

ENVIRONMENTAL LAW

SUPREME COURT OF CANADA

IMPERIAL OIL—POLLUTER PAYS

The recent Supreme Court of Canada decision upholding a Quebec environment ministry order against Imperial Oil comes as no surprise. Provincial laws allow environment ministries to make orders against companies who caused site contamination long after the property has been sold to others. This decision underscores the value to site owners of Ontario's coming Brownfields amendments. When the new legislation takes effect, owners who clean up, and those who buy from them, will be protected from most future government clean-up orders.

Imperial sold a former petroleum depot in 1979 on an "as is" basis. Environmental legislation has evolved since then. Today, every well-advised vendor ensures that responsibility for potential contamination is allocated and secured by the Agreement of Purchase and Sale. Selling "as is" does not limit exposure to government clean-up orders.

This decision is notable because after Imperial sold the former petroleum depot, the purchaser conducted a clean-up that was approved by the Quebec environment ministry, who issued a certificate of authorization in 1987, allowing redevelopment as a residential subdivision.

When residents discovered contamination years after the clean-up, they sued the ministry for negligence. Under threat of these lawsuits, the Minister of the Environment made the order against Imperial, requiring the company to investigate and identify the pollution, and recommend corrective actions. Ultimately, Imperial will be ordered to carry out the recommendations and clean up the contamination.

By the time the case reached the Supreme Court of Canada two issues had been clarified:

CONTENTS

SUPREME COURT OF CANADA

- *Imperial Oil Ltd. v. Quebec (Minister of the Environment)*

CEPA 1999

- Environmental Emergency (E2) Regulation

WHAT'S NEW

- Bill C-45 Receives Royal Assent
- Sutcliffe: Ontario EA Projects Stalled Pending Appeal
- Responding to MOE Orders

ENGAGEMENTS OF NOTE

1. Provincial environment ministries can order polluters to clean up long after the property has changed hands; and
2. Environment ministers have the discretion to make orders against the original polluting owner without including subsequent owners, and without considering the complications or cost implications of intervening clean-up activities.

The issue that remained before the Supreme Court was narrow – was it fair for the Quebec Environment Minister to make the order against Imperial given that:

- a) the Ministry had approved the 1987 clean-up; and
- b) residents had sued the Ministry for negligence in supervising and approving the 1987 clean-up?

Imperial argued that the Minister had a conflict of interest. By making an order against Imperial, the Minister appeared to be trying to insulate the Ministry from its potential legal liability for the failed 1987 clean-up.

The Supreme Court dismissed Imperial's appeal. The Court stated that the Minister

had acted fairly by giving notice, considering objections and complying with the procedural requirements of the statute. A Minister of the Environment, when making a clean-up order, is not subject to the standards of impartiality applicable to a judge. The Minister acts in the public interest to find the best way to compel the persons responsible for the contamination to clean it up. The Minister could order Imperial to clean up, and save public money. Forcing Imperial to do the work and saving the Ministry from the residents' lawsuits was not a personal benefit for the Minister.

Download the full text of *Imperial Oil Ltd. v. Quebec (Minister of the Environment)* from our Online Compliance Centre at:

www.willmsshier.com/compliance.

CEPA 1999

ENVIRONMENTAL EMERGENCY (E2) REGULATION

The federal Environmental Emergency (E2) Regulation under CEPA 1999 took effect on November 18, 2003. The Regulation includes a list of 174 substances that may harm human health or environmental quality if released in an

(Continued on page 2)

ENVIRONMENTAL LAWYER JOINS W&SEL

We are pleased to welcome Andrew Wray to our environmental law team.

Andrew was called to the Ontario Bar in 2002. He holds an LL.B. from the University of Ottawa and a B.A. (Honours) from the University of Toronto. Andrew is fluent in English, French and Spanish. He gained environmental law experience articling for the Canadian Environmental Law Association. Prior to joining W&SEL he practised administrative litigation.

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(Continued from page 1)

environmental emergency, or act of terrorism or vandalism.

The E2 Regulation has two main effects:

1. It triggers CEPA mandatory E2 reporting for spills of any of the 174 substances listed in the Regulation; and
2. Companies exceeding the thresholds for storage of any of these substances, or having storage capacity exceeding the threshold amounts, will have to:
 - file information on quantity and location with Environment Canada (note, first filing deadline is February 16, 2004);
 - develop, implement and test Environmental Emergency (E2) plans for each qualifying substance; and
 - file confirming reports with Environment Canada.

Download the E2 Regulation and the *Implementation Guidelines for Part 8 of the Canadian Environmental Protection Act, 1999 – Environmental Emergency Plans* from our Online Compliance Centre at:

www.willmsshier.com/compliance.

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WHAT'S NEW

BILL C-45 RECEIVES ROYAL ASSENT

On November 7, 2003 the Bill C-45 (Westray) amendments to the *Criminal Code* received federal Royal Assent. When proclaimed into law, these amendments will make "organizations" criminally liable for acts of their employees, contractors and agents that cause harm to workers or the public. Organizations include both corporations and unincorporated organizations described in the *Code*. An organization can be convicted as a result of the acts or failure to act of "senior officers" – those who oversee day-to-day operations but who may not be directors or executives. The legislation also imposes a legal duty on employers or others who direct work to take reasonable measures to protect employee and public safety. Wanton or reckless disregard of this duty resulting in death or bodily harm would result in a charge of criminal negligence.

SUTCLIFFE: ONTARIO EA PROJECTS STALLED PENDING APPEAL

On November 3, 2003 the Ontario Court of Appeal granted leave to appeal the Richmond Landfill decision in *Sutcliffe v. MOE and Canadian Waste*. The controversial two-to-one Divisional Court decision has halted the environmental assessment process for most major Ontario projects in the *Environmental Assessment Act* ('EAA') pipeline, whether private or public sector. The two majority judges interpreted the 1997 amendments intended to streamline the Ontario EAA process, particularly for private sector proponents. According to the majority, every individual EA must include a full review of need and alternatives, as required by the EAA. If this decision stands on appeal, proponents with scoped Terms of Reference will have to revisit or completely redo their EA process.

We expect the Court of Appeal will hear the appeal and release a decision in early to mid-2004.

RESPONDING TO MOE ORDERS

In the last three years the MOE has stepped up Provincial Officer Orders ("Orders") against companies, municipalities and individuals. Orders are quickly drafted in the field by environmental officers, and are not posted on the Environmental Registry. Like anything done quickly, there is a large margin for error in Orders.

A review (appeal) of an Order **must be requested in writing within seven days of service of the Order**. Failure to request a review means that the individual or company subject to the order must comply, or be subject to prosecution. Even when an Order is proved later to be unnecessary or wrong, the MOE has refused to drop charges.

There are a number of reasons to appeal Orders. For example, the Provincial Officer may have set deadlines that cannot be met, ordered work that is costly, disruptive and partially, or even completely unnecessary.

For legal help with Provincial Officer Orders, call our Orders Team:

John Willms	416-862-4821
Marc McAree	416-862-4820
Doug Petrie	416-862-4835
Juli Abouchar	416-862-4836

ENGAGEMENTS OF NOTE

Marc McAree and **Juli Abouchar** will be speaking on *From Spills to Landfills: Overcoming New Environmental Liabilities* at the Canadian Institute's 10th Annual Provincial/Municipal Government Liability Conference, on February 20, 2004.

Donna Shier will be speaking on *Understanding the Legal Framework for Redeveloping Brownfields* at the Strategy Institute's 2nd Annual Developing Toronto's Waterfront Conference, on February 20, 2004.

Marc McAree will be speaking on *Contaminated Land: Avoiding Pitfalls & Closing Deals* at the Brampton Real Estate Board, on April 19, 2004.

Marc McAree and **Barry Spiegel** will be speaking on *The New Brownfields Law in Ontario - Regulatory & Due Diligence Aspects for Engineers* at Ryerson University, on April 20, 2004.

Marc McAree will be speaking on *Contaminated Land: Avoiding Pitfalls & Closing Deals* at the Hamilton Real Estate Board, on May 4, 2004.

Marc McAree and **Barry Spiegel** will be speaking at the Canadian Institute's Fundamentals of Environmental Law, on May 5 and 6, 2004.

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