

**The Polluter Pays Principle: A Primer
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Sierra Legal Defence Fund: A History

1892

- **Sierra Club** founded in the United States (that's not us)

1971

- **Sierra Club Legal Defence Fund** established in the United States (that's not us either; today they call themselves **Earthjustice**)

1989

- **Sierra Club of Canada** opens its office in Ottawa (nope, that's Elizabeth May)

1990

- **Sierra Legal Defence Fund** founded in Vancouver, Canada (yep, that's us)

1996

- **Sierra Legal Defence Fund** comes to Toronto (that's us too)

Introduction

Points To Be Covered

- Incorporation of the Principle in Canadian Law: How Have Courts Treated Government Decisions Utilizing it?
- How Broad Can Governments be in Seeking Damages for Harm to Public Resources?
- Is a Legal Duty Evolving that Requires the Crown to Seek Damages for or Otherwise Address Pollution Issues?

Polluter Pays: Roots

Rio Declaration on Environment and Development (1992) contains oft-cited iteration of the polluter pays principle:

Principle 16

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 investment.

Polluter Pays: Where There's a Will There's a Way

Case Law

- Generally, Courts have made it very clear that environmental legislation is to be interpreted in a flexible manner and that governments have broad discretions under environmental legislation to manage public resources and to address pollution
- Reason for this being that it is impossible to enumerate all the circumstances in which an environmental regulatory regime may be applicable

ex. *R. v. Hydro Quebec* and *Ontario v. Canadian Pacific* cases

Polluter Pays: Where There's a Will There's a Way

Imperial Oil Ltd. v. Attorney General of Quebec

- Ministerial Order issued under Quebec's *Environmental Quality Act* requiring Imperial to prepare remediation plan challenged on the basis that the Minister was not an impartial decision maker
- In upholding the Minister's order the Court discussed polluter pays as one of the organizing principles of the Act:
"To encourage sustainable development, that principle assigns polluters the responsibility for remedying contamination for which they are responsible and imposes on them the direct and immediate costs of pollution. At the same time, polluters are asked to pay more attention to the need to protect ecosystems in the course of their economic activities."

Polluter Pays: Where There's a Will There's a Way

"The procedure which authorizes the Minister to issue an order against whoever is responsible for the pollution ... represents one of the most important enforcement tools available in Quebec's environmental legislation. The adaptation of such a procedure appeared of singular importance in the search for a solution to soil contamination problems. ... Section 31.42 allows for the use of a broad discretion in pursuit of that objective."

- Court held that the Minister did not have to be impartial to issue the remediation order but rather, had to provide Imperial notice of the intention to make the order, receive and review any representations and information submitted and give reasons for the decision once it was made.

Polluter Pays: Where There's a Will There's a Way

Key Finding of Court in *Imperial*:

"...The only interests the Minister was representing were the public interest in protecting the environment and the interest of the State, which is responsible for preserving the environment. In the circumstances of this case, it would be difficult to separate those interests. 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 *Environment Quality Act*, the polluter-pay principle. ..."

Polluter Pays: Where There's a Will There's a Way

Legislation

In *Imperial*, while discussing Quebec's *Environmental Quality Act*, the Supreme Court noted that the following legislation in other jurisdictions enshrine the polluter pays principle:

- *Canadian Environmental Protection Act*, 1999, S.C. 1999, c. 33
- *Arctic Waters Pollution Prevention Act*, R.S.C. 1985, c. A-12, ss. 6, 7
- *Fisheries Act*, R.S.C. 1985, c. F-14, s. 42
- *Waste Management Act*, R.S.B.C. 1996, c. 482, ss. 26.5(1), 27(1), 27.1, 28.2, 28.5
- *Environment Management Act*, R.S.B.C. 1996, c. 118, s. 6(3)
- *Environmental Protection and Enhancement Act*, R.S.A. 2000, c. E-12, ss. 2(i), 112, 113(1), 114(1), 116
- *Environmental Management and Protection Act*, 2002, S.S. 2002, c. E-10.21, ss. 7, 9, 12, 14, 15, 46

Polluter Pays: Where There's a Will There's a Way

Legislation Continued

- *Contaminated Sites Remediation Act*, S.M. 1996, c. 40, ss. 1(1)(c)(i), 9(1), 15(1), 17(1), 21(a)
- *Environmental Protection Act*, R.S.O. 1990, c. E.19, ss. 7, 8, 43, 93, 97, 99, 150, 190(1)
- *Ontario Water Resources Act*, R.S.O. 1990, c. O.40, ss. 16.1, 32, 84, 91
- *Environment Act*, S.N.S. 1994-95, c. 1, ss. 2(c), 69, 71, 78(2), 88, 89, 90
- *Environmental Protection Act*, S.N.L. 2002, c. E-14.2, ss. 8(1), 9, 28, 29, Part XIII
- *Environmental Protection Act*, R.S.P.E.I. 1988, c. E-9, ss. 7, 7.1, 21
- *Environmental Protection Act*, R.S.N.W.T. 1988, c. E-7, ss. 4(2), 5.1, 6, 7, 16

Polluter Pays: Where There's a Will There's a Way

B.C. Hydro and Power Auth. v. B.C. (Environmental Appeal Board)

- Supreme Court affirmed the reasons of the dissenting judge of the B.C. Court of Appeal holding that a corporate restructuring process did not absolve B.C. Hydro from liability for clean-up costs under the *Waste Management Act* as a previous owner of contaminated lands

Polluter Pays: Where There's NO Will There's a Way

B.C. v. Canadian Forest Products ("Canfor")

- Action for damages brought by B.C. Crown for forest fire negligently caused by forestry company
- Damages sought at SCC for both harvestable and protected trees destroyed by fire
- Case essentially turned on fact that B.C. did not frame its Court pleading from the very start for the claim to the protected forest – Court rejected that portion of the claim to damages as a result
- Damages awarded for the harvestable trees but not for those that were set aside for protection

Polluter Pays: Where There's NO Will There's a Way

Canfor Continued

- Interesting principles discussed in Court's decision:
 - Crown not limited to claim damages to a public resource as an owner would be; can also claim damages for loss of public benefits residing in the natural resource damaged
 - Court suggested that there are public rights in the environment that reside in the Crown
 - Court left it for another day as to whether Crown could be compelled to seek damages, address environmentally damaging behaviour or remedy damage to the environment
 - Indicated that it may not be sufficient for the Crown to do nothing in certain situations but left it for another day for those situations to arise and for case law to develop

Where Do Things Stand Today

Boiling it Down – Four Points to Take Away With You

1. Legislative regimes aimed at addressing pollution will be afforded a broad interpretation by Courts if challenged
2. Decisions to remedy contamination will likely be upheld if the decision maker meets procedural requirements at common law and those set out specifically under legislation
3. Crown not limited to claim damages to a public resource as an owner would be; can also claim damages for loss of public benefits residing in the natural resource damaged
4. The notion that the Crown is trustee of the environment for the public and that failure to act in any given situation is legally challengeable will likely develop further in Canadian law – i.e. governments must turn their attention to how environmentally degrading activities will be addressed

