# THE GR COURT DOCKET

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# $1.4 MILLION IN DAMAGES AWARDED UNDER "SPILLS BILL" ACTION: COURT STATES THAT "POLLUTER PAYS" PRINCIPLE CODIFIED

**By Stephen Thiele**

In a ground-breaking decision, Gardiner Roberts LLP lawyers learned last week that they were successful in convincing the Ontario Court of Appeal in *Midwest Properties Ltd. v. Thordarson*[1] that a property owner whose land had been polluted by migrating petroleum hydro carbons ("**PHC**") from an adjacent property was entitled to recover damages for the projected costs of soil remediation under s. 99(2) of the *Environmental Protection Act* ("**EPA**").

Among other pronouncements, the Ontario Court of Appeal determined that Part X of the EPA, which includes s. 99(2), is a statutory codification of the "polluter pays" principle.

This principle provides that whenever possible, the party that causes pollution should pay for remediation, compensation, and prevention.[2]

The Court of Appeal also determined that the escape of PHC from the adjacent property constituted nuisance and negligence, thus exposing the defendants, both a corporate and individual defendant, to separate awards of punitive damages.

## THE RELEVANT FACTS

In 2007, Midwest Properties ("Midwest") purchased the polluted property at issue. At the time of purchase, a visual inspection did not identify any potential contamination. However, Midwest later learned during negotiations to buy part of the adjacent property that the adjacent property was contaminated with PHC.

Midwest then conducted tests of its land which disclosed that PHC had migrated from the adjacent property to Midwest's property. The level of pollution was significant and serious and was found to be increasing over time. An expert hired by Midwest testified at trial that soil testing results indicated a risk that volatile PHC could enter Midwest's building and pose a risk to the occupants. Midwest also discovered that while the Ministry of the Environment ("MOE") had issued a Certificate of Approval allowing for the storage of PHC on the adjacent property, the owners thereof had failed to comply with the Certificate and that the defendants were convicted in 2000 of EPA offences for, among other things, failing to dispose of all waste in excess of the maximum permitted quantities specified in the Certificate.

Furthermore following the commencement of Midwest's action against the defendants but months before the trial, the MOE issued in 2012 an order to the defendants to remediate Midwest's land. But nothing was done and eventually Midwest commenced its action under s. 99 of the EPA and for nuisance and negligence.

Founded in the 1920s, Gardiner Roberts LLP has grown to become a strategically placed mid-sized business law firm with a diverse client base which includes two of Canada's largest banks, several medium to large-sized municipalities, agencies, boards and commissions and other government entities, high tech and software companies, real estate developers, lenders and investors.

A number of our lawyers have enjoyed in-house corporate positions and been appointed as board members of tribunals or as judges.


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## FINDINGS OF THE TRIAL JUDGE

At trial, Midwest's claim under s. 99(2) was dismissed for the reason that the MOE had already ordered the defendants to remediate Midwest's land and that the EPA could not be interpreted in an expansive manner so as to allow damages to include damages for the cost of remediation in circumstances where such remediation had already been ordered under the EPA. In the view of the trial judge, such a result would create an opportunity for double recovery, particularly in circumstances where Midwest had not affected any soil remediation.

The trial judge also rejected Midwest's EPA claim because there was no evidence of actual loss in property value, or of an inability to use or operate its business on the property, or business losses.

Meanwhile, the trial judge rejected Midwest's nuisance and negligence claims on the grounds that there had been a failure to prove damages. More specifically, the trial judge noted that there was no evidence of the environmental state of Midwest's property at the time it had been bought and no proof of a specific diminution in property value. By rejecting Midwest's claim for nuisance and negligence, the trial judge dismissed its claim for punitive damages.

## TRIAL JUDGMENT OVERTURNED

The Court of Appeal completely rejected all of the trial judge's findings.

With respect to s. 99 of the EPA, the Court found that utilizing the modern principle of statutory interpretation the trial judge's interpretation was too narrow and inconsistent with the wording of the EPA and its goals.

The Court determined that Part X of the EPA, which is known as the "Spills Bill", was intended to minimize the harm caused through the discharge of pollutants by requiring prompt reporting and clean-up by a party that owns or controls the pollutant and to ensure that parties who suffer damage through the discharge of pollutants are compensated by establishing a statutory right to recovery from parties that owned and controlled the pollutant. In essence, Part X created a form of no-fault obligation to pay damages on the part of the polluting owner or the controlling person.

The trial judge's decision, however, had resulted in the defendants being allowed to avoid this no-fault obligation by wrongly permitting the defendants to use the MOE remediation order as a shield. The appellate court expressly held that an MOE order and recovery under s. 99(2) were not mutually exclusive.[3]

The Court of Appeal also concluded that Midwest was entitled to damages based on its restoration costs. The Court stated that in contrast to the defendants' argument that Midwest was only entitled to diminution in value damages, the restoration approach was from an environmental perspective superior on the grounds that an award based on diminution of value might not adequately fund clean-up.[4]

The Court further held that in order to succeed in a claim under s. 99(2), Midwest was not required to prove an actionable nuisance since s. 99(2) was enacted to provide a flexible statutory cause of action that superimposed liability over the common law.[5] Under the statutory right of action, issues such as intent, fault, duty of care and foreseeability were eliminated.

The breadth of the statutory remedy was reflected as well through the appellate court's award that both the owner of the adjacent (the corporate defendant) and its controlling-mind (the individual defendant) were jointly and severally liable for the damages awarded. The right to compensation under s. 99(2) was against the owner of the pollutant and the person who controls the pollutant, both

terms which are defined under s. 91(1) of the EPA. As a result of the definition of "person having control of a pollutant", a party, like the individual defendant, having the charge, management or control of a pollutant could not rely on separate ownership of the pollutant to shield themselves from liability.[6]

In this case, the corporate defendant was a small business whose day-to-day operations were simply effectively controlled by the individual defendant.

With respect to nuisance and negligence, the Court of Appeal concluded that the trial judge had committed palpable and overriding errors when she held that Midwest had not established damages. This was contrary to the uncontradicted evidence at trial that established a diminution in the value of Midwest's property and a human health risk.

It was also clear to the Court of Appeal that the other elements of the torts of nuisance and negligence had been satisfied.

These findings were significant because under s. 99(2), Midwest was not entitled to an award for punitive damages. In the circumstances of this case, such an award was appropriate because of the lengthy history of the defendants' failure to comply with MOE orders and their utter indifference to the environmental condition of their own property and surrounding areas, which included Lake Ontario.[7]

The individual defendant could not avoid an award of punitive damages because he was unable to avoid personal liability for the commission of the torts of nuisance and negligence. As stated by the Court of Appeal, 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.[8]

The projected costs of soil remediation were $1.3 million, while the punitive damages awarded was $50,000 against each defendant.

Midwest was represented by Evert Van Woudenberg, a litigation partner at Gardiner Roberts LLP.

Evert was supported in his efforts by Stephen Thiele, who provided background legal research on the issues of liability under the EPA, and the law of nuisance and negligence.

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1. 2015 ONCA 819
2. Ibid, para. 68
3. Ibid, para. 53
4. Ibid., para. 62
5. Ibid., para. 73
6. Ibid., para. 84
7. Ibid., para. 122
8. Ibid., para. 113