Court of Appeal holds that polluters pay... personally

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A company and its principal have been found jointly and severally liable for damages resulting from an EPA breach.

In *Midwest Properties Ltd. v. Thordarson,* the Court of Appeal for Ontario held that a company and its principal were jointly and severally liable for $1.3 million in damages as a result of a breach of the *Environmental Protection Act* ("*EPA*"), as well as punitive damages for nuisance and negligence.

The court imposed personal liability on the company's principal on the basis that he had control over the pollutant which had contaminated the plaintiff's property. This raises the possibility that directors or officers of companies may be considered to exercise control over pollutants and face significant personal exposure as a result of breaches of environmental laws.

Contamination

The appellant, Midwest Properties Ltd. ("Midwest"), and the respondent, Thorco Contracting Limited ("Thorco"), owned adjoining properties in Toronto. Thorco had stored large volumes of waste petroleum hydrocarbons ("PHC") on its property since the mid-1970s, which had resulted in ground contamination.

Between 1998 and 2011, Thorco was in almost constant breach of its licence and/or compliance orders issued by the Ministry of Environment and Climate Change (the "MOE"), including storing waste PHC in excess of permitted quantities and failing to ensure the proper storage of waste PHC.

Contamination of Midwest's property

Midwest obtained an environmental assessment (primarily consisting of a visual inspection) prior to purchasing its property in 2007; however, no potential contamination was identified. Midwest then became interested in acquiring the neighbouring Thorco property.

Being aware that Thorco's business activities related to the servicing of petroleum handling equipment, Midwest obtained environmental assessments for the Thorco property. It was at this time, in 2008, that Midwest discovered that not only was Thorco's property contaminated, but also groundwater flow had caused the contamination to spread to Midwest's property.

Midwest's action

In addition to making claims based in nuisance and negligence against Thorco and its owner, John Thordarson ("Thordarson"), Midwest made a claim under s. 99(2) of the *EPA,* which section states as follows:

> 99(2) Her Majesty in right of Ontario or in right of Canada or any other person has the right to compensation,
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> (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

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(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.

Trial Court decision

At trial, Midwest argued that the contamination of its property entitled it to an award of damages equivalent to the cost of a reasonable remediation plan — which its expert testified would be approximately $1.3 million.

However, the trial judge noted that the defendants had already been ordered by the MOE to remediate the Midwest property, and held that the *EPA* could not be interpreted in an expansive manner that would allow damages to include remediation costs where such remediation had already been ordered.

The fear was that this would result in a "double recovery" to Midwest. Further, in dismissing Midwest's claims, the trial judge found damages had not been proven because Midwest had not demonstrated that the contamination had lowered the value of its property, or hindered Midwest's ability to use its property or operate its business.

Court of Appeal decision

Midwest appealed, and the MOE intervened to contest the trial judge's finding that its order to remediate precluded recovery under s. 99(2) of the *EPA*. In allowing the appeal and finding that Thorco and Thordarson were jointly and severally liable, the court noted that the two goals of the relevant part of the *EPA* were:

(i) 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; and

(ii) 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.

Polluter pays

The court held that the trial judge's interpretation of s. 99(2) undermined the legislative objective of establishing a separate, distinct ground of liability for polluters. The court also held that awarding damages under s. 99(2) based on restoration costs, rather than diminution in property value, was more consistent with the objectives of environmental protection and remediation that underlie the provision.

This approach reflects the "polluter pays" principle, which provides that (wherever possible) the party that causes pollution should pay for the remediation, compensation and prevention. In imposing strict liability on polluters by focusing only on who owns and controls the pollutant, s. 99(2) is effectively a statutory codification of this principle.

Personal liability under *EPA*

Section 99(2) establishes a right to compensation from "the owner of the pollutant and the person having control of the pollutant." While Thorco fell squarely within the definition of "owner of the pollutant," the question was whether Thordarson was a "person having control of a pollutant."

The court noted that the statute defined this term 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.

The court concluded that parties with control of a pollutant could not rely on separate ownership of the pollutant to shield themselves from liability.

"Control"

In considering whether Thordarson had "control" of the PHC pollutant, the court noted that Thorco was a small business whose day-to-day operations were effectively controlled by one individual — Thordarson. He was Thorco's principal, and had sole control of Thorco during the relevant time period.

Mr. Thordarson's evidence at trial established that it was he who applied for approval from the MOE, and that he was responsible for the material being brought onto the property and its storage.

Due diligence defence

The court did not discuss whether the due diligence defence found in s. 99(3) of the *EPA* applied to Thordarson; presumably, there was insufficient evidence to find that the defence applied. The court did comment that the due diligence defence was successfully used in *Bisson v. Brunette Holdings Ltd.*

In that case, it was accepted that the individual defendant — the major shareholder, president, director, and manager of the corporate defendant, which operated as a gasoline bar — had made continued efforts to maintain the gasoline tanks and comply with legislative requirements. Accordingly, all reasonable steps had been taken to prevent a spill or the escape of gasoline, and no personal liability could attach under s. 99(2) of the *EPA*.

Punitive damages awarded

Even though the compensatory damages sought under the common law were the same as those sought under the *EPA*, the Court of Appeal went on to consider whether the trial

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judge erred in dismissing Midwest's nuisance and negligence claims, as the issue was relevant to the availability of punitive damages.

The court noted that there was uncontradicted evidence at trial that established a diminution of property value and a human health risk, with the result that both nuisance and negligence had been established, and Thorco and Thordarson were each liable for punitive damages in the amount of $50,000.

Thorco's history of non-compliance with its licence and MOE orders, and its utter indifference to the environmental condition of its property and the surrounding areas, demonstrated a wanton disregard for its environmental obligations, and was "clearly driven by profit."

Significance

This decision is the first detailed discussion of s. 99(2) of the *EPA*. Given the court's expansive interpretation and the scope of damages that were recoverable, claims based on the EPA may proliferate.

For those individuals who are in "control" of a pollutant — be they officers, directors or employees — all reasonable steps should be taken to prevent environmental spills. In the absence of such due diligence, it is clear that joint and several liability may be imposed against both individuals who "control" the pollutant, and the owner of the pollutant.

Leave to appeal to the Supreme Court of Canada in this case was filed in January 2016. It remains to be seen whether this increased risk of personal liability will remain.

REFERENCES: *Midwest Properties Ltd. v. Thordarson*, 2015 ONCA 819, 2015 CarswellOnt 18029 (Ont. C.A.), leave to appeal filed 2016 CarswellOnt 1953; *Environmental Protection Act*, R.S.O. 1990, c. E.19; *Bisson v. Brunette Holdings Ltd.*, 1993 CarswellOnt 275, [1993] O.J. No. 3378 (Ont. Gen. Div.), additional reasons 1994 CarswellOnt 4459 (Ont. Gen. Div.).

