How Should Plaintiffs Quantify Their Losses Due to Contamination? Property Appraisal or Remediation Estimate?

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In civil lawsuits for losses due to soil and groundwater contamination, plaintiffs often quantify their damages as either:

- the cost to remediate their property
- the loss in market value of their property, or
- both

In *Midwest Properties Ltd. v Thordarson* ("*Midwest*"),[1] the Ontario Court of Appeal held that the Court's preferred method is to quantify damages by evaluating the cost to remediate the plaintiff's property.

Interestingly, *Midwest* does not reference *Cousins v McColl Frontenac Inc* (*"Cousins"*),[2] where the New Brunswick Court of Appeal previously affirmed the opposite – namely, that a reasonable award of damages is the loss in market value of the property.

How do plaintiffs reconcile these different approaches?

Diminution of Value Approach

In *Cousins*, Mr. Cousins purchased a closed service station from Texaco Canada Inc. (now McColl-Frontenac Inc.) as well as two adjacent properties. The Queen's Bench of New Brunswick found that McColl Frontenac Inc. was responsible for the migration of petroleum hydrocarbon contamination from the service station property to one of the adjacent properties.[3]

The Court held that Mr. Cousins was entitled to recover "reasonable" damages.[4] The three properties (of which one was found to be impaired by McColl Frontenac Inc.) were worth approximately $100,000.[5] Mr. Cousins sought between $1,561,844.89 and $2,368,619.74 to remediate the contaminated property and to account for lost profits.[6]

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1 2015 ONCA 819.
2 2006 NBQB 406, affirmed by 2007 NBCA 83.
3 *Ibid* at para 11.
4 *Ibid* at para 12.
5 *Ibid* at para 1.
6 *Ibid* at para 13.

The Court rejected Mr. Cousins' submission and stated:

> …it would not be reasonable to assess damages on the basis of speculative remediation expenses of undeveloped land or theoretical assumptions about lost profits from development that did not occur.[7]

Instead, the Court held that a reasonable award of damages would be the loss in market value of the property.[8] Loss in market value can be substantiated by evidence of inability to sell the property, inability to finance the property and/or diminution in value due to the stigma of owning contaminated property.

On appeal, the New Brunswick Court of Appeal agreed with the trial Court and held, "it would be unreasonable, on the facts of this case, to assess damages on the basis of the cost of remediation."[9] The Court's dictum raises the question of whether it might have had a different view if Mr. Cousins had remediated before trial.

Cousins was decided by the New Brunswick Court of Appeal in 2007. Mr. Cousins was awarded $125,320.07.

Restoration Approach

In *Midwest*, the Ontario Court of Appeal awarded damages for the migration of petroleum hydrocarbons onto a neighbouring property under section 99(2) of the *Environmental Protection Act* ("EPA").

The Court acknowledged the two different approaches to determining the quantum of damages and held that the restoration approach is superior, stating:

> … 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…
>
> … 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.[10]

The Court held that the restoration approach is more consistent with the objectives of environmental protection and remediation that underlie section 99(2) of the EPA.[11] Further, the Court noted that this approach is consistent with a plain reading of section 99(2) of the EPA and reflects the "polluter pays" principle outlined in common law and in the EPA.[12]

The plaintiff was awarded the estimated cost to remediate its property, $1,328,000.[13]

In *Midwest*, decided in 2015, the Ontario Court of Appeal did not reference *Cousins*.

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7 *Ibid* at para 14.
8 *Ibid* at paras 16-19.
9 2007 NBCA 83 at para 1.
10 2015 ONCA 819 at paras 62-63.
11 *Ibid* at para 67.
12 *Ibid* at paras 68-69.
13 *Ibid* at para 125; the plaintiff was also awarded $100,000 in punitive damages.

What Does This Mean for Plaintiffs in Ontario?

Midwest is the most recent appellate decision in Ontario on the measure of damages. *Midwest* establishes liability under section 99(2) of the EPA and completes the damages analysis with reference to section 99(2) of the EPA. *Cousins* and other earlier environmental case law establish liability and discuss damages under the common law environmental tort causes of action including trespass, nuisance, negligence and strict liability.[14]

It can be argued that *Midwest* is now the definitive law in Ontario and that damages for losses due to soil and groundwater contamination will be quantified by the cost to remediate the plaintiff's property regardless of the cause of action.

Likewise, it can be argued that neither *Cousins* nor *Midwest* trumps the other as the rules in these two cases may only be applicable in their respective contexts and jurisdictions. In particular, the applicability of *Midwest* may be narrowed to only statutory claims involving section 99(2) of the EPA, whereas *Cousins* was a common law tort claim.

At a minimum, the decisions in *Cousins* and *Midwest* illustrate the debate between two different approaches to measuring the quantum of damages. They leave questions open for the Courts to answer. For example:

- Does historic contamination count as a "spill" under section 99(2), or can historic contamination only be claimed as an environmental tort? What effect will this have on damages?
- Will there be a swing towards claims in Ontario under section 99(2) and away from environmental tort claims?
- How will Courts handle situations where there is a large disparity between the cost to remediate compared to the loss in market value?

We will continue to update you about how new case law addresses these issues. We are confident that this discussion is only just beginning.

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[14] *Midwest* also finds the defendants liable in negligence and nuisance, however, liability is first established under section 99(2) of the EPA and damages are also established in reference to section 99(2) of the EPA.