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The State of "Polluter Pays" in Canada

By Cindy Chiasson
Executive Director
Environmental Law Centre

In less than two years, the Supreme Court of Canada has dealt with two cases in which the polluter pays principle has been argued by interveners.[1] Both matters addressed regulatory proceedings related to land contamination and upheld decisions or actions taken by regulators under environmental legislation. Each decision was heralded by the interveners as a victory for the polluter pays principle. However, what is not clear is the practical import that these decisions have in relation to this principle. This article will provide a brief background of the polluter pays principle, review the two relevant Supreme Court of Canada decisions, and discuss the current state of the principle in Canadian environmental law.

Polluter pays principle – background

The polluter pays principle has been evident in various iterations for at least 30 years. The Organisation for Economic Cooperation and Development adopted a recommendation in 1974 regarding implementation of the principle by member countries, referring to it as a "fundamental principle [f]or allocating costs of pollution prevention and control measures introduced by the public authorities in Member countries".[2] The recommendation discusses application of the principle to ensure that goods and services causing pollution in their production or use are priced to reflect the costs of preventing or cleaning up that pollution.

The principle was also enunciated on a broader international basis in 1992 as part of the *Rio Declaration on Environment and Development*.[3] Principle 16 of the Rio Declaration states:

> National authorities should endeavour to promote the internalization of environmental costs and the use of economic instruments, taking into account the approach that the polluter should, in principle, bear the cost of pollution, with due regard to the public interest and without distorting international trade and development.

In Canada, the polluter pays principle has been incorporated to varying degrees in environmental legislation since the early 1990s. Many Canadian jurisdictions have legislative provisions requiring persons causing releases into the environment to take steps to control and remediate those releases.[4] A few provinces have specifically enunciated the polluter pays principle as an underlying principle of their environmental legislation.[5] Implementation of the principle in Canadian legislation has been most evident in relation to remediation of land contamination.

Imperial Oil Ltd. v. Quebec

In 2003, the Supreme Court of Canada issued a judgment upholding the ability of the Quebec Minister of Environment to issue an order to Imperial Oil requiring it to assess contamination at a site previously owned by Imperial, with a view towards future

remediation of the site.[6] The site in question had been used for roughly 50 years as a petroleum products depot by Imperial. The depot had been shut down by Imperial, which sold the site to a purchaser who demolished the industrial buildings and subsequently transferred the property to a real estate developer. Ultimately the site was developed as residential properties, following remediation of the site by the developer in consultation with the Quebec Minister of Environment. Further contamination problems became evident on the site in the mid-1990s, and in 1998 the Minister of Environment issued an order to Imperial, as the former owner and operator of the site, to prepare and submit a report assessing the soil contamination and providing recommendations on future action. Imperial challenged the order, and the matter made its way to the Supreme Court of Canada for consideration on points of administrative law.

The key question addressed by the Supreme Court was whether the Minister of Environment had violated administrative law principles of procedural fairness and impartiality by issuing the order to Imperial. Before the order was issued, several of the residential property owners had initiated civil actions against the Minister for involvement in the site's remediation. Basically, Imperial's main argument was that the order was flawed and should be set aside due to bias on the part of the Minister, suggesting that by issuing the order to Imperial, the Minister avoided potential liability on his own part and was therefore in a conflict of interest.

As part of its determination of the application of the rules of procedural fairness to this case, the Supreme Court reviewed the legislative context in which the Minister issued the order to Imperial. It recognized the incorporation of the polluter pays principle in Quebec's *Environment Quality Act* and many other pieces of Canadian environmental legislation, indicating "that principle has become firmly entrenched in environmental law in Canada"[7] and went on to examine the regulatory process under the Act for remediation of contamination. Ultimately, the Supreme Court's decision to uphold the order hinged on its finding that the Minister was exercising a primarily political role, rather than an adjudicative one, in choosing "the best course of action, from the standpoint of the public interest, in order to achieve the objectives of the environmental protection legislation."[8] Due to the nature of the Minister's role under the Act, he was not required to maintain the impartiality that the law would require of a court, and was held to have met the requirements of procedural fairness in issuing the order to Imperial.

North Fraser Harbour Commission v. Environmental Appeal Board

In early 2005, the Supreme Court of Canada ruled on an appeal of a remediation order issued under the British Columbia *Waste Management Act* to B.C. Hydro and Power Authority (BC Hydro), a successor of a party involved in pollution of the site in question.[9] The Act provides for retroactive liability for remediation of contaminated property. Industrial operations on the site took place over roughly forty years, until the late 1950s. BC Hydro was created in 1965 by the amalgamation of three corporate entities, including BC Electric Company. Activities of BC Electric Company were admitted by BC Hydro to have contributed to the site's contamination.

While the legislation under which the disputed order was issued incorporates the polluter pays principle, the principle was not specifically mentioned in the judgment. The Supreme Court did not issue its own reasons, instead adopting the reasons of Justice

Rowles, one of the dissenting justices when the matter was heard by the British Columbia Court of Appeal.[10] BC Hydro had conceded that its predecessor would have been a "responsible person" under the *Waste Management Act* due to its activities at the site. Given that concession, Justice Rowles felt it was unnecessary to deal with the question of retroactive application of the Act and focused on the meaning and effects of corporate amalgamation. BC Hydro had argued that wording in the amalgamation agreement and supporting statute creating it had the effect of protecting it from liability attracted by the company's three predecessor corporations. Justice Rowles disagreed with this argument, indicating that much clearer wording would be required to immunize an amalgamated company from liability for the consequences of acts carried out by its predecessors. As such, the order against BC Hydro requiring remediation was upheld.

Where does polluter pay stand now?

A significant question is whether the two Supreme Court decisions discussed above have strengthened the position of the polluter pays principle in Canadian environmental law. It is noteworthy that the Court recognized the principle as a common element of Canadian environmental statutes[11] and that both decisions were made within the context of regulatory frameworks embodying the principle. However, these decisions have not established the polluter pays principle as an inviolable or "untouchable" element of Canadian environmental law. The principle is not enshrined in the Canadian constitution or the *Charter of Rights*, nor is the more basic right to a clean or healthy environment.[12] Legislation incorporating the polluter pays principle may continue to be challenged in the courts. The Supreme Court decisions were not decided directly on the point of this principle, and it is likely that other challenges will occur in relation the scope of parties caught within the ambit of polluter pays.

It is also possible that the principle could be removed by government from environmental legislation. In some circumstances, the polluter pays principle is being legislatively modified. This can be seen in legislative amendments aimed at promoting the redevelopment of contaminated sites. Ontario has created means to limit the liability of polluters by providing for the termination or closure of liability upon the satisfaction of specified conditions; the National Round Table on the Environment and the Economy has also recommended that provincial and territorial legislation adopt such provisions.[13] Often these provisions involve the remediation of contamination to a particular standard and the filing of detailed information on site conditions, with protection against future liability for contamination on the same site. Alberta is currently reviewing its contaminated sites legislation and the matter of liability termination is part of the discussion related to this review.

Supporters of the polluter pays principle should not assume that the recent Supreme Court decisions enshrine the principle so that it is immune from any future challenge or legislative change. The key will be to keep a vigilant eye on legislative and judicial developments to ensure that the principle is consistently reinforced and the ultimate goal of environmental protection is achieved.

[1] *Imperial Oil Ltd. v. Quebec (Minister of the Environment)* [2003] 2 S.C.R. 624, 2003 SCC 58 (hereinafter "Imperial Oil"); *North Fraser Harbour Commission v. Environmental Appeal Board*, 2005 SCC 1 (hereinafter "North Fraser").

[2] OECD, *The Implementation of the Polluter-Pays Principle,* Doc. No. C(74)223 (1974); online: Environmental Treaties and Resource Indicators, Socioeconomic Data and Applications Center, Center for International Earth

Science Information Network <http://sedac.ciesin.org/entri/texts/oecd/OECD-4.09.html> (accessed 27 February 2005).
[3] UN, *Report of the United Nations Conference on Environment and Development*, Annex 1, "Rio Declaration on Environment and Development" UN Doc. A/CONF.151/26 (Vol. I) (1992); online: United Nations <http://www.un.org/documents/ga/conf151/aconf15126-1annex1.htm> (accessed 18 February 2005).
[4] See, for example, *Canadian Environmental Protection Act, 1999*, S.C. 1999, c. 33, s. 95 or *Environment Management Act*, R.S.B.C. 1996, c. 118, s. 6(3).
[5] See *Environmental Protection and Enhancement Act*, R.S.A. 2000, c. E-12, s. 2(i); *Environment Act*, S.N.S. 1994-95, c. 1, s. 2(c); *Contaminated Sites Remediation Act*, C.C.S.M., c. 205, ss. 1(1)(c)(i) and 21(a).
[6] *Imperial Oil, supra* note 1.
[7] *Ibid.* at para. 23.
[8] *Ibid.* at para. 38.
[9] *North Fraser, supra* note 1.
[10] *British Columbia Hydro and Power Authority v. British Columbia (Environmental Appeal Board)* (2003) 2 C.E.L.R. (3d) 165 (B.C.C.A), 2003 BCCA 436. Justice Rowles' dissent is set out in paras. 84 – 128.
[11] *Supra* note 7.
[12] Both Quebec and Ontario provide for the right to a healthy environment; see *Environment Quality Act*, R.S.Q., c. Q-2, s. 19.1 and *Environmental Bill of Rights, 1993*, S.O. 1993, c. 28.
[13] *Environmental Protection Act*, R.S.O. 1990, c. E.19, s. 168.7. For the National Round Table recommendations, see *Cleaning Up the Past, Building the Future: A National Brownfield Redevelopment Strategy for Canada* (Ottawa: National Round Table on the Environment and the Economy, 2003) at p. 25.