Polluter Pays Doctrine Underscored: Section 99(2) of the EPA Applied: Some Thoughts on Midwest Properties Ltd. v. Thordarson, 2015 ONCA 819

Some Thoughts by the Lawyers at Willms & Shier Environmental Lawyers LLP

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Introduction

Ontario's Court of Appeal awarded damages for migration of petroleum hydrocarbons onto a neighbouring property in *Midwest Properties Ltd. v. Thordarson* under a seldom applied section of the *Environmental Protection Act*, section 99. Midwest is also the most recent case in the interpretation and application of the "polluter pays" doctrine.

On January 26, 2016, Thorco Contracting Limited and Mr. Thordarson filed their application for leave to appeal to the Supreme Court of Canada.

Facts

The appellant, Midwest Properties Ltd. and the respondent, Thorco Contracting Limited, own adjoining properties in an industrial area of Toronto. Thorco stored large volumes of PHCs on its property dating back to 1974.

Prior to its purchase of the property, Midwest obtained a Phase I Environmental Assessment of the property and was advised that further investigation was not required. Subsequently, Midwest became interested in acquiring the Thorco property. Environmental reports provided by its owner, John Thordarson, disclosed PHC contamination in the soil and groundwater. Further testing disclosed that PHCs exceeding the MOECC Standards had migrated on to the Midwest property. Midwest sued Thorco and John Thordarson, relying upon three causes of action: (i) breach of the EPA section 99(2), (ii) nuisance, and (iii) negligence. Evidence at trial established that the contamination at the Midwest property was getting worse. The cost to remediate the Midwest property was estimated at $1.3 million.

Between 1988 and 2011, Thorco was in almost constant breach of compliance orders issued by the Ministry of the Environment. In 2000, Thorco and Thordarson were convicted by the Ontario Court Provincial Division of EPA offences, including counts of failing to dispose of wastes in excess of the maximum permitted quantities specified in its Certificate of Approval obtained in 1988, failing to submit financial assurance, and failing to ensure proper storage of materials on the property. A court order was issued but at the time of the trial, the respondents were still in breach of both the Ministry and Provincial Court orders.

Trial Judgment

The trial judge in this civil action held that respondents Thorco and Thordarson were not liable under any of the causes of action pleaded (*Midwest v. Thordarson*, 2013 ONSC 775). 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 Ministry had already ordered Thorco to remediate Midwest's property, a remedy under EPA section 99(2) was not available to Midwest because it could result in double recovery.

Ontario Court of Appeal Decision

1 EPA Section 99(2)

Midwest appealed the decision on the grounds that the court had misapplied EPA, section 99(2) among other things. Section 99 provides in part:

> (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 …
>
> from the owner of the pollutant and the person having control of the pollutant. (emphasis added)

The Court of Appeal noted that this section, enacted over 35 years ago, brings a private right of action that 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 Court addressed the purpose of section 99 by reviewing the history of the EPA Part X. The Appellate Court said that Part X, commonly referred to as the Spills Bill, has two main goals. The first goal is to minimize the harm caused by the discharge of pollutants by requiring prompt reporting and clean-up by the party who owned or controlled the pollutant, regardless of fault. The second goal is to ensure that parties who suffer damage through the discharge of pollutants are compensated by the establishment of a statutory right of recovery from the parties who owned or controlled the pollutant.

At trial Thordarson and Thorco argued that since they were already subject to Ministry orders to remediate Midwest's property, an award of damages equivalent to the cost of remediation would create the opportunity for double recovery. The Court of Appeal disagreed with the trial judge:

> 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 order as a shield. Such an interpretation would also discourage civil proceedings, and may even discourage officials from issuing remediation orders for fear of blocking a civil suit. (para. 49)

The Appeal Court went on to state that there is no language in section 99(2) to support the trial judge's conclusion that a party cannot advance a civil claim under the section where the owner or person in control of the pollutant is already subject to a Ministry order.

The Court of Appeal also pointed to the fact that Thordarson and Thorco had not cleaned up their property nor Midwest's property despite being ordered to do so in 2012, thus making the chances of double recovery remote. The Court noted that the Ministry had intervened in the appeal and had "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".

2 Measure of Damages under Section 99(2)

In assessing the measure of damages that should be awarded under section 99(2), the Appeal Court said that courts recently have awarded damages based on restoration costs, even where those costs exceed the amount of the decrease in property value. The Court concluded that the restoration damage award approach is superior from an environmental perspective to the diminution in value approach. The Appeal Court stated:

> … 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. (para. 70)

3 Nuisance

The Court of Appeal rejected the Respondents' argument that compensation under section 99(2) is dependent upon the establishment of an actionable nuisance that requires proof of physical injury to the land or substantial interference with the use or enjoyment of the land, in order to claim damages. Once again, the Court stated that section 99(2) is a separate, distinct ground of liability for polluters:

> 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. <u>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</u>. (para. 73) (emphasis added)

4 Personal Liability

Mr. Thordarson sought to avoid personal liability by relying on the "corporate veil" argument that the liability should stop with Thorco. Section 99(2) provides that an action lies against the owner of the pollutant and the person who controls the pollutant. The Court had no difficulty in finding Mr. Thordarson in "control" of the pollutant:

> 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 [the Thorco property] and its storage on the property. (para. 88)

As a consequence, pursuant to section 99(8) of the EPA, the Appeal Court held Thorco and Mr. Thordarson jointly and severally liable for the damages under section 99(2).

5 Punitive Damages

The Court of Appeal said that the law clearly provides that punitive damages cannot be awarded where a statutory cause of action only provides for compensatory damages as in the case of section 99(2), since punitive damages are, by their nature, non-compensatory. In order for punitive damages to be available in this case it was necessary for the Appeal Court to decide that the trial judge erred in dismissing the nuisance and negligence claims brought by Midwest. The Appeal Court found:

> … 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. (para 98)

According to the Appeal Court, it did not matter that the experts had failed to quantify the damage incurred. Quantification of damages was not required to establish that Midwest suffered damage compensable under the law of nuisance and negligence.

The Appeal Court pointed out that the environmental condition of the Midwest property had deteriorated since Midwest acquired it in 2007:

> 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 107, 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 [the Midwest property] in 2007 (para 104)

As for Mr. Thordarson, the Court of Appeal said "there is no question that he was intimately and equally involved in the conduct which was both a nuisance and negligent."

Having determined that the Court could award punitive damages, it set out the general objectives of punitive damages, to punish, to deter, and to denounce a defendant's conduct. The Appeal Court said:

> 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. (para 122)

Midwest was awarded $100,000 in punitive damages, $50,000 from each of Thorco and Mr. Thordarson. In addition, judgment was rendered against both respondents jointly and severally for $1,328,000 for damages under section 99(2) of the EPA.

Some Observations and Thoughts

The *Midwest* decision has garnered a lot of attention. The following are some observations and thoughts by Willms & Shier Environmental Lawyers for your consideration.

1 Plaintiffs have regularly pleaded the EPA section 99(2) for years; now they may actually achieve success on that basis.

2 By pleading section 99(2), success is not guaranteed. Indeed, careful attention should be paid to the facts of each case. In *Midwest*, there were some key facts worth noting.

a) Prior to its purchase, Midwest obtained an environmental assessment for its property that advised that further investigation was not required.

b) Since no contamination was thought to be present at the Midwest property at the time of purchase, Midwest presumably paid a "clean" fair market value for the property.

c) Midwest only became aware of the contamination when it took an interest in acquiring the neighbouring property and conducted environmental tests.

d) From 1988 through 2011, Thorco was in almost constant breach of compliance orders issued by the Ministry, and

e) While the Ministry had issued orders against Thorco and Mr. Thordarson, double recovery could be avoided if a damage award was made by the court.

3 Under section 99(2) a person has the right to compensation for loss or damage incurred as a direct result of the spill of a pollutant that causes or is likely to cause an adverse effect. It is interesting to note that there was no discussion by the Appeal Court in *Midwest* about "the spill of a pollutant" nor about "adverse effect". Presumably, the Court assumed, absent a solid evidentiary basis, that a "spill" (as defined in the EPA) had occurred that "caused an adverse effect".

4 Will a section 99(2) remedy be available for historic contamination, in contrast to ongoing migration from the source?

5 Damage awards based on restoration costs may be preferred over awards for diminution in the value of the property - even where restoration costs exceed the amount of the decrease in property value. This is interesting particularly in light of the analysis in *Cousins v. McColl-Frontenac Inc.*, 2007 NBCA 83.

6 Personal liability for environmental damage will apply under section 99(2) where it can be shown that the impugned person had "control" of the pollutant spilled.

7 Punitive damages may be awarded where a common law cause of action is made out and the party in control of the pollutant demonstrates "wanton disregard for its environmental obligations".

8 The Appeal Court did not require Midwest to use the judgment funds to actually conduct the clean up on its property. Assuming Midwest does clean up, what is to prevent recontamination? If the defendants fail to remediate the Thorco site or fail to install a barrier, what will prevent recontamination of the Midwest property, presuming it is cleaned? Will that give rise to a new claim by Midwest?

And, in closing, a most important question: is the *Smith v Inco* restrictive interpretation of the common law environmental torts overturned given the more recent decisions in *Canadian Tire* and *Midwest*? Has the pendulum swung yet again?

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