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ENVIRONOTES

November 2003

Environmental Solutions for Business

THE SUPREME COURT OF CANADA ENDORSES THE CONCEPT OF "POLLUTER PAYS" - BUT WHAT DOES IT MEAN?

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Inside

On October 30, 2003, the Supreme Court of Canada released its decision in *Imperial Oil Ltd. v. Quebec (Minister of the Environment)*. The decision has been publicized in the media as a landmark endorsement of the "Polluter Pays" concept in environmental matters. Little has been said so far, however, on what ambiguities lurk within the concept or how this might affect other cases in future.

Facts

Imperial Oil operated a bulk plant in Quebec from the 1920's to the 1970's. It sold the property in 1973. In 1987, a real estate developer purchased the site with a plan to build a residential complex on it. The Minister of the Environment approved the decontamination plan proposed by the developer and cleanup proceeded with Ministry approval and no notice to Imperial Oil. The Minister issued a certificate of authorization approving the cleanup after it had been completed.

In 1994, some of the owners of the residential properties discovered hydrocarbon contamination that was of such level that in the words of the Supreme Court of Canada "the land could not be used for residential purposes". The owners of the residential properties commenced actions against the developer, the city and the Quebec Ministry of the Environment.

The city "began to look for a solution that would satisfy the owners involved and the public". It entered into discussions with the Ministry, which in 1998 led the Minister to issue an Order requiring Imperial Oil to prepare a detailed assessment of the soil conditions and recommendations for cleanup.

Imperial Oil appealed the Order, arguing that since the Minister was a party to civil litigation in which Imperial Oil had not been named, the Minister was trying to avoid civil liability by imposing assessment and cleanup obligations on Imperial Oil. In doing so, the Minister was inherently in a conflict of interest.

The Administrative Tribunal dismissed the appeal, but the Superior Court allowed the application for judicial review. The Superior Court held that the Minister's Order should be set aside because the Tribunal adopted an unreasonable interpretation of section 31.42 of the Quebec *Environmental Quality Act* ("*EQA*") and because the Minister was in a conflict of interest. The Quebec Court of Appeal set aside the decision and affirmed the Minister's Order.

Supreme Court of Canada Decision

The sole issue before the Supreme Court of Canada was the question of procedural fairness or natural justice in relation to the Minister's decision. To ascertain the content of the rules of procedural fairness which are relevant to the performance of the Minister's functions, the Supreme Court of Canada began with an examination of the statutory framework created by the *EQA*.

The Supreme Court of Canada reviewed the Quebec legislation that authorized the Minister to issue the Order. While the legislation contains some unique wording, it is significant that the Court specifically found that the Quebec legislation:

> "… applies what is called the 'polluter-pays' principle which has now been incorporated into Quebec's environmental legislation. In fact, that principle has become firmly entrenched in environmental law in Canada. It is found in almost all federal and provincial environmental legislation ..."

The Quebec legislation contains some unique wording including what appears to be a specific declaration that the legislation is retrospective (that is, it applies to owners who had disposed of the property even before the legislation came into effect). Yet, it is significant that the Supreme Court of Canada compared the Quebec legislation to that in other provinces. Any suggestion that the Quebec legislation is different from that in other provinces could be met with the argument that the Supreme Court of Canada has already expressed its views on the matter.

The Supreme Court of Canada acknowledged that the "polluter-pays" principle is ultimately a political choice as to who should bear the cost associated with contamination. The Court found that the Minister, in deciding to apply this principle, was making a "political" decision, and so was not obliged to act in a judicial manner. Provided the Minister follows the procedural requirements set out in the Act (providing notice to the person affected by the Order, receiving and reviewing the representations submitted by that person, and giving reasons for his decision to that person), then he is not required to act in a purely judicial manner nor is he deprived of his jurisdiction to issue an Order by the allegation that he was in a conflict of interest:

> "The method of managing environmental problems selected by the legislature creates a situation that the legislature clearly intended to create and to which it clearly agreed. The role assigned to the Minister by the legislation sometimes inevitably places the Minister in a conflict with those subject to the law he administers, in the implementation of environmental legislation.
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> …The effect of this procedural framework is that the Minister must carefully and attentively examine the observations submitted to him. However, that obligation is not equivalent to the impartiality that is required of a judge or an administrative decision-maker whose primary function is adjudication. In performing his functions, the Minister is involved in the management of an environmental protection system. He must make decisions in a context in which the need for the long-term management of environmental problems plays a prominent role, and in which he must ensure that the fundamental legislative policy on which interpretation and application of environment quality legislation are based is implemented. The Minister has the responsibility of protecting the public interest in the environment, and must make his decisions in consideration of that interest."

The Supreme Court of Canada went on to declare that the Minister was acting, in the context of this case, as defender of the interest of the public and the state in the protection of the environment. In doing so, the Minister used a discretionary political power in which he had to choose among doing nothing, carrying out the necessary investigations and work and then trying to recover the cost "from the persons responsible for the contamination of the site" or going directly to those persons and trying to compel them to take the necessary action at their expense. The Court found that the Minister was not performing an adjudicative function but was "performing a mainly political role which involved his authority, and his duty to choose the best course of action from the standpoint of the public interest in order to achieve the objectives of the environmental protection legislation."

> "In exercising his discretion, the Minister could properly consider a solution that might save some public money. Accordingly, he applied one of the organizing principles of the *EQA,* the polluter-pay principle. There was no conflict of interest such as would warrant judicial intervention, let alone any abuse or misuse of power."

Implications of this Decision

Much of the "similar" legislation referred to by the Supreme Court imposes liability on past owners or operators for contamination they caused even if the contamination only becomes an issue years after disposal of the property. The Quebec legislation, however, goes beyond some of the other legislation in that it includes an explicit retrospective provision making the Act apply to events that took place even before it came into force. (Generally, the other Provincial legislation referred to is considered to apply retroactively to past owners, but only to those who were in fact owners after the Act in question came into effect). It is only where an Act specifically says so that it can be also held to apply retrospectively. It is possible that this distinction alone could serve to lessen the impact of the decision in other provinces.

All past owners of contaminated property, however, must now ask whether under this decision they might be considered a "polluter" who may have to "pay" for investigation and possibly even clean up of the property simply because it is deemed by a Minister or his delegate to be the politically appropriate result.

At first blush, the Supreme Court of Canada decision appears to eliminate the possibility of arguing that it is improper for a person appointed under the legislation, such as an MOE Director in Ontario (in effect the delegate of the Minister), to issue an Order when the person is in a conflict of interest as a result of being named in an action or of having contributed to the contamination. Such an individual would not be in a conflict of interest because in exercising discretion to apply the "polluter-pay" principle, the Director is acting in a political manner, not in an adjudicative manner. As a result, the concept of conflict of interest is of no import or, at the very least, of lesser import.

But, as with any general label that carries an aura of self evident truth to it, problems with the concept may quickly surface, such as to require much more interpretation than has been provided so far.

Imperial left behind an industrial property. A developer, along with the municipality proceeded to develop the property as residential. They knew of the contamination at the time and dealt with it, with the Ministry's blessing, in what was considered to be the right way. Each of these three had some degree of management and control over the property. Each of them bore some responsibility for the fact the property ultimately became residential without being properly cleaned up. Imperial had no say in any of these decisions. Could it be argued that the Ministry, the city and the developer were also "polluters"?

Why did the Supreme Court consider Imperial to be "responsible for the contamination at the site" but not the Ministry, the developer or the city who all bore direct responsibility for the development and the remediation that preceded it? Finding such responsibility would certainly not be an unusual result in Ontario where Provincial Officers and Directors Orders provide every day applications of the concept that persons who have or had "charge management or control" of a contaminant are to be responsible for its investigation and clean up.

If one or all of the Ministry, city or developer are also "Polluters", then why are they not also caught by the "polluter pays" principle?

Nor is it clear for what one is expected to "pay". Tort law has long struggled with the need to impose some limits to what damages are payable. Concepts of "forseeability", and "reasonableness" are used to impose such limits. What limits might be imposed to the concept of "polluter pays"? Is one polluter responsible for everything that happens to the contamination even years after the fact even if others have knowingly acted in a way that made things worse? Should Imperial be liable to bear the likely much greater cost of cleaning up a residential area when others, in their wisdom, decided to create a residential area on top of contamination they already knew about?

The implications of this decision will inevitably be explored in each Province and Territory that has adopted some form of the “polluter pays” concept in its legislation. The Ontario Environmental Appeal Board for instance, has ruled in the past that Ontario Directors must act "fairly" in issuing orders in circumstances very similar to those before the Supreme Court of Canada. The tensions between the concepts expressed in those decisions and the need to find politically acceptable solutions to clean up land contaminated several decades ago will undoubtedly lead to much greater elaboration on the meaning of "polluter pays" than has been given thus far.

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