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COURT OF APPEAL EXPANDS THE SCOPE OF RECOVERABLE DAMAGES IN CONTAMINATED SITES CASES - MIDWEST V. THORDARSON

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The Ontario Court of Appeal in Midwest[1] awarded the plaintiff damages that put it in a better position than it was in at the time it purchased its property. While this seems contrary to basic tort law principles, the case was ultimately decided under section 99(2) of the Environmental Protection Act,[2] which provides for a statutory cause of action and (apparently) a greater scope of recoverable damages in contaminated sites cases.

The result of this case was no doubt influenced by the Court's finding that the conduct of the defendants was reprehensible and the Court's desire to fashion a remedy that would ensure that the polluter, and not the innocent purchaser, paid for the damage caused to the property.

You can read our analysis of Midwest with respect to liability under section 99(2) of the EPA in our article Section 99(2) of the EPA is a "new and powerful tool" for compensation for contaminated lands - Midwest v Thordarson and the Court's finding that the principal of the defendant corporation was personally liable for general and punitive damages, Personal liability to pay damages, including punitive, to a neighbour for environmental contamination: a warning from Midwest.

The Facts

Many of the key facts of this case were revealed for the first time in the Court of Appeal decision. Midwest Properties Ltd. ("Midwest") acquired an industrial property in 2007. Prior to its purchase, it retained an environmental consultant who conducted a Phase I Environmental Site Assessment on the property, and reported that a Phase II was not required. It was only when Midwest became interested in purchasing all or part of the adjoining property owned by the defendant Thorco Contracting Limited ("Thorco") and conducted additional investigations that it discovered its property had been contaminated

by the defendants.[3]

Midwest sued Thorco and its owner, John Thordarson, for breach of section 99(2) of the EPA, and in nuisance and negligence. Mr. Thordarson had controlled Thorco since 1969 and had been storing various materials and wastes on the property in 1974. Mr. Thordarson and Thorco had been convicted in the past for failing to comply with an MOE order and, the Court found, demonstrated a repeated pattern of utter disregard for the effect that their deficient chemical storage practices were having on the surrounding environment.

The Court found that both defendants had breached s. 99(2) of the EPA. While the Court also considered and overturned the trial judge's findings on Midwest's nuisance and negligence claims, it only did so for the purposes of determining and awarding punitive damages against the defendants. The Court quantified damages under s. 99(2) of the EPA and not the common law torts.

Damage Award under Section 99(2) of the EPA

At common law, a purchaser who buys a contaminated property typically does so at its own peril and has a limited claim in tort against its neighbour for any continuing migration of contamination after the purchaser acquired the land. This method of assessing damages is logical, given that the objective of damages in tort law is to put the plaintiff back to the position it was in before the wrong occurred. Prior to its acquisition of the property, the purchaser could not have suffered a wrong at the hand of the defendant. A reasonable purchaser is expected to conduct proper due diligence and, if contamination is discovered prior to purchase, either negotiate a discount on the purchase price or walk away from the deal.

In Midwest, however, the plaintiff's recovery was not limited to the damages it sustained after acquiring the property. Rather, the plaintiff was entitled to an award of damages based on the estimated cost to clean up the entire property, regardless of when the contamination occurred and despite the evidence that the property was already contaminated when it bought it. The Court found there is no requirement under the EPA to establish the level of contamination that existed at the time of purchase. As a result, Midwest was put into a better position than it was in prior to purchasing its property.

The Court held that the statutory cause of action afforded under s.99(2) of the EPA, entitles a plaintiff to recover the full cost of remediating its property from the polluter. Consistent with the "polluter pays" principle, s. 99(2) of the EPA is concerned with the

environment, and aims to put the property, not necessarily the plaintiff, back into the position it was in prior to the contamination caused by the defendant.

Nuisance and Negligence Claims Established

Regarding the tort claims, the Court found that the trial judge erred in dismissing the claims in nuisance and negligence. While the trial judge had concluded that Midwest had not suffered a loss, the Court of Appeal highlighted the uncontradicted evidence that the property suffered a diminution in value[4] and that the contamination presented a health risk, which was evidence of physical and material harm or injury to the lands. Further, there was evidence that the contamination on the Midwest property had worsened after Midwest purchased it.[5]

Notwithstanding that it found a basis for liability in negligence and nuisance, the Court was clear that it was not concerned with the quantification of damages in nuisance and negligence because it would be subsumed in the compensatory damages awarded under the EPA.

Measure of Damages

In Midwest, the Court of Appeal may have ended the debate on whether diminution in value or restoration costs is the appropriate measure of damages in cases of environmental harm. The Court concluded that damages under s. 99(2) of the EPA should not be restricted to the diminution in the value of the property. In other words, a plaintiff can recover damages even where they exceed the property's fair market value. The focus under s. 99(2) is restoring the environmental harm caused to the land.

The Court stated that "awarding damages under s. 99(2) based on restoration costs rather than diminution in property value is more consistent with the objectives of environmental protection and remediation that underlie this provision". The Court went on to hold that limiting damages to the property's loss in value would be "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." The Court went so far as to state that the restoration approach to damages is "superior, from an environmental perspective, to the diminution in value approach".

It is foreseeable that plaintiffs will try and rely on this decision to claim that restoration costs are the appropriate measure of damages in all contaminated lands cases. However, Midwest may have limited application to claims made under s. 99(2) and not apply equally

to common law tort claims. There is an overarching principle in the case law that damages have to be reasonable, and awarding damages in excess of the property's fair market value may not always be reasonable or appropriate. When it comes to industrial or commercial properties, the general principal has been that repair costs can be awarded where they exceed the property's value if:

1. the plaintiff's desire to repair the property is reasonable and it intends to do so; and,
2. the advantages to the plaintiff in repairing the property are in balance with the additional cost to the defendant.

There are clearly more economical approaches to addressing contamination on commercial and industrial properties. For example, risk assessments[6] are increasingly being employed as they often provide a more economical, practical and efficient means of addressing contamination. A plaintiff might be fully compensated by an award for the cost of a risk assessment plus an additional sum to compensate for any residual diminution in value.

The cases cited by the Court in Midwest also do not seem to support that damages based on the cost to restore a property to its pre-contaminated state, regardless of whether they exceed the property's fair market value, is always appropriate.

When the Court stated that there is a recent trend in the common law toward awarding remediation damages, it referred to two decisions: Tridan Developments Ltd. v. Shell Canada Products Ltd.[7] and Canadian Tire Real Estate Ltd. v. Huron Concrete Supply Ltd.[8] While these cases may have awarded damages based on estimated remediation costs, they do not suggest that this is a superior measure of damages. In Tridan, the clean up costs were less than the value of the plaintiff's property and, according to the Court of Appeal, reflected the most economical remedial approach. Notably, the Court said that damage recoveries "are based on costs but are the equivalent of a diminution in property value."[9] In Canadian Tire, the defendant did not dispute that quantification of damages should be based on the estimated cost to restore the property to its pre-contaminated state. There was no evidence lead on plaintiff's property value. The plaintiff also adduced evidence that it had implemented interim remediation measures on its property to address the contamination.

When the Court in Midwest stated that more recently "courts have awarded damages based on restoration costs, even if those costs exceed the amount of the decrease in property value," it cited two other decisions: Jens v. Mannix Co.[10] and Horne v. New Glasgow.[11] Both of those cases, however, deal with residential homes. Owners of

residential properties have generally always been entitled to remediation costs in excess of the property's value, the rationale being that residential properties are unique and not readily replaceable. The same cannot be said for industrial and commercial lands.

Take Away Points

First, a plaintiff who can establish a statutory cause of action under s. 99(2) of the EPA can recover the full estimated costs to remediate its property. A plaintiff will not be limited to only those damages that occurred after it acquired the property or to damages that do not exceed the property's fair market value. Whether the Court's endorsement of remediation costs as the appropriate measure of damages under s. 99(2) will extend to common law tort claims for contaminated lands, remains to be seen but it will likely form the basis of many claims going forward.

Second, in Midwest, the plaintiff was diligent and, through no fault of its own, did not discover the contamination on its property prior to acquiring it. Although not explicit in the Court's decision, the Court's reasoning in Midwest suggests that a purchaser who knowingly buys a contaminated property has the same right to seek full recovery for the damage to its property under s. 99(2). This reading, however, opens the door to multiple claims by different parties for the same loss. Consider for example, a vendor who sells its property at a discount because of contamination that migrated from a neighbouring property, discovered at the time of sale. The vendor could claim against the neighbouring property in common law for the reduction in the purchase price. At the same time, the purchaser could have a claim against the neighbour for the damages sustained to the property, under section 99(2) of the EPA. The potential for a defendant to pay twice in this scenario might resolve itself through the proceedings, but it adds a layer of complication to contaminated site claims.

Finally, Midwest is an important reminder of how critical it is to adduce the evidence you need to prove your case and how the courts are ultimately persuaded by the facts. This is not to diminish the importance of the law, but the facts of a case are often what drive its result. In Midwest, the Court was clearly persuaded by the defendants' reprehensible conduct. Arguably, the outcome on damages might also have been different had the defendants lead positive evidence on the cost to remediate Midwest's property.

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[1] 2015 ONCA 819 [Midwest].

[2] R.S.O. 1990, c. E. 19 [EPA].

[3] The case does not discuss the quality of the first consultant's investigations and

assessments or explain why it was not brought into the action.

[4] The environmental consultant testified that it a loss in value existed but did not quantify it.

[5] The evidence was that two monitoring wells detected free product in 2011 that was not present in 2008.

[6] A risk assessment proposes property-specific clean up standards that offer equal protection to human health and the environmental as the province's generic standards.

[7] (2000), 35 R.P.R (3d) 141 (S.C.), aff'd (2002), 57 O.R. (3d) 503 (C.A.), leave to appeal ref'd, 177 O.A.C. 399 [Tridan].

[8] 2014 ONSC 288, 88 C.E.L.R. (3d) 93 [Canadian Tire].

[9] Tridan, supra note 7 at para 19.

[10] (1978), 89 D.L.R. (3d) 351 (B.C.S.C.).

[11] [1954] 1 D.L.R. 832 (N.S.S.C.).

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