COURT OF APPEAL FOR ONTARIO

CITATION: Midwest Properties Ltd. v. Thordarson, 2015 ONCA 819
DATE: 20151127
DOCKET: C56758

Feldman, Hourigan and Benotto JJ.A.

BETWEEN

Midwest Properties Ltd.

Plaintiff (Appellant)

and

John Thordarson and Thorco Contracting Limited

Defendants (Respondents)

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

Heard: June 1, 2015

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.

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, 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.

[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. 99(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, [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.

Released: November 27, 2015 "KF"

"C. W. Hourigan J.A."
"I agree K. Feldman J.A."

“I agree M.L. Benotto J.A.”