes. With respect to the trial costs, at the conclusion of the appeal the parties were unable to agree on the quantum of costs awarded at trial or what the appropriate quantum of Midwest's costs of the trial would be if it were successful on this appeal. In my view, given the result of the appeal, Midwest is also entitled to its costs of the trial. If the parties are unable to agree on these costs, they may file brief written submissions on costs within 10 days of the release of these reasons.

C.W. HOURIGAN J.A.
K.N. FELDMAN J.A.:-- I agree.
M.L. BENOTTO J.A.:-- I agree.

FILE NUMBER: ________

IN THE SUPREME COURT OF CANADA
(ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO)

BETWEEN:

JOHN THORDARSON and THORCO CONTRACTING LIMITED

Applicants
(Respondents)

and

MIDWEST PROPERTIES LTD.

Respondent
(Appellant)

and

MINISTRY OF THE ENVIRONMENT AND CLIMATE CHANGE

Intervener

MEMORANDUM OF ARGUMENT

OVERVIEW

1. This case raises a pressing and increasingly common concern for property owners across Canada. To what extent is a property owner liable to its neighbours for the alleged migration of historical contamination?

2. The decision of the Court of Appeal for Ontario ("Court of Appeal") has distorted important common law principles applicable to contaminated land disputes. It has also created liability for owners of property with historical contamination under section 99 of

the *Environmental Protection Act* ("EPA")[1] beyond what the statute itself contemplates and where none previously existed.

3. Without the intervention of this Honourable Court, the application of the Court of Appeal's decision would result in indeterminate liability and uncertainty for owners of property with historical contamination. The implications of this decision are far-reaching and include:

(a) A property owner is now liable pursuant to section 99 of the EPA for historical contamination where there has been no identifiable spill of pollutants, contrary to a plain reading and existing judicial interpretation of this section;

(b) The ancient doctrine of *caveat emptor* has been overturned, such that the purchaser of a property can hold neighbouring property owners and vendors of contaminated property liable even where the purchaser knew, or ought to have known, of the contamination at the time of purchase;

(c) An owner of a contaminated property is required to pay twice for the remediation of the same historical contamination: civilly, through payment of damages for restoration costs, and statutorily, through an administrative order for those same restoration costs; and

(d) Damages awarded against a property owner for contaminating a neighbouring property will be calculated based on the cost of restoring that property as opposed to on the diminution in its value. This is so even absent proof of diminution in the value of the property and irrespective of whether there has been any attempt to mitigate damages.

PART I - STATEMENT OF FACTS

A. Midwest Purchases an Industrial Property

4. In 2007, Midwest Properties Ltd. ("Midwest") purchased contaminated land. The property Midwest purchased is an industrial property, located at 285 Midwest Road (the

1 *Environmental Protection Act*, R.S.O. 1990, c E.19 [EPA].

"Midwest Property"), in a heavily industrialized area of Toronto, Ontario. It is adjacent to 1700 Midland Avenue (the "Midland Property").

5. The Midland Property was, and continues to be, owned by Thorco Contracting Limited and has been used by this corporation and its principle, John Thordarson (collectively, the "Applicants" or "Thorco"), to provide products and services to industrial customers. Since 1973, a small portion of this operation has included a petroleum hydrocarbon waste storage business.[2]

6. Around the time of purchase, Midwest had completed a "Phase I" environmental assessment, but failed to investigate whether the property exceeded the applicable Ontario Ministry of the Environment (now Ministry of the Environment and Climate Change or "MOECC") standards for an industrial property.[3] It chose not to do so despite knowing that the property was surrounded by industrial uses, including a petroleum hydrocarbon waste storage area on the Midland Property.

7. Midwest did not pursue any action against the vendor or the environmental consultant who performed the inadequate Phase I on the property.[4]

B. Thorco and Thordarson are Ordered to Remediate

8. Thorco are subject to an MOECC order requiring them to investigate the contamination and to remediate both the Midwest and Midland Properties (the "MOECC Order").[5]

C. Midwest's Claims Dismissed by the Superior Court

9. Midwest sought damages (including punitive damages) against Thorco. It did so on the basis of nuisance, negligence, and a breach of subsection 99(1) of the EPA.

10. Subsection 99(1) establishes a statutory remedy for "loss or damage" incurred as a direct result of a "spill" of "pollutants" (a subset of "contaminants") causing or likely to cause

2 Judgment of the Superior Court below at para. 1.

3 Judgment of the Superior Court below at para. 7.

4 Judgment of the Superior Court below at para. 27.

5 Judgment of the Superior Court below at paras. 4, 20.

an "adverse effect."[6] This section came into effect on November 29, 1985, and only applies to "spills" of "pollutants," as those terms are defined in the EPA, after that date.

11. The Superior Court dismissed all of Midwest's claims. It found that there was no evidence that Midwest had acquired a property that was not contaminated at the time of purchase.[7] In fact, the Court found "no evidence as to when such contamination ha[d] occurred."[8]

12. Without proving damage to the Midwest Property, Midwest could not establish nuisance, or negligence.[9] The Superior Court dismissed Midwest's claim under section 99 of the EPA on the basis that it had not established "damage or loss" as required under the statute.[10]

13. The Court further noted that because the MOECC had already ordered Thorco to remediate the Midwest Property, also awarding Midwest damages under section 99 of the EPA would inappropriately entitle Midwest to double recovery arising from the same legislation.[11]

14. Following the dismissal of Midwest's claims, the Superior Court failed to evaluate Midwest's damages.

D. Decision of the Court of Appeal

15. The Court of Appeal decision reversed completely the judgment of the Superior Court, relying on a number of facts not referred to in the trial judgment.[12]

16. Relying on evidence provided by Midwest's environmental consultants, who were neither trained nor qualified as appraisers, the Court of Appeal concluded that the contamination resulted in a diminution in the value of the Midwest Property.[13] There was no evidence as

6 Judgment of the Superior Court below at paras. 4, 20.

7 Judgment of the Superior Court below at para. 27.

8 Judgment of the Superior Court below at para. 8.

9 Judgment of the Superior Court below at paras. 31, 34.

10 Judgment of the Superior Court below at para. 23.

11 Judgment of the Superior Court below at paras. 22 and 23.

12 Judgment of the Court of Appeal below at para. 5.

13 Judgment of the Court of Appeal below at paras. 2, 26, 98.

to what the quantum of diminution might be, and none was referred to in the Court of Appeal's reasons.

17. The Court of Appeal characterized the historical contamination present on the Midland Property as a "spill" falling within the meaning of section 99 of Part X of the EPA. However, it did so without reference to the legislative definition of "spill" and without reference to a spill event on the Midland property that had resulted in loss or damage to the Midwest property.[14]

18. The Court of Appeal did not find that the historical contamination interfered with the use or enjoyment of the lands.

19. The Court of Appeal also rejected the trial judge's conclusion that an award under section 99 and an award for damages for restoration costs would create the potential for double recovery. Instead, the Court of Appeal characterized this provision, which allows for the civil recovery of damages for spills, as complementary to, rather than exclusive of, the provisions under the EPA that allow the MOECC to order remediation.

20. The Court of Appeal's decision has resulted in Thorco paying twice to restore the Midwest Property—first by paying damages to Midwest civilly for restoration costs and second by incurring the costs to restore the Midwest Property pursuant to the MOECC Order.[15]

21. The MOECC, an intervenor during the appeal, indicated that it would be "forced" to "redirect" its remediation order in the event the Applicants were ordered to pay restoration damages.[16] There is no mechanism in the EPA that would, in fact, require the MOECC to redirect its order. The Court of Appeal did not address how, and whether, the MOECC would redirect such a remediation order after Thorco had begun or completed the restoration work.

22. The Court of Appeal also overturned the trial judge's dismissal of Midwest's claims for nuisance and negligence. The Court of Appeal concluded that Midwest did not have to

14 Judgment of the Court of Appeal below at para. 49.

15 Judgment of the Court of Appeal below at paras. 52 and 55.

16 Judgment of the Court of Appeal below at para. 55.

establish the level of contamination on its property at the time of purchase in order to claim successfully that it had suffered damages,[17] thereby absolving it of its obligation as a purchaser to conduct its own due diligence at the time of purchase.

23. The Court of Appeal rejected the diminution in property value approach to assessing damages and instead awarded damages based on restoration costs. It awarded damages based on future remediation costs, while neglecting to take into consideration the costs already incurred for the restoration of the Midwest Property.[18] There was no evidence at trial relating to any actual loss in value of, or stigma damages associated with, the Midwest Property.

PART II - STATEMENT OF ISSUES

24. This leave application raises the following issues of national and public importance:

(a) Is it reasonable for section 99 of the EPA to apply to historical contamination where there has been no identifiable spill of pollutants?

(b) Does the doctrine of *caveat emptor* continue to apply to purchases of potentially contaminated land? Are prospective purchasers no longer required to conduct their own due diligence and investigate the nature of the property they intend on purchasing?

(c) What is the appropriate measure of damages in environmental contamination cases? Should damages be calculated based on restoration costs or on diminution in the value of the property? Is it fair and equitable to require a liable property owner to both remediate a property by way of administrative order *and* pay damages for the same remediation? Is it reasonable to award damages for remediation costs to a plaintiff where that plaintiff has not taken any steps to remediate the property nor provided any indication that it will use the funds from a judgment to remediate the property? Does this result in unjust enrichment by allowing a plaintiff to recover twice for the same harm?

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17 Judgment of the Court of Appeal below at para. 98.

18 Judgment of the Court of Appeal below at paras. 60-63, 67.

PART III - STATEMENT OF ARGUMENT

A. Issue One: Section 99 of the *Environmental Protection Act*

i. The Court of Appeal erred in finding that Part X of the EPA applies to unidentified sources of historical contamination

(1) Under the EPA, "spills," which constitute a type of discharge, must arise from a specific event and come from a structure, vehicle or other container

25. Section 99 is found within the "Spills" part (Part X) of the EPA, which is colloquially known as the "spills bill." Section 99 provides a mechanism through which either the Crown or any other person may seek compensation for loss or damage arising from the spill of a pollutant:

> Her Majesty in right of Ontario or in right of Canada or any other person has the right to compensation,
>
> (a) for loss or damage incurred as a direct result of,
>
> (i) the spill of a pollutant that causes or is likely to cause an adverse effect,
>
> (ii) the exercise of any authority under subsection 100 (1) or the carrying out of or attempting to carry out a duty imposed or an order or direction made under this Part, or
>
> (iii) neglect or default in carrying out a duty imposed or an order or direction made under this Part;
>
> (b) for all reasonable cost and expense incurred in respect of carrying out or attempting to carry out an order or direction under this Part,
>
> from the owner of the pollutant and the person having control of the pollutant.

26. Subsection 91(1) defines "spill," for the purposes of Part X, as:

> when used with reference to a pollutant, means a discharge,
>
> a. into the natural environment,
>
> b. from or out of a structure, vehicle or other container, and
>
> c. that is abnormal in quality or quantity in light of all the circumstances of the discharge, and when used as a verb has a corresponding meaning.

27. The language of subsection 91(1) confirms that a "spill" is a subset of "discharge," which is a much broader term. Subsection 1(1) of the EPA provides that a discharge "when used as a verb, includes add, deposit, leak or emit and, when used as a noun, includes addition, deposit, emission or leak."

28. A "spill" is a particular kind of "addition, deposit, emission or leak"—one that must both be both "abnormal" and emanate "from or out of a structure, vehicle or other container."[19]

29. The leading commentary on the interpretation of section 99 is Dianne Saxe's *Ontario Environmental Protection Act Annotated.*[20] Dr. Saxe has long maintained that "not every discharge is a spill." Rather, Dr. Saxe concludes that "discharge" is defined expansively; discharges can be "planned for, long-standing and routine" as well as "exceptional."[21] "Spills," on the other hand can *only* be exceptional—not longstanding or indeterminate. Dr Saxe observes that

> The "abnormal" character of "spills" dominate[s] Part X. No one can obtain a licence to have "spills". On the contrary, instant action is required when they occur. The Ministry and the municipality must immediately be notified, generally by a call to a specially established Spills Action Centre that has immediate links to emergency response services (s. 92). Unlike "discharges", "spills" must immediately and automatically be contained and cleaned up (s. 93). ... In all respects spills are treated in the Act as emergencies.[22]

30. As Dr. Saxe points out, unlike a "discharge," a "spill" under subsection 99(2) requires a plaintiff to point to a specific spill event.[23]

(2) A historical, unidentified source of contamination cannot constitute a "spill"

31. Dr. Saxe notes that "[l]oss as a result of some undefined historical source of contamination will not be sufficient to establish a "spill"."[24]

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19 EPA, ss. 1(1), 91(1).

20 Dianne Saxe, *Ontario Environmental Protection Act Annotated* (Toronto: Canada Law Book, Looseleaf) [Saxe].

21 Saxe at X-3, *supra* note 20.

22 Saxe at X-3, *supra* note 20.

23 Saxe at X 22-23, *supra* note 20.

24 Saxe at X-23, *supra* note 20.

32. This analysis aligns with the reasoning from the limited judicial decisions that interpret the definition of "spill" as applicable to section 99.

33. In *Pearson v. Inco Ltd*,[25] the Superior Court of Justice relied upon Dr. Saxe's analysis in finding that a history of emissions of pollutants from a refinery could not be a "spill," given the inclusion of the word "abnormal" in the definition of that term in the EPA.[26]

34. In a similar vein, that Court previously held that an ongoing source of contamination was only a "spill" insofar as "fresh spills" from a specific source could be identified. In that case, "fresh spills" occurred when a landfill continued to produce leachate that was allowed to escape from a specific structure (a dump).[27] Put another way, a general history of contamination, without reference to a specific incident and structure from which pollutants emanate, cannot constitute a spill.

35. In a related manner, the Court of Appeal previously endorsed the view that a "discharge" occurs when a contaminant enters the natural environment and not when it continues to move within the natural environment.[28] That is, the movement of historical contamination in the natural environment alone does not constitute a "discharge." Rather, once a contaminant has already entered the natural environment, it is no longer a "discharge."

36. If historical contamination is not a "discharge," it cannot be a "spill."

37. The Court of Appeal's decision has created inconsistency within its own EPA case law.

(3) Part X of the EPA was intended to address spill events—not historical sources of contamination

38. Hansard from debates in the Ontario Legislative Assembly pertaining to the inclusion of Part X in the EPA indicate that the Legislature intended for Part X to apply exclusively to spills—and not to general discharges such as historical contamination.

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25 *Pearson v. Inco Ltd.* (2001), 57 O.R. (3d) 279 (S.C.J.) [*Pearson*].

26 *Pearson* at para. 22, *supra* note 25.

27 *The Mortgage Insurance Company of Canada v. Innisfil Landfill Corporation* (1995), 30 C.B.R. (3d) 100 (Ont. Gen. Div.) at para. 10.

28 *Canadian National Co. v. Ontario (Director under the Environmental Protection Act)* (1992), 7 O.R. (3d) 97 (C.A.), aff'g 3 O.R. (3d) 609 (Div. Ct.).

39. The "spills bill"— which was to eventually become Part X of the EPA—was introduced to the Ontario Legislature by then-Minister of the Environment Dr. Harry Parrott on December 14, 1978.[29]

40. Minister Parrott articulated the objective of the proposed amendments upon first reading:

> The amendments concern spills of toxic substances or contaminants into the natural environment. The objective of this legislation is to impose clear responsibility for cleanup and to enable my ministry to take immediate control of the situation if required. This includes directing cleanup in some cases, and then sorting out questions of responsibility and payment after we get the mess cleaned up.[30]

41. He also confirmed that the amendments to the EPA were proposed in the context of preventing accidental spills of hazardous substances, particularly during their transport:

> We are broadening the requirement to report spills more promptly and efficiently to our ministry. Several million gallons of industrial products are transported in Ontario each year, out of which 1,000 spills occur. … The accidents reported to my ministry involve a total of approximately 1.25 million gallons of petroleum products, non-petroleum oils, toxic chemicals and other hazardous materials which require immediate remedial action. In addition, about eight million gallons of non-hazardous liquids are involved.[31]

42. Further, the Hansard reveals from subsequent debates that in including the word "abnormal" within the definition of spills, the Legislature intended to introduce regulations that would clarify, through designation, the kinds of discharges that constitute spills. As Minister Parrott noted:

> In addition, among other things, the regulations to be developed will provide for the designation of certain types of discharges of pollutants as being abnormal, thereby clearly spelling out and avoiding delay and argument over what will be regarded as a spill and subject to the legislation.[32]

43. Although these regulations never materialized, the provisions of the EPA that were enacted retained the distinction between "discharge" and "spill"—a clear indicator of the legislative intent to limit the application of Part X of the EPA to spill events, rather than to historical contamination.

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29 Ontario, Legislative Assembly, *Official Report of Debates (Hansard)*, 31st Legis., 2nd Sess., No. 151 (14 December 1978).

30 Ontario, Legislative Assembly, *Official Report of Debates (Hansard)*, 31st Legis., 2nd Sess., No. 151 (14 December 1978) (Hon. Harry Parrott).

31 Ontario, Legislative Assembly, *Official Report of Debates (Hansard)*, 31st Legis., 2nd Sess., No. 151 (14 December 1978) (Hon. Harry Parrott).

32 Ontario, Legislative Assembly, *Official Report of Debates (Hansard)*, 31st Legis., 3rd Sess. No. 8 (27 March 1979) (Hon. Harry Parrott).

44. Extensive discussions during second reading confirm the legislative aim of reducing and better managing the aftermath of spill incidents. Then-opposition Member of Provincial Parliament Marion Bryden, for example, described the bill as

> an attempt to answer the problems created by a series of environmental incidents over the years - spills of oils and other hazardous substances, contamination of water, air and soil, and so on. These were incidents which have caused serious injury to people or communities in this province and where it was found difficult to establish liability or obtain any justice for the victims under existing legislation and common law.[33]

45. By the time the "spills bill" had reached third reading, MPPs were lamenting that were it in effect earlier, it might have helped to prevent, or assist the victims of, a recent train derailment and spill in Mississauga.[34]

46. At third reading, despite the numerous changes that it had undergone, Minister Parrott confirmed that the foundational aims of the "spills bill"—namely, empowering the MOE to deal effectively with spills and ensuring compensation to innocent victims affected by spills—remained firmly intact:

> First, when the bill was introduced we had high hopes, as one of the members said, that we would see payments to innocent victims, uninvolved victims.
>
> Second, we hoped to see legislation which would allow the ministry to very effectively clean up the results of spills in the environment.
>
> I am pleased to advise members that both those original objectives have been met, without being watered down … . They have been met unconditionally.[35]

47. Respectfully, although the Court of Appeal considered the legislative history behind Part X,[36] it did so too narrowly and without consideration of its intended scope and application. Significantly, the Court of Appeal neglected to consider the Legislature's intent that Part X apply to spill events as opposed to historical or other unidentifiable sources of contamination or general kinds of discharge.

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33 Ontario, Legislative Assembly, *Official Report of Debates (Hansard)*, 31st Legis., 3rd Sess. No. 47 (May 15, 1979) (Hon. Marion Bryden).

34 Ontario, Legislative Assembly, *Official Report of Debates (Hansard)*, 31st Legis., 3rd Sess., No. 133 (11 December 1979).

35 Ontario, Legislative Assembly, *Official Report of Debates (Hansard)*, 31st Legis., 3rd Sess., No. 133 (11 December 1979) (Hon. Harry Parrott).

36 Judgment of the Court of Appeal below at paras. 45-47.

ii. The Court of Appeal's error has significant ramifications for environmental law

48. With respect, the Court of Appeal has misinterpreted Part X of the EPA in light of a plain language reading of the relevant provisions; the intent of legislators, as demonstrated by Hansard; and the long-standing understanding in both the case law and literature that a "spill" cannot include historical contamination.

49. This error renders Part X meaningless in relation to the very social evil the Legislature intended it to address: spill incidents involving abnormal discharges of harmful and potentially harmful pollutants. The language of Part X, and the fact it is a stand-alone regime within the EPA, signals the intended approbation of such events and the denunciation of those responsible for them. The Court of Appeal's interpretation effectively collapses the respective definitions of "discharge" and "spill" and neutralizes the power of Part X to do what it was designed to do.

50. Insofar as the Court of Appeal's decision renders historical contamination subject to Part X of the EPA, it also raises significant questions for landowners across the province. Are current owners liable civilly under section 99 for contamination that was not a spill? Are property owners now required to report historical contamination as a "spill," under subsection 92(1) of the EPA? To whom does the duty to mitigate adverse effects and to restore the natural environment, as set out in subsection 93(1), apply when an owner discovers historical contamination on its property? Can landowners upon discovering historical contamination sue in nuisance and under section 99 – with the ability to obtain double compensation?

51. The Court of Appeal's decision has generated unprecedented interest from commentators, which reflects the urgency of these questions.[37]

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37 See e.g. Jack Coop, Jennifer Fairfax, Patrick Welsh & Rebecca Hall-McGuire, "Ninety-nine Problems: Ontario Court of appeal Releases Significant Decisions for Environmental Civil Litigation" (8 Dec 2015), online: Osler <http://ecocidealert.com/?tag=s-99-of-the-epa>; Stanley D. Berger, "Ontario Court of Appeal: Statutory Claim for Damages for Cost of Remediation Not Precluded by Ministry Order for Remediation" (30 Nov 2015), online: Fogler Rubinoff Energy & Environmental Law <http://foglers.com/uploads/press/file/274/Environmental_Nov_30-2.pdf>; Bryan J. Buttigieg & Tamara Farber, "Does Ontario Court of Appeal Midwest Decision Signal Big Changes to environmental Civil Litigation in Ontario?" (December 2015), online: Miller Thomson EnviroNotes! <http://www.millerthomson.com/en/publications/newsletters/environotes/december-2015/does-ontario-court-of-appeal-midwest decision?utm_source=Mondaq&utm_medium=syndication&utm_campaign=View-Original>;

52. This urgency, combined with the novelty of the issues, the error committed by the Court of Appeal, and the inconsistency the decision has created in the case law, cries out for resolution from the Supreme Court.

B. Issue Two: *Caveat Emptor* and Purchaser's Due Diligence

53. A purchaser has an obligation to perform due diligence on a prospective real property purchase. This is a longstanding principle in the common law, including in environmental contamination cases, and is broadly accepted. In the absence of a misrepresentation inducing the purchaser to purchase the property, the doctrine of *caveat emptor* will bar an action against a vendor.[38]

54. In particular, where land is purchased in an industrial area, the purchaser has an obligation to conduct its own due diligence to satisfy itself with the nature of the property.

55. Midwest purchased a property in an industrial area next to a property that was used for industrial uses, including a historical petroleum hydrocarbon waste storage area, and was subject to MOECC Orders. All of this was obvious or readily available information with a visual inspection, even without conducting intrusive investigations of soil and/or groundwater. Midwest knew or ought to have known that the Midwest Property was contaminated.

i. Effect of the Court of Appeal's Decision: No Obligation on a Purchaser to Conduct Due Diligence

56. The decision of the Court of Appeal has far-reaching effects on vendors and neighbouring property owners.

Natalie Mullins, "Court of appeal expands the scope of recoverable damages in contaminated sites cases—*Midwest v. Thordarson* (November 2015), online: Gowlings <http://www.gowlings.com/KnowledgeCentre/article.asp?pubID=4224&lang=0>;

Julia Vizzaccaro & Natalie Mullins, "Section 99(2) of the EPA is a "new and powerful tool" for compensation for contaminated lands—*Midwest v. Thordarson*" (November 2015), online: Gowlings <https://www.gowlings.com/KnowledgeCentre/article.asp?pubID=4225>;

Kyle Magee & Natalie Mullins, "Personal liability to pay damages, including punitive, to a neighbour for environmental contamination: A warning from *Midwest*" (November 2015), online: Gowlings < http://www.gowlings.com/KnowledgeCentre/article.asp?pubID=4226&lang=0>.

38 *Tony's Broadloom & Floor Covering Ltd. v. NMC Canada Inc.* (1996), 31 O.R. (3d) 481 (C.A.); John D. McCamus, "Caveat Emptor: the Position at Common Law" in Law Society of Upper Canada ed., *Real Property Law: Conquering the Complexities* (Toronto: Irwin Law, 2003) at p. 97.

57. The application of the Court of Appeal decision allows a purchaser of a contaminated property, without having conducted any due diligence, to claim full restoration costs from a neighbouring property owner—something the purchaser could not do as against the vendor of the property it purchased. This results in the purchaser getting better than what it bought and thwarts the principle of *caveat emptor*—buyer beware.

58. In fact, the decision abolishes any obligation on a purchaser to conduct any due diligence prior to purchasing a property, even where a property is and was historically used for industrial purposes in an industrial area and where those industrial uses are readily ascertainable. A prospective purchaser of a property is now entitled to turn a blind eye to potential environmental contamination.

59. The Court of Appeal has created uncertainty for owners and sellers of property. It has effectively resulted in a "vendor beware" regime where a vendor, regardless of providing fulsome disclosure and a due diligence period, can be held liable for restoration costs should historical contamination later come to light.

C. Issue Three: What is the proper measure of damages in contaminated land litigation?

60. The Court of Appeal's decision has resulted in significant confusion about how damages in contaminated land claims in Canada ought to be calculated. As this Honourable Court has noted, "the question of compensation for environmental damage is of great importance."[39] The Applicants respectfully request this Court's assistance in clarifying this important issue.

i. Is a plaintiff entitled to double recovery of its damages in tort?

61. One of the keystone principles to the law of damages in tort is *restitutio in integrum*—restoring the plaintiff to the position that they would have been in but for the wrong that occurred.[40]

62. However, while a plaintiff is entitled to recover damages for the full measure of its loss, it is not entitled to a windfall.[41]

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39 *British Columbia v. Canadian Forest Products Ltd*, 2004 SCC 38 at para. 7 ["*Canadian Forest Products*"]

40 L.N. Klar et al, *Remedies in Tort*, Vol. 4 (Thomson Reuters: Carswell, 1987), 27-84.1 at para. 30 (looseleaf) ["Klar"].

63. The corollary of this principle is the longstanding principle, accepted by this Court, that double recovery and double punishment must be avoided; a person should not be penalized twice for the same infraction, and a plaintiff should not recover twice for the same injury.[42] The courts have an obligation to assess civil damages with a view to avoiding double punishment or double recovery.[43]

64. The rule against double recovery has been applied by this Court to environmental cases to prevent a windfall.[44]

65. The Court of Appeal's decision has entitled Midwest to double recovery: an award of civil damages for the cost of restoring the Midwest Property and the MOECC Order requiring Thorco to restore the Midwest Property. The MOECC Order and damages award serve the same legal purpose: the remediation of the Midwest Property. This amounts to an unjust enrichment for Midwest.

66. The application of the Court of Appeal's decision entitles a plaintiff both to have its property remediated (through an administrative order) and to receive payment for the cost of the same remediation (through a damages award against the defendant). The Court of Appeal's decision offends the longstanding doctrine against double recovery.

ii. Determining damages: restoration costs versus diminution in property value

67. Traditionally, for torts involving harm to property, the principle of *restitutio in integrum* has entitled a successful plaintiff to recovery for the value of the harmed property.[45]

68. Historically, in land contamination cases, Canadian courts have followed the traditional common law rule of awarding damages based on the diminution in property value.[46]

69. Currently, in the context of contaminated land, there are two conflicting bases upon which appellate-level courts have awarded damages: the diminution in the value of the harmed property (the traditional approach) or the cost of its restoration.[47]

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41 *Ratych v. Bloomer*, [1990] 1 S.C.R. 940 at para. 21 ["*Ratych*"]

42 *Raytch* at para. 71, *supra* note 41; *Canadian Forest Products* at paras. 94, 118, *supra* note 39

43 *Norberg v. Wynrib*, [1992] 2 S.C.R. 226 at para. 58.

44 *Canadian Forest Products Ltd.* at para. 118, *supra* note 39

45 See e.g. *Hosking v. Phillips* (1848), 3 Exch. Rep. 168 (Eng. Ex. Ct.).

46 See e.g. *Beers v. Jacques Whitford Environment Ltd.*, 2001 NBQB 173 (though the Court awarded damages for the "stigma effect" on any future sale of the property).

70. As the Court of Appeal itself acknowledged in its decision, there remains "a significant debate in the case law about whether diminution in value or restoration costs is the appropriate measure of damages in cases of environmental harm."[48] Indeed, the question of how damages ought to be awarded in land contamination cases has continued to attract significant academic attention.[49] Unfortunately, instead of resolving this debate, the Court of Appeal's decision serves only to further muddy the waters.

71. The Court of Appeal chose to award restoration costs (i.e., damages based on the cost of remediating the property) after purporting to identify a "trend" in the common law towards awarding damages on that basis. It pointed to its 2002 decision in *Tridan Developments Ltd v. Shell Canada Products Ltd*[50] and the Ontario Superior Court decision in *Canadian Tire Real Estate Ltd v. Huron Concrete Supply Ltd*[51] as evidence of this "trend."[52]

72. Respectfully, neither *Tridan* nor *Canadian Tire* is indicative of such a "trend." The question of whether to award damages based on restoration costs versus diminution in value was not at issue in *Canadian Tire*.[53] Similarly, the Court of Appeal in *Tridan* did not turn its mind to this question. Although this was a live question for the lower court in *Tridan*, the Court of Appeal was not asked to address this aspect of the decision.[54] Instead, the Court of Appeal was focused on the appropriateness of awarding "stigma" damages and the calculation of restoration damages based on a "pristine" standard.

73. The Applicants respectfully submit there is no clear "trend" emerging towards awarding damages based on restoration costs. Rather, it is increasingly unclear when, and whether, restoration damages ought to be awarded. There continues to be no guidance from the

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47 Klar 27-162.84 at para. 134 and para. 137, *supra* note 40

48 Judgment of the Court of Appeal below at para. 60.

49 See e.g., Jodie Hierlmeier, "The Enigma of Stigma: A New Environmental Contamination Challenge Facing Canada's Judiciary" (2002) 11 Dalhousie J Legal Stud 179 at 182-185; Katherine van Rensburg, "Deconstructing *Tridan*: A Litigator's Perspective" (2004) 15 J. Envt'l L. & Prac. 85 at 4-8, 20; S. Powell & K.G. Zwick "Yesteryear's Leasehold Covenants in a Contamination Conscious Canada" (2007) J. Envt'l L. & Prac. 271 at 282-286.

50 *Tridan Developments Ltd. v. Shell Canada Products Ltd.*, (2002), 57 O.R. (3d) 503 (C.A.), aff'ing (2000), 35 R.P.R (3d) 151 (S.C), leave to appeal to S.C.C. refused 177 O.A.C. 399 [*Tridan*].

51 *Canadian Tire Real Estate Ltd v. Huron Concrete Supply Ltd.*, 2014 ONSC 288 [*Canadian Tire*].

52 Judgment of the Court of Appeal below at paras. 64-66.

53 *Canadian Tire* at para. 6, *supra* note 51 (where the Court confirms that "Canadian Tire did not pursue a claim for loss in value or loss of enjoyment of the Canadian Tire Property at trial.").

54 *Tridan* at paras. 2-3, *supra* note 50.

courts as to when damages awards ought to take into consideration "stigma," restoration costs, and diminution in property value and the weight that ought to be given to each.

74. The Applicants submit, rather, that the "trend" in the appellate-level case law is not to deny in principle damages based on diminution of value as the Court of Appeal suggests. Rather, the "trend" in the case law, if one can be identified, has been to deny damages based on diminution of some *future* or *potential* value of the land, particularly based on so-called stigma damages.[55]

75. Moreover, where courts have awarded damages on the basis of restoration costs, they have consistently been careful to do so only to the extent that such damages are "reasonable." In particular, courts have specifically avoided awarding damages in excess of the value of the property itself. The courts have remained mindful of the principle of *restitutio in integrum*.

76. In *Tridan*, for example, in awarding the plaintiff damages based on the cost of remediating the land in question to a "pristine" condition, the Court of Appeal underscored the need for damages to be reasonable.[56] It made a similar inference in *Biskey v. Chatham-Kent (Municipality)*, noting that the plaintiff could not claim more from the respondent "than the diminution in value of the property attributable to its former use … in other words the difference between the price the [Applicants] paid for the property and the value the property actually had given its history and condition."[57]

77. Further, where remediation costs are contemplated, courts have considered whether the plaintiff seeking such damages has generally taken steps to mitigate its damages.[58]

78. The Court of Appeal's decision has created inconsistency in the case law. To date, no principled approach or test has emerged to guide future decision makers faced with the question of how to award damages arising from environmental harm.

79. This uncertainty has significant national ramifications. Courts across the county, like those in Ontario, have struggled with the question of how damages ought to be awarded

55 *Tridan*, *supra* note 50; *Biskey v. Chatham-Kent (Municipality)*, 2012 ONCA 802 at para. 18 ["*Biskey*"].

56 *Tridan* at para. 12, *supra* note 50.

57 *Biskey* at para. 19, *supra* note 55.

58 See e.g. *Canadian Tire* at para. 321, *supra* note 51; *618369 Alberta Ltd v. Canadian Turbo (1993) Inc.*, 2004 ABQB 283 at para. 36-38.

in environmental contamination cases, particularly how to negotiate the relationship between remediation costs, stigma damages, and diminution in value of a property.[59]

80. Given this uncertainty, the Court of Appeal's decision raises numerous questions with ramifications for the common law across Canada. Are damage awards based on restoration costs *always* appropriate, or only under certain circumstances? What if the cost of restoration significantly exceeds the diminution in the value of the land? What are considered reasonable restoration costs?

81. Further, how should courts reconcile the relationship between the principle of *restitutio in integrum* and that of polluter pays? Or, has the Court of Appeal effectively banished this foundational principle in damages law from cases relating to environmental contamination? To what extent does a plaintiff have an obligation to mitigate? Is a purchaser relieved from its due diligence obligations?

82. Canadian jurisdictions have struggled, and continue to struggle, with the issue of contaminated land. This national problem has resulted largely from a collective history of inadequate regulation and insufficient scientific understanding of the impacts of industrial activities upon the environment. Inevitably, these disputes will continue to find their way to Canadian courtrooms. It is imperative that the Courts and litigants alike have the clarity required to address the issue of damages in these disputes when it arises.

PART IV - SUBMISSIONS ON COSTS

83. Given the lack of judicial interpretation of section 99 of the EPA, the disruption of the *caveat emptor* principle, and the need for guidance on the issue of damages in environmental contamination cases, the Applicants respectfully submit that this case is one of public and national importance. As such, it merits costs for the Applicants, should leave be granted; should leave be denied, costs against the Applicants should be denied.

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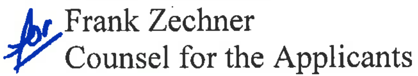
59 See e.g. *618369 Alberta Ltd. v. Canadian Turbo (1993) Inc.*, 2004 ABQB 283; *Jens et. al. v. Mannix Co Ltd.* (1978), 89 D.L.R (3d) 351 (BCSC), var'd by 30 D.L.R. (4th) 260 (C.A); *Église Vie et Réveil Inc c. Sunoco Inc.*, [2003] R.R.A. 1400 (QC C.S.); *Aldred v. Colbeck*, 2010 BCSC 57.

PART V - ORDER REQUESTED

84. The Applicants respectfully request that leave to appeal be granted with costs. In the event that this application is unsuccessful, the Applicants respectfully request that it be denied without costs.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 25th day of January, 2016.

Paula Lombardi

Frank Zechner
Counsel for the Applicants

PART VI - TABLE OF AUTHORITIES

Cases	**Para**
Aldred v. Colbeck, 2010 BCSC 57	79
Beers v. Jacques Whitford Environment Ltd., 2001 NBQB 173	68
Biskey v. Chatham-Kent (Municipality), 2012 ONCA 802	74, 76
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Canadian National Railway Co. v. Ontario (Director under the Environmental Protection Act) (1992), 7 O.R. (3d) (C.A), aff'g 3 O.R. (3d) 609 (Div. Ct.)	35
Canadian Tire Real Estate Ltd. v. Huron Concrete Supply Ltd., 2014 ONSC 288	71, 72, 77
Église Vie et Réveil Inc. c. Sunoco Inc., [2003] R.R.A. 1400 (QC C.S.)	79
Hosking v. Phillips (1848), 3 Exch. Rep. 168 (Eng. Ex. Ct.)	67
Jens et al v. Mannix Co. Ltd. (1978), 89 D.L.R (3d) 351 (B.C. S.C.) var'd by 30 D.L.R. (4th) 260 (C.A.)	79
Norberg v. Wynrib, [1992] 2 S.C.R. 226	63
Pearson v. Inco Ltd. (2001), 57 O.R. (3d) 279 (S.C.)	33
The Mortgage Insurance Company of Canada v. Innisfil Landfill Corporation (1995), 30 C.B.R. (3d) 100 (Ont. Gen. Div)	34
Ratych v. Bloomer, [1990] 1 S.C.R. 940	61, 63
Tony's Broadloom & Floor Covering Ltd. v. NMC Canada Inc. (1996), 31 O.R. (3d) 481 (C.A.)	53
Tridan Developments Ltd. v. Shell Canada Products Ltd. (2002), 57 O.R. (3d) 503 (C.A.) aff'g (2000), 35 R.P.R. (3d) 151 (S.C.), leave to appeal to SCC refused [2002] S.C.C.A. No. 98	71, 72, 74, 76
618369 Alberta Ltd. v. Canadian Turbo (1993) Inc., 2004 ABQB 283	77, 79

Articles	
Jodie Hierlmeier, "The Enigma of Stigma: A New Environmental Contamination Challenge Facing Canada's Judiciary" (2002) 11 Dalhousie J. Legal Stud. 179	70
Katherine van Rensburg, "Deconstructing *Tridan*: A Litigator's Perspective" (2004) 15 J. Envt'l L. & Prac. 85	70
S. Powell & K.G. Zwick, "Yesteryear's Leasehold Covenants in a Contamination Conscious Canada" (2007) J. Envt'l L. & Prac. 271	70
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Dianne Saxe, *Ontario Environmental Protection Act Annotated* (Toronto: Canada Law Book, Looseleaf).	29, 30, 31
John D. McCamus, "Caveat Emptor: the Position at Common Law" in Law Society of Upper Canada ed., *Real Property Law: Conquering the Complexities* (Toronto: Irwin Law, 2003)	53
L.N. Klar et al, *Remedies in Tort*, Vol. 4 (Thomson Reuters: Carswell, 1987) (Looseleaf)	61, 69
Commentary	
Bryan J Buttigieg & Tamara Farber, "Does Ontario Court of Appeal Midwest Decision Signal Big Changes to environmental Civil Litigation in Ontario?", online: Miller Thomson EnviroNotes! <http://www.millerthomson.com/en/publications/newsletters/environotes/december-2015/does-ontario-court-of-appeal-midwest-decision?utm_source=Mondaq&utm_medium=syndication&utm_campaign=View-Original>	51
Jack Coop, Jennifer Fairfax, Patrick Welsh & Rebecca Hall-McGuire, "Ninety-nine Problems: Ontario Court of appeal Releases Significant Decisions for Environmental Civil Litigation" (8 December 2015), online: Osler <http://ecocidealert.com/?tag=s-99-of-the-epa>	51
Stanley D. Berger, "Ontario Court of Appeal: Statutory Claim for Damages for Cost of Remediation Not Precluded by Ministry Order for Remediation" (30 November 2015), online: Fogler Rubinoff Energy & Environmental Law <http://foglers.com/uploads/press/file/274/Environmental_Nov_30-2.pdf>	51
Natalie Mullins, "Court of appeal expands the scope of recoverable damages in contaminated sites cases—*Midwest v. Thordarson*	51

(November 2015), online: Gowlings <http://www.gowlings.com/KnowledgeCentre/article.asp?pubID=4224 &lang=0>	
Julia Vizzaccaro & Natalie Mullins, "Section 99(2) of the EPA is a "new and powerful tool" for compensation for contaminated lands—*Midwest v. Thordarson*" (November 2015), online: Gowlings <https://www.gowlings.com/KnowledgeCentre/article.asp?pubID=4225 >	51
Kyle Magee & Natalie Mullins, "Personal liability to pay damages, including punitive, to a neighbour for environmental contamination: A warning from *Midwest*" (November 2015), online: Gowlings <http://www.gowlings.com/KnowledgeCentre/article.asp?pubID=4226 &lang=0>	51
Hansard	
Ontario, Legislative Assembly, *Official Report of Debates (Hansard)*, 31st Legis., 2nd Sess., No. 151 (14 December 1978)	39, 40, 41
Ontario, Legislative Assembly, *Official Report of Debates (Hansard)*, 31st Legis., 3rd Sess. No. 8 (27 March 1979)	42
Ontario, Legislative Assembly, *Official Report of Debates (Hansard)*, 31st Legis., 3rd Sess. No. 47 (15 May 1979)	44
Ontario, Legislative Assembly, *Official Report of Debates (Hansard)*, 31st Legis., 3rd Sess., No. 133 (11 December 1979)	45, 46

PART VII - STATUTORY PROVISIONS

Environmental Protection Act, R.S.O 1990, c E.19 s. 1(1):

"discharge", when used as a verb, includes add, deposit, leak or emit and, when used as a noun, includes addition, deposit, emission or leak

«rejet» S'entend en outre d'un ajout, d'un dépôt, d'une perte ou d'une émission; le verbe «rejeter» s'entend en outre d'ajouter, de déposer, de perdre ou d'émettre

Environmental Protection Act, R.S.O 1990, c E.19 s. 91(1)

Interpretation and application, Part X

91. (1) In this Part,

"spill", when used with reference to a pollutant, means a discharge,

(a) into the natural environment,

(b) from or out of a structure, vehicle or other container, and

(c) that is abnormal in quality or quantity in light of all the circumstances of the discharge,

and when used as a verb has a corresponding meaning;

91. (1) Les définitions qui suivent s'appliquent à la présente partie.

«déversement» S'entend du rejet d'un polluant qui satisfait à l'ensemble des conditions suivantes :

a) il se fait dans l'environnement naturel;

b) il se fait à partir d'un ouvrage, d'un véhicule ou d'un autre contenant ou hors de ceux-ci;

c) il est d'une quantité ou d'une intensité anormales compte tenu de l'ensemble des circonstances qui ont trait à ce rejet;

le verbe «déverser» a une signification correspondante.

Environmental Protection Act, R.S.O 1990, c E.19 s. 93(1)

93. (1) The owner of a pollutant and the person having control of a pollutant that is spilled and that causes or is likely to cause an adverse effect shall forthwith do everything practicable to prevent, eliminate and ameliorate the adverse effect and to restore the natural environment.

93. (1) Le propriétaire d'un polluant et la personne qui exerce un contrôle sur un polluant qui est déversé et qui entraîne ou entraînera vraisemblablement une conséquence préjudiciable prennent sans délai toutes les mesures réalisables pour empêcher et éliminer cette conséquence préjudiciable ou en atténuer la portée et pour reconstituer l'environnement naturel.

Environmental Protection Act, R.S.O 1990, c E.19 s. 99

99. (1) In this section,

"loss or damage" includes personal injury, loss of life, loss of use or enjoyment of property and pecuniary loss, including loss of income.

Right to compensation

(2) Her Majesty in right of Ontario or in right of Canada or any other person has the right to compensation,

(a) for loss or damage incurred as a direct result of,

(i) the spill of a pollutant that causes or is likely to cause an adverse effect,

(ii) the exercise of any authority under subsection 100 (1) or the carrying out of or attempting to carry out a duty imposed or an order or direction made under this Part, or

(iii) neglect or default in carrying out a duty imposed or an order or direction made under this Part;

(b) for all reasonable cost and expense incurred in respect of carrying out or attempting to carry out an order or direction under this Part,

from the owner of the pollutant and the person having control of the pollutant.

Exception

(3) An owner of a pollutant or a person having control of a pollutant is not liable under subsection (2) if they establish that they took all reasonable steps to prevent the spill of the pollutant or if they establish that the spill of the pollutant was wholly caused by,

(a) an act of war, civil war, insurrection, an act of terrorism or an act of hostility by the government of a foreign country;

(b) a natural phenomenon of an exceptional, inevitable and irresistible character; or

(c) an act or omission with intent to cause harm by a person other than a person for whose wrongful act or omission the owner of the pollutant or the person having control of the pollutant is by law responsible,

or any combination thereof.

Qualification

(4) Subsection (3) does not relieve the owner of the pollutant or the person having control of the pollutant,

(a) from liability for loss or damage that is a direct result of neglect or default of the owner of the pollutant or the person having control of the pollutant in carrying out a duty imposed or an order or direction made under this Part; or

(b) from liability, under clause (2) (a), for cost and expense incurred or, under clause (2) (b), for all reasonable cost and expense incurred,

(i) to do everything practicable to prevent, eliminate and ameliorate the adverse effect, or

(ii) to do everything practicable to restore the natural environment,

or both.

Enforcement of right

(5) The right to compensation under subsection (2) may be enforced by action in a court of competent jurisdiction.

Liability

(6) Liability under subsection (2) does not depend upon fault or negligence. R.S.O. 1990, c. E.19, s. 99 (6).

Contribution

(7) In an action under this section,

(a) where the plaintiff is an owner of the pollutant or a person having control of the pollutant, the court shall determine the degree, if any, in which the plaintiff would be liable to make contribution or indemnification under subsection (8) if the plaintiff were a defendant; and

(b) where the plaintiff is not an owner or a person having control referred to in clause (a), the court shall determine the degree, if any, in which the plaintiff caused or contributed to the loss, damage, cost or expense by fault or negligence,

and the court shall reduce the compensation by the degree, if any, so determined.

Extent of liability

(8) Where two or more persons are liable to pay compensation under this section, they are jointly and severally liable to the person suffering the loss, damage, cost or expense but as between themselves, in the absence of an express or implied contract, each is liable to make contribution to and indemnify the other in accordance with the following principles:

1. Where two or more persons are liable to pay compensation under this section and one or more of them caused or contributed to the loss, damage, cost or expense by fault or negligence, such one or more of them shall make contribution to and indemnify,

   i. where one person is found at fault or negligent, any other person liable to pay compensation under this section, and

   ii. where two or more persons are found at fault or negligent, each other and any other person liable to pay compensation under this section in the degree in which each of such two or more persons caused or contributed to the loss, damage, cost or expense by fault or negligence.

2. For the purpose of subparagraph ii of paragraph 1, if it is not practicable to determine the respective degrees in which the fault or negligence of two or more persons liable to pay compensation under this section caused or contributed to the loss, damage, cost or expense, such two or more persons shall be deemed to be equally at fault or negligent.

3. Where no person liable to pay compensation under this section caused or contributed to the loss, damage, cost or expense by fault or negligence, each of the persons liable to pay compensation is liable to make contribution to and indemnify each other in such degree as is determined to be just and equitable in the circumstances.

Enforcement of contribution

(9) The right to contribution or indemnification under subsection (8) may be enforced by action in a court of competent jurisdiction. R

Adding parties

(10) Wherever it appears that a person not already a party to an action under this section may be liable in respect of the loss, damage, cost or expense for which compensation is claimed, the person may be added as a party defendant to the action upon such terms as are considered just or may be made a third party to the action in the manner prescribed by the rules of practice for adding third parties.

Settlement and recovery between persons liable

(11) A person liable to pay compensation under this section may recover contribution or indemnity from any other person liable to pay compensation under this section in respect of the loss, damage, cost or expense for which the compensation is claimed by settling with the person suffering the loss, damage, cost or expense and continuing the action or commencing an action against such other person.

Amount of settlement

(12) A person who has settled a claim and continued or commenced an action as mentioned in subsection (11) must satisfy the court that the amount of the settlement was reasonable, and, if the court finds the amount was excessive, the court may fix the amount at which the claim should have been settled.

99. (1) La définition qui suit s'applique au présent article.

«perte ou dommage» S'entend d'une lésion corporelle, de la perte de la vie, de la perte de l'usage ou de la jouissance de biens ainsi que d'une perte pécuniaire, y compris celle du revenu. L.R.O. 1990, chap. E.19, par. 99 (1).

Droit à l'indemnisation

(2) Sa Majesté du chef de l'Ontario ou du chef du Canada ou toute autre personne a le droit d'obtenir une indemnisation du propriétaire du polluant et de la personne qui exerce un contrôle sur le polluant :

a) en ce qui concerne une perte ou un dommage subis directement à la suite :

(i) du déversement d'un polluant qui a ou aura vraisemblablement une conséquence préjudiciable,

(ii) de l'exercice de tout pouvoir en vertu du paragraphe 100 (1) ou de l'exécution d'une obligation imposée, de l'application d'un arrêté pris, ou d'une directive donnée dans le cadre de la présente partie, ou de la tentative qui est faite à cette fin,

(iii) du défaut, notamment par négligence, d'exécuter une obligation imposée ou d'appliquer un arrêté pris ou une directive donnée dans le cadre de la présente partie;

b) en ce qui concerne les frais et les dépenses raisonnables engagés en vue de faire appliquer ou de tenter de faire appliquer un arrêté pris ou une directive donnée dans le cadre de la présente partie.

Exception

(3) Le propriétaire du polluant ou la personne qui exerce un contrôle sur le polluant n'engagent pas leur responsabilité en vertu du paragraphe (2) s'ils démontrent qu'ils ont pris

toutes les mesures raisonnables pour empêcher le déversement du polluant ou s'ils démontrent que ce déversement a été occasionné en totalité par l'une ou plusieurs des causes suivantes :

a) un fait de guerre, une guerre civile, une insurrection, un acte de terrorisme ou un acte d'hostilité de la part du gouvernement d'un pays étranger;

b) un phénomène naturel d'un caractère exceptionnel, inévitable et inéluctable;

c) un acte accompli ou une omission commise dans l'intention de nuire par une personne autre que celle dont le propriétaire du polluant ou la personne qui exerce un contrôle sur le polluant est responsable en droit à cet effet.

Précisions

(4) Le paragraphe (3) ne dégage pas le propriétaire du polluant ou la personne qui exerce un contrôle sur le polluant :

a) de la responsabilité qui découle de la perte ou du dommage qui survient directement à la suite du défaut, notamment par négligence, du propriétaire du polluant ou de la personne qui exerce un contrôle sur le polluant d'exécuter une obligation imposée ou de faire appliquer un arrêté pris ou une directive donnée aux termes de la présente partie;

b) de la responsabilité encourue en vertu de l'alinéa (2) a) à l'égard des frais et des dépenses engagés ou, en vertu de l'alinéa (2) b), à l'égard des frais et des dépenses raisonnables qui sont engagés pour l'une ou l'autre des fins suivantes ou pour les deux à la fois :

(i) prendre toutes les mesures réalisables de façon à empêcher et à éliminer la conséquence préjudiciable et à en atténuer la portée,

(ii) prendre toutes les mesures réalisables de façon à reconstituer l'environnement naturel.

Exercice du droit à l'indemnisation

(5) Le droit à l'indemnisation prévu au paragraphe (2) peut être exercé au moyen d'une action intentée devant un tribunal compétent.

Responsabilité

(6) La responsabilité encourue aux termes du paragraphe (2) n'est pas subordonnée à une faute ou à une négligence.

Contribution

(7) Dans une action intentée en vertu du présent article :

a) si le demandeur est le propriétaire du polluant ou la personne qui exerce un contrôle sur le polluant, le tribunal décide dans quelle mesure, le cas échéant, le demandeur serait tenu de verser une contribution ou une indemnité aux termes du paragraphe (8) s'il était le défendeur;

b) si le demandeur n'est pas le propriétaire du polluant ou la personne qui exerce un contrôle sur le polluant visés à l'alinéa a), le tribunal décide dans quelle mesure, le cas échéant, le demandeur a causé la perte, le dommage, les frais ou les dépenses ou y a contribué par sa faute ou par sa négligence.

Le tribunal réduit le montant de l'indemnisation dans la mesure, le cas échéant, fixée par la décision.

Étendue de la responsabilité

(8) Deux ou plusieurs personnes qui sont tenues de verser une indemnisation aux termes du présent article sont solidairement responsables envers la personne qui a subi la perte, le dommage, les frais ou les dépenses; en ce qui concerne leur responsabilité mutuelle, à défaut de contrat entre elles, même implicite, chaque personne est tenue de verser une contribution aux autres et de les indemniser conformément aux principes suivants :

1. Si deux ou plusieurs personnes sont tenues de payer une indemnisation en vertu du présent article et que l'une ou plusieurs d'entre elles ont causé la perte, le dommage, les frais ou les dépenses ou y ont contribué par leur faute ou leur négligence, celles-ci versent des contributions et des indemnités de l'une des façons suivantes :
   i. une personne dont la faute ou la négligence sont constatées indemnise toute autre personne tenue de payer une indemnisation aux termes du présent article,
   ii. deux personnes ou plus dont la faute ou la négligence sont constatées s'indemnisent mutuellement et indemnisent toute autre personne tenue de payer une indemnisation aux termes du présent article dans la mesure où les deux personnes ou plus ont causé la perte, le dommage, les frais ou les dépenses par leur faute ou leur négligence, ou y ont contribué.
2. Pour l'application de la sous-disposition ii de la disposition 1, s'il s'avère trop difficile de déterminer la mesure dans laquelle la faute ou la négligence de deux ou plusieurs personnes tenues de payer une indemnité aux termes du présent article ont causé ou contribué à causer la perte, le dommage, les frais ou les dépenses, ces personnes sont réputées également responsables.
3. Si aucune des personnes tenues de verser une indemnisation aux termes du présent article n'a causé la perte, le dommage, les frais ou les dépenses ou n'y a contribué par sa faute ou sa négligence, chacune de ces personnes est tenue de verser aux autres une contribution et une indemnité dans la mesure jugée juste et équitable dans les circonstances.

Exercice du droit à une contribution

(9) Le droit à une contribution ou à une indemnité aux termes du paragraphe (8) peut être exercé au moyen d'une action intentée devant un tribunal compétent.

Jonction de parties

(10) S'il appert qu'une personne qui n'est pas déjà partie à une action intentée en vertu du présent article pourrait être responsable de la perte, du dommage, des frais ou des dépenses pour lesquels une indemnisation est réclamée, la personne peut être jointe à l'action comme défendeur, à des conditions qui sont estimées justes. Elle peut également être mise en cause conformément aux règles de procédure civile en matière de mise en cause.

Transaction et recouvrement entre les personnes responsables

(11) La personne tenue de verser une indemnisation aux termes du présent article peut recouvrer une contribution ou une indemnité de toute autre personne tenue de verser une indemnisation aux termes du présent article à l'égard de la perte, du dommage, des frais ou des dépenses pour lesquels l'indemnisation est réclamée, de la façon suivante : elle transige avec la personne qui a subi la perte, le dommage, les frais ou les dépenses et poursuit l'action ou intente une nouvelle action contre cette autre personne.

Montant de la transaction

(12) La personne qui a effectué une transaction et qui poursuit ou intente l'action visée au paragraphe (11) doit convaincre le tribunal que le montant de la transaction était raisonnable. Si le tribunal constate que le montant était excessif, il peut fixer le montant auquel la transaction aurait dû s'élever.

Court File No.:

IN THE SUPREME COURT OF CANADA
(ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO)

BETWEEN:

JOHN THORDARSON and THORCO CONTRACTING LIMITED

Applicant

- and –

MIDWEST PROPERTIES LTD.

Respondent

- and –

MINISTRY OF THE ENVIRONMENT AND CLIMATE CHANGE

Intervener

APPLICATION FOR LEAVE TO APPEAL

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