News Brief
ENVIRONMENTAL LAW CENTRE

Vol.20 No.1, 2005 Page 1
ISSN 1712-6843

Message from the Minister of Alberta Environment

By Guy Boutilier
Minister of Environment
Government of Alberta

It's an honour to welcome readers to the first online issue of *News Brief.*

I am pleased to be Alberta's Environment Minister. Along with my government colleagues, I recognize that Albertans value the environment and protecting it for future generations is a top priority and a shared responsibility. Today's environmental issues are complex; understanding them requires ecological, economic, political, social, and legal knowledge.

In partnership with organizations such as the Environmental Law Centre (ELC), we can build on our success to ensure Albertans continue to lead the way in environmental stewardship, and are supported in their endeavours by good objective information.

Hon. Guy Boutilier

I commend the ELC for its dedication to our environment. Over the last 23 years, its work as an independent organization has demonstrated its sincere commitment to protecting and preserving our environment. I am confident the ELC will continue to do outstanding work. The services that it provides in the areas of education, research, and information are extremely valuable to Albertans. The ELC is recognized for the quality of information provided to citizens in all sectors of society about environmental and natural resources law.

I look forward to working in partnership with the ELC. Together, we can continue to ensure a clean Alberta. Congratulations on the excellence the ELC has achieved in the past and best wishes for future success.

"Harmony" in Toxic Substance Regulation Muddles *CEPA 1999* Five-Year Review

By Jason Unger
Staff Counsel
Environmental Law Centre

Review of the *Canadian Environmental Protection Act, 1999*[1](*CEPA 1999*) is set to begin in March of 2005. It marks the five-year anniversary of the Act coming into the force and triggers a review of the administration of the Act by a "committee of the House of Commons, of the Senate or both Houses of Parliament"[2] (the "Parliamentary Committee").

Preparations for the review have already begun, with Environment Canada and Health Canada holding regional workshops and publishing a scoping paper to assist in gathering information in preparation for the review.[3] This initial consultation ended on February 11, 2005; however, it is expected that the bulk of consultation will occur once the Parliamentary Committee has been struck.

Anyone bent on assessing the administration of the Act, let alone the Act in isolation (at 235 pages and 356 sections), should be prepared for a Herculean task. A thorough assessment requires a review of the ongoing federal assessment of approximately 21,000 substances on the Detailed Substance List, evaluating the regulation of those substances identified as "toxic", and determining how effective the enforcement of the Act has been to date.

Assessing the "harmonized" regulation of toxic substances

The task of assessing *CEPA 1999* is made even more difficult by attempts to "harmonize" federal and provincial regulation of toxic substances. Framed by federal and provincial governments as attempts to avoid duplication, "harmonization" has resulted in various substances being regulated by the provinces while others continue to be regulated federally.

In so far as the federal government could assert regulatory jurisdiction over all toxic substances through *CEPA 1999* but has chosen not to, the "harmonization" of toxic substance regulation reflects, to varying degrees, a deferral and/or delegation of substance regulation to numerous non-CEPA bodies and instruments.[4] One of the main non-CEPA bodies that deal with substances is the Canadian Council of Ministers of the Environment (CCME), comprised of the provincial, federal and territorial Ministers of the Environment, through its development of Canada Wide Standards (CWS).

This apparent delegation of substance regulation dictates that the review of *CEPA 1999* must include a review of the non-CEPA or "harmonizing" instruments. To do otherwise is to omit assessment of substance regulation that could, and some would argue, should be dealt within under *CEPA 1999*. This broader review and assessment of toxic substance regulation is also essential to determine whether the administration of CEPA and the choice to "harmonize" substance regulation is adequately upholding the *CEPA 1999* principles of pollution prevention and sustainable development.

Under the current "harmonized" approach a toxic substance may be provincially or federally regulated and may attract a variety of management approaches, from legislated regulation of the substance, to guidelines, policies, voluntary measures and programs. Each regulatory or management tool also varies in its transparency, its legal enforceability and how it holds parties and governments accountable.

As a result, the past five years of "harmonization" have seen an increasingly complex regulatory framework and, arguably, a system of substance regulation that is significantly less effective and efficient than having a single national regulatory system. This multi-jurisdictional, multi-tool approach to toxic substance regulation also makes it extremely difficult to assess whether the goals and objectives of *CEPA 1999* are being met.

What is evident, however, is that pollution prevention, and the ultimate goal of sustainable development, is undermined by "harmonization" in at least two ways. First, the current framework of toxic substance regulation fails to ensure that legally enforceable instruments exist and are effectively applied on a national level. Second, the regulatory framework fails to ensure that public participation is fostered and facilitated.

Legally enforceable standards

Harmonization, in effect, removes certain toxic substances from the application of *CEPA 1999*. Examples of substances that could be fully regulated under *CEPA 1999* but are instead dealt with through CWS include dioxins, furans, and mercury. This results in the legal tools of *CEPA 1999*, such as virtual elimination, environmental protection actions, and pollution prevention plans, going unused, effectively undermining the value of the Act.

Furthermore, where the provinces deal with substances through the CWS, there are no guarantees that the standards will be legally enforceable, even if legal standards may have arisen under *CEPA 1999*. In instances where legally enforceable standards are lacking, an important tool for pollution prevention and public participation is undermined.

Public participation and *CEPA 1999*

Harmonization also undermines public participation, both in process and in practice.

Procedurally, many non-CEPA instruments fail to incorporate substantive provisions for the public to participate. For instance, under *CEPA 1999* the public can request an investigation of an alleged violation of the Act[5] and the Minister must provide ongoing reports on the progress of the investigation.[6] Provincial laws provide varying degrees of public participation powers in this regard; however, with the use of the CWS and the resulting uncertainty regarding whether provincial standards will be implemented through legally binding means, the effectiveness and applicability of all provisions allowing for requests for investigations are undermined. When substance regulation is deferred to CCME and CWS processes the provinces are able to avoid implementing legal provisions equivalent to those found in *CEPA 1999*.

Public participation is also undermined in practice as the public is left to wander a maze of legislative and non-legislative instruments, each with varying amounts of

transparency, to determine whether standards for a particular substance exists, what the standards are, whether they are being met and whether they can take legal action to enforce them. For instance, where a CWS exists and is implemented through a provincial approval, transparency regarding what the standard is and whether it has been violated is significantly decreased.

Need for national standards

The issues outlined above speak to the value of having a strong centralized, and therefore federal, regulator of toxic substances. Undoubtedly many provinces will shudder at the prospect, viewing federal regulation as a relinquishment of constitutional jurisdiction. Constitutional rhetoric however must not prevent Canada from effectively dealing with toxic substances in a transparent and efficient manner.

A strong federal role in toxic substance regulation is further justified by the fact that the substances in question are ones that our society as a whole should seek to prevent reaching the environment in the first instance. Whether you live in Chicoutimi, Vegreville or Penticton there should be the same assurance that toxic substances are being effectively regulated, that pollution prevention is the governing principle being applied, and that the public has legal rights to participate in the process.

Conclusion

In reviewing *CEPA 1999* the Parliamentary Committee will have to assess whether the objectives of the Act are being met. The task is made significantly more difficult by the number of regulatory instruments that have arisen from attempts to "harmonize" regulation of toxic substances. Indeed the questions about the efficacy of harmonizing regulation must not go unanswered.

Is pollution prevention and sustainable development best served by the increasingly complex multi-jurisdictional and multi-instrument approach to toxic substance regulation? Are the legal tools available and enforceable, both provincially and nationally, to promote effective pollution prevention? Do the Canada Wide Standards adequately uphold principles of pollution prevention and public participation? Is the federal deferral of substance regulation to the provinces occurring for valid environmental and health reasons and not due to erroneous provincial arguments about duplication and constitutional infringements?

Difficult but relevant questions, such as these, must be answered if the next phase of *CEPA 1999* is to effectively promote sustainable development and pollution prevention.

[1] *Canadian Environmental Protection Act*, *1999*, S.C. 1999, c. 33, as amended.
[2] *Ibid* at s. 343.
[3] Environment Canada, *Scoping the Issues: Preparation for the Parliamentary Review of the Canadian Environmental Protection Act, 1999*: *Strengthening Legislation for Sustainable Environment, a Healthy Population and Competitive Economy* (Ottawa: Environment Canada, 2004).
[4] See *Canadian Environmental Law Association* v. *Canada (Minister of Environment)* [1999] 3 F.C. 564 (T.D.), aff'd 2001 F.C.A. 233.
[5] *Supra* note 1 at s. 17.
[6] *Supra* note 1 at s. 19.

Group Standing and the Environmental Appeals Board: The Latest Word

By James Mallet
Staff Counsel
Environmental Law Centre

Albertans involved in environmental and community groups have long been aware of the advantages of acting together. These include administrative efficiencies, a heightened public profile for the group and its issues, and the potential for greater influence on government decision-making. Groups inform and galvanize their members, and can represent the interests of individuals who might not otherwise have the time or resources to act effectively on the issues they care about. These groups also play a vital role as government and industry watchdogs.

However, groups have encountered serious obstacles when seeking to influence government decisions on activities authorized under the *Environmental Protection and Enhancement Act*[1] and the *Water Act*.[2] This article examines the challenges facing groups who wish to appeal an official decision under one of these Acts to the Environmental Appeals Board.

Right of appeal for 'directly affected' persons

The Alberta Environmental Appeals Board (EAB) was established in 1993 to hear appeals of decisions relating to environmental approvals and other administrative decisions made under the *Environmental Protection and Enhancement Act.* With the passing of the Alberta *Water Act* in 1999, decisions concerning authorizations under that Act were also made subject to appeal to the EAB. Both Acts provide persons who are 'directly affected' by specified decisions with the right to appeal.

A significant number of EAB decisions have addressed the scope of 'directly affected' status. The Board has generally required evidence that the authorized activity in question will affect the appellant directly and personally, and that the activity will interfere with the appellant's health, property, livelihood, or other interest in a natural resource. The Board has stated that "the generalized interest of all Albertans in protecting the environment" is insufficient to establish directly affected status.[3] On this basis, professional involvement, recreational interests, nature appreciation, artistic inspiration, wildlife viewing, and environmental concerns not related to a direct impact on the appellant have been rejected by the Board as grounds for standing.[4]

Group standing before the EAB

Group appellants have several important advantages over individual appellants. The financial burden of the appeal, which will normally include legal fees, expert fees, and administrative costs, is shared among the membership. The responsibilities for putting the case together and organizing for the appeal hearing are also generally shared. Group appeals also raise public awareness by demonstrating that the appeal is not merely the griping of one local resident, but an issue of broader public concern.

In a series of cases, the EAB has sought to clarify the circumstances in which a community, environmental or other interest group may be found 'directly affected'.

In *Hazeldean* (1995), an area resident appealed on behalf of the local community league.[5] The Board found the league to be directly affected by a newly-approved emissions source at a nearby plywood manufacturing plant. As part of its submission, the community league included a survey that had been competed by 105 Hazeldean area residents. Over half of the respondents were concerned about neighbourhood air quality, odours, and health effects connected with the new emission source. The decision does not indicate how many people resided in the community, or how representative the survey was. However, in the Board's words, "if the people of the Hazeldean district are not directly affected, no one will ever be."[6]

In *Bailey* (2001), the EAB considered whether the Lake Wabamun Enhancement and Protection Association (LWEPA) was directly affected by the challenged renewal approval of the Wabamun thermal electric power plant.[7] The Board determined that many members were lakefront property owners and at least two had already established standing as individuals. The Board also stressed that LWEPA was formed for the express purpose of participating in the regulatory approval process, and that the individuals involved had chosen to participate in the process as members of the group. The Board granted standing to LWEPA, and went on to state that even if the two individual members had not filed appeals it would have found LWEPA to be directly affected.[8]

Most recently, the EAB considered group standing in *Jericho* (2004).[9] At issue was whether the Southern Alberta Environmental Group (SAEG) had standing to appeal an amending license issued to the Saint Mary River Irrigation District to use water for non-irrigation purposes. The appeal had been filed by an individual who was a member of the group, on behalf of himself and the SAEG. Included with the notice of appeal was a list of 72 group members, plus a petition supporting the appeal signed by 26 members.

The Board held that in order for SAEG to be found directly affected, the group must establish that at least half of its members are individually directly affected. The membership list and supporting petition were insufficient to establish standing. The Board required affidavits from the individual members of SAEG explaining how they personally were directly affected. There was limited time for the group to respond, and less half of the members of SAEG ultimately submitted letters and affidavits.

The Board in *Jericho* distinguished *Bailey*, emphasizing that in the latter case, due to their proximity to the lake, all members of the group would likely have been found directly affected had they filed individual appeals.[10] Unlike LWEPA, the Board reasoned, SAEG was not formed to engage in the regulatory process, and its membership was not confined to an area in which the affects of the approved activity would be "obvious", if not established by evidence.[11]

Although the Board determined that the appeal had been filed on behalf of SAEG, it went on to examine whether the individual members of the group were directly affected. After considering the letters and affidavits filed, the Board determined that none of the members had established standing.

Practical considerations for groups considering an appeal

The Board's restrictive approach to group standing is inconsistent with the high level of group involvement in environmental issues in Alberta and with the provincial government's reliance on group participation in regulatory processes. It is also at odds

with the Board's support for parties who work together to reduce costs and streamline proceedings before the EAB.[12]

However, there is no indication that the Board is prepared to broaden its current approach. Groups will therefore need to plan strategically and recognize the limitations of the process. There are steps groups can take to maximize their chances of being found directly affected:

- In many cases less than half of the group's members will have a direct, personal interest in the matter under appeal (see comments above under *Right of appeal*). In these cases, consider forming a separate group of more clearly affected persons to submit a statement of concern to Alberta Environment and to file a subsequent notice of appeal;[13]

- Where possible, group members should also file individual statements of concern and appeals, either jointly or separately. Where one member is filing on behalf of the group or the individual members, the most directly affected member should do so;

- For community leagues and other groups with a large membership, a well-drafted and executed survey of concerns may in some cases be sufficient to establish group standing. However, in the absence of a clear or obvious effect on the membership, sworn evidence regarding impacts on individual members will be required;

- Be prepared to ask each member to submit an affidavit to the Board two weeks before the hearing, or before the preliminary meeting if one is held. The affidavit must explain how the individual member is directly affected by the challenged decision. The Board may agree to accept unsworn letters provided they are sworn prior to the start of the hearing or preliminary meeting (this should be confirmed with the Board beforehand). The Board normally requires that at least half the membership demonstrate that they are directly affected;

- Where applicable, groups should emphasize any current or past involvement in government regulatory processes that are directly related to the matter before the Board;

- Where there are several parties and numerous issues, consider approaching the authorization holder (respondent) to negotiate an agreement on parties to the appeal and issues to be heard. Practically speaking, the assistance of counsel may be necessary. Where it finds such an agreement to be in the public interest, the Board may accept it and extend party status to a group that could not ordinarily have established directly affected status.[14]

[1] R.S.A. 2000, c. E-12.
[2] R.S.A. 2000, c. W-3.
[3] *Preliminary Motions: Gadd v. Director, Central Region, Regional Services, Alberta Environment re: Cardinal River Coals Ltd.* (8 October 2004), Appeal Nos. 03-150, 03-151 and 03-152-ID1 (A.E.A.B.) at para. 68.
[4] *Jericho et al. v. Director, Southern Region, Regional Services, Alberta Environment re: St. Mary River Irrigation District* (4 November 2004), Appeal Nos. 03-145 and 03-154-D (A.E.A.B.) at paras. 126-127.

[5] *Hazeldean Community League and two citizens of Edmonton v. Director, Air and Water Approvals Division, Alberta Environmental Protection* (11 May 1995), Appeal No. 95-002 (A.E.A.B.).
[6] *Ibid*. at 4.
[7] *Bailey et al v. Director, Northern East Slopes Region, Environmental Service, Alberta Environment re: TransAlta Utilities Corporation* (13 March 2001), Appeal No. 00-074, 075, 077, 078, 01-001-005 and 011 (A.E.A.B.).
[8] *Ibid*. at para. 56.
[9] *Supra* note 4.
[10] *Ibid*. at para. 121.
[11] *Ibid*. at para. 122.
[12] *Preliminary Issues: Doull et al v. Director, Northern Region, Regional Services, Alberta Environment re: Inland Cement Limited* (11 October 2002), Appeal Nos. 02-018-041, 047, 060, 061, 073 and 074-ID1 (A.E.A.B.).
[13] Only directly affected parties who submit a statement of concern to Alberta Environment within the prescribed period have standing to appeal the Director's decision: *supra* note 1, s. 73; *supra* note 2, s. 109.
[14] *Supra* note 1, s. 95(6); *supra* note 12 at para. 79.

In Progress

By Dolores Noga
Information Services Coordinator
Environmental Law Centre

Legislative Proposals

The Alberta Energy and Utilities Board is inviting comments on a technical report prepared which examines possible options for the management of wastes containing naturally occuring radioactive material (NORM). The Board has jurisdiction to maintain and administer oilfield waste management requirements for the upstream petroleum industry and has set out the current requirements in *Guide 58: Oilfield Waste Management Requirements for the Upstream Petroleum Industry* as well as in *Interim Directive 2000-3: Harmonization of Waste Management*. The technical report exploring possible options is available on the EUB website or paper copies can be obtained by phoning 403-297-8190. Submissions are requested by April 18, 2005. Access to the report and further information is available on the EUB website at <www.eub.gov.ab.ca/BBS/requirements/gbs/bulletin-2005-07.htm>.

Enforcement Actions

- Alberta Environment issued Enforcement Orders under the *Environmental Protection and Enhancement Act* and under the *Water Act* to Agrimax Ltd. of Calgary, as owner and operator of a sulphur processing plant near Irricana. The order pursuant to the *Environmental Protection and Enhancement Act* was issued for contravening their Approval to operate by failing to submit required annual reports and a number of monthly reports within the appropriate time frame, failing to complete all required sampling, and failing to report the Approval contraventions. The Order requires Agrimax to immediately submit the missing reports and to "immediately comply with each and every term and condition set out in the Approval", as well as to submit a written report by April 4, 2005 indicating how this compliance has been achieved.

The order pursuant to the *Water Act* relates to failing to submit annual reports required further to their Interim Licence to divert water. The order requires immediate submission of the reports and notes what must be included in each.

- Alberta Environment issued an Enforcement Order to 565343 Alberta Ltd., operating as Hillside Poultry Farms (1993), of the County of Grande Prairie. The Company operates a poultry processing plant pursuant to an Approval, part of which includes authorization for an Industrial Wastewater Control System and an on-site landfill for the disposal of feathers. A routine inspection indicated that required monthly and annual sampling of the wastewater system was not being done and required reports had not been submitted. Further inspection also revealed that plastics and other non-inert wastes were being burned rather than disposed of at an approved waste facility. The Order requires: the submission of all reports; submission of, and upon approval, implemention of, a proposal addressing the future operation of the wastewater system and the feather landfill; that the inert waste burner be used for inert wastes only with proper disposal of other wastes, and the submission of written monthly progress reports.

- Alberta Environment was involved in a number of prosecutions in which Provincial Court judges issued sentences. These include:
  - Magna IV Engineering Calgary Ltd. and co-accused Cambridge Shopping Centres Limited pled guilty to failing to store hazardous waste, in this case, transformer oil containing polychlorinated biphenyls, in appropriately labelled containers, a contravention of s. 11(1)(d) of the *Waste Control Regulation*. The Company was sentenced to a fine of $20,125.
  - Bryan Fear, owner of Coverall Coveralls Inc. was sentenced to a fine of $1,000 after Fear pled guilty to unlawfully storing hazardous recyclables near Acme, AB. Fear was also given a creative sentencing order requiring that he not handle hazardous wastes or recyclables in Alberta for commercial gain for two years. All of the other charges were withdrawn.
  - Lac Ste. Anne County was fined $5,000 after pleading guilty to disposing of waste in an area other than an approved waste management facility. The offence occurred near Sangudo when an operator was ordered to bury debris on site, including a barrel of 2,4-D.

- The Natural Resources Conservation Board released Board Decision 04-11, its review of the Enforcement Order issued to AAA Cattle Company Ltd. The Board granted a conditional, partial stay of the Order, limiting AAA to a maximum of 5261 cattle. Granting of the partial stay is conditional upon AAA continuing to pursue an amendment to its Approval.

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.