# Court of Appeal for British Columbia

Citation: ***British Columbia Hydro and Power Authority v. British Columbia (Environmental Appeal Board)***, 2003 BCCA 436

Date: 20030729
Docket: CA027158

Between:

**British Columbia Hydro and Power Authority**

Appellant
(Petitioner)

And

**Environmental Appeal Board, the Attorney General of British Columbia, North Fraser Harbour Commission, Canadian Pacific Railway, General Chemical Canada Ltd., and Deputy Director of Waste Management**

Respondents
(Respondents)

Before: The Honourable Madam Justice Rowles
The Honourable Madam Justice Prowse
The Honourable Madam Justice Newbury

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Place and Dates of Hearing: Vancouver, British Columbia
December 5 and 6, 2002

Place and Date of Judgment: Vancouver, British Columbia
July 29, 2003

**Written Reasons by**:
The Honourable Madam Justice Newbury



**Concurring Reasons by:**
The Honourable Madam Justice Prowse (P. 90, para. 79)

**Dissenting Reasons by:**
The Honourable Madam Justice Rowles (P. 93, para. 84)

**Reasons for Judgment of the Honourable Madam Justice Newbury:**

[1] On April 1, 1997, Part 4 of the ***Waste Management Act***, R.S.B.C. 1996, c. 482, was proclaimed in force, almost four years after it had been enacted by the Legislature. In general terms, Part 4 was obviously intended to strengthen and extend already existing provisions in the ***Act*** aimed at implementing the principle of 'polluter-pay' — the notion that a person who has contaminated or contributed to the contamination of real property should bear the costs of remedying such contamination.

[2] Part 4 requires that anyone seeking the subdivision or rezoning of land that is or was used for industrial or commercial activity, prepare and file a "site profile" with the authority specified in the ***Act***. The profile may lead to the ordering of a site investigation the purpose of which is to determine whether the site is contaminated. Division 3 of Part 4, headed "Liability" and attached as Appendix A to these Reasons, provides for the "remediation" of a contaminated site by the "responsible persons". This is a key phrase defined in s. 26.5 of the ***Act***. It includes both current and previous "owners" and "operators" of the site, as well as present and past transporters of contaminating substances, and even

certain secured creditors. Responsible persons are subject to two main consequences under Part 4: first, under s. 27.1, a manager appointed under the ***Act*** may issue a remediation order to any responsible person, requiring that he or she undertake the remediation of contaminated property or contribute "in cash or kind" to a person who has incurred remediation costs. Second, s. 27 provides that a person who is responsible for remediation is "absolutely, retroactively, jointly and severally liable" to any person or governmental body for reasonably incurred remediation costs.

[3] The central question posed by this appeal is whether B.C. Hydro and Power Authority ("B.C. Hydro") may be made the subject of a remediation order under s. 27.1 not by reason of its own acts or conduct, but by reason of the acts of B.C. Electric Corporation ("B.C. Electric") in and about a site in Vancouver between 1920 and 1957. B.C. Electric is no longer in existence: it amalgamated with two other corporations in 1965 to form B.C. Hydro, following which it was "declared to be dissolved" by special statute. Can B.C. Hydro be fixed now with the 'responsibility' under the ***Waste Management Act*** that B.C. Electric would attract if it still existed?

[4] The answer to this question involves two avenues of inquiry. First, it is argued that by virtue of the amalgamation, B.C. Electric continues to exist in some sense in the amalgamated corporation such that B.C. Hydro is subject to all the obligations of B.C. Electric, including even those arising under legislation enacted in 1997. B.C. Hydro argues, on the other hand, that given the unusual circumstances and terms of its amalgamation, it is subject only to those obligations of B.C. Electric that existed "immediately before the amalgamation" – words that appear in both the amalgamation agreement and an Order–in-Council approving it. If B.C. Hydro's argument is correct, then the second question is whether all or part of the ***Waste Management Act*** operates retroactively such that B.C. Electric may now be said to have been a responsible person with remediation obligations as of the time immediately before its amalgamation.

[5] This court is the third level of review of a decision of a manager under the ***Waste Management Act*** to the effect that B.C. Hydro could not be named as a "responsible person" by reason of the activities of B.C. Electric involving the site in question. At the first level of review, the Environmental Appeal Board held that the manager had erred and that B.C. Hydro could, by virtue of B.C. Electric's earlier conduct, be

named in a remediation order under s. 27.1. This determination was upheld on appeal to the British Columbia Supreme Court, from which decision the present appeal is taken.

[6] As will be seen below, I am of the view that the court below and the Board erred in concluding that the amalgamation agreement between the predecessor corporations of B.C. Hydro did not have the effect of limiting the liabilities and obligations assumed by the amalgamated corporation to those existing immediately prior to the amalgamation. Although the issue was not addressed by counsel, I conclude in the alternative that as a result of its amalgamation and dissolution in 1965, B.C. Electric cannot now be said to be a "person" and therefore cannot be said to be a previous or current "operator" or "owner" as those terms are defined in the ***Act***. Further, like the manager under the ***Act***, I conclude that Part 4 does not operate retroactively to attach remediation obligations to B.C. Electric as of the time immediately before its amalgamation on August 20, 1965. Accordingly, I would allow the appeal.

***THE SITE***

[7] In the early years of the 20th century, the property now known as 9250 Oak Street in Vancouver was the site of a plant

that manufactured roofing materials. Who exactly owned and operated the manufacturing facility at what times is not clear from the materials before us; but it would appear that one or more predecessors of the respondent General Chemical Canada Ltd. ("GCC") did so, and that beginning in or about 1920, one of those predecessors, referred to as "Barrett", entered into an agreement with B.C. Electric (until 1946, known as B.C. Electric Power and Gas Company) under which the latter supplied coal tar to the site from its gas plant in Vancouver. (In addition, B.C. Electric Railway Company, whose operations were eventually merged into those of B.C. Electric, operated a railway spur constructed in 1919 under an agreement with CPR which was used for transporting coal tar to and from the Oak Street site, but this fact was not developed by counsel). It appears the arrangements between Barrett and B.C. Electric continued until approximately August 1957, when GCC began to use oil-based asphalt rather than coal tar in its manufacturing process.

[8] In October 1966, the Oak Street property was acquired by Canadian Gypsum Company (now called "CGC Inc."), which operated the business until it sold to Globe West Products Inc. ("Globe West") in 1980. The respondent Mr. Lawson, a resident of Ontario, has been identified as a former director

and officer of the 'Globe West' companies. Globe West's parent, Globe Asphalt Products Ltd., underwent some corporate reincarnations but its ultimate parent company, GN Industries Inc., ceased carrying on business in 1991 and was wound up. In 1986, Globe West ceased manufacturing asphalt-based products on the site and sold the property to the North Fraser Harbour Commission. The Commission now uses the site for storage and vehicle parking.

[9] On May 20, 1998, the Deputy Director of Waste Management, acting as a "manager" under the ***Waste Management Act***, found that the site had been polluted by "serious, extensive and highly coal tar-related contamination" and that the property and others it had in turn contaminated, including the Fraser River, were "among the most severely contaminated sites in British Columbia." The manager found that GCC, CGC, GN Industries Ltd., North Fraser Harbour Commission, Her Majesty the Queen in Right of the Province as represented by B.C. Lands, and Mr. Lawson were "responsible persons" as defined in the ***Act***. The named parties took various appeals to the order, and GCC and CGC applied to have B.C. Hydro also named as a responsible party in the order.

***B.C. ELECTRIC AND B.C. HYDRO***

[10] The famous (or perhaps infamous) history of the provincial government's attempt in 1961 to obtain control of the generation and sale of electricity in British Columbia is perhaps not well-known to many born since then, but at the time it created a huge political controversy, as well as one of the longest trials in the (then) history of the Supreme Court of British Columbia. The legislature of the day passed three statutes in 1961 — the ***Power Development Act, 1961***, (2nd Session), c. 4, the ***Power Development Act, 1961 Amendment Act, 1962***, c. 50, and the ***British Columbia Hydro Power and Authority Act***, ***1962***, c. 8 — which purported to expropriate all the shares of B.C. Electric (then a wholly-owned subsidiary of British Columbia Power Corporation Ltd.) and to amalgamate it with British Columbia Power Commission into a corporation to be known as B.C. Hydro and Power Authority. The legislation purported to cancel all the obligations of B.C. Electric under any agreement, deed or trust or otherwise to allot or issue shares in its capital stock, thus impinging upon the terms of a private trust agreement between B.C. Power and B.C. Electric providing for the conversion of debentures of B.C. Electric into shares of B.C. Power Corporation. The legislation also purported to limit the access of the latter company to the

courts to dispute the compulsory acquisition of the B.C. Electric shares.

[11] On July 29, 1963 Lett, C.J.S.C. declared the three statutes *ultra vires* the province as effectively purporting to sterilize the functions and activities of B.C. Power Corporation, a Dominion corporation, by a law not of general application. (See ***British Columbia Power Corporation Ltd. v. Attorney-General of British Columbia*** (1963) 47 D.L.R. (2d) 633.) In the words of the Chief Justice:

> In the light of this evidence and on these authorities, I can come to no other conclusion than that the effect of the impugned legislation would be to make it impossible "in a practical business sense" or "in a practical way" for the plaintiff company to exercise its powers and therefore, to use the words of Lord Atkin in *Lymburn v. Mayland*, [1932] 2 D.L.R. 6 at p. 10 ..., "... the functions and activities of [the] company were sterilised or its status and essential capacities impaired in a substantial degree." [at 703]

[12] Although the Court's conclusion stated above now appears to be of doubtful validity (see ***Churchills Falls (Nfld.) Corp. v. Attorney General of Newfoundland*** (1984) 8 D.L.R. (4th) 1 (S.C.C.), at 26), it obliged the government of the day to take a more conciliatory view to B.C. Power Corporation and its shareholders. Eventually, the dispute, and an appeal taken from the trial judgment, were resolved by agreement.

[13] Following the settlement, the Province in March, 1964 enacted another ***British Columbia Hydro and Power Authority Act***, ***1964,*** this one cited as S.B.C. 1964, c. 7, and the ***Power Measures Act, 1964***, S.B.C. 1964, c. 40. The former statute successfully created British Columbia Hydro and Power Authority (the "Authority") as an agent of Her Majesty in Right of the Province. The Authority was given various powers relating to the generation, manufacture, distribution and supply of power. It was authorized to "amalgamate in any manner with or enter into partnership with any corporation, firm or person." (My emphasis.) Consistent with its status as an agent of the Crown, it was also given powers of expropriation, and immunity from certain actions and proceedings described at s. 52(3) of the ***British Columbia Hydro and Power Authority Act, 1964***. Section 53(1) stated that the Authority was not bound by any statute of the Province, except as provided by the 1964 Act.

[14] By the ***Power Measures Act, 1964***, the Province "validated and confirmed" everything "done as directors of the Company [B.C. Electric] by the persons who [had] been named as directors of the Company" in the invalid legislation of 1962. This statute also validated and confirmed the creation and exchange by B.C. Electric of certain bonds and the

cancellation of preferred shares in B.C. Electric, the redemption of certain debentures, and the termination and cancellation of "any obligation of [B.C. Electric] incurred or that may or shall arise under any agreement, deed of trust or otherwise to allot or issue shares in the capital stock of the Company". (s. 6(2).) Section 9(1)(a) empowered B.C. Electric or B.C. Power Commission or both to "amalgamate or enter into partnership with each other or with each other and any other corporation or corporations".



[15] It was not long before the powers of amalgamation given to the three entities were exercised. On August 29, 1965, the Authority, B.C. Power Commission and B.C. Electric entered into an Amalgamation Agreement. (See Appendix B to these Reasons.) The Agreement stated that the three corporations amalgamated in such a manner that:

> (*a*) they continue as one amalgamated corporation which is the British Columbia Hydro and Power Authority as established by the British Columbia Hydro and Power Authority Act, 1964,
>
> (*b*) the Company [B.C. Electric] and the Commission [B.C. Power Commission] cease to exist as separate corporations, and
>
> (*c*) the Authority shall be seized of, possess and hold all the properties, assets, undertakings, contracts, powers, rights, privileges, immunities, concessions and franchises, whether conferred or imposed by statute or otherwise,

> and subject to the Power Measures Act, 1964, shall be liable for all duties, liabilities and obligations, whether conferred or imposed by statute or otherwise, of each of the Authority, the Company and the Commission immediately before the amalgamation. [Emphasis added.]

The amalgamation became effective as of 5:00 p.m. Vancouver time on August 20, 1965.

[16] When the ***Power Measures Act, 1966***, S.B.C. 1966, c. 38, was enacted in 1966, the signed Amalgamation Agreement was appended as a schedule. This statute ratified and confirmed the Agreement as having been validly made and as being in full force and effect since August 20, 1965. Section 4 stated that the amalgamation would not constitute a breach of any covenant or an event of default under any trust deed or other document under which bonds, debentures or other securities of the predecessor companies had been issued. Under s.5, all the common shares in the capital of B.C. Electric owned by the Province "immediately before the amalgamation" were deemed to have been surrendered to B.C. Hydro and Power Authority "and cancelled immediately upon the amalgamation having become effective." Section 6(1) stated that all assets, undertakings powers and rights purported to have been made, and all debts, liabilities and obligations purported to have been incurred "in the name of British Columbia Hydro and Power Authority but

not made, acquired or incurred by or issued by the Authority" were deemed to have been made, acquired, issued, incurred by, to, for or on behalf of B.C. Power Commission or B.C. Electric or both, as the case required; and that the amalgamated corporation (which I refer to as "B.C. Hydro") was possessed of all such "properties, assets, undertakings ... and franchises to the extent that they have not been disposed, and ... subject to the *Power Measures Act, 1964*, subject to all such debts, liabilities, and obligations to the extent that they have not been discharged."

[17] Also on August 20, 1965, Order-in-Council No. 2386 was passed approving the amalgamation of the three corporations, again in such a manner that:

> (a) they continue as one amalgamated corporation which is British Columbia Hydro and Power Authority as established by the British Columbia Hydro and Power Authority Act, 1964, and
>
> (b) the said British Columbia Electric Company Limited and the said British Columbia Power Commission cease to exist as separate corporations, and
>
> (c) the said British Columbia Hydro and Power Authority shall be seized of, possess and hold all the properties, assets, undertakings, contracts, powers, rights, privileges, immunities, concessions and franchises, whether conferred or imposed by statute or otherwise and subject to the Power Measures Act, 1964 be liable for all duties, liabilities and obligations, whether conferred or

> imposed by statute or otherwise, of each of the said British Columbia Hydro and Power Authority, British Columbia Electric Company Limited and British Columbia Power Commission immediately before the amalgamation: [Emphasis added.]

A copy of the Order is appended to these Reasons as Appendix C.

[18] Last, another Order-in-Council, No. 2387, was passed on August 23, 1965. (See Appendix D hereto). The operative paragraph of that Order "recommended" that:

> . . . pursuant to the *Power Measures Act, 1964*, and all other powers thereunto enabling section 212 of the *Companies Act* shall apply to the British Columbia Electric Company Limited, and that pursuant to that section the incorporation of British Columbia Electric Company Limited be revoked and cancelled and that British Columbia Electric Company Limited be declared to be dissolved, and that such other provisions of the *Companies Act* apply to the British Columbia Electric Company Limited to the extent necessary to effect the revocation, cancellation and dissolution hereby made. [Emphasis added.]

Thus ended the long and contentious process by which the generation of hydro-electric power throughout most of the Province became the function of a public utility which since 1965 has played such an important role in British Columbia's industrial and economic life.

***THE WASTE MANAGEMENT ACT***

[19] Before reviewing the operation of Part 4 of the ***Waste Management Act*** in detail, I will note briefly its predecessor, the ***Pollution Control Act, 1967*** (S.B.C. 1967, c. 34). Section 26 thereof contained what by comparison to the present legislation is a narrow version of the polluter-pay principle. It provided in material part:

> 26. (1) Where, in the opinion of the Minister
>
> (a) pollution has been, is being, or is likely to be caused, suffered or permitted within the territorial jurisdiction of the Province, on land, on or in water, or in air,
>
> (b) the pollution is not being or is unlikely to be prevented, controlled, removed, or abated by a person causing, suffering, or permitting it, or by the local authority for the areas suffering the pollution, or by any other agency, and
>
> (c) immediate action is required to prevent, control, remove, or abate the pollution, he may, by order approved by the Lieutenant-Governor in Council, declare a pollution emergency exists in a part or the whole of the Province.
>
> (2) Where the Minister makes an order under subsection (1), he, or a person authorized in writing by him, may require any person to provide labour, services, material or equipment for the purpose of preventing, controlling, removing or abating the pollution . . .

> (4) A certificate signed by the Minister showing the total costs and expenses incurred by the Government and the amount of money paid out by the Government under this section may be filed in the Supreme Court and, on being filed, shall, for all purposes except an appeal, be deemed to be a judgment of the court and enforceable as such against the person named in it as the person causing or permitting the pollution and liable for the costs and expenses incurred and money paid. [Emphasis added.]



[20] In ***Re Rempel-Trail Transportation Ltd. and Neilsen*** (1978) 93 D.L.R. (3d) 595 (B.C.S.C.), Taylor J. (later J.A.) considered s. 26 in connection with a highway accident that had occurred six months before s. 26 came into force. The accident resulted in the petitioner's truck dumping an oily substance into a lake. Three weeks after s. 26 came into force, the Minister issued an order under s. 26(1) alleging that the substance had been observed seeping from land adjacent to the highway and that the substance was "entering onto the waters of Red Rocky Lake and environs." The Minister incurred various costs in containing and cleaning up the pollution. Several months later, he issued a certificate under s. 26(4), naming the petitioner.

[21] One of the petitioner's arguments on judicial review was that the certificate was invalid because it related to an event that had occurred prior to the coming into effect of the

relevant provisions of the ***Pollution Control Act***. The Minister argued, on the other hand, that it was an "existing condition of pollution" which gave rise to liability on the petitioner's part for the clean-up costs, rather than the "act of polluting" itself. Taylor J. did not accede to this view. In his analysis:

> If the Minister's position is right, those whose conduct caused pollution, within the meaning of the Act many years, or even decades ago without in any way breaking the law, could now be charged with the costs of cleaning up that pollution; these costs could be very substantial indeed in the case of many manufacturing or mineral extraction operations according to the applicant.
>
> Authorities were cited on both sides in which statutes not expressly retroactive have been held to have, or not to have, retrospective effect. But I think the issue is determined by the clear words of the section. While s-s. (1) refers to a situation in which pollution "has been, is being, or is likely to be caused", this subsection does not authorize imposition of liability. The wording of s-s. (4), which authorizes the charging of clean-up costs to a party responsible for pollution, says that the Minister's certificate is to be enforceable against "the person causing or permitting the pollution". The tense is present. The subsection seems to refer to those who at the time of the declaration of the emergency were "causing or permitting" the pollution. [at 598-9; emphasis added.]

[22] Taylor J. added that had he not reached this conclusion on the words of the subsection itself, he would have arrived at the same result "on the basis of the authorities concerning

construction of statutory provisions not expressly made retroactive in circumstances in which new obligations, burdens, or disabilities may be imposed as a consequence of events pre-dating their enactment." (At 599.) He discussed the meaning of retroactivity and the presumption against it in statutory construction, to which reference will be made below. Turning then to the argument that the presumption does not apply to a statute intended "for the protection of the public", he said:

> While the principle intent of the statute undoubtedly is the protection of the public, it cannot be said that this is the purpose of s. 26(4); the purpose of the subsection is to recover from an individual money expended by the Minister under authority of the statute, a result which, like the raising of tax revenues, certainly benefits the public, but cannot be said to constitute a form of public protection. [at 601]

[23] It was against this background that the ***Waste Management Act***, R.S.B.C. 1979, c. 428.5, and later amendments became law. Section 22 of the early form of the ***Act*** provided:

> 22. (1) Where a manager is satisfied on reasonable grounds that a substance is causing pollution, he may order the person who had possession, charge or control of the substance at the time it escaped or was emitted, spilled, dumped, discharged, abandoned or introduced into the environment, or any other person who caused or authorized the pollution to do any of the things referred to in subsection (2). [Emphasis added.]

Subsection (2) stated that such an order could require the person on whom it was served to undertake site investigations and ultimately to carry out measures reasonably necessary to abate or stop the pollution in question.

[24] Section 22 was considered by Lander J. in ***West Fraser Timber Co. v. British Columbia (Regional Waste Manager)*** [1988] B.C.J. No. 2127 (B.C.S.C.), where one of the defendants, Domtar, had operated a mill and wood treatment plant on land part of which it owned and part of which it leased from B.C. Rail. Domtar sold the former property and assigned the lease to West Fraser in 1978. On the expiration of the lease, the property sat vacant. In 1987, a manager under the ***Act*** issued an order naming four parties, including Domtar. Domtar contested the order, arguing that s. 22 was not retroactive or retrospective, and relied on ***Re Rempel-Trail Transportation***, *supra*. However, Lander J. took a somewhat different view of the new ***Act***. He reasoned as follows:

> Under the new legislation, and particularly having regard to s. 22:
>
> > (1) there is no express provisions [sic] of retroactivity;
> >
> > (2) the clear words of the section refer to "the person who had possession, charge or control of the substance at the time it escaped ... or was abandoned or introduced into the

> environment, or any other person who caused or authorized the pollution ...;
>
> (3) there is no new obligation imposed which was not created by the 1967 legislation, which was in force at the time of this incident;
>
> (4) the intent of the legislation, including the amendments which included the clarification of the word "person", is clearly to protect the public; and to place the responsibility for pollution abatement and cleanup on those private parties who caused the pollution or were in control of the problem material.
>
> (5) further, such amendments are in the nature of procedural clarification in view of the earlier legislation.
>
> Even if the presumption against retrospective operation applies, and it is not at all apparent that it does, the clear intent of the legislation is to allocate the cost of pollution on those people who caused it in the protection of the public interest. There was no error of law or jurisdiction in this regard in the order of October 20, 1987. [at 7-8; emphasis added.]

In the result, the Court held that the manager's order had been validly made under s. 22 of the ***Waste Management Act***.

[25] Section 22 of the early ***Act*** was also considered in ***British Columbia Railway Co. v. Driedger*** [1988] B.C.J. No. 3053 (aff'd at [1990] B.C.J. No. 1207 (B.C.C.A.)), where Gibbs J. (as he then was) held that the provision could not apply to "an innocent, ignorant (in the sense of not knowing) owner who had nothing to do with, and no knowledge of" the contamination

of the site in question, or the attempts of others to rectify the problem. Gibbs J. observed:

> The theme of the Act is that the person who has custody of polluting substances is responsible for safe custody, that the person who uses is responsible for safe use, that the person who transports is responsible for safe transportation, and that the person who fails to discharge his responsibility must accept liability for the remedial measures. It is the safe use responsibility which arises here, and although it may be possible to strain the words of Section 22(1) to fit B.C. Rail, I am satisfied that the legislature did not have that intent. I would have to see much stronger and more specific words. . . . [para. 10]



***Part 4 of the Present Act***

[26] As earlier mentioned, Part 4 of the ***Act***, headed "Contaminated Site Remediation", was proclaimed in force on April 1, 1997. Division 1 of Part 4 contains various definitions, including the following:

> "contaminated site" means an area of land in which the soil or any groundwater lying beneath it, or the water or the underlying sediment, contains
>
> (a) a special waste, or
>
> (b) another prescribed substance in quantities or concentrations exceeding prescribed criteria, standards or conditions;
>
> "operator" means, subject to subsection (2), a person who is or was in control of or

> responsible for any operation located at a contaminated site, but does not include a secured creditor unless the secured creditor is described in section 26.5 (3);
>
> "owner" means a person who is in possession of, has the right of control of, occupies or controls the use of real property, including, without limitation, a person who has any estate or interest, legal or equitable, in the real property, but does not include a secured creditor unless the secured creditor is described in section 26.5 (3);
>
> "person" includes a government body and any director, officer, employee or agent of a person or government body;
>
> "remediation order" means a remediation order under section 27.1;
>
> "responsible person" means a person described in section 26.5;

The term "remediate" is not defined; however, the ***Act*** defines "remediation" to mean action "to eliminate, limit, correct, counteract, mitigate or remove" any contaminant or the negative affects thereof on the environment.

[27] Division 2 and regulations thereto establish the conditions under which a property owner, a person applying for subdivision or zoning approval, a vendor of land or a trustee, receiver or liquidator or person commencing foreclosure proceedings in respect of land that has been used for industrial, commercial or other prescribed activities, is

required to prepare a site profile and provide it to a manager appointed under the ***Act***. The manager may then order a preliminary or detailed site investigation and, under s. 26.4(1), may determine whether a site is contaminated. Notice in writing of the manager's preliminary determination is given to various interested persons, who are given the opportunity to comment on the preliminary determination. The manager may then make a final determination, which decision may be appealed under Part 7 of the ***Act***.

[28] Division 3, the most important for purpose of this appeal, is headed "Liability". I have appended the whole of Division 3 as Appendix A to these Reasons, but will note here the provisions of particular relevance. It will be recalled that the term "responsible person" is defined to mean a person described in s. 26.5. Section 26.5(1) states:

> 26.5 (1) Subject to section 26.6, the following persons are responsible for remediation at a contaminated site:
>
> (a) a current owner or operator of the site;
>
> (b) a previous owner or operator of the site;
>
> (c) a person who
>
> (i) produced a substance, and

> (ii) by contract, agreement or otherwise caused the substance to be disposed of, handled or treated in a manner that, in whole or in part, caused the site to become a contaminated site;
>
> (d) a person who
>
> (i) transported or arranged for transport of a substance, and
>
> (ii) by contract, agreement or otherwise caused the substance to be disposed of, handled or treated in a manner that, in whole or in part, caused the site to become a contaminated site;
>
> (e) a person who is in a class designated in the regulations as responsible for remediation. [Emphasis added.]

Subsection (2) contains similar provisions defining "responsible person" in connection with property contaminated by the migration of a substance from elsewhere to the contaminated site.

[29] Section 26.5(3) establishes the conditions under which a secured creditor is or is not responsible for remediation of a contaminated site, and s. 26.6(1) lists a series of persons who are not responsible for remediation, including those described in subpara. (d):

> (d) an owner or operator who establishes that
>
> (i) at the time the person became an owner or operator of the site,
>
> (A) the site was a contaminated site,
>
> (B) the person had no knowledge or reason to know or suspect that the site was a contaminated site, and
>
> (C) the person undertook all appropriate inquiries into the previous ownership and uses of the site and undertook other investigations, consistent with good commercial or customary practice at that time, in an effort to minimize potential liability,
>
> (ii) while the person was an owner of the site, the person did not transfer any interest in the site without first disclosing any known contamination to the transferee, and
>
> (iii) the owner or operator did not, by any act or omission, cause or contribute to the contamination of the site;

Under s-s. (3), a person seeking to establish that he or she is not a "responsible person" has the burden of proving "all elements of the exemption on a balance of probabilities."

[30] The concept of "responsible person" or 'responsibility' under Part 4 is, as the Deputy Director of Waste Management suggested in his factum, a statutory term of art. As he submitted, s. 26.5 is not so much a definition section "as much as it is a detailed description (along with s. 26.6) of

the persons subject to two distinct consequences, which collectively comprise 'responsibility' in this novel statutory regime." He characterizes the two consequences as "regulatory" – as described in s. 27.1 – and "financial" – as described in s. 27(1).

[31] Under s. 27.1(1), a manager may issue a remediation order to any responsible person, requiring that that person undertake remediation, contribute "in cash or in kind" to another person who has reasonably incurred remediation costs, or give security on conditions specified by the manager. When considering "who will be ordered to undertake or contribute to" remediation, the manager must take certain factors into account, including the terms of any private agreements between responsible persons regarding liability for remediation. Also under s-s. (4), the manager must "name one or more persons whose activities, directly or indirectly, contributed most substantially" to the contamination of the site. The manager may obtain a (non-binding) opinion of an "allocation panel" as to whether a person is a responsible person or was a "minor contributor" to the contamination; or concerning the share of remediation costs that should be attributed to a particular responsible person. (I note parenthetically that no argument was advanced in this case as to whether s. 27.1 confers on the

manager the powers of a superior court judge contrary to s. 96 of the ***Constitution Act***. I shall assume the section is valid for purposes of this appeal.) Section 27.1(5) states that a remediation order does not affect the right of a person affected by the order to obtain relief under an agreement, other legislation or common law.

[32] Section 27, the "financial" provision, deals with the recovery by "any person or government body" of remediation costs. It states in part:

> 27 (1) A person who is responsible for remediation at a contaminated site is absolutely, retroactively and jointly and severally liable to any person or government body for reasonably incurred costs of remediation of the contaminated site, whether incurred on or off the contaminated site. . . .
>
> (3) Liability under this Part applies
>
> (a) even though the introduction of a substance into the environment is or was not prohibited by any legislation if the introduction contributed in whole or in part to the site becoming a contaminated site, and
>
> (b) despite the terms of any cancelled, expired, abandoned or current permit or approval or waste management plan and its associated operational certificate that authorizes the discharge of waste into the environment.

> (4) Subject to section 27.3 (3), any person, including, but not limited to, a responsible person and a manager, who incurs costs in carrying out remediation at a contaminated site may pursue in an action or proceeding the reasonably incurred costs of remediation from one or more responsible persons in accordance with the principles of liability set out in this Part. [Emphasis added.]



[33] It will be noted that s. 27(1) does not on its face require the issuance of a remediation order before it operates: all that the person or government body seeking recovery needs to show is that it has incurred, reasonably, remediation costs in respect of a contaminated site. Whether a person seeking recovery must nevertheless satisfy various regulatory conditions under Part 4 has been the subject of considerable litigation: see ***Swamy v. Tham Demolition Ltd.*** (2000) 81 B.C.L.R. (3d) 293 and [2001] B.C.J. No. 721, ***O'Connor v. Fleck*** (2000) 79 B.C.L.R. (3d) 280, and ***No. 158 Seabright Holdings Ltd. v. Imperial Oil Ltd.*** [2001] B.C.J. No. 1922, all decisions of the Supreme Court of British Columbia; and the recent decision of this court in ***Workshop Holdings Ltd. v. CAE Machinery Ltd.***, 2003 BCCA 56, [2003] B.C.J. No. 165. Noteworthy for purposes of this appeal, however, is that for the "absolute" liability to arise, it appears the remediation costs must have been incurred by the person or

government suing for recovery. That is not necessarily the case where an order is made under s. 27.1, which contemplates that the responsible person or persons named in the order may be required to carry out or contribute to remediation work yet to be done.

[34] Section 27.1 is the foundation for the proceeding in this case. An order was issued by a manager on May 20, 1998 identifying six entities as "persons responsible" for the remediation of the site at 9250 Oak Street in Vancouver and neighbouring land. Certain of the entities so named applied to the manager to add B.C. Hydro as a "responsible person" under the order. Thus the proceeding is not an action taken by one responsible person to recover remediation costs from another (allegedly) responsible person under s. 27(4); rather, the proceeding was initiated by the issuance of a remediation order by a manager under s. 27.1, and concerns an application to him by those originally named, to amend his order. In the Deputy Director's terminology, this proceeding is "regulatory" rather than "financial".

***THE ISSUES AND THE DECISIONS BELOW***

[35] As noted earlier, the central question posed on this appeal is whether B.C. Hydro is or may be a "responsible

person" under the ***Waste Management Act*** by reason of the activities of B.C. Electric in and around the Oak Street property between 1920 and 1957. Counsel for B.C. Hydro conceded, rightly in my view, that if B.C. Electric were still in existence, it would be a "responsible person" by reason of its activities at the site until 1957. To this extent the ***Waste Management Act,*** unlike its predecessor the ***Pollution Control Act***, operates in respect of events – polluting conduct – predating its enactment. But since B.C. Electric no longer exists, B.C. Hydro must be shown to have somehow 'assumed' or 'inherited' (I use those terms loosely) its obligations either expressly or by implication, in order to be fixed with 'responsibility' under the ***Act.*** The respondents say that it did – that both under the terms of the Amalgamation Agreement and by virtue of the essential nature of a corporate amalgamation, B.C. Hydro is fixed with the liabilities to which B.C. Electric would have been subject had it not amalgamated.

[36] In answer, B.C Hydro contends that the effect of an amalgamation depends on the meaning and intent of the statute under which it was carried out; and that in the unusual circumstances surrounding this amalgamation, B.C. Hydro became subject only to the liabilities and obligations of B.C.

Electric that existed "immediately before the amalgamation." As well, B.C. Hydro submits that although the word "retroactively" appears in s. 27(1) of the ***Waste Management Act***, there is nothing in s. 26.5(1) or elsewhere in Part 4 that operates retroactively to result in B.C. Electric's having been a "responsible person" with remediation obligations as of 4:59 p.m., August 20, 1965 — immediately before the amalgamation.

[37] The manager appointed under the ***Waste Management Act*** addressed both these issues in his reasons of October 15, 1998. He began by noting that had the 1965 amalgamation been an 'ordinary' one — one carried out pursuant to the British Columbia ***Companies Act***, for example — all obligations and liabilities of B.C. Electric would have "flowed on" into B.C. Hydro. However, he said:

> There is . . . one critical difference. The amalgamated BC Hydro was limited to the obligations of BC Electric that existed as of a particular moment in time - 5:00 p.m. on August 20, 1965. This amalgamation clearly gives BC Hydro greater protection from legal liability than would be the case in the usual corporate amalgamation. This limitation of liability, ratified by Order in Council and by legislation, is critical. The courts have made clear that the effect of any particular amalgamation depends ultimately on the terms of the applicable legislation: *R. v. Black & Decker*.

As well, he noted, if B.C. Hydro's actions or status had been at issue — either before or after 1965 — it could clearly be named as a responsible person under s. 26.5. But again, he said:

> . . . on the information before me, BC Hydro had nothing to do with 9250 Oak Street. BC Hydro only came into existence in 1964. At that time, it was separate and distinct from B.C. Electric. The Amalgamation Agreement is dated August 20, 1965.
>
> As for BC Electric, it is now dissolved and has no separate existence. Both today and on April 1, 1997, the date on which the 1993 amendments came into force, BC Electric did not exist as a separate entity. If BC Electric had retained separate status, or had amalgamated with B.C. Hydro in the ordinary fashion under British Columbia law, I would have no hesitation in considering its responsibility under s. 26.5 as part of the new amalgamated entity: *Witco Chemical Co. v. Oakville (Town*), [1975] 1 S.C.R. 273.
>
> One is therefore left with what the Amalgamation Agreement says about *BC Hydro's liability for the acts of BC Electric*. The law, as set out in the Amalgamation Agreement and as approved by Cabinet Order and subsequent legislation, tells me that in this particular amalgamation, B.C. Hydro can only be liable for the statutory obligations of BC Electric as they existed immediately before August 20, 1965. [Underlining represents my emphasis.]

[38] The manager found that the "responsible person" provisions of the ***Waste Management Act*** could apply to B.C. Electric only if those provisions were "fully retroactive" — i.e., "if the 1993 amendments which came into effect in 1997,

reached back in time and changed the law as it existed in 1965 by making B.C. Electric a responsible person at that time." He noted the distinction between "retroactive" and "retrospective" legislation described by Professor E.A. Driedger in 1978 in an article entitled "*Statutes: Retroactive Retrospective Reflections*", 56 ***Can. Bar Rev.*** 264, which distinction I will discuss more fully below. The manager concluded that s. 26.5 of the ***Waste Management Act*** was not retroactive. In his analysis:

> In my opinion, for the purpose of the power to issue a remediation order in s. 27.1(1) of the *Act*, the definitions of responsible person in the 1993 amendments to the *Waste Management Act* are not retroactive. Nothing in the language of s. 26.5 suggests that the definitions operate backward in time and change the law from what it was in 1965. The provisions are instead a clear example of retrospective legislation which – in relation to the definition of responsible person – operates for the future, but in so doing imposes new legal consequences in respect of past actions, events or status. Thus, on April 1, 1997, a person who was a past or present owner or operator of a contaminated site, or a person who in the past was a producer or transporter, became a responsible person subject to a remediation order. While the effect of the amendments was to *dramatically expand in the present the responsibility of persons for their past actions or status*, the amendments do not change the law as it existed before the legislation came into force. Because the 1993 amendments do not reach back in time and change the law so that, as of August 20, 1965, BC Electric was a responsible person, the only logical conclusion is that BC Hydro cannot be legally responsible for the actions of BC Electric.

In arriving at this conclusion, I have given careful consideration to the express use of the word "retroactive" in s. 27(1). However, this does not speak to the 1993 amendments generally, or to the power to issue a remediation order in particular. Instead, the word is used specifically in the liability provision:

> 27(1) A person who is responsible for remediation at a contaminated site is absolutely, retroactively, jointly and severally liable to any person or government body for reasonably incurred costs of remediation of the contaminated site, whether incurred on or off the contaminated site.

Section 27(1) does not, as I read it, make retroactive the entire set of 1993 amendments or the definitions of responsible persons so as to change past laws. Instead, what it plainly says is that where persons are responsible for remediation under these amendments, *their liability to others for the reasonably incurred costs of remediation by those others (including government) is retroactive (as well as absolute, joint and several).*

BC Hydro states that whether this use of the term "retroactive" might make BC Hydro liable in damages for BC Electric's actions in a s. 27 claim is not an issue I have to decide here. I agree. Whether ordered parties might rely on s. 27 to recover remediation costs against BC Hydro (either in its own right or as a result of the actions of any existing former officers or directors of BC Electric who might be indemnified by BC Hydro) is a question they can pursue as they see fit. However, I am satisfied that s. 27 does not take the 1993 amendments back in time and change the law as it existed on August 20, 1965 such that as of that date, BC Electric was a responsible person subject to a remediation order. [Underlining represents my emphasis.]

[39] Later in his reasons, the manager (whose name happens to be Mr. R.J. Driedger) acknowledged that he had come to this conclusion reluctantly, since B.C. Hydro had found "a 'legal gap' which has little moral or policy justification in so far as avoidance of contaminated sites legislation is concerned." He noted it was open to the Legislature to close this 'gap' and suggested that B.C. Hydro might co-operate in remediation efforts on a voluntary basis "either as part of good corporate citizenship or in the context of lawsuits filed by the parties."

***The Environmental Appeal Board***

[40] The Harbour Commission, GCC and CGC appealed to the Environmental Appeal Board on the basis that the manager had erred in law. The Board allowed the appeal for reasons dated August 23, 1999. It began its reasons by describing the arguments made by GCC and the Harbour Commission concerning the effect of a corporate amalgamation, as illuminated by the Supreme Court of Canada's decision in ***R. v. Black and Decker Manufacturing Co.*** [1975] 1 S.C.R. 411. In that case, the Court noted that the language used in the ***Canada Corporations Act,*** RSC 1970, c. C-32, to the effect that an amalgamated company "is subject to all the contracts, liabilities, debts

and obligations of each of the amalgamating companies", was "all-embracing" and "merely supportive of a general principle".

[41] The Board also noted that ***Black and Decker*** had been considered by the Supreme Court of British Columbia in ***Rossi v. McDonald's Restaurants of Canada Ltd.*** [1991] B.C.J. 429. There, the Court declined to follow earlier case law to the effect that on an amalgamation under the British Columbia ***Companies Act***, the amalgamating companies do not continue to exist. On a consideration of cases decided under federal, Ontario and British Columbia corporate legislation, the Court in ***Rossi*** held that a corporate amalgamation does not constitute an assignment (in ***Rossi,*** of a lease). In the words of Shaw J., ". . . there is not the complete divestiture of property or rights which is a fundamental characteristic of an assignment." (at 5)

[42] The Board in the instant case considered the argument of GCC and the Harbour Commission that the words "immediately before the amalgamation" (which did not appear in the B.C. ***Companies Act*** and do not now appear in the ***Canada Business Corporations Act***, R.S.C. 1985, c. C-44), were intended to have a similar effect to the word "thereafter" in the ***Companies Act***

"by establishing that from the moment of amalgamation, the new entity assumes the obligations of the amalgamating entities." Following a review of the steps by which B.C. Hydro had been created and amalgamated in 1964, the Board concluded that the Legislature had intended "to combine the three amalgamating entities in such a way that they continue to exist as one unified entity." In the Board's analysis:

> As a consequence of their amalgamated status, they no longer exist as **separate** entities. Specifically, B.C. Electric continues as an element of the amalgamated B.C. Hydro, though it is no longer a discrete entity. The analogy of three streams merging and mixing to form one river illustrates this concept. Therefore, based on the nature of the amalgamation process, the amalgamated B.C. Hydro cannot avoid liability for the past acts of a part of itself, i.e. B.C. Electric, unless there is a clear legislative intent to stop this liability from flowing to B.C. Hydro.

[43] The Board then considered the meaning of the words "immediately before the amalgamation" contained in the Amalgamation Agreement and Order-in-Council. As before, GCC and the Harbour Commission argued that the phrase merely denoted "the time from which the amalgamated B.C. Hydro takes on the liabilities of the amalgamating entities". Noting that the words of a statute are to be read in their entire context, the Board observed that:

> . . . the Agreement contains no phrases such as "is only liable for" or "is not liable thereafter for" which would clearly indicate an intention to limit liability. Rather, the Agreement contains broad and inclusive language, providing that the amalgamated B.C. Hydro "shall be liable for **all the duties, liabilities and obligations**" of each of the amalgamating companies, "whether conferred or imposed by statute or otherwise ... immediately before the amalgamation."

[44] After reviewing various corporations statutes and the 1964 statutes dealing with B.C. Hydro, as well as the objects and purposes of the ***Waste Management Act*** (to which B.C. Hydro is subject by virtue of s. 32(7)(y) of the present ***British Columbia Hydro and Power Authority Act***, R.S.B.C. 1996, c. 212), the Board concluded:

> . . . the purpose of the words "immediately before the amalgamation" in the Agreement is to recognize the date from which the amalgamated B.C. Hydro became liable for all of the liabilities, duties and obligations of the amalgamating entities, and became seized of and possessed all their assets, rights, undertakings, powers, privileges, etc. The Agreement contains no language showing an express or clear intention to limit the amalgamated B.C. Hydro's liability for the actions of the amalgamating entities, including B.C. Electric.
>
> Therefore, the Panel finds that B.C. Hydro can be liable for the pre-amalgamation actions of B.C. Electric, and may be named a responsible person under Part 4 of the *Waste Management Act* on that basis. The Panel orders that this matter be remitted to the Deputy Director for a determination, as to whether, on the facts, this is an appropriate case in which to find that B.C. Hydro should be

> named as a responsible person to the Order and subsequent amendments. [Emphasis added.]

[45] Given this finding, the tribunal agreed with GCC and the Harbour Commission that it was unnecessary to determine whether the ***Waste Management Act*** is "retroactive, such that B.C. Electric could have been a 'responsible person' at the time of amalgamation." The Board nevertheless expressed the view that although s. 27(1) (the "liability" provision) of the ***Waste Management Act*** was clearly retroactive, s. 26.5 operated only retrospectively "to define who may be a responsible person". In their words:

> The Panel agrees that an important purpose of Part 4 is to make polluters pay for cleaning up contamination that results from both their actions, regardless of whether those actions occur in the past or the present. This serves the public interest in preventing and reducing harm to the environment and human health, and correctly places the costs of clean up on those responsible, rather than on tax payers. With this purpose in mind, section 26.5 casts a broad net in defining "responsible person." However, the Panel finds that section 26.5 need not be applied retroactively in order for Part 4 to achieve its purpose. Rather, Part 4 imposes a duty, as of the law's coming into force, on responsible persons to pay "absolutely, retroactively and jointly and severally" for the cost of cleaning up contamination resulting from their past and present activities. By applying section 26.5 retrospectively and section 27(1) retroactively, the *Waste Management Act* makes responsible persons pay to the full extent possible, without having to make them responsible persons in the past.

However, the Board did not find it necessary to reach a conclusive finding on this issue.

***Supreme Court of British Columbia***

[46] In October, 1994, B.C. Hydro filed a petition in the Supreme Court of British Columbia pursuant to the ***Judicial Review Procedure Act***, seeking an order quashing the Board's decision or relief in the nature of *certiorari*. The Chambers judge dismissed the appeal from the bench on April 6, 2000. I quote below the material part of his reasoning:

> In my opinion, the clear purpose of [clause 1(c)] of the Amalgamation Agreement] is to prevent the expiration of B.C. Electric's legal responsibilities upon amalgamation. Its clear purpose is to transfer those responsibilities to the new single entity formed from three pre-amalgamation entities. B.C. Electric lives on in the petition as the result of a transition intended by the Legislature to be seamless. The acts giving rise to contamination had been completed prior to the amalgamation and any legal responsibility for those acts arising before or after the amalgamation was assumed by the petitioner. If the Legislature had intended to limit the transfer only to legal responsibility that arose or materialized before the amalgamation and not after, it would have and should have made that intention clear by explicit language to that effect. I agree with the conclusion of the Board that the words "immediately before the amalgamation" are not words of limitation. They do not limit the legal responsibility. I agree with the reasoning of the Board, at page 21 of its decision, that the purpose of the four concluding words in the clause is to identify the date on which the petitioner became the beneficiary of all the property of B.C. Electric and

> on which it assumed all of that company's duties, liabilities and obligations. Those duties, liabilities and obligations did not terminate on August 20, 1965. They were ongoing and it was the clear intention of the Legislature that they be assumed by the petitioner. Therefore, any legal responsibility under the ***Waste Management Act*** that would have fallen on B.C. Electric falls on the petitioner. [para. 9; emphasis added.]

The Chambers judge found further support for his conclusion in ***R. v. Black and Decker***, *supra*, and was not persuaded that the concluding clause of the Amalgamation Agreement in the case at bar distinguished it from the reasoning in that case.

[47] This appeal was brought in May 2000, by which time the manager had been ordered by the Board to determine whether B.C. Hydro was a "responsible person" on the merits, and had determined that it was. At the time of that decision (November, 1999) some remediation work at the Oak Street site had been done, but a "significant amount" remained undone.

***ANALYSIS***

***What Liabilities of B.C.Electric Became Liabilities of B.C. Hydro?***

[48] I turn first to the submission of the respondents GCC and the Harbour Commission that the nature of a corporate amalgamation is such that all obligations and liabilities

necessarily carry through to the amalgamated corporation – despite what may be terms to the contrary in the amalgamation agreement. This raises squarely the meaning and effect of the concluding words of clause (c) of the 1965 Agreement by which B.C. Hydro came into being. For convenience, I set out again the operative part of that document:

> (1) The Authority, the Commission and the Company hereby amalgamate with each other in such a manner that
>
> (*a*) they continue as one amalgamated corporation which is the British Columbia Hydro and Power Authority as a established by the British Columbia Hydro and Power Authority Act, 1964,
>
> (*b*) the Company [B.C. Electric] and the Commission [B.C. Power Commission] cease to exist as separate corporations, and
>
> (*c*) the Authority shall be seized of, possess and hold all the properties, assets, undertakings, contracts, powers, rights, privileges, immunities, concessions and franchises, whether conferred or imposed by statute or otherwise, and subject to the Power Measures Act, 1964, shall be liable for all duties, liabilities and obligations, whether conferred or imposed by statute or otherwise, of each of the authority, the Company and the Commission immediately before the amalgamation. [Emphasis added.]

This was followed, of course, by the Order-in-Council 'revoking' and 'cancelling' B.C. Electric's "incorporation", and declaring it to be "dissolved."

[49] At the outset, it bears noting that the rules of construction of contract mandate that the words used be construed in their plain and ordinary sense and that "the literal meaning must be given to the language of the contract unless this would result in an absurdity." (See Fridman, ***The Law of Contract in Canada,*** 1994, at 454). A contract, like a statute, should be construed as a whole, giving effect to everything in it if at all possible. (*Supra*, at 469). What then is the ordinary and natural meaning of what Mr. Spencer called the "four little words" at the end of clause (c), read in the context of the Amalgamation Agreement as a whole?

[50] It is fair to say that none of the counsel appearing before us sought to defend the idea that the purpose of the words "immediately before the amalgamation" at the end of clause (c) was to "identify the date on which [B.C. Hydro] became the beneficiary of all the property of B.C. Electric and on which it assumed all of that company's duties, liabilities and obligations." (Chambers judge, Reasons for Judgment, para. 9.) With respect, I agree it would be nonsensical to say that B.C. Hydro acquired all the properties and assumed all the obligations and liabilities of B.C. Electric "immediately before the amalgamation" when that did not happen until the moment of amalgamation. The effective

time and date of the amalgamation were in any event clearly stated in clause 2 of the Agreement, and the Order-in-Council confirmed that the amalgamation "shall become effective at the date and time provided in the amalgamation agreement" — not the moment immediately before.

[51] At the same time, Mr. Mitchell for the Harbour Commission argued strongly that the four words were not "words of limitation" but were intended to ensure a seamless continuance of B.C. Electric's assets and liabilities, or were the "flip side" of the word "thereafter" in the phrase ". . . and thereafter the amalgamated company shall be seized of and shall hold and possess . . ." appearing in statutes such as the ***Companies Act***, R.S.B.C. 1960, c. 67, at s. 178(11). This submission is indistinguishable in my view from the Chambers judge's explanation of the four words. For his part, Mr. Spencer on behalf of the C.P.R. submitted that the phrase modifies "the Authority, the Company, and the Commission" appearing immediately before. With respect, I believe there can be little doubt that as a matter of grammatical construction, the four words modify (at least) the phrase "duties, liabilities and obligations" in clause (c) of the Agreement. On an ordinary reading of the document, these words limit the duties, liabilities and obligations being

assumed. They answer the question "Which duties, liabilities and obligations are being assumed?" The answer appears to be, "All those to which B.C. Electric and the other predecessor corporations were subject immediately before the amalgamation."

[52] The respondents naturally cautioned against over-emphasizing the four words and contended that to read them as limiting the liabilities assumed by B.C. Hydro would be inconsistent with the notion that upon an amalgamation the predecessor corporations "live on" in some sense, though not as separate corporate entities. In this regard Mr. Spencer noted the words "as a separate corporation" in clause (b) of the Agreement and the reference to "continuing" as one amalgamated corporation. He relied heavily on ***Black and Decker,*** *supra*, where it was held that after an amalgamation under the ***Canada Corporations Act***, R.S.C. 1970, c. C-32, an amalgamated corporation remained liable to be prosecuted for criminal offences allegedly committed by a predecessor prior to the amalgamation. One would have been very surprised to see any other result, given that the statute (like the ***Companies Act*** at the time) provided that upon the issuance of letters patent of amalgamation, an amalgamated company was "subject to all the contracts, liabilities, debts and

obligations of each of the amalgamating companies." As Dickson J. (as he then was) noted, if Parliament had intended that a company could, by the simple expedient of amalgamating with another, free itself of accountability under the ***Combines Investigation Act*** or the ***Criminal Code***, clearer language would surely have been necessary. (At 417-8.) In the case at bar, of course, there was no attempt to rid B.C. Hydro of liabilities or obligations to which B.C. Electric was subject at the time of amalgamation: those liabilities were expressly "inherited" by B.C. Hydro.

[53] The Court went on, however, to say in ***Black and Decker***:

> Whether an amalgamation creates or extinguishes a corporate entity will, of course, depend upon the terms of the applicable statute, but as I read the Act, in particular s. 137, and consider the purposes which an amalgamation is intended to serve, it would appear to me that upon an amalgamation under the *Canada Corporations Act* no "new" company is created and no "old" company is extinguished. The *Canada Corporations Act* does not in terms so state and the following considerations in my view serve to negate any such inference: (i) palpably the controlling word in s. 137 is "continue". That word means "to remain in existence or in its present condition"- *Shorter Oxford English Dictionary*. The companies "are amalgamated and are continued as one company" which is the very antithesis of the notion that the amalgamating companies are extinguished or that they continue in a truncated state; [at 417; emphasis added.]

and:

> If ss. 137(13)(b) and 137(14) are to be read, however, as other than merely supportive of a general principle and other than all-embracing, then some corporate incidents, such as criminal responsibility, must be regarded as severed from the amalgamating companies and outside the amalgamated company. . . . The effect of the statute, on a proper construction, is to have the amalgamating companies continue without subtraction in the amalgamated company, with all their strengths and their weaknesses, their perfections and imperfections, and their sins, if sinners they be. Letters patent of amalgamation do not give absolution. [at 422]



[54] Like s. 137 of the ***Canada Corporations Act,*** the Amalgamation Agreement in the case at bar stated that the predecessor corporations would "continue" as one corporation, which would "possess" all the assets of the predecessors. However, neither ***Black and Decker*** nor its companion case, ***Witco Chemical Co., Canada, Ltd. v. The Corporation of the Town of Oakville*** [1975] 1 S.C.R. 273, nor any of the other cases to which we were referred dealt with obligations or liabilities which were created after the date of amalgamation; nor did they deal with statutory wording similar to the terms of clause (c) of the Agreement. Thus, observations about the "blending" and "continuance" of the predecessors are not of great assistance in construing the terms of a private agreement in which the parties appear to have done what it was in their commercial interest to do – limit the liabilities

flowing through to B.C. Hydro, to those in existence at the time of amalgamation.

[55] Mr. Singleton on behalf of B.C. Hydro relied first on the four words themselves. In his submission, they limited the liabilities of B.C. Electric being assumed by B.C. Hydro under the Agreement, which was not subject to or informed by any statute of general application. If the words were unclear, he relied also on the context of the Agreement and the factual matrix in which it was written, to argue that they were intended to, and did, limit the obligations assumed by B.C. Hydro at the time of amalgamation. Obviously, this was no ordinary amalgamation, as shown by the litigation between the Province and B.C. Power Commission; the special legislation enacted in 1964-5; B.C. Hydro's immunity from most provincial enactments; and the care taken by the author of the Amalgamation Agreement and by the legislative draftsman concerning what liabilities were being assumed, what shares were being surrendered to the Province, and what the effect of the re-organization was to be on the predecessors' secured and unsecured debt obligations and commitments regarding share allotments and conversions. Mr. Singleton noted that although the language in the Amalgamation Agreement for the most part paralleled that of s. 178(11) of the ***Companies Act*** and the

counterpart provisions in the ***Canada Corporations Act*** at the time, the "four little words" distinguished this amalgamation from amalgamations under those statutes, and must be given meaning if at all possible. Last, the statutory dissolution of B.C. Electric, though perhaps redundant, could leave no doubt that it did not "live on" in any sense – formal, substantive, or metaphysical.

[56] Applying the "golden rule" that words used in a contract must be given their plain and ordinary meaning unless an absurdity would result, I cannot read the concluding words of clause (c) of the Agreement as meaning anything other than that the liabilities which B.C. Hydro was assuming at the time of amalgamation were limited – the literal and ordinary meaning, and a result consistent with the commercial interests of all three parties to the Agreement. (The concluding words may also have limited the assets being assumed, but that is irrelevant to this appeal.) The words were obviously chosen deliberately and the fact they are not "unique" in the annals of corporate precedents does not mean they are mere surplusage or were not intended to have meaning. They have the effect of protecting B.C. Hydro from any obligations other than those that would have properly appeared on the balance sheet of B.C. Electric immediately prior to the amalgamation.

[57] This result is not in my view inconsistent with the concept of an amalgamation as a "continuance" of the predecessors as one, or the flowing of three rivers into one. The three predecessors did become one and their undertakings, including existing liabilities, were merged. But as stated in ***Black and Decker*** at 420, the word "amalgamation" is not a legal term and is "not susceptible of exact definition." (In this regard see, e.g., ***Re South African Supply and Cold Storage Co.*** [1904] 2 Ch. 268 and ***Re Seaboard Life Insurance Co. and Attorney General of British Columbia*** (1986) 30 D.L.R. (4th) 264 (B.C.S.C.).) At the end of the day, as Dickson J. stated in ***Black and Decker,*** the statute under which the amalgamation is authorized will govern. In this case, the ***British Columbia Hydro and Power Authority Act, 1964*** empowered the Authority to amalgamate "in any manner" with other corporations, and it was in B.C. Hydro's interest and indeed the public interest not to have the amalgamated corporation assume more obligations than it intended to assume. The amalgamation was not carried out under B.C. Electric's constating statute, the ***Companies Act***, presumably so that it would not be subject to the 'usual' provisions. This was an exceptional case, to which a great deal of legislative attention was devoted. The predecessor corporations ceased to

exist as such, and in case there was any doubt on the point, B.C. Electric was also dissolved, and its certificate of incorporation was cancelled, by special order. In my opinion, it is not tenable to maintain that B.C. Electric lived on in some sense sufficient to attract liability for an obligation arising more than 30 years later.



***Alternate Conclusion***

[58] Before leaving this part of the analysis, I note my alternate conclusion that even if the Amalgamation Agreement had not contained the 'limiting' words in clause (c), B.C. Hydro could not be brought within the definition of "responsible person" in Part 4. "Responsible person" refers to a "previous owner or operator of the site": s. 26.5(1)(b). The term "operator" means "a person who is or was in control of or responsible for" operations at the site, and "owner" means "a person" who has certain possessory or other rights in the property. The term "person" is not defined to include bodies corporate that previously existed but no longer exist. It is obvious that B.C. Hydro itself was never in control of any operation at the site, and never was in possession of or in occupation or control of the property. Is B.C. Electric "a person who is or was" in control or in possession of rights in

the property? Counsel did not address this question directly, but if my views expressed above on the meaning of the "four little words" were incorrect, it might be helpful for me to do so for purposes of any further appeal.

[59] In my opinion, regardless of the effect of the four words, it cannot now be said that B.C. Electric is a "person" as required by the definitions of "owner" and "operator". Under the Amalgamation Agreement and the Order-in-Council of August 20, 1965, B.C. Electric ceased to exist as a separate corporation, and under the Order-in-Council of August 23, 1965, its incorporation was "revoked and cancelled" and it was "declared to be dissolved." Whatever happened to its assets, undertaking and liabilities, B.C. Electric is no longer a "person" — i.e., a body corporate that may sue and be sued.

[60] I reach this conclusion notwithstanding ***Black and Decker*** and ***Witco***, *supra*. In the latter case, the Court ruled that a corporation which had amalgamated with another effective as of the day after it had issued a writ against the defendants, should be permitted to amend its writ and statement of claim — even though a limitation period would have barred the action against one of the defendants in the interim. The Court, *per* Spence J., emphasized that the "error" of the plaintiff had

been *bona fide* and that no defendant had been misled or prejudiced by the plaintiff's "error". He therefore allowed the appeal. Having done so, he went on in *obiter* to note the wording of the amalgamation provisions of the Ontario statute (which was almost identical to that considered in ***Black and Decker***, discussed at para. 52 above), and expressed the opinion that the statute "ha[d] a strong indication that the corporate entity Witco Chemical Company, Canada, Limited, did continue to exist as a corporate entity despite the fact that by s. 197(4)(a) and (b) all its powers had passed to the amalgamated corporation." (At 282-3.) In the end, "there was not an extinguishment of the corporate identity of [Witco] sufficient to justify the Court in holding that the writ had been issued in the name of a non-existent plaintiff." (At 283-4.) The opposite seems true in the case at bar, where the Order-in-Council of August 23, 1965 could not have been clearer in extinguishing B.C. Electric's corporate identity or 'personhood', and where there was no statutory wording comparable to the wording of Ontario's ***Business Corporations Act*** or the wording at issue in ***Black and Decker***.

[61] On their face, then, the terms "previous owner or operator" and "responsible person" do not in my opinion reach corporations such as B.C. Electric which have ceased to exist,

either by being wound up (and not revived under applicable legislation) or dissolved in some other way. Is there some other aspect of Part 4 that mandates a different conclusion? I turn next to that question, which I will address on the understanding that whether B.C. Electric is now a "person", it would be open to the Legislature to attach a liability or obligation to it as of some point prior to 5:00 p.m. on August 20, 1965, which liability would have attached at that time to B.C. Hydro, making B.C. Electric's present lack of 'personhood' irrelevant.

***Does the Waste Management Act have the effect of making B.C. Electric a "responsible party" immediately before the amalgamation?***

[62] Proceeding on the assumption that the "four little words" do have the effect I have stated, does the ***Waste Management Act*** operate so as to fasten B.C. Electric with the obligations of a "responsible person" as at the moment immediately before its amalgamation in 1965? This question raises squarely the distinction between the retrospective and retroactive operation of statutes. The distinction has gained recognition in Canada due in large part to the writing of Professor Driedger, the author of the first and second editions of

***Construction of Statutes***. Professor Driedger stated the distinction succinctly in his 1978 article, *supra*:

> A retroactive statute is one that operates as of a time prior to its enactment. A retrospective statute is one that operates for the future only. It is prospective, but it imposes new results in respect of a past event. A retroactive statute *operates backwards.* A retrospective statute *operates forward*, but it looks backwards in that it attaches new consequences *for the future* to an event that took place before the statute was enacted. A retroactive statute changes the law from what it was; a retrospective statute changes the law from what it otherwise would be with respect to a prior event. [at 268-9; emphasis added.]

In so writing, Professor Driedger would appear to have articulated the reasoning of Dickson J. for the majority of the Court in ***Gustavson Drilling (1964) Ltd. v. M.N.R.*** (1975) 66 D.L.R. (3d) 449, at 460. (In England, the judgment of Buckley, J. in ***West v. Gwynne*** [1911] 2 Ch. 1 (C.A.), at 11-12, was evidently pivotal in making this distinction.) In the second edition of ***Construction of Statutes***, Driedger elaborated further:

> A retroactive statute is one that operates backwards, that is to say, it is operative as of a time prior to its enactment. It makes the law different from what it was during a period prior to its enactment. A statute is made retroactive in one of two ways: either it is stated that it shall be deemed to have come into force at a time prior to its enactment, or it is expressed to be operative

> with respect to past transactions as of a past time, as, for example, the Act of Indemnity considered in *Phillips v. Eyre*. A retroactive statute is easy to recognize, because there must be in it a provision that changes the law as of a time prior to its enactment. Thus, for example, the Act to amend the Customs Tariff, S.C. 1969-70, c. 6, assented to on December 19, 1969, provided that the amendments to the Customs Tariff should be deemed to have come into force on June 4, 1969 (the date of the Budget Speech of the Minister of Finance) and to have applied to goods imported after that day; thus, a new and higher rate of duty was applied to past transactions as of a past time, namely, importations prior to the date the Act was enacted.
>
> A retrospective statute, on the other hand, changes the law only for the future, but it looks to the past and attaches new prejudicial consequences to a completed transaction. As Lord Goddard said in *Re a Solicitor's Clerk* [[1957] 1 W.L.R. 1219, at p. 1223] an Act is retrospective if it
>
> > provided that anything done before the Act should be void or voidable, or if a penalty were inflicted for having acted in this or any other capacity before the Act came into force....
>
> A retrospective statute operates as of a past time in the sense that it opens up a closed transaction and changes its consequences, although the change is effective only for the future. [at 186; emphasis added.]

(With respect to the first underlined emphasized sentence above, I note that the ***Waste Management Act*** does not contain any statement of a specific time prior to its enactment when it was intended to change the law. Counsel for the Attorney General suggested that the ***Act*** should be taken as being

retroactive to the date on which British Columbia entered Confederation.)

[63] Although many writers and courts use the words "retroactive" and "retrospective" interchangeably, the distinction suggested by Driedger has been adopted on many occasions by this court, including ***Bera v. Marr*** (1986) 27 D.L.R. (4th) 161, ***MacKenzie v. British Columbia (Commissioner of Teachers' Pensions)*** (1992) 69 B.C.L.R. (2d) 227, at paras. 11-14, and ***Hornby Island Trust Committee v. Stormwell*** (1988) 30 B.C.L.R. (2d) 383, where Lambert J.A. said for the Court:

> A retroactive statute operates forward in time, starting from a point further back in time than the date of its enactment; so it changes the legal consequences of past events as if the law had been different than it really was at the time those events occurred. A retrospective statute operates forward in time, starting only from the date of its enactment; but from that time forward it changes the legal consequences of past events. [at 389-90]; emphasis added.]

(See also Lambert J.A. (in dissent on another point) in ***Johnstone v. Wright*** [2002] B.C.J. No. 1422, at para. 5.)

[64] In the third edition of ***Construction of Statutes,*** edited by Professor R. Sullivan, she notes a "growing confusion around the term 'retrospective' in Canadian case law." She writes that the word "retroactive" is ambiguous:

> ***Two meanings of "retroactive legislation".*** To say of legislation that it is retroactive is an ambiguous statement. It might mean that the legislation itself is retroactive, that is, it is intended to operate retroactively as evidenced by provisions that expressly make it applicable to the past. This is the sense intended by Beetz J. when he said, in *Venne v. Quebec (Commission de protection du territoire agricole)*, that "[t]rue retroactivity can generally be seen simply from reading a statute". Because it is strongly presumed that legislation is not intended to operate retroactively, statements rebutting the presumption tend to be obvious and clear.
>
> The statement that legislation is retroactive can also mean that, whether or not it is intended to be retroactive, its application to certain circumstances would in fact give it a retroactive effect. This is usually the sense intended when litigants claim that legislation is retroactive. They mean that its application to *them* would be retroactive and therefore presumably was not intended. Unlike retroactivity in the first sense, retroactivity in the second sense cannot be seen simply from reading the statute. Recognizing whether a given application of legislation is retroactive is often a difficult judgment. [at 512]

[65] Professor Sullivan avoids using the term "retrospective" altogether in her analysis, which uses a model developed by J.-P. Côté, dividing fact-situations into "ephemeral", "continuing" and "successive". (See Côté, ***The Interpretation of Legislation in Canada*** (2nd ed., 1991) at 279.) That nomenclature appears to have been abandoned by Côté in his third edition, published in 2000 (at 125-139) and receives less emphasis from Professor Sullivan in the fourth edition of

Driedger (2002), at 548-553. I do not propose to complicate the law in British Columbia further by departing from Professor Driedger's analysis and the jurisprudence of this court cited above. I will also pass by the interesting question, not discussed by any of the foregoing authors, of how a statutory limitation or postponement thereof would operate in connection with retrospective or retroactive legislation.

[66] Applying Driedger's terminology to the case at bar, there is no disagreement among counsel that Part 4 of the ***Waste Management Act*** is at least retrospective — i.e., that at a minimum, it changes the law from what it would otherwise be with respect to prior events. It holds previous owners and operators, as well as present ones, responsible, and secured creditors who "at any time" exercised control over the treatment or disposal of a substance which resulted in contamination. The liability provision (s. 27(1)) applies even though the conduct in question "is or was not prohibited by any legislation", and despite the terms of any "cancelled, expired, abandoned or current permit or approval or waste management plan. . . ." Thus it seems clear the perceived deficiencies of the previous legislation revealed by cases such as ***Rempel–Trail*** and ***B.C. Railway v. Driedger***, *supra*, are

cured – the ***Act*** "reaches back into the past" in the sense that it attaches responsibility to past events or conduct. As I have already mentioned, counsel for B.C Hydro therefore conceded that if B.C. Electric were still in existence, it would be subject to being named as a responsible person by reason of its activities in and about the Oak Street site between 1920 and 1954. But does Part 4 operate retroactively such that B.C. Electric can be said to have been a "responsible" person as of 4:59 p.m. on August 20, 1964? Does Part 4 make the law different from what it was at that time?

[67] As noted earlier, Professor Driedger states that a retroactive statute is "easy to recognize" since it must contain a provision that changes the law as of a time prior to its enactment." (See also Côté, *supra*, 3rd ed., at 127.) The ***Waste Management Act*** as a whole does not contain any statement that it is meant to apply as of a date earlier than April 1, 1997, nor that it shall be deemed always to have been law, or that it has always been the law. The only express reference in Part 4 to retroactivity is the word "retroactively" in s. 27(1), which applies to the liability of persons "who are responsible for remediation" of a contaminated site — a phrase which all counsel assumed, correctly in my view, is meant to refer to "responsible persons" as defined by s. 26.5(1). The

definition does not suggest that such persons "are and have always been" responsible persons or that they "are and have since British Columbia entered Confederation, been" responsible for remediation. Nor is any reference made to the predecessor corporations of previous or present owners or operators, or to the estates of deceased owners or operators.



[68] Does retroactive operation arise by necessary implication? B.C. Hydro argues that the presumption against retroactivity answers this question in the negative. The presumption, which applies both to the retroactive and retrospective operation of statutes, is founded in the belief that legislation of this kind infringes on the rule of law and is unfair. Professor Sullivan states the reasons for the presumption most strongly:

> ***The reasons for presumption.*** Because a retroactive law applies to past events, its practical effect is to change the law that was applicable to those events at the time they occurred. To change the law governing a matter after it has already passed violates the rule of law. In fact, it makes compliance with the law impossible. As Raz points out, the fundamental tenet on which the rule of law is built is that in order to comply with the law, or rely on it in a useful way, the subjects of the law have to know in advance what it is. [J. Raz, "The Rule of Law and its Virtue" in *The Authority of* Law (New York: Oxford University Press, 1979).] By definition, a retroactive law is unknowable until it is too late.

> No matter how reasonable or benevolent retroactive legislation may be, it is inherently arbitrary for those who could not know its content when acting or making their plans. And when retroactive legislation results in a loss or disadvantage for those who relied on the previous law, it is not only arbitrary but also unfair. Even for persons who are not directly affected, the stability and security of law are diminished by the frequent or unwarranted enactment of retroactive legislation.
>
> In short, retroactive legislation is undesirable because it is arbitrary and because it tends to be unfair. [at 513]

(See also Côté, *supra*, 3rd ed., at 148; Driedger, *supra*, 2nd ed., at 185; M. McDonald, *An Enquiry into the Ethics of Retrospective Liability: The Case of British Columbia's Bill 26*, (1995) 29 ***U.B.C. Law Rev.*** 63; and R. Crowley and F. Thompson, *Retroactive Liability, Superfund and the Regulation of Contaminated Sites in British Columbia*, at p. 87 of the same volume, especially at 110.)

[69] However, the presumption does not apply in all cases. Professor Driedger, in a passage approved by the Supreme Court of Canada in ***Brosseau v. Alberta Securities Commission*** [1989] 1 S.C.R. 301, at 318-19, explains:

> . . . there are three kinds of statutes that can properly be said to be retrospective, but there is only one that attracts the presumption. First, there are the statutes that attach benevolent consequences to a prior event; they do not attract

> the presumption. Second, there are those that attach prejudicial consequences to a prior event; they attract the presumption. Third, there are those that impose a penalty on a person who is described by reference to a prior event, but the penalty is not intended as further punishment for the event; these do not attract the presumption. [at 198]

[70] L'Heureux-Dubé, J. summarized this passage of ***Brosseau*** by saying the presumption applies "only to prejudicial statutes" (p. 318), and that since the statutory amendment under consideration in ***Brosseau*** was "designed to protect the public, the presumption . . . [was] effectively rebutted" (p. 321). As noted by Professor Sullivan (*supra*, 4th ed., at 561), the latter comment of L'Heureux-Dubé J. was, with respect, perhaps misleading: the presumption is not rebutted simply by showing that the purpose of a provision is to protect the public. The emphasis is not on the intention or motivation of the Legislature, but on the consequences attached by the legislation to the past acts or conduct. Moreover, as Mr. Singleton argued, virtually every statute is designed to protect the public or the public interest in some way. Obviously, the ***Waste Management Act*** is intended to do so. But Part 4 clearly does not attach "benevolent consequences" to prior events. It attaches new liabilities to conduct (even conduct expressly authorized under permits issued by the

Crown) that previously did not attract liability; and that consequence is "prejudicial" to those affected, though perhaps not "punitive" or "penal".

[71] I have little doubt that the presumption applies to Part 4. But since it applies to both retroactive and retrospective legislation (though with less force to the latter: see Driedger, *supra*, 2nd ed., at 197-8), it is in any event not of great assistance to the question being addressed in this case. So, setting aside the presumption and considering only that a statute generally speaks prospectively, I return to whether Part 4 or the definition of "responsible person" in s. 26.5 is by implication to be read retroactively to some point in time prior to August 20, 1965. In answering this question, counsel for the Attorney General said that recent cases have shown a "policy trend" towards recognizing the desirability of environmental protection and remediation. This argument was not helpful, assuming as it does that the meaning and operation of statutes may or should be decided by judges on the basis of the laudability (in their opinion) of the policy objective in question. Mr. Singleton, counsel for B.C. Hydro, rightly responded that the role of the courts is to interpret the law, including statutes, in accordance with recognized

rules of law and that if the meaning of a statute is clear, a court must give effect to it.

[72] At the same time, s. 8 of the ***Interpretation Act***, R.S.B.C. 1996, c. 238, states that every enactment must be construed as being remedial and must be given "such fair, large and liberal construction and interpretation as best ensures the attainment of its objects." Further, the "modern" approach to statutory construction (endorsed on many occasions by the Supreme Court of Canada) tells us that "the words of an Act should be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament." (Driegder, 2nd ed., *supra*, at 87.) In this regard, the Attorney General submitted in his factum that the express words of the ***Waste Management Act*** clearly show a legislative intent that all the provisions of Part 4 be interpreted retroactively and that such interpretation is necessary to give effect to the purposes of Part 4. The primary purpose of Part 4, Ms. Rowbotham argued, is the "expeditious remediation of contaminated sites", which purpose would be undermined "if the Ministry [of the Environment] was limited as to the parties it could order to remediate a property." More specifically:

> . . . to hold that a person could be retroactively liable in a private cost recovery action for remediation, but could not be retroactively responsible for causing the contamination, would rob even the private cost recovery action of its intent. The private cost recovery is designed to enable persons who incur remediation costs to recover those costs from *anyone* who caused or contributed to the contamination. However, these persons are described in s. 27(4) as 'responsible persons'. If responsibility is not retroactive under a remediation order, then the pool of persons liable under s. 27(4) would be similarly restricted.



[73] With respect, I am not persuaded that Part 4 must be given retroactive, as opposed to retrospective, operation to achieve its apparent purpose of subjecting a large class of persons to remediation obligations. As already noted, Part 4 undoubtedly "reaches into the past". It fastens responsibility on previous owners and operators of contaminated sites and persons who transported or arranged for the transport of contaminating substances at some time in the past, i.e., prior to April 1, 1997. Presumably, Part 4 permits the recovery of remediation costs incurred before that date. In Driedger's terminology, new "prejudicial consequences" are attached to completed transactions or events. The reasoning in ***Rempel–Trail*** and ***B.C. Railway v. Driedger***, *supra,* is no longer tenable. Furthermore, once a person has been shown to be a "responsible person" as defined, his or her liability under s. 27(1) is very arguably – we need

not finally decide the point in this case – retroactive, although when it is retroactive to is unclear. (Since as already mentioned, a plaintiff suing under s. 27(1) must have incurred remediation costs, it may be that the liability dates back to when the costs were incurred. I leave this issue to be resolved on another day.) But with respect to the Attorney General's submission that "to be liable is to be responsible", it must be remembered that under Part 4, liability follows responsibility. The statute clearly contemplates that before one may be "liable" under s. 27(1), he or she must be a "responsible person" as defined by s. 26.5.

[74] In summary, Part 4 casts a very wide net indeed, both in terms of past events and in terms of persons caught by the definition of "responsible person." It cannot be said, in my opinion, that its objects would be undermined unless the definition also operated retroactively. Indeed, I consider that in drafting the ***Act*** to operate retrospectively, the draftsman must have attained the Legislature's main objective and that cases in which retroactive operation would yield many practical results would be very rare indeed.

[75] By the same token, if all of Part 4 or the definition of "responsible person", did operate retroactively, the

implications would be breathtaking in terms of legal theory. Any individual or body corporate who had contributed to the contamination of real property in British Columbia since the time it entered Confederation would be caught in the net as of the time of the contamination. Individuals have died, estates and corporations have been wound up, businesses and properties have been bought and sold, financial statements have been relied upon — the finality of a host of transactions and representations would be cast into doubt by a statute that imposes liability retroactively to 1871 — subject, I suppose, to any bar arising under the ***Limitation Act*** (concerning which we received no submissions). Quite apart from any presumption of construction, this fact should cause any court to require that clear language be used to effect such a result.

[76] In short, I agree with Deputy Director Driedger, who stated in his reasons:

> . . . for the purpose of the power to issue a remediation order in s. 27.1(1() of the Act, the definitions of responsible person in the 1993 amendments to the *Waste Management Act* are not retroactive. Nothing in the language of s. 26.5 suggests that definitions operate backward in time and change the law from what it was in 1965. The provisions are instead a clear example of retrospective legislation which — in relation to the definition of responsible person – operates for the future but in so doing imposes new legal consequences in respect of past actions, events or

> status. Thus, on April 1, 1997, a person who was a past or present owner or operator of a contaminated site, or a person who in the past was a producer or transporter, became a responsible person subject to a remediation order. While the effect of the amendments was to dramatically expand in the present the responsibility of persons for their past actions or status, the amendments do not change the law as it existed before the legislation came into force.
>
> [Emphasis added.]

(I note that in an article entitled "*Retrospectivity in Law*" (1995) 29 ***U.B.C. Law Rev.*** 5, Professor E. Edinger takes a similar view concerning Part 4 (see paras 10–12), as does Professor M. McDonald, *ibid*, at 63-71.)

[77] It follows in my judgement that B.C. Electric cannot be said to have been a "responsible person" as at 4:59 p.m. on August 20, 1965 or to have had a liability under s. 27(1) of the ***Waste Management Act*** at that time. As well, for the reasons stated earlier, it is my view that B.C. Hydro assumed only the obligations and liabilities to which B.C. Electric was subject immediately before the amalgamation in 1964, and alternately, that even had B.C. Electric amalgamated in the 'usual way', it cannot now be said to be a "person" as required by the chain of statutory definitions encompassed by the term "responsible person" in Part 4. I would allow the

appeal and reinstate the decision of the Deputy Director dated October 15, 1998 as it relates to B.C. Hydro.

[78] We are indebted to counsel for their able arguments.

"The Honourable Madam Justice Newbury"

**APPENDIX A**

***Waste Management Act***

**Part 4 - Contaminated Site Remediation**



**Division 3 — Liability**

**Persons responsible for remediation at contaminated sites**

**26.5** (1) Subject to section 26.6, the following persons are responsible for remediation at a contaminated site:

(a) a current owner or operator of the site;

(b) a previous owner or operator of the site;

(c) a person who

(i) produced a substance, and

(ii) by contract, agreement or otherwise caused the substance to be disposed of, handled or treated in a manner that, in whole or in part, caused the site to become a contaminated site;

(d) a person who

(i) transported or arranged for transport of a substance, and

(ii) by contract, agreement or otherwise caused the substance to be disposed of, handled or treated in a manner that, in whole or in part, caused the site to become a contaminated site;

(e) a person who is in a class designated in the regulations as responsible for remediation.

(2) In addition to the persons referred to in subsection (1), the following persons are responsible for remediation at a contaminated site that was contaminated by migration of a substance to the contaminated site:

(a) a current owner or operator of the site from which the substance migrated;

(b) a previous owner or operator of the site from which the substance migrated;

(c) a person who

(i) produced the substance, and

(ii) by contract, agreement or otherwise caused the substance to be disposed of, handled or treated in a manner that, in whole or in part, caused the substance to migrate to the contaminated site;

(d) a person who

(i) transported or arranged for transport of the substance, and

(ii) by contract, agreement or otherwise caused the substance to be disposed of, handled or treated in a manner that, in whole or in part, caused the substance to migrate to the contaminated site.

(3) A secured creditor is responsible for remediation at a contaminated site if

(a) the secured creditor at any time exercised control over or imposed requirements on any person regarding the manner of treatment, disposal or handling of a substance and the control or requirements, in whole or in part, caused the site to become a contaminated site, or

(b) the secured creditor becomes the registered owner in fee simple of the real property at the contaminated site,

but a secured creditor is not responsible for remediation if it acts primarily to protect its security interest, including, without limitation, if the secured creditor

(c) participates only in purely financial matters related to the site,

(d) has the capacity or ability to influence any operation at the contaminated site in a way that would have the effect of causing or

increasing contamination, but does not exercise that capacity or ability in such a way as to cause or increase contamination,

(e) imposes requirements on any person if the requirements do not have a reasonable probability of causing or increasing contamination at the site, or

(f) appoints a person to inspect or investigate a contaminated site to determine future steps or actions that the secured creditor might take.

**Persons not responsible for remediation**

**26.6** (1) The following persons are not responsible for remediation at a contaminated site:

(a) a person who would become a responsible person only because of an act of God that occurred before the coming into force of this section and who exercised due diligence with respect to any substance that, in whole or in part, caused the site to become a contaminated site;

(b) a person who would become a responsible person only because of an act of war and who exercised due diligence with respect to any substance that, in whole or in part, caused the site to become a contaminated site;

(c) a person who would become a responsible person only because of an act or omission of a third party, other than

(i) an employee,

(ii) an agent, or

(iii) a party with whom the person has a contractual relationship,

if the person exercised due diligence with respect to any substance that, in whole or in part, caused the site to become a contaminated site;

(d) an owner or operator who establishes that

(i) at the time the person became an owner or operator of the site,

(A) the site was a contaminated site,

(B) the person had no knowledge or reason to know or suspect that the site was a contaminated site, and

(C) the person undertook all appropriate inquiries into the previous ownership and uses of the site and undertook other investigations, consistent with good commercial or customary practice at that time, in an effort to minimize potential liability,

(ii) while the person was an owner of the site, the person did not transfer any interest in the site without first disclosing any known contamination to the transferee, and

(iii) the owner or operator did not, by any act or omission, cause or contribute to the contamination of the site;

(e) an owner or operator who owned or occupied a site that at the time of acquisition was not a contaminated site and during the ownership or operation the owner or operator did not dispose of, handle or treat a substance in a manner that, in whole or in part, caused the site to become a contaminated site;

(f) a person described in section 26.5 (1) (c) or (d) or (2) (c) or (d) who

(i) transported or arranged to transport a substance to a site if the owner or operator of the site was authorized by or under statute to accept the substance at the time of its deposit, and

(ii) received permission to deposit the substance from the owner or operator described in subparagraph (i);

(g) a government body that involuntarily acquires an ownership interest in the contaminated site, other than by government restructuring or expropriation, unless the government body caused or contributed to the contamination of the site;

(h) a person who provides assistance or advice respecting remediation work at a contaminated site in accordance with this Act, unless the assistance or advice was carried out in a negligent fashion;

(i) a person who owns or operates a contaminated site that was contaminated only by the migration of a substance from other real property not owned or operated by the person;

(j) an owner or operator of a contaminated site containing substances that are present only as natural occurrences not assisted by human activity and if those substances alone caused the site to be a contaminated site;

(k) subject to subsection (2), a government body that possesses, owns or operates a roadway, highway or right of way for sewer or water on a contaminated site, to the extent of the possession, ownership or operation;

(l) a person who was a responsible person for a contaminated site for which a conditional certificate of compliance or a certificate of compliance was issued and for which another person subsequently proposes or undertakes to

(i) change the use of the contaminated site, and

(ii) provide additional remediation;

(m) a person who is in a class designated in the regulations as not responsible for remediation.

(2) Subsection (1) (k) does not apply with respect to contamination placed or deposited below a roadway, highway or right of way for sewer or water by the

government body that possesses, owns or operates the roadway, highway or right of way for sewer or water.

(3) A person seeking to establish that he or she is not a responsible person under subsection (1) has the burden to prove all elements of the exemption on a balance of probabilities.

**General principles of liability for remediation**

**27** (1) A person who is responsible for remediation at a contaminated site is absolutely, retroactively and jointly and severally liable to any person or government body for reasonably incurred costs of remediation of the contaminated site, whether incurred on or off the contaminated site.

(2) For the purpose of this section, **"costs of remediation"** means all costs of remediation and includes, without limitation,

(a) costs of preparing a site profile,

(b) costs of carrying out a site investigation and preparing a report, whether or not there has been a determination under section 26.4 as to whether or not the site is a contaminated site,

(c) legal and consultant costs associated with seeking contributions from other responsible persons, and

(d) fees imposed by a manager, a municipality, an approving officer, a division head or a district inspector under this Part.

(3) Liability under this Part applies

(a) even though the introduction of a substance into the environment is or was not prohibited by any legislation if the introduction contributed in whole or in part to the site becoming a contaminated site, and

(b) despite the terms of any cancelled, expired, abandoned or current permit or approval or waste management plan and its associated

operational certificate that authorizes the discharge of waste into the environment.

(4) Subject to section 27.3 (3), any person, including, but not limited to, a responsible person and a manager, who incurs costs in carrying out remediation at a contaminated site may pursue in an action or proceeding the reasonably incurred costs of remediation from one or more responsible persons in accordance with the principles of liability set out in this Part.

**Remediation orders**

**27.1** (1) A manager may issue a remediation order to any responsible person.

(2) A remediation order may require a person referred to in subsection (1) to do all or any of the following:

(a) undertake remediation;

(b) contribute, in cash or in kind, towards another person who has reasonably incurred costs of remediation;

(c) give security in an amount and form, which can include real and personal property, subject to conditions the manager specifies.

(3) When considering whether a person should be required to undertake remediation under subsection (2), a manager may determine whether remediation should begin promptly, and must particularly consider the following:

(a) adverse effects on human health or pollution of the environment caused by contamination at the site;

(b) the potential for adverse effects on human health or pollution of the environment arising from contamination at the site;

(c) the likelihood of responsible persons or other persons not acting expeditiously or satisfactorily in implementing remediation;

(d) in consultation with the chief inspector appointed under the *Mines Act,* the requirements of a reclamation permit issued under section 10 of that Act;

(e) in consultation with a division head under the *Petroleum and Natural Gas Act,* the adequacy of remediation being undertaken under section 84 of that Act;

(f) other factors, if any, prescribed in the regulations.

(4) When considering who will be ordered to undertake or contribute to remediation under subsections (1) and (2), a manager must to the extent feasible without jeopardizing remediation requirements

(a) take into account private agreements respecting liability for remediation between or among responsible persons, if those agreements are known to the manager, and

(b) on the basis of information known to the manager, name one or more persons whose activities, directly or indirectly, contributed most substantially to the site becoming a contaminated site, taking into account factors such as

(i) the degree of involvement by the persons in the generation, transportation, treatment, storage or disposal of any substance that contributed, in whole or in part, to the site becoming a contaminated site, and

(ii) the diligence exercised by persons with respect to the contamination.

(5) A remediation order does not affect or modify the right of a person affected by the order to seek or obtain relief under an agreement, other legislation or common law, including but not limited to damages for injury or loss resulting from a release or threatened release of a contaminating substance.

(6) If a remediation order or a pollution abatement order requiring remediation under section 31 is issued, and a manager has not yet determined if a site is a contaminated site under section 26.4, the manager must, as soon as reasonably possible after the issuance of the order,

(a) determine whether the subject site is a contaminated site, in accordance with section 26.4, and

(b) make a ruling as to whether the person named in the order is a responsible person under section 26.5,

and if the person is not found to be a responsible person under paragraph (b), the manager making the order must compensate, in accordance with the regulations, the person for any costs directly incurred by the person to comply with the order.

(7) A person receiving a remediation order under subsection (1) or actual notice of a remediation order under subsection (11) must not, without the consent of a manager, knowingly do anything that diminishes or reduces assets that could be used to satisfy the terms and conditions of the remediation order, and if the person does so, the manager, despite any other remedy sought, may commence a civil action against the person for the amount of the diminishment or reduction.

(8) A manager may provide in a remediation order that a responsible person at a contaminated site is not required to begin remediation for a specified period of time if the contaminated site does not present an imminent and significant threat or risk to

(a) human health, given current and anticipated human exposure, or

(b) the environment.

(9) A person who has submitted a site profile under section 26.1 (8) must not directly or indirectly diminish or reduce assets at a site designated in the site registry as a contaminated site, including, without limitation,

(a) disposition of real or personal assets, or

(b) subdivision of land

until he or she requests and obtains written notice from a manager that the manager does not intend to issue a remediation order, and if the manager gives notice of the intention to issue a remediation order, or if the manager issues a remediation order, subsection (7) applies.

(10) A manager may amend or cancel a remediation order.

(11) A manager making a remediation order must, within a reasonable time, provide notice of the order in writing to every person holding an interest with respect to the contaminated site that is registered in the land title office at the time of issuing the order.

**Allocation panel**

**27.2** (1) The minister may appoint up to 12 persons with specialized knowledge in contamination, remediation or methods of dispute resolution to act as allocation advisors under this section.

(2) A manager may, on request by any person, appoint an allocation panel consisting of 3 allocation advisors to provide an opinion as to all or any of the following:

(a) whether the person is a responsible person;

(b) whether a responsible person is a minor contributor;

(c) the responsible person's contribution to contamination and the share of the remediation costs attributable to this contamination if the costs of remediation are known or reasonably ascertainable.

(3) When providing an opinion under subsection (2) (b) and (c), the allocation panel must, to the extent of available information, have regard to the following:

(a) the information available to identify a person's relative contribution to the contamination;

(b) the amount of substances causing the contamination;

(c) the degree of toxicity of the substances causing the contamination;

(d) the degree of involvement by the responsible person, compared with one or more other responsible persons, in the generation, transportation, treatment, storage or disposal of the substances that caused the site to become contaminated;

(e) the degree of diligence exercised by the responsible person, compared with one or more other responsible persons, with respect to the substances causing contamination, taking into account the characteristics of the substances;

(f) the degree of cooperation by the responsible person with government officials to prevent any harm to human health or the environment;

(g) in the case of a minor contributor, factors set out in section 27.3 (1) (a) and (b);

(h) other factors considered relevant by the panel to apportioning liability.

(4) A manager may require, as a condition of entering a voluntary remediation agreement with a responsible person, that the responsible person, at his or her own cost, seek and provide to the manager an opinion from an allocation panel under subsection (2).

(5) A manager may consider, but is not bound by, any allocation panel opinion.

(6) Work performed by the allocation panel must be paid for by the person who requests the opinion.

**Minor contributors**

**27.3** (1) A manager may determine that a responsible person is a minor contributor if the person demonstrates that

(a) only a minor portion of the contamination present at the site can be attributed to the person,

(b) either

(i) no remediation would be required solely as a result of the contribution of the person to the contamination at the site, or

(ii) the cost of remediation attributable to the person would be only a minor portion of the total cost of the remediation required at the site, and

(c) in all circumstances the application of joint and several liability to the person would be unduly harsh.

(2) When a manager makes a determination under subsection (1) that a responsible person is a minor contributor, the manager must determine the amount or portion of remediation costs attributable to the responsible person.

(3) A responsible person determined to be a minor contributor under subsection (1) is only liable for remediation costs in an action or proceeding brought by another person or the government under section 27 up to the amount or portion specified by a manager in the determination under subsection (2).

**APPENDIX B**

**Amalgamation Agreement**

**SCHEDULE**

THIS AGREEMENT is made the 20th day of August, 1965,

Between:

BRITISH COLUMBIA HYDRO AND POWER AUTHORITY, established by the British Columbia Hydro and Power Authority Act, 1964, of 970 Burrard Street, in the City of Vancouver, in the Province of British Columbia (hereinafter called "the Authority"),

AND

BRITISH COLUMBIA POWER COMMISSION, established by the Power Act, of 970 Burrard Street, in the City of Vancouver, in the Province of British Columbia (hereinafter called "the Commission"),

AND

BRITISH COLUMBIA ELECTRIC COMPANY LIMITED, a company incorporated under the laws of British Columbia, of 970 Burrard Street, in the City of Vancouver, in the Province of British Columbia (hereinafter called "the Company").

WHEREAS, by Order in Council made on the 20th day of August, 1965, pursuant to section 14(1) of the British Columbia Hydro and Power Authority Act, 1964, and pursuant to section 9(1) of the Power Measures Act, 1964, and pursuant to all other powers thereunto enabling, approval has been given to the Authority, the Commission and the Company having power to amalgamate with each other in the manner therein set out;

AND WHEREAS by the said Order in Council the procedure to be followed for effecting such amalgamation is prescribed to be by agreement between the Authority, the Commission and the and the Company;

NOW THEREFORE THIS AGREEMENT WITNESSES THAT:

(1) The Authority, the Commission and the Company hereby amalgamate with each other in such a manner that

(*a*) they continue as one amalgamated corporation which is the British Columbia Hydro and Power

Authority as established by the British Columbia Hydro and Power Authority Act, 1964,

(*b*) the Company and the Commission cease to exist as separate corporations, and

(*c*) the Authority shall be seized of, possess and hold all the properties, assets, undertakings, contracts, powers, rights, privileges, immunities, concessions and franchises, whether conferred or imposed by statute or otherwise, and subject to the Power Measures Act, 1964, shall be liable for all duties, liabilities and obligations, whether conferred or imposed by statute or otherwise, of each of the Authority, the Company and the Commission immediately before the amalgamation.

(2) This agreement and the amalgamation effected hereby are effective at and from 5 p.m. local time in Vancouver, British Columbia, on Friday, the 20th day of August, 1965.

IN WITNESS WHEREOF this agreement has been executed by the parties hereto.

The Common Seal of BRITISH COLUMBIA HYDRO AND POWER AUTHORITY was hereto affixed in the presence of:
"G.M. Shrum" [SEAL]
*Chairman.*
"P.R. Kidd"
*Assistant Secretary*.

The official seal of BRITISH COLUMBIA POWER COMMISSION was hereto affixed in the presence of:
"H.L. Keenleyside" [SEAL]
*Chairman.*
"P.R. Kidd"
*Secretary*.

The Common Seal of BRITISH COLUMBIA ELECTRIC COMPANY LIMITED was hereto affixed in the presence of:
"G.M. Shrum" [SEAL]
*Chairman.*
"P.R. Kidd"
*Assistant Secretary*.

**APPENDIX C**

**Order-in-Council No. 2386**

Approved and ordered this 20th day of August, A.D. 1965.

"George R. Pearkes"
*Lieutenant-Governor.*

At the Executive Council Chamber, Victoria,

PRESENT:

The Honourable "W.A.C. Bennett" In the Chair.
Mr. "R.W. Bonner"
Mr. "R.G. Williston"
Mr. "E.C.T. Martin"
Mr. "W.D. Black"
Mr.
Mr.
Mr.
Mr.
Mr.
Mr.
Mr.
Mr.
Mr.
Mr.

*To His Honour*
*The Lieutenant-Governor in Council*:

The undersigned has the honour to recommend:

THAT, pursuant to section 14(1) of the British Columbia Hydro and Power Authority Act, 1964 and pursuant to section 9(1) of the Power Measures Act, 1964 and pursuant to all other powers thereunto enabling, approval be given to the British Columbia Hydro and Power Authority established by the British Columbia Hydro and Power Authority, 1964 and to the British Columbia Electric Company Limited and to the British Columbia Power Commission having power to amalgamate with each other in such a manner that

(a) they continue as one amalgamated corporation which is British Columbia Hydro and Power Authority as

established by the British Columbia Hydro and Power Authority Act, 1964, and

(b) the said British Columbia Electric Company Limited and the said British Columbia Power Commission cease to exist as separate corporations, and

(c) the said British Columbia Hydro and Power Authority shall be seized of, possess and hold all the properties, assets, undertakings, contracts, powers, rights, privileges, immunities, concessions and franchises, whether conferred or imposed by statute or otherwise and subject to the Power Measures Act, 1964 be liable for all duties, liabilities and obligations, whether conferred or imposed by statute or otherwise, of each of the said British Columbia Hydro and Power Authority, British Columbia Electric Company Limited and British Columbia Power Commission immediately before the amalgamation:

AND THAT the procedure for effecting such amalgamation shall be as follows:-

(a) British Columbia Hydro and Power Authority, established by the British Columbia Hydro and Power Authority Act, 1964, British Columbia Electric Company Limited, and British Columbia Power Commission, shall enter into an agreement providing for the amalgamation; and

(b) the amalgamation effected by the amalgamation agreement shall become effective at the date and time provided in the amalgamation agreement.

DATED this 20th day of August A.D. 1965

"W.A.C. Bennett"
PREMIER

APPROVED this 20th day of August A.D. 1965

"W.A.C. Bennett"
PRESIDING MEMBER OF THE EXECUTIVE COUNCIL.

**APPENDIX D**

**Order-in-Council No. 2387**

Approved and ordered this 23rd day of August, A.D. 1965.

"George R. Pearkes"
*Lieutenant-Governor.*

At the Executive Council Chamber, Victoria,

PRESENT:

The Honourable In the Chair.
Mr. Bennett
Mr. Bonner
Mr. Williston
Mr. Martin
Mr. Black
Mr.
Mr.
Mr.
Mr.
Mr.
Mr.
Mr.
Mr.
Mr.

*To His Honour*
*The Lieutenant-Governor in Council*:

The undersigned has the honour to report:

THAT British Columbia Electric Company Limited is a company incorporated under the Companies Act:

AND THAT by Order of the Lieutenant-Governor in Council made pursuant to the British Columbia Hydro and Power Authority Act, 1964, and the Power Measures Act, 1964, and all other powers thereunto enabling, the amalgamation of British Columbia Hydro and Power Authority established by the British Columbia Hydro and Power Authority Act, 1964, and the British Columbia Electric Company Limited and the British Columbia

Power Commission has been approved, and that by agreement made pursuant to that Order-in-Council the amalgamation aforesaid has taken place, and that the British Columbia Electric Company Limited has ceased to exist as a separate corporation:

AND THAT the Power Measures Act, 1964 provides that the Companies Act has not applied and does not apply to the British Columbia Electric Company Limited except to the extent that may be provided by Order of the Lieutenant-Governor in Council:

AND TO RECOMMEND THAT pursuant to the Power Measures Act, 1964 and all other powers thereunto enabling section 212 of the Companies Act shall apply to the British Columbia Electric Company Limited, and that pursuant to that section the incorporation of British Columbia Electric Company Limited be revoked and cancelled and that British Columbia Electric Company Limited be declared to be dissolved, and that such other provisions of the Companies Act apply to the British Columbia Electric Company Limited to the extent necessary to effect the revocation, cancellation and dissolution hereby made.

DATED this 21st day of August, A.D. 1965.

"R.W. Bonner"
ATTORNEY GENERAL.

APPROVED this 21st day of August, 1965.

"W.A.C. Bennett"
PRESIDING MEMBER OF THE EXECUTIVE COUNCIL.

**Reasons for Judgment of the Honourable Madam Justice Prowse:**

[79] I have had the privilege of reading, in draft form, the reasons for judgment of my colleagues. With respect, I agree with Madam Justice Newbury that the British Columbia Hydro and Power Authority ("Hydro") cannot be fixed with liability under the ***Waste Management Act***, R.S.B.C. 1996, c. 482, in these circumstances. I am also in substantial agreement with her reasons for reaching this conclusion. I would prefer not to express any view, however, with respect to her alternative basis for finding that Hydro is not liable, discussed at para. 6, and paras. 58-60 of her draft, since this point was not raised, or addressed, by the parties.

[80] While I take no issue with Madam Justice Rowles' discussion of the general law of amalgamation and the application of ***R. v. Black and Decker Manufacturing Co.***, [1975] 1 S.C.R. 411 as a general rule, I agree with Newbury J.A. that neither the general law of amalgamation nor the ***Black and Decker*** decision governs the result in this case. As counsel noted at the outset of this appeal, the resolution of this case turns primarily on the Agreement between the parties, with particular emphasis on the words "immediately before the amalgamation" in clause (c) of the Agreement.

[81] Madam Justice Rowles directly addresses the meaning of this phrase in para. 115 of her reasons where she states that "saying that the new enterprise has the obligations of the old as they existed 'immediately before the amalgamation', is no different in substance from saying that 'thereafter' (meaning after amalgamation) the new enterprise has all the obligations of the old." For the reasons given by Newbury J.A., I am unable to agree with this interpretation.

[82] I also note that the spectre of companies at large avoiding liability to third parties through amalgamation is effectively precluded by various legislation governing amalgamations, including the ***Company Act***, R.S.B.C. 1996, c. 62, the ***Business Corporations Act***, S.B.C. 2002, c. 57 [not yet enacted], and the ***Canada Business Corporations Act***, R.S.C. 1985, c. C-44. It is only because Hydro is not subject to such legislation, because of the specific wording of this Agreement, and because of the other factors mentioned by Newbury J.A., that the result in this case, which I agree is anomalous, could occur. In other words, this case is not of precedential value.

[83] In the result, I, too, would allow the appeal and reinstate the decision of the Deputy Director dated October 15, 1998, as it relates to Hydro.

"The Honourable Madam Justice Prowse"

**Reasons for Judgment of the Honourable Madam Justice Rowles:**

**I. Introduction**

[84] This is an appeal from the order of Mr. Justice Low dated 6 April 2000, dismissing a petition brought by the appellant, the British Columbia Hydro and Power Authority, for judicial review of a decision of the Environmental Appeal Board ("EAB") dated 23 August 1999. The EAB decided that the appellant could be held liable for the pre-amalgamation actions of the British Columbia Electric Company ("B.C. Electric") and could be named as a "responsible person" under Part 4, the contaminated site remediation provisions, of the ***Waste Management Act***, R.S.B.C. 1996, c. 482.

[85] The effect of the dismissal of the appellant's petition for judicial review was to uphold the order made by the EAB adding the appellant to a Remediation Order under the ***Waste Management Act*** on account of activities of B.C. Electric that pre-dated the amalgamation of the British Columbia Hydro and Power Authority, the British Columbia Power Commission, and B.C. Electric.

[86] I have had the advantage of reading the draft reasons for judgment of Madam Justice Newbury. With respect, I am unable

to agree with my colleague's analysis and conclusion that as a result of the 1965 Amalgamation Agreement and the statute ratifying the amalgamation, the appellant became subject only to those liabilities and obligations of B.C. Electric that existed "immediately before the amalgamation". Instead, I am of the view that under the Amalgamation Agreement, which was subsequently ratified by the ***Power Measures Act, 1966***, S.B.C. 1966, c. 38, the appellant became fixed with the liabilities to which B.C. Electric would have been subject had it not amalgamated with the other entities.

**II. Overview of the appellant's arguments**

[87] In essence, the appellant argues that it was given special protection by statute from the actions of the three amalgamating companies. No convincing rationale for such immunity is offered, but it is said to be available because of the language of the Amalgamation Agreement and the subsequent Order-in-Council approving the amalgamation. The appellant posits that the language used dictates the result.

[88] The appellant seems to suggest in its factum that the government was seeking to minimize the potential risk of the newly amalgamated company encountering liability for the actions of the three amalgamating entities. In my view, a

plain reading of the Amalgamation Agreement and the enabling legislation does not support that suggestion. The language used in the Agreement and in the Order-in-Council which followed does not suggest an intention to restrict the liabilities of the newly amalgamated corporation; rather, the words are consistent with an intention that it would possess all of the assets and be subject to all the liabilities of the amalgamating entities, without exception or restriction.

[89] The appellant has not made reference to any historical circumstances that brought about the amalgamation, or anything else that would support its suggestion that there was a concern about the possibility of the Authority finding itself saddled with liabilities as yet unknown. If such an argument were to prevail, the result would be, in my respectful view, absurd and unjust: some liabilities would be recognized while others of the same kind that had not yet matured would be denied. Similarly, it would interfere with the rights of third parties, and it would fly in the face of the generally understood common law interpretation of the effect of amalgamation on the constituent entities.

[90] As my colleague, Madam Justice Newbury, has noted, the appellant correctly conceded that if B.C. Electric were still

in existence, it would be a "responsible person" under the ***Waste Management Act*** by reason of its pre-amalgamation activities at what has since been determined to be a contaminated site. In view of that concession, and the conclusion I have reached with respect to the effect of the amalgamation, I find it unnecessary to consider the question of whether the legislature intended the ***Waste Management Act*** to have true retroactive effect.

**III. Analysis**

[91] Mr. Justice Low was of the view that the decision of the Supreme Court of Canada in ***R. v. Black and Decker Manufacturing Co.***, [1975] 1 S.C.R. 411, provided support for his conclusion that the words "immediately before the amalgamation" did not have the effect of limiting the appellant's legal responsibility for obligations that would have fallen on B.C. Electric under the ***Waste Management Act*** had it remained in existence. I agree with that opinion.

[92] ***Black and Decker*** is a useful place to begin. In that case, the Supreme Court considered the effect of an amalgamation under the ***Canada Corporations Act***, R.S.C. 1970, c. C-32. Three companies had agreed to amalgamate under the name Black and Decker Manufacturing Company, Limited ("Black

and Decker"). Their agreement was dated 25 January 1971 and, on the same date, letters patent were issued confirming the agreement. On 5 April 1972, an Information was sworn charging Black and Decker with two counts of retail price maintenance offences contrary to the combines investigation legislation. The offences were alleged to have occurred between October 1966 and August 1970. Black and Decker moved to quash the Information or, alternatively, for dismissal on the ground that no criminal responsibility pre-dating the 1971 amalgamation could be transferred to it. The Ontario Court of Appeal prohibited further proceedings on the Information but that order was set aside on appeal to the Supreme Court of Canada.

[93] The Supreme Court held that upon an amalgamation under the ***Canada Corporations Act***, no "new" company is created, and no "old" company is extinguished. Instead, the court held that the amalgamated companies "are amalgamated and are continued as one company". On this view, Dickson J., giving the judgment of the court, concluded that the amalgamating companies in their new identity as the amalgamated corporation remain liable to prosecution for offences committed pre-amalgamation.

[94] In this case, the British Columbia Hydro and Power Authority, the British Columbia Power Commission and B.C. Electric entered into an Amalgamation Agreement on 20 August 1965. The Amalgamation Agreement is annexed to my colleague's reasons and, consequently, there is no need to reproduce it here. As my colleague has stated, the Agreement provided that three corporations amalgamated in such a manner that:

> (*a*) they continue as one amalgamated corporation which is the British Columbia Hydro and Power Authority as established by the British Columbia Hydro and Power Authority Act, 1964,
>
> (*b*) the Company [B.C. Electric] and the Commission [B.C. Power Commission] cease to exist as separate corporations, and
>
> (*c*) the Authority [B.C. Hydro] shall be seized of, possess and hold all the properties, assets, undertakings, contracts, powers, rights, privileges, immunities, concessions and franchises, whether conferred or imposed by statute or otherwise, and subject to the Power Measures Act, 1964, shall be liable for all duties, liabilities and obligations, whether conferred or imposed by statute or otherwise, of each of the Authority, the Company and the Commission immediately before the amalgamation.

[95] The specific words in the Amalgamation Agreement before us are that the amalgamating entities will "continue as one amalgamated corporation." Those words are very similar to the words under consideration in ***Black and Decker***.

[96] In ***Black and Decker***, the Ontario Court of Appeal had reasoned that since the "new" company was not even in existence during the period covered by the dates in the Information, it could not possibly be found guilty unless it were liable for acts or omissions of the old company. The Supreme Court rejected the proposition, which had been the implicit underpinning for the Court of Appeal's decision, that the amalgamated company was somehow a different, separate, or distinct entity from the "old" companies. In doing so, Dickson J., as he then was, said (at 417):

> Whether an amalgamation creates or extinguishes a corporate entity will, of course, depend upon the terms of the applicable statute, but as I read the Act, in particular s. 137, and consider the purposes which an amalgamation is intended to serve, it would appear to me that upon an amalgamation under the *Canada Corporations Act* no "new" company is created and no "old" company is extinguished. The *Canada Corporations Act* does not in terms so state and the following considerations in my view serve to negate any such inference: (i) palpably the controlling word in s. 137 is "continue". That word means "to remain in existence or in its present condition": — *Shorter Oxford English Dictionary*. The companies "are amalgamated and are continued as one company" which is the very antithesis of the notion that the amalgamating companies are extinguished or that they continue in a truncated state;...

[97] In my view, the words used in the Amalgamation Agreement in this case are identical, in effect, to the words used in the ***Canada Corporations Act***. The effect of an amalgamation

is, as Dickson J. described it (at 417), "that of blending and continuance as one and the selfsame company".

[98] Further, I note that the use of the term "possess" in the Amalgamation Agreement, when used in connection with the assets and undertaking of the constituent entities, is a term of continuance.

[99] The particular question before the Supreme Court in ***Black and Decker*** was whether the amalgamated company could be tried for the alleged criminal acts of one of its predecessors. The Court concluded that it could be tried. Mr. Justice Dickson determined (at 417-18) that:

> ...if Parliament had intended that a company by the simple expedient of amalgamating with another company could free itself of accountability for acts in contravention of the *Criminal Code* or the *Combines Investigation Act* or the *Income Tax Act*, I cannot but think that other and clearer language than that now found in the *Canada Corporations Act* would be necessary.

[100] In my opinion, those words apply with equal force here.

[101] In ***Black and Decker***, Dickson J. noted that the word "amalgamation" is not a legal term and is not susceptible of exact definition but is derived from mercantile usage and

denotes "a legal means of achieving an economic end". He continued (at 420-21):

> ... The juridical nature of an amalgamation need not be determined by juridical criteria alone, to the exclusion of consideration of the purposes of amalgamation. Provision is made under the *Canada Corporations Act* and under the Acts of the various provinces whereby two or more companies incorporated under the governing Act may amalgamate and form one corporation. The purpose is economic: to build, to consolidate, perhaps to diversify, existing businesses; so that through union there will be enhanced strength. It is a joining of forces and resources in order to perform better in the economic field. If that be so, it would surely be paradoxical if that process were to involve death by suicide or the mysterious disappearance of those who sought security, strength and, above all, survival in that union. Also, one must recall that the amalgamating companies *physically* continue to exist in the sense that offices, warehouses, factories corporate records and correspondence and documents are still there, and business goes on. In a physical sense an amalgamating business or company does not disappear although it may become part of a greater enterprise.
>
> There are various ways in which companies can be put together. The *assets* of one or more existing companies may be sold to another existing company or to a company newly-incorporated, in exchange for cash or shares or other consideration. The consideration received may then be distributed to the shareholders of the companies whose assets have been sold, and these companies wound up and their charters surrendered. In this type of transaction a new company may be incorporated or an old company may be wound up but the legal position is clear. There is no fusion of corporate entities. Another form of merger occurs when an existing company or a newly-incorporated company acquires the *shares* of one or more existing companies which latter companies may then be retained as subsidiaries or wound up after their assets have been passed up to

> the parent company. Again there is no fusion. But in an amalgamation a different result is sought and different legal mechanics are adopted, usually for the express purpose of ensuring the continued existence of the constituent companies. The motivating factor may be the *Income Tax Act* or difficulties likely to arise in conveying assets if the merger were by asset or share purchase. But whatever the motive, the end result is to coalesce to create a homogeneous whole. The analogies of a river formed by the confluence of two streams, or the creation of a single rope through the intertwining of strands have been suggested by others.
>
> [Underlining added.]

[102] The proposition advanced by the appellant in this case is that the combined entity is in some way immune from the responsibilities of its constituent parts. That seems to me to be the opposite of what is intended by an amalgamation.

[103] ***Black and Decker*** is useful on another point as well. In that case, the Supreme Court was faced with Black and Decker's argument that if an amalgamation had the effect contended for by the prosecution, then the words used in the ***Canada Corporations Act*** (which are similar to those contained in the Amalgamation Agreement here), would be mere surplusage. The words used in s. 137(13)(b) of the ***Canada Corporations Act*** were these:

> *(b)* the amalgamated company possesses all the property, rights, assets, privileges and franchises,

> and is subject to all the contracts, liabilities, debts and obligations of each of the amalgamating companies.

[104] In responding to that argument, Dickson J. observed (at 421-22) that those words (and the words of s. 137(14)) "spell out in broad language amplification of a general principle, a not uncommon practice of legislative draftsmen." He then went on to identify the very problem which, in my view, would be created by the interpretation of the Amalgamation Agreement for which the appellant contends in this case. Dickson J. said (at 422), if the words of the statute

> ... are to be read, however, as other than merely supportive of a general principle and other than all-embracing, then some corporate incidents, such as criminal responsibility, must be regarded as severed from the amalgamating companies and outside the amalgamated company. What happens to these vestigial remnants? Are they extinguished and if so, by what authority? Do they continue in a state of ethereal suspension? Such metaphysical abstractions are not, in my view, a necessary concomitant of the legislation. The effect of the statute, on a proper construction, is to have the amalgamating companies continue without subtraction in the amalgamated company, with all their strengths and their weaknesses, their perfections and imperfections, and their sins, if sinners they be. Letters patent of amalgamation do not give absolution.
>
> [Underlining added.]

[105] Support for the conclusions reached by the EAB and Low J. as to the effect of the Amalgamation Agreement may be found in other cases as well. In ***Agrifoods International Corp. v. Beatrice Foods Inc.*** (1997), 34 B.L.R. (2d) 294, [1997] B.C.J. No. 393 (Q.L.) (B.C.S.C.) at para. 80, Spencer J. said the consequences of an amalgamation must be examined practically and, absent a juridical reason to the contrary, the amalgamation carries with it the property rights and liabilities enjoyed by the amalgamating entities.

[106] At common law, the nature of an amalgamation is such that the new corporation possesses all the property and rights of the companies the amalgamation has brought together: ***Hoole v. Advani*** (1996), 29 B.L.R. (2d) 150, [1996] B.C.J. No. 614 (Q.L.) (B.C.S.C.) at paras. 15-16, relying upon the decision of Shaw J. in ***Rossi v. McDonald's Restaurants of Canada Ltd.*** (1991), 1 B.L.R. (2d) 175, [1991] B.C.J. No. 429 (Q.L.) (B.C.S.C.). In the ***Rossi*** case, the language of the certificate of amalgamation, which was issued by the Minister under the Ontario ***Business Corporations Act*** to give effect to the amalgamation, was in identical terms to the relevant portions of the Amalgamation Agreement between the three entities in this case. The certificate provided that:

> The Amalgamated Corporation shall possess all the property, rights, privileges, franchises and other assets, and shall be subject to all the liabilities, contracts and disabilities and debts, of the Amalgamating Corporations as such exist immediately before the amalgamation."
>
> [Underlining added.]

[107] Contrary to the arguments of the appellant, there is nothing particularly unusual about the words "immediately before the amalgamation" used in the 1965 Amalgamation Agreement. The suggestion that those words must bear a special meaning limiting the liabilities assumed by the amalgamated entity because they are unique or unusual does not withstand scrutiny. It was the language used in the amalgamation certificate in ***Rossi***, *supra*. It also appears in similar form in the statute books and in texts of corporate precedents.

[108] By way of example, the precedent form of amalgamation agreement in *O'Brien's Encyclopaedia of Forms*, 10th ed., vol. 6, (Agincourt: Canada Law Book, 1980) at 310, uses this language:

> Each of the parties shall contribute to Amalco all its assets, subject to its liabilities, as of the date immediately before the date of the certificate of amalgamation.
>
> Amalco shall possess all the property, rights, privileges, and franchises and shall be subject to

> all the liabilities, contracts, disabilities and debts of each of the parties hereto as of the date immediately before the date of the certificate of amalgamation.
>
> ["Amalco" refers to the corporation continuing from the amalgamation of the three companies used in the example.]



[109] Almost identical language appears in the 1962 version of ***Canadian Corporation Precedents***, vol. 2, (Toronto: Carswell, 1962), at p. 1321, and the 1976 version, 2nd ed., vol. 3, at pp. 12—22.

[110] The amalgamation provisions of the ***Income Tax Act*** in effect at the time of this amalgamation used similar language (see, for example, ***Income Tax Act***, R.S.C. 1952, c. 148, s. 851, in *Stikeman Annotated Income Tax Act*, 1963-4).

[111] In view of the foregoing, I am far from persuaded that the words "immediately before the amalgamation" can take this case outside of the general rule that upon an amalgamation the appellant would have assumed the responsibilities of each of the three entities of which the appellant was then comprised.

[112] I am also of the view that the appellant can derive no support for its position from the rules of statutory construction. Clause 1(a) of the Amalgamation Agreement provides that the three entities amalgamate such that they

"continue" as one amalgamated corporation. Clause 1(b) provides that the individual amalgamating entities cease to exist "as separate corporations". Clause 1(c) can be broken down as follows:

> [i] the Authority
>
> [ii] shall be seized of, possess and hold all the properties, assets, undertakings, contracts, powers, rights, privileges, immunities, concessions and franchises, whether conferred or imposed by statute or otherwise,
>
> [iii] and subject to the Power Measures Act, 1964, shall be liable for all duties, liabilities and obligations, whether conferred or imposed by statute or otherwise,
>
> [iv] of each of the Authority, the Company and the Commission
>
> [v] immediately before the amalgamation.

[113] The appellant argues that the words "immediately before the amalgamation" are words which limit the liabilities assumed by it. I do not agree with that argument.

[114] Clause 1(c) can be understood as follows: "the Authority" in subparagraph [i] above identifies the amalgamated entity; the words quoted in [iv] above describe the entities whose obligations are referred to in [ii] and [iii]; and the words in [v], "immediately before the

amalgamation", which modify the words from both subparagraphs [ii] and [iii], describe the effective time of the assumption.

[115] The words "immediately before the amalgamation" in the Amalgamation Agreement have a similar effect to the word "thereafter" in s. 178(11) of the ***Companies Act***, R.S.B.C. 1960, c. 67. They simply establish that from the time of the amalgamation, the new enterprise, for all purposes, replaces the old. Expressing that by saying that the new enterprise has the obligations of the old as they existed "immediately before the amalgamation", is no different in substance from saying that "thereafter" (meaning after amalgamation) the new enterprise has all the obligations of the old.

[116] The appellant's argument that the words "immediately before the amalgamation" are in some way words of limitation do not appear to me to be supportable. As previously noted, in an amalgamation responsibility for all the past acts of the former entities are generally assumed by and subsumed within the new entity (***Black and Decker***, *supra*). Thus, in future, if a liability arises out of something done by B.C. Electric in the past, the responsibility for the past acts of a now constituent part of the British Columbia Hydro and Power Authority would become that of the British Columbia Hydro and

Power Authority. As stated by Dickson J. in ***Black and Decker*** in relation to the construction of the statute under consideration there (at 422):

> The effect of the statute, on a proper construction, is to have the amalgamating companies continue without subtraction in the amalgamated company, with all their strengths and their weaknesses, their perfections and imperfections, and their sins, if sinners they be.

[117] As applied to this case, if B.C. Electric's pre-1965 activities would have made it an "operator" or a "producer", which for the purposes of Part 4 of the ***Waste Management Act*** is assumed on this appeal, then the appellant, as the combined or amalgamated company, which is the continuation of B.C. Electric, is a "responsible person" under the ***Waste Management Act***.

[118] There is nothing in the Amalgamation Agreement that requires a different result. The effect of the amalgamation is to continue the three prior entities as one combined entity. The rights, duties and obligations of each of the parts of the new entity continue unextinguished as those of the combined organization. In my view, had a limit on future liability been intended, much clearer language would have been required.

[119] I should also mention that the appellant advanced the argument that limitation of liability is a valid legislative purpose, but that argument, standing alone, does not assist. Limiting liability may be a valid legislative purpose, but clear language is needed to do so.

[120] The Amalgamation Agreement uses broad and all encompassing language to confirm the scope of the amalgamated company's responsibility. The words used do not suggest that the parties to the Agreement intended to define a class of duties, liabilities and obligations for which the appellant would not be liable. For example, instead of just the "assets" of the constituent parts, the Agreement provides that the new enterprise "shall be seized of, possess and hold all the properties, assets, undertakings, contracts, powers, rights, privileges, immunities, concessions and franchises, whether conferred or imposed by statute or otherwise...."

[121] Nor does the language used suggest that the new enterprise was to assume only the debts owing at a particular point in time. Rather, the combined entity assumes "all duties, liabilities and obligations, whether conferred or imposed by statute or otherwise...." The use of such broad

words is consistent with an intention that the obligations being assumed were complete.

[122] Similarly, the Amalgamation Agreement makes clear that it does not matter how the right or obligation was created. Regardless of whether it was created "by statute or otherwise", the obligation becomes that of the new entity.

[123] Nor is there anything in the Amalgamation Agreement that suggests that there was any limitation upon the obligations assumed. There are several drafting techniques that could easily have been used, for example, the addition of the words "but not otherwise", or other words of limitation such as "shall *only* be liable for...", or "shall have no liability except as expressly set out herein".

[124] To suggest that an amalgamation agreement could unilaterally absolve the constituent parts of the enterprise of future obligations for their past actions seems to me to be a startling proposition. No case authority has been cited by the appellant to support such a proposition.

[125] I note, as well, that nothing in the language of the Amalgamation Agreement suggests an intention that the amalgamation would extinguish the rights of third parties, yet

that would be the inevitable effect of adopting the appellant's proposition as to the effect of the words "immediately before the amalgamation". Tort liability is an example. In tort cases, the cause of action only arises when the damage occurs, is discovered, or ought to have been discovered by the plaintiff. In other words, the cause of action may well arise after the amalgamation occurred, but be the result of events occurring prior to the amalgamation. In ***Central Trust Co. v. Rafuse***, [1986] 2 S.C.R. 147 at 219, Le Dain J., for the court, held that the general rule is that a cause of action in tort "arose when damage occurred, according to the established rule", subject to the application of discoverability rule, which may further delay the accrual of the cause of action. (See also ***City of Kamloops v. Nielsen***, [1984] 2 S.C.R. 2 at 38.)

[126] On the basis of the appellant's interpretation, the amalgamated company would be immune from liability for the consequences of an act occurring before amalgamation that did not manifest itself in damage until after the amalgamation. To destroy the rights of innocent third parties in the absence of any clear statutory warrant seems to me to be unsupportable.

**IV. Conclusion**

[127] For the reasons I have given, I am of the view that Mr. Justice Low was correct in dismissing the appellant's judicial review petition and, thus, sustaining the decision of the EAB.

[128] In the result, I would dismiss the appeal.



"The Honourable Madam Justice Rowles"

CORECTION: October 2, 2003.

At page 56, the paragraph number "[58" is deleted.